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ALASKA'S NUISANCE STATUTE REVISITED: FEDERAL SUBSTANTIVE DUE PROCESS LIMITS TO COMMON LAW ABROGATION

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I. BACKDROP: SITKA, ALASKA: 1992–94

The Alaska Pulp Corporation (APC) pulp mill in Sitka, Alaska was never an exemplar of environmentally sound management.[1] APC, which is owned by a consortium of Japanese corporations, ignored its own consultant's findings that the mill's proposed construction site in Silver Bay was particularly fragile, and proceeded with the lowest cost—and most environmentally destructive—waste and emissions discharge system available.[2] Since beginning operations in 1959, the mill had been repeatedly cited by the EPA for violations of its Clean Water Act National Pollutant Discharge Elimination System (NPDES) permit.[3] Because of the mill's chronic inability to comply with its NPDES permit, the EPA in 1986 entered into a consent decree requiring APC's good faith efforts to move towards compliance.[4]

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* Executive Editor, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 1996–97.

[1] *See* Plaintiff's Pretrial Memorandum at 1–6, Edwards v. Alaska Pulp Corp., (Alaska Super. Ct., Sept. 12, 1994) (No. 1SI–92–257 CI) [hereinafter *Sept. 12 Memorandum*] (on file with B.C. ENVTL. AFF. L. REV.).

[2] *Id.* at 3.

[3] *Id.* at 4.

[4] United States v. Alaska Pulp Corp., No. CIV.A86–331, 1986 EPA Consent LEXIS 105, at *1. At one point, the EPA grew so weary of accepting fines from the company—essentially payments to continue to pollute—that the agency began returning them. *See Sept. 12 Memorandum, supra* note 1, at 5. The mill also operated under a consent order with the state Department of Environmental Conservation for repeated violations of state air standards. *Id.* at 6.

Local residents charged that the mill was causing the water quality in Sitka Sound to deteriorate aesthetically and ecologically, and complained that foul odors and fumes interfered with the use of their property.[5] Residents also charged that these problems resulted in a drop in property values and made property difficult to rent or sell.[6] In February, 1992, Sitka resident Larry Edwards filed a class action private nuisance suit on behalf of himself and 120 other landowners along the Sound.[7]

In March, 1993, James Clark, the attorney for Alaska Pulp Corporation, Ltd. (APL is the parent company of APC), began promoting a remarkable legislative enactment designed to circumvent the Edwards suit.[8] Clark circulated a draft of a proposed statutory revision of Alaska's common law cause of action for nuisance to state representatives and Alaska Attorney General Charles Cole. Under Clark's proposal, a discharge, emission, occupation, or structure could not be an actionable nuisance if it was licensed, permitted, or otherwise authorized by law.[9] Despite serious questions raised as to the bill's constitutionality, proponents introduced the bill during the 1993 legislative session.[10] The following year, due in large measure to careful shepherding by Sitka's representative in the Alaska Senate, Robin Taylor,[11] the Alaska legislature passed the bill; Governor Walter "Wally" Hickel signed the bill into law in April, 1994.[12]

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[5] *Sept. 12 Memorandum, supra* note 1, at 8–13. The Pretrial Memorandum cited a 1991 Department of Environment and Conservation report that found that the mill was the source of toxic floating sludge, a darkening of the water, and toxics in sediments and fish tissue. *Id.* at 8. It also cited a 1992 City of Sitka report which found the mill responsible for illegally high sulfur dioxide and particulate matter discharges. *Id.* at 9. Finally, it noted that the United States Forest Service confirmed that the health and diversity of lichens increased dramatically with increased distance from the mill, and that the ecological impacts were noticeable as far away as eleven miles from the mill. *Id.*

[6] *Id.* at 10–12; *see also* Ian Mader, *House Moves on Anti-lawsuit Bill*, JUNEAU EMPIRE, Mar. 21, 1994, at 3.

[7] *See Sept. 12 Memorandum, supra* note 1, at 1.

[8] *See* Plaintiff's Memorandum in Opposition to Defendant's Motions for Judgment on the Pleadings or Alternatively for Summary Judgment, at Exhibit 1, Edwards v. Alaska Pulp Corp., (Alaska Super. Ct., July 20, 1994) (No. 1SI–92–257 CI) [hereinafter *July 20 Memorandum*] (on file with B.C. ENVTL. AFF. L. REV.).

[9] *Id.*

[10] *Id.* at 5.

[11] Senator Taylor's zealous advocacy on behalf of APC over the years had earned him the moniker "the Senator from APC." Telephone Interview with James McGowan, attorney for plaintiff Larry Edwards (Feb. 8, 1996) [hereinafter *McGowan Interview*].

[12] *July 20 Memorandum, supra* note 8, at 5. Alaska Statute § 09.45.230 (the final version of the bill which was passed) states in part:

Soon thereafter, APC's attorneys filed a motion for judgment on the pleadings, arguing that the new law rendered the Edwards suit moot.[13] Edwards's attorneys responded that the statute was neither applicable—APC's actions were never in compliance with pollution regulations and hence were not protected by the statute—nor constitutional.[14] The Alaska Superior Court agreed that the statute was unconstitutional as retroactively applied to the Edwards lawsuit and rejected the defendant's motion.[15] Moreover, rejecting the claim that the statute was a well-considered revision of the common law, the court found that an "important" purpose of the statute was specifically to circumvent the Edwards lawsuit against APC.[16] The court noted, however, that the statute could be read to extinguish future private nuisance claims.[17]

By the time the trial was scheduled to start, APC had closed down its Sitka mill, making the desired injunction against pollution discharges irrelevant.[18] Consequently, the parties agreed to settle. APC

A person may not maintain an action under this section based upon an air emission or water or solid waste discharge . . . where the emission or discharge was expressly authorized by and is not in violation of a term or condition of

(1) a statute or regulation

(2) a license, permit or order that is

(A) issued after public hearing by the state or federal government; and

(B) subject to

(i) continuing compliance monitoring;

(ii) periodic review by the issuing agency;

(iii) renewal on a periodic basis; or

(iv) AS 46.40; or

(3) a court order or judgment.

ALASKA STAT. § 09.45.230 (1995).

[13] *See July 20 Memorandum, supra* note 8, at 1–2.

[14] *Id.* at 2–3. Plaintiff's attorneys primarily based their challenge on the due process clause and interpreting case law of the Alaska Constitution. *See id.*

[15] *See* Edwards v. Alaska Pulp Corp., No. 1SI–92–257 CI, slip op. at 4 (Alaska Super. Ct., Sept. 22, 1994) (memorandum and order addressing the constitutionality of Section 09.45.230.) [hereinafter *Sept. 22 Order*]. The Alaska Superior Court noted that, under federal law, vested rights cannot be abridged by a statute that effectively takes away an accrued cause of action to enforce those rights. *Id.* at 2 (citing Greyhound Food Management, Inc. v. City of Dayton, 653 F. Supp. 1297 (S.D. Ohio 1986), *aff'd*, 852 F.2d 866 (6th Cir. 1989)). Moreover, under the Alaska Constitution, an unlitigated claim is a property interest that cannot be taken away by government action without due process of law. *Id.* at 3 (citing Bush v. Reid, 526 P.2d 1215 (Alaska 1973)). It also represented an uncompensated taking of property. *See id.* at 2 (citing Wickwire v. City and Borough of Juneau, 557 P.2d 783 (Alaska 1976)).

[16] *Id.* at 4 n.6.

[17] *Id.* at 4.

[18] Naftali Bendavid, *Edwards, et al. v. Alaska Pulp Corp., et al.*, LEGAL TIMES, Oct. 24, 1994, at 16.

set up a $2 million trust fund to improve the "quality of life" in Sitka, funding science classes and a community music festival.[19]

II. Introduction: Statutory Revision of Common Law Property Protections

Senator Taylor and APL's rather ham-fisted attempt to circumvent a costly lawsuit failed.[20] The story demonstrates, however, that polluting industries successfully can weaken and even destroy traditionally powerful common law protections by turning to sympathetic legislatures.[21] Although the Alaska Superior Court held the law inapplicable to the Silver Bay landowners in the Edwards suit, the court still considered the law valid as applied prospectively, and at the present time every landowner in Alaska faces the prospect of serious property damage at the hands of polluting facilities without the opportunity for a remedy under a private nuisance claim.[22]

Polluting industries in other states will probably find the story of Alaska's effort to override the common law in favor of pollution regulation a useful and interesting model.[23] With national and state legislatures today at times demonstrating an unusual sympathy for corporate and industrial concerns,[24] other states also may attempt to abrogate traditional remedial mechanisms such as nuisance and negligence in favor of regulatory schemes.[25] Future legislators, moreover,

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[19] *Id.* Although this article refers to the settlement as a "fairy tale" end to the divisive litigation, *id.*, the story was far from over. *See* Jane Fritsch, *EPA hears 'Hands Off' Alaska Pulp*, The Commercial Appeal (Memphis), Aug. 27, 1995, at 7A. APC had left over a million pounds of dioxin and other toxin-laced fly ash at its abandoned mill site. *Id.* When the EPA began investigating it for Superfund listing, Alaska Senator Frank Murkowski attempted to prevent the listing. *Id.*

[20] *See supra* text accompanying notes 8–17. The fact that the statute was a blatantly obvious attempt to extinguish the Edwards lawsuit was not its only weakness. *See* Alaska Stat. § 09.45.230. Section 09.45.230 applied only to private nuisance, leaving open the possibility of creative efforts to circumvent the common law damages bar by using public nuisance, strict liability, trespass, or negligence claims. *See id.*

[21] *See supra* text accompanying notes 8–17; *see also Sept. 22 Order*, *supra* note 15, at 4 ("The perception that a large corporation can go to the legislature and extinguish an existing property right belonging to a single individual has to be detrimental to the perception of the administration of justice.").

[22] *See Sept. 22 Order*, *supra* note 15, at 4.

[23] *See State Reform of Tort Laws Proceeds During Calls For Federal Intervention*, U.S. Law Week, May 24, 1995, at 1–18 [hereinafter *State Reform of Tort Laws*].

[24] *See generally* Zygmunt J.B. Plater, *Environmental Law as a Mirror of the Future: Civic Values Confronting Market Force Dynamics in a Time of Counter-Revolution*, 23 B.C. Envtl. Aff. L. Rev. 733 (1996).

[25] *See State Reform of Tort Laws*, *supra* note 23.

probably would draft common law override bills more comprehensively than did the authors of Alaska's anti-nuisance statute.[26]

This Comment contemplates a hypothetical state statute that extinguishes common law remedies for injuries caused by a discharge or emission, providing that the responsible facility is in compliance with pollution regulation or otherwise complies with the law.[27] Unlike Section 09.45.230, however, this hypothetical statute would apply only prospectively and would abrogate the full range of common law remedies, including public nuisance, trespass, strict liability, and negligence.

This Comment argues that a statutory abrogation of the common law that leaves property subject to uncompensable damage is an unconstitutional deprivation of liberty and property without due process.[28] In doing so, this Comment bypasses the conventional view that substantive due process review is always completely deferential where a statute does not impinge upon a "fundamental" interest. Instead, this Comment argues that, where a statute deprives individuals of important common law protections and leaves them with no legal remedies for injuries caused by pollution, judicial scrutiny will be greater. Based on United States Supreme Court precedent, a court probably should find the hypothetical statute posited above to be unreasonable and arbitrary, and consequently violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Section III of this Comment examines the need for common law property protections in light of the nature of pollution standards and regulations such as the Clean Air and Clean Water Acts. Section IV then briefly examines the history of substantive review of legislation under the Due Process Clause and traces the evolution of the current "two-tiered" standard of review. Section V demonstrates that, despite the deference typically due to economic regulation, the Supreme

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[26] *See supra* note 20.

[27] The reason for examining the constitutionality of a non-existent statute is that something akin to the "hypothetical" posited above may become reality in the future. The shortcomings of Alaska's Section 09.45.230—retroactive application to existing suits, and application only to private nuisance—are quite obvious. Industry lawyers and lobbyists will easily conjure up a more airtight version of the same idea.

[28] *See infra* text accompanying notes 282–351. This comment focuses on substantive due process review of legislation. Other constitutional challenges to this hypothetical statute are promising as well, perhaps chief among them a "takings" challenge. The author of this Comment wrote a term paper on the takings challenge to Alaska's nuisance statute for an environmental law class. This paper is on file with BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.

Court examines common law abrogation and liability limitations with a significant quantum of scrutiny, and balances several factors to ensure that the common law change is fair and reasonable. Section VI posits some possible justifications for this implicit higher scrutiny by tracing various themes that run through the Court's constitutional jurisprudence. Finally, Section VII applies the multi-factor reasonableness balancing standard articulated in Section V to the hypothetical common law abrogation statute, and examines why the statute probably should fail.

III. Pollution Regulation: Insufficient Protection for Property

Statutory pollution regulation is not well designed to protect property from damage associated with air and water emissions.[29] Emissions that are permissible under pollution regulations still can cause significant damage to individual property or the environment.[30] Moreover, statutory pollution regulation generally does not provide for compensation for damages to private citizens caused by pollution.[31] Common law private actions thus provide a necessary complement to environmental regulations, one which the statutes themselves contemplate.[32] Consequently, the abrogation of common law claims would leave property subject to damage that could not be compensated or remedied by any legal mechanism.

As with any legislation, anti-pollution regulation usually represents a compromise between those who want rigorous environmental protection and those who insist that strict regulation would weaken industries and slow economic progress.[33] Lobbyists for polluting in-

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[29] *See infra* text accompanying notes 33–47. This section is by no means meant as a comprehensive critique of pollution regulation. Rather, it is intended to demonstrate that the common law remains critically important for the protection of property from damage caused by pollution.

[30] *See* cases cited *infra* note 47.

[31] *See infra* text accompanying notes 39–42.

[32] *See, e.g.*, 42 U.S.C. § 7604(e) (1994) (Clean Air Act) ("Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief . . . ."); 33 U.S.C. § 1365(e) (1994) (Clean Water Act) (identical language to 42 U.S.C. § 7604(e) except with "effluent" replacing the term "emission"); *see also* International Paper Co. v. Ouellette, 479 U.S. 481, 497 (1987) (noting that "savings clause" demonstrates that Clean Water Act is not meant to preempt state nuisance claims).

[33] *See* Robert McClure, *This Year, Conserve is a Bad Word: Lobbyists for Environmental Groups Can't Get Any Major Legislation Passed*, Orlando Sentinel-Trib., Apr. 2, 1993, at B5.

dustries often have significant influence in the legislative process, and legislators are often loathe to implement strict environmental regulations that could significantly impact economic competitiveness and employment.[34] As a result, significant levels of pollution are still allowed under virtually all regulatory regimes.[35]

Second, regulatory pollution standards are by their nature broad prescriptions, applicable across a state or the entire nation.[36] These standards attempt to articulate manageable ceilings on emissions to control pollution at the broadest level, and are poorly suited to deal with the myriad of individualized situations and local circumstances that render certain areas more susceptible to harm than others.[37] Local and individualized pollution control continues to rely on the common law, because the common law accounts for local standards of reasonableness that vary from place to place.[38]

Furthermore, environmental regulations do not provide any mechanisms for individuals to secure compensation for individual personal or property damages.[39] Instead, many regulations provide for citizen enforcement provisions,[40] and explicitly retain common law remedies for damages.[41] Under current federal pollution regulations, common law actions provide the sole legal mechanism available to compensate individuals who have been damaged in some way by pollution.[42]

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[34] Indeed, industry has frequently attempted to evade all responsibility for pollution, despite often overwhelming evidence to the contrary. *See* ZYGMUNT J.B. PLATER, ET AL; ENVIRONMENTAL LAW AND POLICY: NATURE, LAW AND SOCIETY 760 (1992) [hereinafter PLATER, ENVIRONMENTAL LAW] (noting that when regulators considered clean air problem in early 1970s, automakers strenuously denied that cars contributed to smog).

[35] *See id.* at 774, 818.

[36] For example, the federal Clean Air Act establishes National Ambient Air Quality Standards (NAAQS) applicable on a nationwide basis. *See* PLATER, ENVIRONMENTAL LAW, *supra* note 34, at 773.

[37] Interview with Zygmunt J.B. Plater, Professor of Law, Boston College Law School, in Newton, MA (Nov. 16, 1995).

[38] *See* Scott C. Seiler, Comment, *Federal Preemption of State Law Environmental Remedies after* International Paper Co. v. Ouellette, 49 LA. L. REV. 193, 194 n.4 (1988).

[39] *See* W. David Slawson, *The Right to Protection from Air Pollution*, 59 S. CAL. L. REV. 667, 742 & 759–61 (1986). Professor Slawson notes that public regulation and private enforcement are both critically important, as each accomplish objectives the other cannot. *Id.* at 760.

[40] *See, e.g.*, 33 U.S.C. § 1365(a) (Clean Water Act section allowing any individual to commence a civil action against persons in violation of the Act's provisions, or the state for failing to enforce the Act).

[41] *See supra* note 32.

[42] *See* Arnold W. Reitze, Jr., *A Century of Air Pollution Control Law: What's Worked; What's Failed; What Might Work*, 21 ENVTL. L. 1549, 1559–60 (1991). This is true even if the facility causing damage was in compliance with the regulations. *See* Water Pollution Control Act

Finally, pollution control regulations are heavily oriented towards the protection of human health, and much less oriented towards the protection of property and the environment.[43] For example, the Clean Air Act is divided into primary standards, based on the protection on human health, and secondary standards, broadly based on the protection of "social welfare" but generally referring to effects of air pollution on materials, agriculture, ecosystems, and aesthetics.[44] The primary standards are strict and generally well-enforced.[45] Secondary standards—those most applicable to the protection of property—are not only less rigorous in substance, but generally have been enforced poorly.[46]

Thus, pollution control regulations offer at best a slender quantum of protection to property. Even in heavily regulated industries and regions, the traditional mechanisms of the common law have remained necessary to control pollution levels in particular circumstances and to compensate for damages that occur.[47]

IV. The Due Process Clause and the Development of Substantive Review of Legislation

Before examining why statutes that abrogate common law protections on private property should be subject to significant constitutional scrutiny, a brief explanation of the Due Process Clause gener-

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Amendments of 1972, Pub. L. No. 92–500, 1972 U.S.C.C.A.N. 3746–47 ("Compliance with requirements under this act would not be a defense to a common law action for pollution damages.").

[43] *See* Samuel Hayes, *Clean Air: From the 1970 Act to the 1977 Amendments*, 17 Duq. L. Rev. 33, 35–36 (1978–79).

[44] *Id.* at 35.

[45] *See* 42 U.S.C. § 7410(a). This section requires primary standards to be met "as expeditiously as possible" but in no case later than three years after EPA approval. *Id.*

[46] Hayes, *supra* note 43, at 36. State implementation plans must only state a "reasonable time" in which the secondary standards will be attained. *See* Plater, Environmental Law, *supra* note 34, at 787–88. In practice, there has been little pressure to meet secondary standards. *Id.*

[47] Many states have explicitly ruled that facilities in compliance with pollution regulations can be liable for nuisance and other common law damages. *See, e.g.*, Galaxy Carpet Mills, Inc. v. Massengill, 338 S.E.2d 428, 429–30 (Ga. 1986) (holding that carpet dye plant could be held liable in nuisance despite permit from Environmental Protection Division); Borland v. Sanders Lead Co., 369 So. 2d 523, 526–27 (Ala. 1979) (noting that compliance with state air pollution law did not shield lead recovery plant from trespass suit seeking damages caused by company's pollutants). However, such a view is not universal. *See* New England Legal Found. v. Costle, 666 F.2d 30, 33 (2d. Cir. 1981) (noting that courts' reluctance to enjoin activities specifically authorized by legislatures is even greater where issue is technically complex and where Congress has granted administrative authority to an agency having technical expertise); Borough of Collegeville v. Philadelphia Suburban Water Co., 105 A.2d 722, 731 (Pa. 1954) (a structure authorized by the legislature cannot be a nuisance).

ally and the evolution of the United States Supreme Court's substantive review of legislation may be instructive. This history is important in helping to explain why the elevated standard of review for common law abrogation has remained implicit.[48]

Congress passed the Fourteenth Amendment[49] in 1868 in order to secure the protections of law for recently freed slaves.[50] The Due Process Clause of the Fourteenth Amendment was designed to protect individuals from arbitrary or abusive exercises of state power and to prevent unreasonable government deprivations of liberty and property.[51] The original understanding of the Due Process Clause was procedural: to ensure that government utilized appropriate procedures before depriving persons of life, liberty, or property.[52]

Early on, the Supreme Court developed a substantive component of the Due Process Clause.[53] According to the Court, certain government deprivations are inherently violative of due process, regardless of the procedures used.[54] In other words, the government simply cannot take certain acts with legislation.[55] The reach and nature of this substantive review has changed drastically over the years.[56]

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[48] *See infra* text accompanying notes 81–215.

[49] "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 2.

[50] *See* Slaughter-House Cases, 83 U.S. 36, 71 (1872); Charles A. Miller, *The Forest of Due Process Law: The American Constitutional Tradition*, *in* DUE PROCESS 17 (J. Roland Pennock and John W. Chapman, eds., 1977).

[51] Daniels v. Williams, 474 U.S. 327, 329–30 (1985); Honda v. Oberg, 114 S. Ct. 2331, 2342 (1994).

[52] *See* JOHN E. NOWAK & RONALD ROTUNDA, CONSTITUTIONAL LAW 355 (4th ed. 1991). Judicial review of procedural due process challenges examines the nature of the interest and the amount of procedural protection which is due, and employs a balancing test to determine what procedures are appropriate. *See* Matthews v. Eldridge, 424 U.S. 319, 335 (1975). Procedural due process applies to systems of individualized deprivations, not directly legislated ones. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 682–83 (2d ed. 1988).

[53] NOWAK & ROTUNDA, *supra* note 52, at 351. Many commentators agree that this substantive component of due process review was not intended by the authors of the 14th Amendment. *See, e.g.*, Louis Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74, 85 (1963) (noting that substantive due process review may be "wholly a judicial creation").

[54] *See* Poe v. Ullman, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting) ("Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three."). Justice Harlan's view of substantive due process as protecting rights from legislative interference was borne out four years later, in *Griswold v. Connecticut*. *See* 381 U.S. 479, 484–85 (1964). Justice Harlan, however, took issue with the Court's narrow "penumbra" basis for finding protected rights. *Id.* at 500–02 (Harlan, J., concurring).

[55] *Id.* at 484–85.

[56] *Compare* Lochner v. New York, 198 U.S. 45, 64 (1905) (striking down labor regulation in

Initially, the Court used substantive due process review to strike down legislation that the Justices felt to be unwise or ill-considered.[57] The zenith of this highly activist approach was the 1905 landmark decision *Lochner v. New York*, in which the Supreme Court used substantive due process review to strike down a New York statute regulating the hours of workers in bakeries.[58] The Court argued that the law arbitrarily and unnecessarily violated a person's freedom to contract his or her own hours, and that the police powers of the state could not override liberties and rights of individuals.[59]

Within thirty years, however, judicial intervention in such economic regulation on due process grounds had been almost completely discredited.[60] In *United States v. Carolene Products Co.*, the Court upheld a milk regulation, applying a presumption of constitutionality to economic regulations in substantive due process attacks.[61] During the ensuing decades, the Court's presumption of constitutionality has included a willingness to imply hypothetical justifications for regulations in order to find them constitutional, even where there was no indication that these reasons in fact motivated the legislators.[62] In 1963, the Court explicitly stated that it had abandoned the use of the Due Process Clause to nullify unwise economic legislation.[63]

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bakeries as interfering with rights of contract) *with* Ferguson v. Skrupa, 372 U.S. 726, 731–32 (1963) (upholding statute prohibiting non-lawyers from engaging in business of debt adjusting) *and* Roe v. Wade, 410 U.S. 113, 153 (1973) (invalidating Texas statute's near-total prohibition of abortion as interfering with due process right of privacy).

[57] *See Lochner*, 198 U.S. at 64; Allgeyer v. Louisiana, 165 U.S. 578, 593 (1897).

[58] *Lochner*, 198 U.S. at 64.

[59] *Id.* at 60, 62.

[60] *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937); Nebbia v. New York, 291 U.S. 502, 525 (1934). In *West Coast Hotel*, the Court upheld a state minimum wage law for women, directly overruling *Lochner*-era precedent. 300 U.S. at 400 (overruling Adkins v. Children's Hospital, 261 U.S. 525 (1923)). However, some commentators have argued that the Court's shift is not necessarily a total repudiation of the *Lochner* approach. *See* Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 880 (1987). In *West Coast Hotel*—often seen as the keynote example of the modern "hands off" approach—the Court seemed more concerned with the need for the minimum wage legislation at issue in the case than with the importance of judicial restraint. *Id.* Professor Sunstein even argues that *Lochner* has never really been overruled. *Id.* at 875.

[61] United States v. Carolene Products Co., 304 U.S. 144, 148 (1938).

[62] *See* Williamson v. Lee Optical, 348 U.S. 483, 487 (1955).

[63] Ferguson v. Skrupa, 372 U.S. 726, 730–31 (1963). Despite the Court's strong language in *Ferguson*, some commentators have argued that the substantive due process review discredited by *Lochner* continues, albeit without the sensitive due process vocabulary. *See* Zygmunt J.B. Plater and William Lund Norine, *Through the Looking Glass of Eminent Domain: Exploring the 'Arbitrary And Capricious' Test and Substantive Rationality Review of Governmental Decisions*, 16 B.C. ENVTL. AFF. L. REV. 661, 729–30 (1989) ("It is hardly new to assert that

Today, the Court has stated that, as long as the government's purpose is not illegitimate, and the means chosen to effectuate that purpose are not irrational, courts will not interfere with economic legislation on substantive due process grounds.[64] This highly deferential standard of review typically is referred to as the "arbitrary and capricious" or "rational basis" standard.[65] In the realm of property regulation, the government has broad police power authority to restrict use of property as long as that restriction rationally furthers the public interest.[66] Although the "arbitrary and capricious" standard is not one of complete deference, post-*Lochner* courts only rarely have struck down property regulations on due process grounds.[67] The court's deference may be even greater where the deprivation or restriction is directly created by statute, rather than through the exercise of administrative discretion.[68]

Despite its unwillingness to strike down economic regulations on substantive due process grounds, the Supreme Court continues to utilize substantive due process review to strike down legislation which impinges on so-called "fundamental rights."[69] The category of fundamental rights includes many of those protected by the Bill of Rights[70] as well as other rights not mentioned in the Constitu-

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generic' substantive due process never disappeared from the courts. Because of the profession's aversions to the excesses of the old 'economic' substantive due process cases, however, it is rarer to find judges overtly identifying their inquiries as substantive due process."); Miller, *supra* note 50, at 31 (substantive review shifted to less "unpalatable phraseology"—i.e., other constitutional language—after *Lochner*).

[64] *See Ferguson*, 372 U.S. at 730–31.

[65] Plater and Norine, *supra* note 63, at 702. According to Plater and Norine, arbitrary and capricious review consists of four categories: the authority of the government to undertake the act; whether or not the purpose of the act is a proper, public one; whether there is a reasonable relationship of ends to means; and whether or not the burden on any individual is undue. *Id.* at 665.

[66] *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387–88 (1926).

[67] *See* Plater and Norine, *supra* note 63, at 699–701. For an example of a property regulation struck down for failing the strict scrutiny reserved for "fundamental interests," see Moore v. City of E. Cleveland, 431 U.S. 494, 505–06 (1977) (striking down housing ordinance restricting freedom of extended family members to reside together as interfering with fundamental liberty interests).

[68] *See* Plater and Norine, *supra* note 63, at 667 n.15.

[69] *See* Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

[70] *See* Palko v. Connecticut, 302 U.S. 319, 325–26 (1937) (holding that certain fundamental interests protected by Bill of Rights apply to states under the 14th Amendment); Adamson v. California, 332 U.S. 46, 71–72 (1947) (Black, J., dissenting) (arguing that framers of 14th Amendment intended to apply Amendment to all of Bill of Rights). For a complete discussion of whether and to what extent the 14th Amendment includes all the rights guaranteed under the Bill of Rights, see Henkin, *supra* note 53 *passim*.

tion.[71] The Court has struggled with how to determine whether or not a right should be considered "fundamental," and the categorization of rights as fundamental or not has been at times contentious.[72] Rights deemed fundamental primarily have included aspects of privacy and family affairs, such as marriage, child-rearing and childbearing.[73]

More recently, the Court has exhibited an increased wariness of expanding the category of rights deemed fundamental.[74] In *Bowers v. Hardwick*, for example, a decision upholding a Georgia statute outlawing sodomy, the Court warned against the expansion of due process protections into previously unprotected areas of rights:

> The Court is most vulnerable and it comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design in the constitution . . . . There should be, therefore, great resistance to expand the substantive reach of the [Due Process Clause], particularly if it requires redefining the category of rights deemed fundamental.[75]

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[71] *See, e.g., In re* Winship, 397 U.S. 358, 364 (1970) (holding that Due Process Clause protects accused from conviction except upon proof beyond a reasonable doubt of every fact necessary to sustain conviction).

[72] *See Griswold*, 381 U.S. at 485–86, 499 (Goldberg, J., concurring), 499–501 (Harlan, J., concurring). The differing conceptions of what constitutes a fundamental right resulted in several separate opinions in *Griswold v. Connecticut*, the case which first applied substantive due process protection to fundamental rights. *Id.* Justice Douglas's majority opinion based judicial intervention on a "penumbra theory" of rights. *Id.* at 485–86. Certain rights not specifically mentioned in the Constitution "emanate" from the guarantees in the Bill of Rights, he said, and "help give them life and substance." *Id.* Justice Goldberg stated that the Ninth Amendment demonstrated that the framers of the Constitution believed that certain fundamental rights existed in addition to the rights protected in the Bill of Rights. *Id.* at 499 (Goldberg, J., concurring). In order to determine what rights are fundamental, Goldberg stated, judges should "look to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] . . . as to be ranked as fundamental.'" *Id.* at 493 (citing Snyder v. Massachusetts, 291 U.S. 97, 105 (1933)). Justice Harlan, on the other hand, stated that the Due Process Clause protects basic values "implicit in the concept of ordered liberty." *Griswold*, 381 U.S. at 500 (Harlan, J., concurring). The inquiry should not depend on the Bill of Rights or its emanations, he said, because the Due Process Clause "stands . . . on its own bottom." *Id.* Justice Harlan's view seems to have been borne out in later cases, which held that certain interests represent basic human rights which are of fundamental importance to society, without being tied to particular constitutional guarantees. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152–53 (1973).

[73] *See* John H. Ely, *Forward: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 11 (1978). Non-privacy oriented rights deemed fundamental for purposes of due process protection include the right of interstate travel, United States v. Guest, 383 U.S. 745, 757 (1966), and the right to refuse unwanted medical treatment. Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 278 (1990).

[74] *See* Bowers v. Hardwick, 478 U.S. 186, 194–95 (1986).

[75] *Id.* at 194–95.

Other attempts to persuade the Court that certain rights should be deemed fundamental for the purposes of due process review have failed.[76]

Where the right infringed upon by government regulation in fact is considered fundamental, the Court not only requires that the government purpose behind the law be "compelling," but that the means chosen be "narrowly drawn" or even "necessary" to achieve that end.[77] This standard of review is frequently described as "strict scrutiny."[78]

In summary, substantive due process review today typically is viewed in the context of a dichotomy between economic regulation on the one hand, and regulations impacting "fundamental interests" on the other.[79] The decision as to which standard of review to apply to a regulation usually determines the outcome, because the standard is one of extreme deference for economic regulation, and one of strictest scrutiny where fundamental interests are at stake.[80]

V. Substantive Due Process Review of State Legislation which Alters Traditional Common Law Remedies

The standard of review used by the Court where a statute has eliminated a mechanism of the common law does not fit comfortably into the two-tiered analysis described above.[81] Although common law abrogation appears to be a species of "economic" regulation,[82] the Court does not utilize the bare-bones rationality review that, according to cases like *Ferguson v. Skrupa* and *United States v. Carolene Products Co.*, statutes of this classification are due.[83] Instead, the

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[76] *See, e.g.*, Whalen v. Roe, 429 U.S. 589, 596–98 (1977) (upholding state statute requiring collection of information about prescription drug users); Kelley v. Johnson, 425 U.S. 238, 244 (1976) (upholding statute requiring short haircuts for police officers).

[77] *See* Roe v. Wade, 410 U.S. 113, 155 (1973).

[78] *See* Nowak & Rotunda, *supra* note 52, at 575. Strict scrutiny review has been used more frequently in equal protection challenges. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11–12 (1967) (striking down statute prohibiting miscegenation as being unnecessary to accomplishment of permissible state objective).

[79] Nowak & Rotunda, supra note 52, at 374, 388.

[80] *See* Fullilove v. Klutznik, 448 U.S. 448, 507 (1980).

[81] *Compare* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 82–94 (1978) *with* Roe, 410 U.S. at 155 *and* Ferguson v. Skrupa, 372 U.S. 726, 730–32 (1963); *see also* Jeffrey P. DeGraffenreid, Comment, *Testing The Constitutionality Of Tort Reform With A Quid Pro Quo Analysis: Is Kansas' Judicial Approach An Adequate Substitute For A More Traditional Constitutional Requirement?*, 31 Washburn L.J. 314, 320 (1992) (noting that the *Duke* Court could "certainly" have sustained Price-Anderson Act by using only rational relationship test).

[82] *See Duke*, 438 U.S. at 82–83.

[83] *See Ferguson*, 372 U.S. at 730–31; United States v. Carolene Products Co., 304 U.S. 144, 152

Court employs a multi-factor balancing test to ensure that the challenged common law change is reasonable and fair.[84] Although the Court has never held explicitly that the Due Process Clause requires a different standard of review where a common law mechanism is restricted, the Court almost always has applied greater scrutiny in these circumstances.[85] As a result, the nature and boundaries of this heightened review, and the reasons why such a different standard is appropriate, remain unclear.[86]

There are two different models for conceptualizing this heightened review. One possibility is that traditional common law protections inhabit a "gray area" between fundamental rights, such as privacy, and interests subject to economic regulation, such as wages or prices, and consequently is examined with an "intermediate" level of scrutiny.[87] Although the Court has never explicitly articulated this possibility, it has utilized "intermediate" levels of scrutiny in other consti-

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(1938). Under that standard, a reviewing court would merely inquire if the purpose is legitimate, and if the means chosen are rationally related to those ends, i.e., if legislators conceivably could have concluded that the means chosen would effectuate the desired ends. *Id.*

[84] *See Duke*, 438 U.S. at 82–94; *see also* Crowell v. Benson, 285 U.S. 22, 41 (1932) (suggesting that standard is one of reasonableness where common law remedies are altered, not simple rationality).

[85] *Compare Ferguson*, 372 U.S. at 730–31 *with Duke*, 438 U.S. at 82–94 and New York Cent. R.R. v. White, 243 U.S. 188, 196–206 (1917). *But see* Silver v. Silver, 280 U.S. 117, 122 (1929). In *Silver*, the Court applied rational basis scrutiny to a Connecticut statute which provided that no person carried gratuitously as a guest in an automobile could recover from the owner or operator for injuries caused by its negligent operation. *See id.* at 122–23. The Court stated, "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." *Id.* at 122. However, just two years after *Silver*, the Court upheld a federal workers' compensation statute only after ensuring that the statute provided a replacement to abrogated rights to sue in tort and was consequently not unreasonable. *See Crowell*, 285 U.S. at 41. One reason for the difference might be that the Court decided *Silver* on equal protection grounds, and never actually discussed the Due Process Clause. *See Silver*, 280 U.S. at 121–23.

[86] *See Duke*, 438 U.S. at 82–94. Note that the retroactive elimination of a vested claim or cause of action is quite a different issue. *See, e.g., Sept. 22 Order*, *supra* note 15, at 4; Elizabeth L. Loeb, Note, *Constitutional Fallout From The Warner Amendment: Annihilating The Rights Of Atomic Weapons Testing Victims*, 62 N.Y.U. L. REV. 1331, 1355 (1987). The concern here is prospective abrogation of rights, remedies or claims.

[87] *See* Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977). The Court has never explicitly utilized an intermediate standard for substantive due process challenges, and explicitly refused to apply one to the Price-Anderson Act in *Duke*. *See Duke*, 438 U.S. at 83–84. However, in a due process challenge to a zoning regulation prohibiting certain extended family members from residing in the same household, Justice Powell, writing for a plurality, used language which suggested intermediate due process scrutiny. *See Moore*, 431 U.S. at 499. Without explicitly applying strict scrutiny review, Powell stated that courts must "examine closely" statutes infringing upon important rights of family autonomy. *Id.* The Court struck down the statute. *Id.* at 499–500.

tutional contexts.[88] The second possibility is that the Court is in fact using an "arbitrary and capricious" standard of review, but with a different definition of arbitrary than that applied in challenges to, say, business regulations.[89] Under this model, the "rationality" of legislation is not a static, universal standard, but depends upon the context in which rationality is examined.[90] By requiring that an alteration to the common law abrogation be reasonable and fair, the Court may be articulating what it means by "rational" in this context.[91]

The precise due process limitations to common law change are not clear.[92] Legislatures unquestionably have the power to alter the common law by statute.[93] Alteration to the common law frequently is necessary as circumstances change; barring revision to traditional legal concepts would cause the law to stagnate in outdated and inapplicable norms.[94] However, the Court has stated that statutory alteration of the common law is not without constitutional limits, and that there is a fundamental, normative element to the common law which demands constitutional protection from legislative interference.[95] In *Pruneyard Shopping Center v. Robins*, for example, the Court upheld a statute which limited private trespass claims against peaceful leafletters.[96] Justice Marshall joined the opinion of the Court, but wrote separately to warn that the common law could not be always so readily altered:

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[88] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 199–204 (1976) (applying "intermediate" scrutiny in equal protection challenge to statute which discriminates between genders in sale of beer). The Court in *Duke* explicitly rejected petitioner's argument that it should utilize intermediate scrutiny to review the Price-Anderson Act. *Duke*, 438 U.S. at 83–84. However, the possibility of intermediate scrutiny in due process challenges has never been foreclosed explicitly. *Id.*

[89] *Compare Ferguson*, 372 U.S. at 730–31 *with Duke*, 438 U.S. at 82–94 *and New York Cent. R.R.*, 243 U.S. at 196–206.

[90] *See Duke*, 438 U.S. at 82–94; *New York Cent. R.R.*, 243 U.S. at 196–206.

[91] *See Duke*, 438 U.S. at 82–94; *New York Cent. R.R.*, 243 U.S. at 196–206.

[92] *See Duke*, 438 U.S. at 82–94; *New York Cent. R.R.*, 243 U.S. at 196–206.

[93] *See* Silver v. Silver, 280 U.S. 117, 121 (1929); Munn v. Illinois, 94 U.S. 113, 134 (1876) ("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 without due process; but the law itself . . . may be changed at the will, or even at the whim, of the legislature *unless prevented by constitutional limitations*.") (emphasis added).

[94] *See Silver*, 280 U.S. at 122.

[95] *See* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 93–94 (1980) (Marshall, J., concurring); *Munn*, 94 U.S. at 134.

[96] *Pruneyard*, 447 U.S. at 88. The Court noted that the statute infringed on neither any recognized property right nor any First Amendment rights of the mall owners. *Id.*

> On the other hand, I do not understand the Court to suggest that rights of property are to be defined solely by state law, or that there is no federal constitutional barrier to the abrogation of common-law rights by Congress or a state government. The constitutional terms "life, liberty, and property" do not derive their meaning solely from the provisions of positive [e.g., statutory] law. They have a normative dimension as well, establishing a sphere of private autonomy which government is bound to respect. *Quite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way.* Indeed, our cases demonstrate that there are limits on governmental authority to abolish "core" common-law rights, including rights against trespass, at least without a compelling showing of necessity or a provision for a reasonable alternative remedy.[97]

According to Marshall, then, the Due Process Clause places constitutional limitations on statutory common law abrogation.[98] The Court has never explicitly articulated these limits, but these limits have become at least partially evident through the inquiry the Court has applied in due process challenges to legislative attempts to restrict or alter the common law.[99]

The due process limits to statutory common law abrogation were evident in *Duke Power v. Carolina Environmental Study Group.*[100] The plaintiffs in *Duke*—an environmental group, a labor union, and a number of local property owners—challenged the constitutionality of the Price-Anderson Act[101] on equal protection and due process grounds.[102] With this Act, Congress sought to encourage private nuclear energy development by setting a statutory limit of $560 million on a nuclear plant's liability for injuries resulting from a catastrophic accident.[103] Congress considered the cap, in effect a limitation on the common law right to sue under negligence or strict liability, to be vital to the development of the private nuclear power industry, which could not secure insurance for potentially massive damage claims.[104] The

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[97] *Pruneyard*, 447 U.S. at 93–94 (Marshall, J., concurring) (emphasis added).

[98] *Id.*

[99] *See supra* text accompanying notes 124–215.

[100] *See* Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 82–94 (1978).

[101] 42 U.S.C. § 2210 (1970 & Supp. V).

[102] *Duke*, 438 U.S. at 67–68.

[103] *Id.* at 63–64. As a federal statute, the Price-Anderson Act was challenged under the due process clause of the Fifth Amendment. *Id.* at 67. There is, however, no meaningful difference between the due process protections of the Fifth and the Fourteenth Amendments. *See* Twining v. State of New Jersey, 211 U.S. 78, 101 (1908); Carrol v. Greenwich Ins. Co. of New York, 199 U.S. 401, 410 (1905).

[104] *Duke*, 438 U.S. at 63–64. The nuclear power industry had petitioned Congress for relief

Act required Congress, should an accident result in damages in excess of $560 million, to take whatever action was required to protect the public from the consequences of such a disaster.[105] After Congress passed the Act, Duke Power Company, a privately-owned utility, began constructing nuclear power plants in North and South Carolina.[106]

The plaintiffs successfully persuaded the United States District Court for the Western District of North Carolina that the Price-Anderson Act violated the Due Process Clause because injuries could occur without any assurance that victims would be compensated adequately.[107] The District Court's decision noted that the statutory limit was not rationally related to potential losses, that it tended to encourage irresponsibility in matters of safety, and that there was no "quid pro quo" for the liability limitation.[108]

The United States Supreme Court disagreed, and reversed.[109] The Court stated that the Price-Anderson Act was "classic" economic regulation, and hence the appropriate standard of review was the "arbitrary and capricious" standard.[110] Thus, the Act came before the Court with a presumption of constitutionality and "the burden [was] on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way."[111]

Although purporting to apply an "arbitrary and capricious" standard, the Court nevertheless conducted an examination of the statute that was not nearly so circumscribed.[112] The Court inquired into a number of different factors and circumstances to ensure that the Price-Anderson Act was reasonable and fair to affected individuals.[113] The *Duke* Court's inquiry has been utilized in other due process

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because, despite the remote likelihood of a major accident, potential liabilities still dwarfed the ability of the industry and private insurance companies to absorb the risk. *Id.*

[105] *Id.* at 66–67; *see* 42 U.S.C. § 2210(e).

[106] *Duke*, 438 U.S. at 67.

[107] Carolina Envtl. Study Group v. United States Atomic Energy Comm'n, 431 F. Supp. 203, 222–25 (W.D.N.C. 1977).

[108] *Id.* at 222–24. The decision also found that the statute, by forcing victims of nuclear accidents to bear all of the injury, violated the Equal Protection Clause. *Id.* at 224–25.

[109] *Duke*, 438 U.S. at 67.

[110] *Id.* at 83. The Court found that the statute was 'classic' economic regulation because the record showed that Congress sought to encourage private nuclear power while providing for public compensation in the event of a nuclear accident. *Id.* It was therefore a legislative effort to adjust "the burdens and benefits of economic life," the very definition of economic regulation. *Id.* (citing Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976)).

[111] *Duke*, 438 U.S. at 83–84 (citing *Usery*, 428 U.S. at 15).

[112] *See id.*; DeGraffenreid, *supra* note 81, at 320.

[113] *Duke*, 438 U.S. at 82–94.

challenges, which, taken together, provide a working model for the Court's standard of review for common law abrogation cases.[114]

In its examination of the Price-Anderson Act, the *Duke* Court first demonstrated that the Act was necessary; without the Price-Anderson Act, private nuclear energy, an industry perceived as critically important for the nation, certainly would fail.[115] Second, the Court explained that potentially affected residents received an adequate substitute remedy for their lost common law protections.[116] Third, the Court explained why the statutory compensation scheme offered various additional benefits which were unavailable under the common law, as it allowed for more certain compensation for harms and speedier settlement of claims.[117] Fourth, the Court noted that the chance of an accident that would exceed the $560 million liability limit was exceedingly remote.[118] Moreover, the Court found that the Act would not increase the risk of an accident because it did not remove safety incentives for plant managers or alter the integrity of the permitting process.[119]

Duke's analysis, when considered along with other Supreme Court cases, indicates that substantive due process review where a legislature alters traditional common law protections is not the black and white test of "rationality" utilized in cases like *Ferguson v. Skrupa*.[120] Rather, review of common law abrogation includes a nuanced balancing of various factors to ensure that the challenged statute is reasonable and fair.[121] This balancing seems designed to draw out the "normative boundaries" of the common law noted by Marshall in *Pruneyard Shopping Center v. Robins*, beyond which governments cannot go.[122] The following discussion examines in greater detail some of these balancing factors, not only those in *Duke* but also those in other cases in which statutes have abrogated common law compensatory mechanisms.[123]

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[114] *See, e.g.*, New York Cent. R.R. v. White, 243 U.S. 188, 196–206 (1917). This "model" of reasonableness balancing is set forth below. *See supra* text accompanying notes 124–215.

[115] *Duke*, 438 U.S. at 84.

[116] *Id.* at 87–94. The government had promised as part of the same legislation to take whatever steps would be necessary to make up for any shortfall between the liability limit and the actual damages suffered. *See id.*

[117] *Id.* at 89–94.

[118] *Id.* at 86 n.28.

[119] *Id.* at 87.

[120] *See Duke*, 438 U.S. at 84–94; Ferguson v. Skrupa, 372 U.S. 726, 730–31 (1963).

[121] *See Duke*, 438 U.S. at 84–94.

[122] *See* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 93–94 (1980) (Marshall, J., concurring).

[123] Although the factors are discussed individually, they are elements of a balancing test

A. *Statutory Replacements to the Abrogated Common Law Remedies*

In many common law abrogation cases, the Court inquires whether or not the statute that abrogates the common law provides some form of alternative to take its place.[124] The Court's due process concern appears muted where a legislature simply replaces a common law mechanism for compensating harms with a statutory one.[125] Whether some reasonable replacement to altered traditional mechanisms is actually mandated by the Due Process Clause, however, is unclear.[126] The Supreme Court has confronted this question on a few occasions, but never has decided it explicitly.[127] The language and reasoning used in many cases, however, suggests that the Court would in fact require such a substitute were it ever forced to directly confront the question.[128]

In *Duke*, the Court relied heavily on the fact that the Price-Anderson Act provided a "reasonably just alternative" to the common law tort claims that the Act barred in finding that the Act did not represent a deprivation of property without due process.[129] The *Duke* Court avoided holding that the Due Process Clause positively demands some sort of substitute for the common law protections it abrogates.[130] Instead, the Court found that the challenged statutory scheme did in fact provide a reasonable substitute for the abrogated compensatory mechanisms, and thus saw no need to resolve this long-standing question directly.[131] However, the *Duke* Court offered a strong hint that,

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wherein a shortcoming in one area might be made more constitutionally "palatable" by a strong showing in another. The exact weight to be accorded any single factor, however, is unclear.

[124] *See, e.g.*, *Duke*, 438 U.S. at 87–92; New York Cent. R.R. v. White, 243 U.S. 188, 201–02 (1917).

[125] *See Duke*, 438 U.S. at 87–92; *New York Cent. R.R.*, 243 U.S. at 201–02.

[126] *Duke*, 438 U.S. at 88.

[127] *See* Fein v. Permanente Medical Group, 474 U.S. 892, 892–95 (1985) (White, J., dissenting). The *Fein* case provided such an opportunity, but the Court dismissed the case for want of a substantial federal question. *Id.* The refusal to deal with the question of whether or not the Due Process Clause demands a "quid pro quo" in exchange for lost common law rights prompted a dissent from Justice White. *Id.* White noted that the circuits and states were split on whether or not the Due Process Clause required a reasonable alternative, and that the Supreme Court should settle the issue. *Id.*

[128] *See infra* text accompanying note 133.

[129] *Duke*, 438 U.S. at 87–92. Congress, as part of the challenged legislation, had committed itself to compensating any injuries or property damage that were not covered by the $560 million in liability insurance to be carried by the nuclear plants. *Id.* at 93. In other words, no one would suffer uncompensated damage under the Act; Congress would have to pay whatever the plant owners could not. *Id.*

[130] *Id.* at 88.

[131] *Id.*

were it ever forced to confront the issue head-on, some substitute—or perhaps at least a strong justification on why one is impracticable—would be required.[132] The Court stated, "[Congress's] panoply of remedies and guarantees is at the least a reasonably just substitute for the common-law rights replaced by the Price-Anderson Act. *Nothing more is required* by the Due Process Clause."[133]

The issue of whether or not the Due Process Clause requires that abrogated or altered common law mechanisms be replaced with some alternative also has been dealt with in due process challenges to worker compensation statutes.[134] In one of the earliest of these cases, *New York Central Railroad v. White*, the Supreme Court rejected a due process challenge to New York's Workmen's Compensation Law.[135] The statute eliminated traditional negligence suits for death or injury in certain industries deemed particularly hazardous and set out a prescribed schedule for compensation regardless of fault.[136] After one railroad employee accidentally was killed, both the railroad and the worker's widow challenged the suit on constitutional grounds.[137] The employee's widow claimed that the statute represented a violation of the Due Process Clause by limiting her to a prescribed amount of compensation, regardless of the circumstances, and deprived her of the opportunity to argue for a fuller recovery.[138]

In at least partial agreement with the plaintiff, the Court expressed doubt that a legislature simply can obliterate traditional protections such as negligence suits without leaving anything in their stead.[139] The Court cautioned that the case should not be read to mean "that any scale of compensation, however insignificant on the one hand or onerous on the other, would be supportable."[140] As did the Court in *Duke*,

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[132] *Id.* at 93.

[133] *Id.* (emphasis added). The district court, in fact, had held that the Due Process Clause requires some reasonable, certain and adequate provision for obtaining compensation. Carolina Envtl. Study Group v. United States Atomic Energy Comm'n, 431 F. Supp. 203, 223 (W.D.N.C. 1977). The United States Supreme Court did not disagree with this statement; it merely viewed the Price-Anderson Act as providing the necessary quantum of protection. *Duke*, 438 U.S. at 87–93.

[134] *See* New York Cent. R.R. v. White, 243 U.S. 188, 201–02 (1917).

[135] *Id.*

[136] *Id.* at 192.

[137] *Id.* at 190.

[138] *Id.* at 196–97. The Railroad also mounted a due process claim because it was being held liable regardless of fault. *Id.* at 196–97. That argument was rejected. *Id.* at 209.

[139] *New York Cent. R.R.*, 243 U.S. at 201 ("[I]t perhaps may be doubted whether the State could abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead.").

[140] *Id.* at 205.

however, the Court in *New York Central Railroad* declined to answer the question directly because the workmen's compensation statute, by providing a universally applicable schedule of reasonable compensation, did provide a just and fair substitute to the common law.[141] Although an injured party lost the opportunity to make an argument for higher compensation based on special circumstances or particularly egregious negligence on the employer's behalf, the statute guaranteed to the parties a fair and reasonable compensation.[142] By simply replacing a traditional compensation scheme with a similar statutory one, the workmen's compensation law did not represent a violation of due process.[143]

Although the Court has refused to decide explicitly whether or not the Due Process Clause requires that common law protections be replaced with a reasonable substitute if abrogated, the Court never has been confronted with a statute that does not somehow replace the altered common law mechanism.[144] In light of the importance the Court has attached to this issue and the language utilized in *Duke*, however, the Court eventually may find that the Due Process Clause demands such a reasonable alternative, or at least some compelling reason why one is not possible.[145]

B. *Other Benefits or Advantages Conferred by the Statute*

Another factor considered by the Court in due process challenges to common law abrogation statutes is whether the statutory alteration of common law provides new, alternative benefits to the party whose common law rights and remedies have been restricted by a statute.[146] Even if a statute does not fully replace the compensatory

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[141] *Id.* at 201.

[142] *Id.* at 201–02.

[143] *Id.* Fifteen years later, the Supreme Court relied on *New York Central Railroad* to sustain the Longshoreman and Harbor Workers Act, a federal workers' compensation plan. Crowell v. Benson, 285 U.S. 22, 41 (1932). The statute was found constitutional only after the Court concluded that "the classifications of the statute [and] the extent of the compensation provided are [not] unreasonable." *Id.*

[144] *See supra* note 127.

[145] *See* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 93 (1978).

[146] *See, e.g., New York Cent. R.R.*, 243 U.S. at 201. Although the "other benefits" inquiry is closely related to that of "reasonable alternatives," it can be considered distinct. In the "alternatives" category, the Court inquires simply if there is some alternative remedial mechanism offered by the challenged statute in exchange for the common law rights the statute restricts or abrogates. *See id.* at 200–03. The "benefits" inquiry carries that examination further, to determine if the statute provides additional advantages or benefits that the affected parties did not have under the common law. *See Duke*, 438 U.S. at 87–93. While these advantages are typically linked to the nature of the remedy, the Court has never stated that non-remedial

mechanisms of the common law, the Court apparently will balance that loss with other advantages which accrue to the affected parties.[147]

In *Duke*, for example, the Supreme Court found that the statutory liability scheme not only reasonably replaced the common law, but, by offering to the affected parties a variety of advantages unavailable under common law tort remedies, was in fact superior.[148] The Court noted that it was not at all clear that a plant could even pay an amount as large as $560 million in common law tort claims in the event of a catastrophic accident in the first place.[149] The Price-Anderson Act assured that plants would be able to provide at least that amount of compensation.[150] Moreover, the statute ensured more equitable compensation than could the common law.[151] Under traditional liability rules, the first few parties in massive claims often exhaust all of a defendant's resources, leaving slower-moving parties with no compensation whatsoever.[152] The Act, in contrast, ensured that everyone would be compensated, regardless of speed or litigation strategy.[153] The Act further obviated the need to prove fault or other wrongdoing in order to receive compensation, as would be necessary under a common law cause of action.[154] Under the Act, compensation for loss would follow regardless of the cause of the accident, including "acts of God" which provide an affirmative defense to tort claims.[155] Conse-

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benefits cannot be considered. *See id.* Many commentators and cases lump the two categories together as a general category of "quid pro quo" for lost rights. *See id.*; DeGraffenreid, *supra* note 81, at 317–29. The separation into distinct sub-categories for the purposes of this argument reflects the fact than some decisions appear to treat the two separately, as well as the fact that some cases have looked to benefits unrelated to the remedy (for example, the general benefit of lower medical costs in malpractice award restrictions) in balancing due process concerns. *See infra* notes 161–63 and accompanying text.

[147] *See Duke*, 438 U.S. at 87–93; *New York Cent. R.R.*, 243 U.S. at 201–06.

[148] *Duke*, 438 U.S. at 89–92.

[149] *Id.* at 92 n.36. Expert testimony offered to the District Court indicated that the Duke Power Company could not be expected to accumulate more than $200 million in damage claims without reaching the point of insolvency. *Id.* Even with the full amount of private insurance available, the company could not pay the $560 million provided for under the Price-Anderson Act. *Id.*

[150] *Id.*

[151] *Id.* at 89–92.

[152] *Id.* at 90. The Court cited the testimony of the Chairman of the Nuclear Regulatory Commission: "The prospect of inequitable distribution would produce a race to the courthouse door in contrast to the present system of assured orderly and equitable compensation." *Id.* (citing *Hearings on H.R. 8631 Before the Joint Committee on Atomic Energy*, 94th Cong., 1st Sess. 69 (1975)).

[153] *Duke*, 438 U.S. at 91–92.

[154] *Id.* at 91.

[155] *Id.* at 91–92. The Court noted that the "act of God" scenario—an earthquake or major

quently, the Act's compensation system ensured speedy, certain, and efficient settlement of claims, something for which the common law, the Court noted, is not well known.[156]

The same reasoning was utilized by the Court in *New York Central Railroad* to analyze New York's Workmen's Compensation Act.[157] Although workers gave up the possibility of large settlements in a common law suit, they received in exchange the certainty that some reasonable compensation would be paid, and paid quickly.[158] The worker was spared the difficulties of proving negligence or the amount of damages, as would be necessary under the common law.[159] As a result of these benefits to the parties who had lost their traditional right to sue their employer, the Court held, "the particular rules of the common law affecting the subject-matter are not placed by the Fourteenth Amendment beyond the reach of the law making power of the State."[160]

The Supreme Court never has considered benefits beyond those directly associated with the nature of the remedy provided for under the statute as cognizable in due process balancing.[161] State courts attempting to follow the U.S. Supreme Court's treatment of the issue of other benefits, however, have been hesitant to expand the category of cognizable benefits to balance against the loss of common law rights.[162] For example, several state supreme courts have stated that the "benefit" of lower medical costs and insurance premiums could not justify restricting the amount of compensation available in malpractice suits.[163]

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storm—would be more likely as the cause of a massive accident at a nuclear plant than under general circumstances. *Id.*

[156] *Id.* at 92.

[157] New York Cent. R.R. v. White, 243 U.S. 188, 201–04 (1917).

[158] *Id.* at 201.

[159] *Id.* at 202–04.

[160] *Id.* at 202.

[161] *See, e.g.*, Duke Power v. Carolina Envtl. Study Group, 438 U.S. 59, 87–93 (1978); *New York Cent. R.R.*, 243 U.S. at 199–207.

[162] *See, e.g.*, Carson v. Maurer, 424 A.2d 825, 836 (N.H. 1980); Arneson v. Olson, 270 N.W.2d 125, 135–36 (N.D. 1978); Wright v. Central Du Page Hosp. Ass'n, 347 N.E.2d 736, 742 (Ill. 1976).

[163] *Arneson*, 270 N.W.2d at 136; *Wright*, 347 N.E.2d at 742; *see also* Smith v. Department of Ins., 507 So. 2d 1080, 1089 (Fla. 1987) (holding that affordable health insurance was too speculative a benefit to balance against cap on non-economic damages in state tort claims); *Carson*, 424 A.2d at 837 ("It is simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore most in need of compensation.").

As with the question of "reasonable alternatives," the Court never has stated explicitly that such alternative benefits or advantages are required by the Due Process Clause when common law rights are restricted.[164] However, the language of these cases suggests that such alternative benefits remain an important balancing factor in due process scrutiny.[165]

C. *The Need for the Common Law Change*

Another factor that the Supreme Court has considered in due process inquiries into common law alteration is the need for the challenged statute.[166] Nominally, the Court treats the inquiry into the need of a statute very differently depending on whether it is applying the rational basis test for economic legislation or the strict scrutiny test reserved for fundamental rights.[167] However, the Court's inquiry into the need for statutes which abrogate the common law does not fit comfortably into this dichotomy, and demonstrates further that due process scrutiny implicitly is higher for statutes which alter the common law.[168]

A demonstration of the "need" for a statute is an important element of the strict scrutiny due process review used where statutes impinge upon fundamental rights.[169] According to Justice Harlan, the scope of the liberties protected by the Due Process Clause "includes a freedom from all substantial arbitrary impositions and *needless restraints*," and recognizes that "certain interests require *particularly careful scrutiny of the state needs asserted* to justify their abridgment."[170] As a result, the Court requires that statutes which restrict a fundamental interest be drawn as narrowly as possible.[171] According to the Court in *Roe v. Wade*, statutes which unnecessarily or over-expansively restrict fundamental interests violate the Due Process Clause.[172]

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[164] *See, e.g.*, *Duke*, 438 U.S. at 87–93; *New York Cent. R.R.*, 243 U.S. at 199–207.

[165] *See* Baptist Hosp. v. Baber, 672 S.W.2d 296, 298 (Tex. Ct. App. 1984) ("[I]t is safe to reflect, we think, that where a true quid pro quo does exist, it strengthens the statute's constitutionality.").

[166] *See Duke*, 438 U.S. at 84.

[167] *Compare* Roe v. Wade, 410 U.S. 113, 155 (1973) *with* Whalen v. Roe, 429 U.S. 589, 597 (1976).

[168] *See Duke*, 438 U.S. at 84.

[169] *See* Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

[170] *Id.* (emphasis added).

[171] *See Roe*, 410 U.S. at 155.

[172] *Id.*

In due process challenges to legislation that does not impact fundamental interests, on the other hand, the Court has explicitly stated that courts have no business asking whether or not the legislation is needed.[173] Courts are consequently not invited to question the necessity of a challenged statute when using "rational basis" scrutiny.[174] As the Supreme Court stated in *Whalen v. Roe*, "state legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part."[175] Indeed, such invasive judicial scrutiny of state regulation is the essence of judicial interference with legislation from the discredited *Lochner* era.[176]

However, the Supreme Court appears to demand that significant alterations to the common law be necessary for some government objective in order to comport with the Due Process Clause.[177] This is true even where the Court insists that it is using the "rational basis" scrutiny for economic legislation.[178] Justice Marshall explicitly stated that necessity was a due process consideration where legislatures abrogate common law rights.[179] "Indeed," Justice Marshall stated, "our cases demonstrate that there are limits on governmental authority to abolish 'core' common-law rights, including rights against trespass, *at least without a compelling showing of necessity* or a provision for a reasonable alternative remedy."[180]

In *Duke*, the Court predicated a conclusion that the Price-Anderson Act's liability cap did not violate due process on its finding that the Act was necessary for the development of the private nuclear power industry.[181] Without such a cap, both Congress and the Court found, the industry simply could not develop.[182] Because the liability limitation was necessary to that legitimate objective, the Court noted, it

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[173] *See* Whalen v. Roe, 429 U.S. 589, 597 (1976); Berman v. Parker, 348 U.S. 26, 32–33 (1954); Plater and Norine, *supra* note 63, at 693–97.

[174] *Whalen*, 429 U.S. at 597; Olsen v. Nebraska ex rel. Western Reference & Bond Ass'n, 313 U.S. 236, 246 (1940) ("We are not concerned, however, with the wisdom, need, or appropriateness of the legislation.").

[175] *Whalen*, 429 U.S. at 597.

[176] *See* Lochner v. New York, 198 U.S. 45, 64 (1905).

[177] *See* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 84 (1978).

[178] *Id.* at 83.

[179] Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 94 (1980) (Marshall, J., concurring).

[180] *Id.* (emphasis added).

[181] *Duke*, 438 U.S. at 84.

[182] *Id.* at 63–65.

bore a rational relationship to Congress's goal.[183] The language of the opinion suggests that the link between the rationality of a statute and the need for it is quite direct: "The record before us fully supports the need for the imposition of a statutory limit on liability to encourage private industry participation and *hence bears a rational relationship* to Congress's concern for [encouraging private nuclear power development]."[184]

In *Duke*, the Court seemed to suggest that the challenged common law alteration was an effective means of handling a serious policy problem.[185] The policy in question was complex, and the consequences of not altering the common law were potentially grave.[186] "Rational" in this context thus appears not only to mean that the common law change is conceivably related to a legitimate government end, but that the legislation is required to address squarely a genuine policy issue.[187] This reasoning suggests that where the statutory abrogation of common law rights is not really needed in order to effectuate a policy goal, courts should not consider the statute to be rational.[188] Courts will not necessarily query whether or not a challenged statute is the best possible or even the only available means of effectuating the intended goal.[189] Rather, the Court's inquiry suggests that where statutes deprive individuals of traditional protections and remedies, the Due Process Clause at the very least demands that the deprivation be warranted by the circumstances.[190]

D. *Risk of Harm*

A final factor in the due process balancing of common law abrogation is the likelihood of harm and whether the challenged restriction of common law remedies will result in an increased risk of harm to those individuals whose common law rights have been restricted.[191] In some instances where common law rights are restricted by statute, the Court has inquired into how likely it is that affected parties would

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[183] *Id.* at 84.
[184] *Id.* (emphasis added).
[185] *See id.* at 84.
[186] *See Duke*, 438 U.S. at 84.
[187] *See id.*
[188] *See id.*
[189] *See id.* at 84.
[190] *See id.*
[191] *Duke*, 438 U.S. at 86–88.

ever have the opportunity to exercise those rights.[192] Moreover, the Court has inquired if the restriction of common law rights and remedies would result in an increase in the likelihood of injuries that those rights were meant to prevent.[193] In other words, a restriction of a common law right seems more violative of the Due Process Clause where the absence of a remedy removes incentives for parties to avoid harming others.

In *Duke*, the Court took pains to note the vanishingly small possibility that the Price-Anderson Act's liability limits would ever be invoked at all.[194] The risk of a nuclear accident that would cause more than $560 million in damage, the Court found, was almost nonexistent.[195] In so stating, the Court seemed to suggest that legislatures could reasonably restrict rights which almost certainly never would be invoked.[196]

Furthermore, the Supreme Court disputed the District Court's conclusion that the liability limitation would encourage irresponsibility and increase the likelihood of an accident.[197] Nothing in the liability limitation, noted the Supreme Court, undermined the rigor or integrity of the permitting process for nuclear power plants.[198] Moreover, "the risk of financial loss and possible bankruptcy to the utility is in itself no small incentive to avoid the kind of cavalier conduct implicitly attributed to licensees by the District Court."[199] Thus, according to the Supreme Court, the liability limitations of the Price-Anderson Act in no way detracted from the protection of the public.[200]

This inquiry was mirrored in a due process challenge to a government immunity statute in *Martinez v. California*.[201] The challenged statute in *Martinez* granted total immunity to state employees from liability resulting from injuries occurring as a result of parole board

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[192] *See id.*

[193] *See id.* at 86–88; Martinez v. California, 444 U.S. 277, 281 (1980).

[194] *Duke*, 438 U.S. at 86–88. The Court cited a 1975 study that found that the chances of an accident causing $100 million in damages and minor health effects was one in 20,000. *Id.* at 86 n.28. The chances of an accident causing $14 billion in damages, 3300 fatalities, and 45,000 early illnesses was estimated to be one in one billion. *Id.*

[195] *Id.* at 86.

[196] *Id.*

[197] *Id.* at 87.

[198] *Id.*

[199] *Duke*, 438 U.S. at 86.

[200] *See id.* at 87.

[201] 444 U.S. 277, 283 (1980).

decisions.[202] The due process challenge was raised by a family that was prevented from suing the parole board after a dangerous felon, whom the board had released, raped and murdered their daughter.[203]

The Supreme Court rejected the challenge, finding that the immunity statute was too attenuated from the murder to constitute cognizable government action.[204] Immunity from tort suits does not violate due process, the Court held, simply because it incrementally impacts the probability of harm to an innocent bystander.[205] This statute did not encourage irresponsible action, the Court noted, but rather was one consideration in one small piece—the parole board's release of the felon—in a complex chain of events.[206] In other words, the immunity statute did not violate the Due Process Clause because it did not contribute to the injury suffered by the family.[207] Under this analysis, however, if immunity from tort claims did in fact significantly contribute to an injury, the immunity statute would implicate due process concern.[208]

In both *Duke* and *Martinez*, the Supreme Court emphasized that the abrogation of common law tort remedies did not increase the likelihood of harm to others.[209] This reasoning suggests that a limitation on common law liability that does increase the likelihood of harm—perhaps by reducing the incentive for due care—may run afoul of the general due process inquiry into fairness and reasonableness.[210]

E. *Summary*

When a court is presented with a due process challenge to a statute that alters traditional compensatory mechanisms and legal protections of the common law, that court should inquire whether the statute replaces the traditional protections with new ones or other advantages, if it is needed, and whether it will increase the likelihood of injury.[211] These distinct but related balancing factors suggest that the Due Process Clause demands that common law abrogation be basi-

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[202] *Id.* at 279.
[203] *Id.* at 280.
[204] *Id.* at 281.
[205] *Id.*
[206] *Martinez*, 444 U.S. at 281.
[207] *See id.*
[208] *See id.*
[209] *See id.*; *Duke*, 438 U.S. at 86.
[210] *See Martinez*, 444 U.S. at 281; *Duke*, 438 U.S. at 86.
[211] *See supra* text accompanying notes 124–210.

cally reasonable and fair.[212] In other words, the United States Supreme Court has implicitly stated that statutes that unnecessarily render individuals subject to uncompensated injuries are irrational, and hence violative of the Due Process Clause.[213] This reasonableness-based conception of "rationality" is a far cry from that applied to purely economic due process challenges, wherein a regulation is immune from due process challenge as long as legislators conceivably could have concluded that the chosen means would effectuate a legitimate objective.[214] Cases like *Duke* undercut the notion that courts always will be extremely deferential when confronted with "economic" regulation.[215]

VI. Understanding the Court's Heightened Due Process Scrutiny of Common Law Abrogation: Some Underlying Themes

How is the United States Supreme Court's reasonableness balancing consistent with the general post-*Lochner* view that economic regulation is subject to almost total due process deference from the courts? What is the reason for the Court's examination of the reasonableness and fairness of common law alterations? Because the Court

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[212] *See id.* While the distinct balancing factors provide a logical categorization for analysis, the inquiry is ultimately holistic and integrating. The *New York Central Railroad* Court held:

> *Viewing the entire matter*, it cannot be pronounced arbitrary and unreasonable for the State to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee, or in case of his death to those who were entitled to look to him for support, in lieu of the common-law liability confined to cases of negligence.

New York Cent. R.R. v. White, 243 U.S. 188, 205 (1917) (emphasis added). The *Duke* Court echoed this theme when it stated:

> When appraised in terms of both the extremely remote possibility of an accident where liability would exceed the limitation and Congress' now statutory commitment to "take whatever action is deemed necessary and appropriate to protect the public from the consequences of" any such disaster, we hold the congressional decision to fix a $560 million ceiling . . . to be within permissible limits and not violative of due process.

Duke, 438 U.S. at 86–87.

[213] *See Duke*, 438 U.S. at 86–87.

[214] *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 730–31 (1963). Had the Court applied the standard of review used in these cases to the Price-Anderson Act, the Court could have reached its result much more quickly. *See* DeGraffenreid, *supra* note 81, at 320. The most basic rationality review of the Price-Anderson Act would simply state that encouraging private nuclear power development is a proper government objective, and that Congress could have conceivably believed that the Act's liability limitations would help effectuate that goal. *See Ferguson*, 372 U.S. at 730–31.

[215] *See Duke*, 438 U.S. at 84–94.

has never even acknowledged explicitly that common law alteration demands scrutiny for reasonableness, the justification for this scrutiny remains hidden. However, common law abrogation implicates certain issues which the Court has noted merit particular concern. History and tradition, for example, play a central role in the articulation of due process boundaries.[216] Statutes which alter ancient common law mechanisms consequently seem to merit greater due process scrutiny than statutes which alter less traditional rights.[217] Moreover, the Court appears to be responding to issues of "natural law" and fundamental fairness, concerns that may be implicated where legislatures eliminate traditional legal protections.[218] Finally, the Court also has articulated a due process requirement of a "right to redress," and thus demands that individuals be left with some sort of reasonable compensatory mechanism.[219]

This section attempts to trace some of these themes in greater detail. Although these factors are not always explicitly discussed in common law abrogation cases, the concerns and interests that they represent could be influencing the Court to utilize a standard of review which does not fit into the traditional dichotomy of substantive due process review.[220]

A. *"Natural Justice" Concerns: Due Process as Ensuring the Fundamental Fairness of Statutes*[221]

One possible explanation for the Court's willingness to examine closely common law abrogation and liability limitations is that these legislative acts often implicate issues of fundamental fairness and natural justice.[222] Natural justice stands for the proposition that there are fundamental, normative standards of fairness that cannot be ig-

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[216] *See infra* Section VI.B.

[217] *See id.*

[218] *See infra* Section VI.A.

[219] *See infra* Section VI.C.

[220] *See, e.g., Duke*, 438 U.S. at 82–94; New York Cent. R.R. v. White, 243 U.S. 188, 196–206 (1917).

[221] The issues of natural justice, natural law and the role of basic fairness concerns in constitutional due process jurisprudence are complex and numerous. A full discussion of this topic is beyond the scope of this paper. The purpose of this section is to touch on the concern of natural justice, and how the Court's review seems to reflect an underlying concern that statutes should be reasonable and fair in their effect on individuals. For a more recent revisitation of the issue of natural law generally, see Symposium, *Perspectives on Natural Law*, 61 U. CIN. L. REV. 1 (1992).

[222] *See New York Cent. R.R.*, 243 U.S. at 202 ("Of course, we cannot ignore the question

nored, even absent specific constitutional provisions.[223] According to some Supreme Court justices, the Due Process Clauses of the Fifth and Fourteenth Amendments incorporate some element of "fundamental fairness."[224] Natural justice seems to be an applicable consideration where traditional protections of the common law have been abrogated and individuals are left subject to injuries that cannot be compensated.[225]

According to the United States Supreme Court in *Calder v. Bull*, some legislative deprivations are so unfair that they violate the social compact, the very purpose for which people enter into organized society.[226] This "compact" exerts normative limitations on legislative authority.[227] Legislation that oversteps these boundaries is not a rightful exercise of state authority, and hence is void.[228] This social compact limit in large measure drives substantive due process review, the judicial articulation of the limits on legislative power.[229]

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whether the new arrangement is arbitrary and unreasonable, from the standpoint of natural justice.").

[223] *See* Calder v. Bull, 3 U.S. 386, 392–94 (1798).

[224] *See, e.g., In re* Winship, 397 U.S. 355, 372 n.5 (1970) (Harlan, J., concurring). Justice Harlan's frustration with one of his colleague's narrow interpretation of the Due Process Clause prompted the following footnote:

> I cannot refrain from expressing my continued bafflement at my Brother Black's insistence that due process, whether under the Fourteenth Amendment or the Fifth Amendment, does not embody a concept of fundamental fairness as part of our scheme of constitutionally ordered liberty. His thesis flies in the face of a course of judicial history reflected in an unbroken line of opinions that have interpreted due process to impose restraints on the procedures government may adopt in its dealing with its citizens . . . as well as the uncontroverted scholarly research . . . respecting the intendment of the Due Process Clause of the Fourteenth Amendment . . . .

Id. (citations omitted); *see also* NOWAK & ROTUNDA, *supra* note 52, at 388 ("[F]undamental rights analysis is simply no more than the modern recognition of the natural law concepts first espoused by Justice Chase in Calder v. Bull.").

[225] *See New York Cent. R.R.*, 243 U.S. at 203.

[226] *Calder*, 3 U.S. at 394.

[227] NOWAK & ROTUNDA, *supra* note 52, at 351. Presumably, the idea of a "social compact" underlay Justice Marshall's warning in *Pruneyard* that there are fundamental elements of the common law that simply cannot be abrogated. *See* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 93–94 (1980) (Marshall, J., concurring).

[228] *Calder*, 3 U.S. at 388.

[229] *Id.*; *see also* J. Roland Pennock, *Introduction*, *in* DUE PROCESS xv, xviii, xxvi (J. Roland Pennock & John W. Chapman, eds., 1977) (due process review incorporates an element of "fundamental fairness" as well as justice and rationality). Although in form the Court has adopted Justice Iredell's plea for judicial restraint, in substance it continues to utilize "natural law" to review acts of the other branches of government. *See* NOWAK & ROTUNDA, *supra* note 52, at 351.

Many commentators—and some members of the Supreme Court—have viewed the Ninth Amendment to the Constitution[230] as the Constitutional "source" of unenumerated natural law rights to be protected by the courts.[231] As Justice Goldberg pointed out in *Griswold v. Connecticut*, the history of the Ninth Amendment demonstrates that the framers intended to ensure that the first eight amendments did not exhaust the basic and fundamental rights guaranteed by the Constitution.[232] "[T]he Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive."[233] The right to decide how and when to procreate, Goldberg insisted, must be among these basic rights if the Ninth Amendment was to have any meaning at all.[234] In other words, Goldberg saw the Court's role as protecting basic, fundamental values from government interference, even if not specifically mentioned in the Constitution.[235]

The judicial inquiry into alternatives, necessity, and the risk of harm appears to represent an attempt to ensure that the challenged common law alteration is not in conflict with concepts of natural justice and basic fairness.[236] In the examination of New York's workers' compensation law, for example, the Court balanced the various factors such as statutory replacement of the common law and other quid pro quo benefits specifically within the context of natural justice.[237] The Court found that the challenged workers' compensation statute merely redistributed the risks and benefits of employment in a way that was basically fair to both employer and employee, and reasonable given the balance of risks and costs under the common

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[230] "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

[231] Griswold v. Connecticut, 381 U.S. 479, 490 (1964) (Goldberg, J., concurring); *see also* Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTINGS L.J. 305, 313–22 (1987); Ronald E. Klipsch, *Aspects of a Constitutional Right to a Habitable Environment: Towards an Environmental Due Process*, 49 IND. L.J. 203, 219–22 (1974).

[232] *Griswold*, 381 U.S. at 490 (Goldberg, J., concurring).

[233] *Id.* at 492.

[234] *Id.* at 491.

[235] *See id.* at 499. Other Justices have noted that certain rights are constitutionally protected even absent the Ninth Amendment. *See id.* at 500–02 (Harlan, J., concurring). Justice Harlan emphasizes respect for the "teachings of history" and the basic values that underlie society. *See id.* at 501–02; *infra* text accompanying notes 245–64.

[236] *See, e.g.*, Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 93 (1978); New York Cent. R.R. v. White, 243 U.S. 188, 203 (1917); Crowell v. Benson, 285 U.S. 22, 41 (1932).

[237] *New York Cent. R.R.*, 243 U.S. at 202.

law.[238] The Court further noted the fact that employees were not forced to participate in the liability limitation scheme, because employment with a regulated industry was optional.[239] In light of its basic fairness and reasonableness, the Court determined that the statute did not violate the Due Process Clause.[240]

In sum, the Due Process Clause appears to implicitly include some component of basic fairness.[241] Whether articulated in terms of "natural law," the social compact which undergirds the Constitution, or the Ninth Amendment reservation of "other" rights that cannot be constitutionally infringed, the Court appears concerned with the issue of basic fairness when it protects rights with the Due Process Clause of the Fourteenth Amendment.[242] Natural law concerns are most obviously utilized when the Court is protecting the narrow realm of rights deemed "fundamental" from legislative interference.[243] However, as the Court explicitly noted in *New York Central Railroad v. White*, natural justice is also a relevant issue where the challenged statute is considered "economic" regulation.[244]

B. *Substantive Due Process Limits as a Reflection of History and Tradition*

The United States Supreme Court has relied heavily on tradition and history to articulate the boundaries imposed by the Due Process Clause on government action.[245] "Due process" means, most funda-

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[238] *Id.* at 203–04. With regard to the Railroad's due process challenge, the Court noted:

> It is plain that, *on grounds of natural justice*, it is not unreasonable for the State, while relieving the employer from responsibility for damages measured by common-law standards and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a reasonable amount, and according to a reasonable and definite scale, by way of compensation for the loss of earning power incurred in the common enterprise, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall—that is, upon the injured employee or his dependents.

Id. (emphasis added).

[239] *Id.* at 203. ("Employer and employee, by mutual consent, engage in a common operation intended to be advantageous to both . . . ."). This inquiry explicitly took place within the context of natural law and fairness. *Id.* at 203–05.

[240] *Id.*

[241] *See supra* text accompanying notes 69–78.

[242] *See supra* text accompanying notes 222–40.

[243] *See* Griswold v. Connecticut, 381 U.S. 479, 485–86 (1964).

[244] *New York Cent. R.R.*, 243 U.S. at 196–206.

[245] *See, e.g.*, Honda v. Oberg, 114 S. Ct. 2331, 2339 (1994) ("As this Court has stated from its first Due Process cases, traditional practice provides a touchstone for constitutional analysis."); *Griswold*, 381 U.S. at 486 ("We deal with a right of privacy older than the Bill of Rights—older

mentally, the "law of the land," tracing its roots back to the Magna Carta and the basic social understandings rooted deep in early English history.[246] Due process jurisprudence thus has come to exemplify what Justice Harlan referred to as "respect for the teachings of history, [and] solid recognition of the basic values that underlie our society . . . ."[247] According to the Court, long adherence to a particular rule does not conclusively establish that rule as a requirement of due process.[248] However, long adherence to a rule "reflect[s] a profound judgment about the way in which the law should be enforced and justice administered."[249] As a result, many due process challenges look to the historical basis of the common law right asserted when deciding if a government restriction or alteration of that right has gone too far.[250]

In *Ingraham v. Wright*, for example, the Court found a constitutionally protected liberty interest in freedom from corporal punishment, largely because of the historical and traditional basis for that right.[251] The Court explained:

> The Due Process Clause . . . was intended to give Americans at least the protection against governmental power that they had enjoyed as Englishmen against the power of the Crown. The liberty preserved from deprivation without due process included the right "generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[252]

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than our political parties, older than our school system."); Tumey v. Ohio, 273 U.S. 510, 523 (1926) ("These cases show that, in determining what due process of law is, under the Fifth or Fourteenth Amendment, the Court must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors . . . .").

[246] *See* FRANK R. STRONG, SUBSTANTIVE DUE PROCESS OF LAW: A DICHOTOMY OF SENSE AND NONSENSE 3–18 (1986). The influence of the Magna Carta as the fundamental basis of what due process means has long been remarked upon. *See, e.g., In re* Winship, 397 U.S. 358, 379 (1970) (Black, J., dissenting) ("One of the earliest cases in this Court to involve the interpretation of the Due Process Clause of the Fifth Amendment declared that 'the words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words 'by the law of the land' in Magna Charta.'") (citing Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 276 (1856)); Pennock, *supra* note 229, at xv ("due process of law" is the official English translation of the Magna Carta's "*per leggem terrae*").

[247] *Griswold*, 381 U.S. at 501 (Harlan, J., concurring).

[248] *In re* Winship, 397 U.S. at 361–62.

[249] *Id.* (citing Duncan v. Louisiana, 391 U.S. 145, 155 (1968)).

[250] *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 672–73 (1977); *In re* Winship, 397 U.S. at 361–62.

[251] *Ingraham*, 430 U.S. at 672–73.

[252] *Id.* (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

Likewise, in *Moore v. City of East Cleveland*, Justice Powell, writing for the plurality, found that a zoning ordinance violated the Due Process Clause in large measure because of the statute's affront to traditional concepts of liberty within the family.[253] He stated, "[t]he Constitution protects the sanctity of the family *precisely because* the institution of the family is deeply rooted in this Nation's history and tradition."[254] Although the history of the substantive reach of the Due Process Clause counseled restraint, noted Powell, that history does not demand abandonment in the face of government action which offends such long-held values.[255]

Conversely, due process challenges to government restriction of historically unprotected interests are far more likely to fail.[256] In *Michael H. v. Gerald D.*, for example, the Court upheld a statute which gave presumptive parental rights to married couples as against third-party biological fathers.[257] Justice Scalia noted that tradition supports relationships that develop within a unitary family, and does not give any rights to adulterous fathers.[258] The Court's requirement that rights protected by the Due Process Clause have deep roots in tradition, Scalia noted, was to "prevent future generations from lightly casting aside important traditional values . . . ."[259] Similarly, the Court in *Bowers v. Hardwick* held that the Georgia statute outlawing sodomy was not unconstitutional, in part because homosexual conduct always had been subject to proscription.[260] The banning of homosexual conduct had "ancient" roots and long-standing acceptance in United States history.[261] As a result, the Due Process Clause did not protect the right to engage in homosexual sodomy.[262]

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[253] Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977). In *Moore*, the challenged local ordinance proscribed limits on who could live in the same household. The regulation stated that certain combinations of extended family members—grandchildren who were cousins, for example—could not live in the same house together. *Id.* at 496–97.

[254] *Id.* at 503 (emphasis added).

[255] *Id.* at 502. Powell was likely referring to the discredited *Lochner*-era judicial intervention in economic and social regulation. *See* Lochner v. New York, 198 U.S. 45, 64 (1905); *supra* text accompanying notes 57–68.

[256] *See* Michael H. v. Gerald D., 491 U.S 110, 121–30 (1989).

[257] *Id.*

[258] *Id.* at 124–27.

[259] *Id.* at 122 n.2.

[260] Bowers v. Hardwick, 478 U.S. 186, 192–94 (1986). The majority's focus on homosexual conduct in this decision, when the statute banned all sodomy, baffled the dissent. *See id.* at 200 (Blackmun, J., dissenting).

[261] *Id.* at 192–94.

[262] *Id.* at 196.

Under the Court's treatment of due process challenges, a key factor is the nature of the right asserted, and how long that right has been recognized.[263] The greater the breach with history, the Court has implicitly asserted, the greater the due process protection the Court will give.[264]

C. *Due Process and the Right to a Remedy by Some Effective Procedure*

Abrogation and liability limitation statutes conflict with another theme of the legal system: the due process right of redress for injury.[265] No constitutional provision expressly states that there is a right of redress in the courts, and the Supreme Court repeatedly has allowed such a right to be limited or altered.[266] However, the Court explicitly has stated that statutes which limit access to the courts must provide some alternative means of redress for injuries.[267]

In *Gibbes v. Zimmerman*, the Court upheld a South Carolina statute that prohibited the institution of legal actions against a bank without the consent of the Governor.[268] The Court noted that individuals have no constitutionally protected property interest in any particular remedy, and that the challenged statute provided a procedure that guaranteed creditor interests no differently than individual suits.[269] The Court went on to state, however, that the Due Process Clause required some remedy for the redress of wrongs.[270] Individuals are "guaranteed by the Fourteenth Amendment . . . the preservation of [a] substantial right to redress *by some effective procedure*."[271] The admonition had been noted several times before, for example in *Crane v. Halo*.[272] The Court in *Crane* stated, "No one has a vested right in any given mode of procedure . . . and *so long as a substantial and*

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[263] *See id.;* Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977); Ingraham v. Wright, 430 U.S. 651, 672–73 (1977).

[264] *Moore*, 431 U.S. at 503; *Ingraham*, 430 U.S. at 672–73.

[265] *See* Gibbes v. Zimmerman, 290 U.S. 326, 332 (1933).

[266] *See, e.g.*, Silver v. Silver, 280 U.S. 117, 122 (1929).

[267] *Gibbes*, 290 U.S. at 332.

[268] *Id.* at 329–30. The statute applied under particular emergency circumstances, while the state was in control of the bank. *Id.*

[269] *Id.* The Court therefore rejected petitioner's due process challenge to the statute. *Id.*

[270] *Id.* at 332.

[271] *Id.* (emphasis added). Interestingly, *Gibbes* and its kin are rarely cited in recent times. However, they have never been explicitly overruled or otherwise discredited.

[272] 258 U.S. 142, 147 (1922).

efficient remedy remains or is provided due process of law is not denied by a legislative change."[273]

The requirement of some means of redress presumably underlies the Court's inquiry into whether or not statutes provide for a reasonable substitute to the altered common law remedies.[274] Thus, the Court in *New York Central Railroad v. White* relied on the fact that, even though injured employees lost their right to sue in tort, the statute guaranteed a reasonable compensation.[275] Because the statute provided some means of redressing workplace injuries, the restriction on the right to sue was "not placed by the Fourteenth Amendment beyond the reach of the law making power of the State."[276] Statutes that remove common law protections and leave individuals subject to injuries that cannot be remedied may consequently run afoul of the Due Process Clause.[277]

D. *Summary*

The Court scrutinizes due process challenges to common law restrictions with greater scrutiny than the highly deferential "arbitrary

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[273] *Id.* (citations omitted) (emphasis added); *see also* Oshkosh Waterworks Co. v. Oshkosh, 187 U.S. 437, 439 (1903) ("substantial or efficacious remedy" must remain or be given when statutes alter existing remedies); Ritzholt v. Marsh, 105 F.2d 937, 939 (D.C. Cir. 1939).

[274] *See, e.g.*, Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 87–92 (1978); New York Cent. R.R. v. White, 243 U.S. 188, 201–03 (1917).

[275] *New York Cent. R.R.*, 243 U.S. at 201–03.

[276] *Id.* at 202; *see also Duke*, 438 U.S. at 92–93 (ensuring that victims of a nuclear accident would be compensated for injuries, and therefore their common law rights to sue could be restricted without offending Due Process Clause).

[277] *Gibbes*, 290 U.S. at 332; *see also* Honda v. Oberg, 114 S. Ct. 2331, 2342 (1994). In a 1994 decision, the Court in *Honda* found that an Oregon statute prohibiting judicial review of punitive damage awards violated the Due Process Clause. *Honda*, 114 S. Ct. at 2339–41. Judicial review of punitive damage awards, stated the Court, is a procedural protection against arbitrary or unfair deprivations of property. *Id.* The prevention of such arbitrary deprivations, stated the Court, is the very purpose of the Due Process Clause. *Id.* at 2342. Abrogating this traditional procedural protection consequently violated due process. *Id.* This outcome raises the possibility that the line between procedure and substance, when applied to the common law, is blurred. *See id.* at 2338–42. Common law rights and remedies are procedures, but legislation altering those rights and remedies is by definition substance. *See* Ettor v. City of Tacoma, 228 U.S. 148, 155 (1913) (matters of remedy for substantive rights are procedural issues). In *Honda*, the Court applied neither the rational basis standard, strict scrutiny, nor the balancing test articulated in *Matthews v. Eldridge* used to determine what process is due. *Honda*, 114 S. Ct. at 2339–42; *see* Matthews v. Eldridge, 424 U.S. 319, 332–35 (1975); *see also* Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 85 (1982) (substance and procedure are two aspects of same phenomenon). This topic is beyond the scope of this paper.

and capricious" test utilized in economic regulation cases.[278] Instead, the Court considers a variety of factors to ensure that the challenged statute is reasonable and fair, and that individuals are not unnecessarily left subject to uncompensable harms.[279] The Court has never explicitly stated that common law change merits a higher standard of due process review.[280] Nonetheless, the "reasonableness balance" used by the Court reflects a number of important judicial concerns, such as natural justice, history and tradition, and the right to redress injuries by some effective procedure.[281] These major themes of the law provide some possible explanations why courts inquire more closely into statutory alterations to the common law.

VII. Application: The Constitutionality of Statutes which Abrogate Common Law Protections in Favor of Pollution Regulations

According to the reasonableness balancing test, a court probably should find the hypothetical common law abrogation statute posited at the beginning of this Comment to be a violation of the Due Process Clause.[282] Applying the various factors used by the Court in its balancing test to the proposed common law bar, the statute appears very different than the statutes upheld in *Duke* and *New York Central Railroad*.[283] Moreover, looked at in light of the values and concerns which drive the reasonableness balancing test, such as natural justice, history and tradition, and the right of redress, the hypothetical statute offends many of these bases for judicial concern.[284] According to the standard of review enunciated in *Duke*, *New York Central Railroad*, and related cases, the hypothetical common law bar probably should be considered an unconstitutional deprivation.[285]

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[278] *See supra* text accompanying notes 81–215.

[279] *See id.*

[280] *See, e.g.*, *Duke*, 438 U.S. at 82–94; *New York Cent. R.R.*, 243 U.S. at 196–206.

[281] *See supra* text accompanying notes 221–77.

[282] *See supra* text accompanying note 27. As noted, Alaska's § 09.45.230 was written too incompletely to serve as the model for this analysis because it did not prohibit public nuisance, trespass or negligence claims. *See id.* As such, the statute would probably not hinder substantially claims for compensation resulting from pollution. *See id.*

[283] *See infra* text accompanying notes 286–325.

[284] *See infra* text accompanying notes 326–351.

[285] *See* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 82–94 (1978); New York Cent. R.R. v. White, 243 U.S. 188, 196–206 (1917).

A. *Applying "Reasonableness Balancing" Review to the Hypothetical Statute*

1. Reasonable Alternatives to the Abrogated Mechanisms

The hypothetical statute provides for no alternative remedial mechanism for individuals who have lost common law rights to sue in tort.[286] In stark contrast to the Price-Anderson Act, the hypothetical statute provides no government commitment to compensate landowners injured by industrial pollution allowed under pollution regulations.[287] Unlike the Workmen's Compensation Law, there is no guarantee of a reasonable, albeit reduced, sum of compensation.[288] Pollution regulation alone does not provide a reasonable alternative to tort claims because regulation still allows for significant property damage in particular circumstances.[289] Neither the hypothetical statute nor the pollution control regulations themselves provide for compensation for harms that occur to third parties by facilities that are in compliance.[290] Consequently, under the statute affected landowners would be left unprotected from pollution-based harms, without any mechanism whatsoever to obtain compensation for injuries.[291]

The Court never has held that abrogated common law mechanisms must be replaced with some reasonable alternative.[292] If ever confronted with a case which demands that the Court finally resolve this question, it is impossible to predict the outcome.[293] However, even if the Due Process Clause does not in fact demand one, a replacement to altered common law remedies weighs in favor

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[286] *See supra* text accompanying note 27.

[287] *See Duke*, 438 U.S. at 92–93.

[288] *See New York Cent. R.R.*, 243 U.S. at 200–02.

[289] *See supra* text accompanying notes 29–47.

[290] *See id.* Citizen suit provisions to require government enforcement of pollution regulations are of little value to an individual who has been harmed by a facility in compliance with applicable standards and seeks compensation. *See supra* text accompanying notes 39–42.

[291] *See id.*

[292] *See, e.g.*, Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 87–88 (1978); *supra* note 27 and accompanying text.

[293] *Compare* David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1198 n.6 (1992) (considering it safe to conclude that the Constitution does not require alternative for abrogated rights) *with* DeGraffenreid, *supra* note 81, at 320 (noting that Court in *Duke* had the opportunity to decide quid pro quo issue but did not, demonstrating that they do not want to dispense with requirement).

of a statute's constitutionality.[294] The hypothetical statute provides none.[295]

2. The Existence of Alternative Benefits

In *Duke* and *New York Central Railroad*, the Court balanced the restriction on common law rights with new advantages offered by the alternative remedy.[296] Because the hypothetical statute does not offer any replacement to the tort claims it abrogates, no alternative benefits of the sort considered in *Duke* and *New York Central Railroad* are applicable.[297] This absence makes it less likely that a court would consider the statute to be constitutional.[298]

Additional benefits to affected individuals under the hypothetical statute could conceivably accrue from the economic or commercial advantages of restricted tort actions. A bar on common law damage claims potentially could increase profits for local corporations, thereby creating jobs for residents, and augmenting tax revenue for the government.[299] However, the Court's discussion of "quid pro quo" benefits has centered exclusively on the nature and extent of the remedy provided for under the challenged statutory compensation scheme, and never has extended to the consideration of benefits unrelated to the replacement remedy.[300] Moreover, state courts have been wholly unenthusiastic about considering such attenuated benefits a sufficient quid pro quo for the loss of common law rights.[301]

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[294] *See Duke*, 438 U.S. at 87–93.

[295] *See supra* note 27 and accompanying text.

[296] *Duke*, 438 U.S. at 89–93; New York Cent. R.R. v. White, 243 U.S. 188, 200–04 (1917).

[297] *See Duke*, 438 U.S. at 89–93; *New York Cent. R.R.*, 243 U.S. at 200–04.

[298] *See* Baptist Hosp. v. Baber, 672 S.W.2d 296, 298 (Tex. Ct. App. 1984) (even if not required, a "true quid pro quo" strengthens the statute's constitutionality).

[299] In the case of Alaska's anti-nuisance statute, such economic benefits are rather difficult to discern. *See* ALASKA STAT. § 09.23.450. There is no indication that nuisance suits threatened the viability of Alaskan industrial enterprises, or even cut into profits. *See infra* text accompanying notes 304–10. In fact, only one nuisance suit based on pollution damage was underway in the state at the time the statute was passed, and even that was considered quite unusual. *McGowan Interview*, *supra* note 11.

[300] *See Duke*, 438 U.S. at 89–93; *New York Cent. R.R.*, 243 U.S. at 200–04.

[301] *See supra* notes 163–64 and accompanying text; Wright v. Central Du Page Hosp. Ass'n, 347 N.E.2d 736, 742 (Ill. 1976) (noting that lower medical costs for all do not provide a cognizable quid pro quo for the limitation of medical malpractice awards).

3. The Necessity of Barring Private Actions for Pollution Damage

Rationality review appears to incorporate an inquiry into whether or not a challenged alteration to the common law is warranted.[302] This inquiry is fact specific and the result would depend upon the circumstances.[303] In Alaska, the anti-nuisance statute did not appear to be particularly necessary to achieve any government objective. Unlike the demonstrated need for the Price-Anderson Act's limitation on tort liability with regard to the development of private nuclear power,[304] there is little evidence that the Alaska nuisance bar was particularly necessary to solve a general policy problem.[305] Rather, Alaska statute Section 09.23.450 appears to have been a legislative boon to one politically well-connected corporation—the Alaska Pulp Corporation—to escape a particular lawsuit for property damage.[306]

At the time the Alaska legislature passed Section 09.45.230, private nuisance actions in Alaska were extraordinarily infrequent.[307] The statute's proponents could not point to any indication that nuisance suits for pollution damage impacted the profitability of Alaskan industry.[308] As a result, Section 09.23.450 appears to deprive individuals of their common law protections without any demonstration that the deprivation was warranted.[309] According to the Court's analysis in *Duke*, a deprivation of a traditional right that is not necessary may be irrational.[310]

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[302] *See supra* text accompanying notes 166–90.

[303] *See Duke*, 438 U.S. at 84. Thus, rather than examine the abstract hypothetical statute against a non-existent factual background, the necessity inquiry will be applied to Alaska's § 09.45.230.

[304] *Id.*

[305] *See Bill Would Muzzle Pollution Lawsuits*, JUNEAU EMPIRE, Apr. 21, 1994, at 1 [hereinafter *Bill Would Muzzle*].

[306] *See Sept. 22 Order*, *supra* note 15, at 4 n.6 (noting that an "important" purpose of the statute was to extinguish the lawsuit brought by Larry Edwards and his neighbors).

[307] *See supra* note 299. In fact, the Edwards nuisance suit against APC came as a total surprise to the local legal community. *McGowan Interview*, *supra* note 11.

[308] *See Bill Would Muzzle*, *supra* note 305, at 1. According to Senator Robin Taylor, the representative who shepherded the anti-nuisance bill through the Alaska legislature, he introduced the bill to prevent environmental activists from blocking new development. Dirk Miller, *AG Questions Bill on Nuisance Suits*, JUNEAU EMPIRE, Mar. 10, 1994, at 1. Taylor referred to opponents of his bill as "eco-loonies." *Id.*

[309] *See* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 94 (1980) (Marshall, J., concurring) (noting that precedent demonstrates that "core" common law rights cannot be abrogated without a showing of compelling necessity or a reasonable replacement).

[310] *See* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 84 (1978). Under the hypothetical statute, however, circumstances could demonstrate a need for some common law bar. *Id.* If private industry were struggling under the burden of multiple common law suits

4. Likelihood of harm

The nature and application of pollution regulations allow permissible industrial activity to seriously damage property.[311] Consequently, individuals under the hypothetical common law bar are subject to substantial risk of property damage without any mechanism to compensate for those harms.[312] In *Duke*, the Court determined that the risk of such an accident was so infinitesimally small that limiting tort liability seemed reasonable.[313] In contrast, harm to landowners where industries are bound only by statutory regulations appears far more likely.[314] This elevated risk may consequently raise due process concerns.[315]

Moreover, the hypothetical statute could increase the likelihood of pollution-based injuries to property.[316] Presumably, the threat of private tort actions encourages industries to restrain pollution beyond the level of compliance with pollution standards.[317] The statute removes these incentives for industrial managers to reduce potentially damaging pollution.[318] As a result, the abrogation of private tort remedies potentially increases the likelihood of harm.[319]

The Court in *Duke* did not quarrel with the District Judge's conclusion that the increased likelihood of harm caused by the Price-Anderson Act rendered it violative of due process.[320] The Court simply disagreed that the Act would increase that likelihood.[321] The factors noted by the *Duke* Court, that the integrity of the permitting process remained unchanged and that the threat of bankruptcy obviated any potential decrease in care, are inapplicable to the hypothetical statute.[322] The integrity of the permitting process is irrelevant because

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for damages caused by pollution, a reviewing court could potentially find that a common law bar is necessary to the realization of a government purpose. *Id.* Of course, necessity is only one of several factors to be considered in the reasonableness balancing test. *See supra* note 123.

[311] *See supra* text accompanying notes 29–47.

[312] *See supra* text accompanying notes 39–42.

[313] *Duke*, 438 U.S. at 86–87.

[314] *See supra* text accompanying notes 29–47.

[315] *See Duke*, 438 U.S. at 86–87.

[316] *Id.* at 87.

[317] *See* PLATER, ENVIRONMENTAL LAW, *supra* note 34, at 109–12.

[318] *See supra* text accompanying notes 39–42.

[319] *See Duke*, 438 U.S. at 87.

[320] *Id.*; *see* Carolina Envtl. Study Group v. United States Atomic Energy Comm'n, 431 F. Supp. 203, 223 (W.D.N.C. 1977) ("[T]he tendency of such low ceiling [*sic*] is to diminish rather than to heighten steps necessary to protect the public and the environment.").

[321] *Duke*, 438 U.S. at 87.

[322] *See id.*

pollution-based harms to property can still occur under allowable emissions.[323] The risk of bankruptcy, an applicable consideration where the harm risked is a nuclear catastrophe, is not a concern where the harm is property damage to others caused by continuing air and water emissions.[324] According to the *Duke* Court's reasoning, a statute that actually makes uncompensable injury more likely would implicate due process concerns.[325]

B. *Examining the Hypothetical Statute in Light of the Concerns Underlying the Reasonableness Balance*

Under the specific factors balanced by *Duke* and its legal kin, the hypothetical common law abrogation statute probably would fall short of meeting the due process requirement of reasonableness.[326] Examining the statute from the perspective of the legal themes that underlie those factors, the reasons for its likely unconstitutionality become more apparent.[327] By allowing politically influential corporations to damage or destroy private property without any mechanism for compensation or remedy, the statute violates fundamental notions of fairness and justice.[328] By eliminating literally ancient common law rights with nothing in their stead, the statute offends the tradition due process is designed to protect.[329] Furthermore, by eliminating every avenue of remedy for injuries to property, the hypothetical statute deprives individuals of their due process right to redress.[330] Consequently, the hypothetical statute offends many of the concerns that drive the Court's reasonableness balance review and further demonstrates why the statute should fail that review.

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[323] *See supra* text accompanying notes 29–47. Even if the permitting and regulatory process of pollution control is flawless, the real issue is that permissible pollution can still damage property. *Id.*

[324] *See Duke*, 438 U.S. at 87. To the contrary, an industry would probably benefit economically from the opportunity to pollute without being forced to compensate third parties for harms which result from that pollution. *See* PLATER, ENVIRONMENTAL LAW, *supra* note 34, at 109–12.

[325] *See Duke*, 438 U.S. at 87.

[326] *See supra* text accompanying notes 286–325.

[327] *See, e.g.*, Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 93–94 (1980) (Marshall, J., concurring); Gibbes v. Zimmerman, 290 U.S. 326, 332 (1933); New York Cent. R.R. v. White, 243 U.S. 188, 202 (1917).

[328] *See supra* text accompanying notes 221–44.

[329] *See supra* text accompanying notes 245–64.

[330] *See supra* text accompanying notes 265–77.

1. Natural Justice and Fairness Concerns

A statute which licenses politically powerful industries to damage, and even destroy, private property while providing no means of redress to its owners implicates the Court's implicit but ubiquitous concern with generalized issues of fundamental fairness and natural justice.[331] Uncompensable harm in these circumstances likely would strike many people as a basic outrage, an affront to the concept of "ordered liberty,"[332] and would conflict with the Court's multi-factor inquiry into reasonableness.[333] The inquiry into necessity, alternative remedial mechanisms, other benefits and the risk of harm ultimately ensures that a common law abrogation is fair.[334]

The hypothetical statute "fails" many or even all of the reasonableness balancing factors.[335] Moreover, the statute seems unfair in other respects. For example, the Court may be treating common law alterations differently depending on whether or not participation in the altered scheme is consensual.[336] Participation in the hypothetical statute's liability limits would not be consensual.[337] The bar would apply regionally; affected individuals would have to either participate or move to a different area.[338] The statute would therefore remove the common law protections of a captive audience.[339] The cases, however,

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[331] *See supra* text accompanying notes 245–64; *see also New York Cent. R.R.*, 243 U.S. at 202. The rather seedy tale of the passage of Alaska's § 09.23.450—and the role of powerful private interests in the legislative process—supplements the egregiousness of that statute's effects. *See supra* text accompanying notes 1–19.

[332] Griswold v. Connecticut, 381 U.S. 479, 500 (1964) (Harlan, J., concurring) (citing Palko v. Connecticut, 302 U.S. 319, 325 (1947)).

[333] *See supra* text accompanying notes 81–215.

[334] *See New York Cent. R.R.*, 243 U.S. at 202.

[335] *See supra* text accompanying notes 286–325.

[336] *Compare* Silver v. Silver, 280 U.S. 117, 122 (1929) (liability limits for guest passengers in vehicles) *and New York Cent. R.R.*, 243 U.S. at 200–04 (workers accept employment—and hence worker's compensation statute—voluntarily) *with* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 87–93 (1978) (liability limitation applies equally to everyone). It may be possible to distinguish *Silver*, which used a highly deferential rational basis test, from *Duke*, which employed the reasonableness balancing standard, on the basis of implied consent to the common law limit. *See Duke*, 438 U.S. at 87–93; *Silver*, 280 U.S. at 122. Moreover, the *Silver* decision, although frequently cited for the proposition that the common law can be changed without replacement, never explicitly deals with the due process argument. *Silver*, 280 U.S. at 117; *see* DeGraffenreid, *supra* note 81, at 317 n.17. Several states have held *Silver* inapplicable to due process challenges to common law restrictions, or have decided that *Silver* is no longer good law. *See In re* Aircrash in Bali, 684 F.2d 1301, 1312 (9th Cir. 1982) (citing Thompson v. Hagan, 523 P.2d 1365 (Idaho 1974); McGeehan v. Bunch, 540 P.2d 238 (N.M. 1975); Lakonen v. Eighth Judicial Dist. Court, 538 P.2d 574 (Nev. 1975); Henry v. Bauder, 518 P.2d 362 (Kan. 1974)).

[337] *See supra* text accompanying note 27.

[338] *See id.*

[339] *See id.*

suggest that non-consensual common law alterations are subject to stricter due process scrutiny.[340]

While the Court has considered natural justice and fairness concerns to discern "fundamental" interests,[341] these concerns are apparently equally applicable to other rights.[342] Not only does the statute conflict with most of the factors used to ensure reasonableness and fairness, but the statute "feels" unfair and unreasonable in a way that the Price-Anderson Act and the Workmen's Compensation Act do not.[343]

2. Due Process Limits as a Reflection of History and Tradition

Some common law protections and remedies represent traditions and mechanisms which stretch back to the very origins of the legal system.[344] Common law actions in private nuisance, for example, developed in medieval England and have been used without interruption for hundreds of years.[345] As such, common law property protections are presumed to reflect a "profound judgment" as to how the law should be administered.[346] According to the Supreme Court, rights that have long been recognized and respected are entitled to greater due process protection than rights without such long-standing acceptance.[347] The greater the basis in tradition and history for a particular right or interest, the less enthusiastic the Court will be about seeing it abrogated by statute without reasonable alternatives or other trade-offs.[348]

3. The Due Process Right of Redress

The hypothetical statute restricts common law rights to sue for damages without leaving any alternative mechanisms in their

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[340] *Duke*, 438 U.S. at 63–64.

[341] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 499–501 (1964) (Harlan, J., concurring).

[342] *See* New York Cent. R.R. v. White, 243 U.S. 188, 203 (1917).

[343] *Compare supra* text accompanying note 27 *with Duke*, 438 U.S. at 63–64 *and New York Cent. R.R.*, 243 U.S. at 200–04.

[344] *See* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 957–58 (3rd ed. 1993) (citing William Aldred's Case, 9 Co. Rep. 57b, 77 Eng. Rep. 816 (K.B. 1611)).

[345] *Id.*

[346] *See* Griswold v. Connecticut, 381 U.S. 479, 486 (1964) (majority opinion rests protection of privacy in marriage context on tradition); *see also In re* Winship, 397 U.S. 358, 362 (1970).

[347] *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 192–94 (1986); Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977); Ingraham v. Wright, 430 U.S. 651, 672–73 (1977); *see also* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 94 n.3 (1980) (Marshall, J., concurring).

[348] *See Pruneyard*, 447 U.S. at 94 (Marshall, J., concurring).

stead.[349] Landowners whose property has been damaged by pollution within regulated standards consequently have no remedy at law either for injunctions or compensation.[350] According to the Supreme Court in *Gibbes v. Zimmerman*, such an absolute loss of a right of remedy may directly violate the Due Process Clause.[351]

VIII. Conclusion

By using a multi-factor balancing test to examine statutory alterations to common law rights, the Court appears to demand that common law abrogation be reasonable and fair. The Court's treatment of this issue fits uncomfortably into the traditional substantive due process dichotomy of arbitrary and capricious review for economic regulation, and strict scrutiny for laws which restrict fundamental interests. Whether the Court's reasonableness and fairness review represents some implicit intermediate standard of review, or rather a more substantive conception of "rationality," however, remains unclear.

If this proposed reasonableness balancing standard is accurate, then legislatures may not be able to abrogate common law mechanisms such as nuisance and trespass in favor of existing statutory pollution control machinery. Unless pollution standards incorporate some mechanism to compensate individuals injured by polluting facilities, and unless the common law alteration can be shown necessary to some important goal, such statutes probably violate the due process protections of the 14th Amendment.

Moreover, the substantive component of the Due Process Clause is a dynamic, evolving concept.[352] Thus, even if a court were to disagree that the Due Process Clause has historically demanded a higher level of scrutiny where traditional protections are legislatively abrogated, there is no reason why such scrutiny could not be applied now.[353] Due process review has changed drastically over the last ninety years, from a powerful tool used to strike down legislation deemed unwise,[354]

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[349] *See supra* text accompanying note 27.

[350] *See supra* text accompanying notes 20–47.

[351] *See* Gibbes v. Zimmerman, 290 U.S. 326, 332 (1933).

[352] *See* Pennock, *supra* note 229, at xx.

[353] *See* Hurtado v. California, 110 U.S. 516, 530–31 (1884). The Court in *Hurtado* noted that "[t]he Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future . . . ." *Id.* Due process is to be determined by a "gradual process of judicial inclusion and exclusion." *Id.* at 534.

[354] *See, e.g.*, Lochner v. New York, 198 U.S. 45, 64 (1905).

to the opposite pole of extraordinary deference,[355] and most recently to a mechanism for judicial protection of fundamental rights.[356] Due process evolves to meet the changing needs of society and evolving notions of fairness and justice.[357] If the Due Process Clause does not currently protect private property from damage by politically well-connected corporations and their allies in local legislatures, perhaps it should.

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[355] *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 731–32 (1923).

[356] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 153 (1973).

[357] *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926) (The scope of application of constitutional guarantees "must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation"); Miller, *supra* note 50, at 3; *see also* Pennock, *supra* note 229, at xx (describing how values shift from a strong belief in laissez-faire to faith in necessity of government regulation was reflected in courts' interpretation of due process in first half of this century).