Tab 8

Supreme Court of the United States

GALVAN
v.
PRESS.

No. 407.

Argued Jan. 11, 12, 1954.
Decided May 24, 1954.

Habeas corpus proceeding. The United States District Court for the Southern District of California, Southern Division, denied the petition, and the petitioner appealed. The Court of Appeals for the Ninth Circuit, 201 F.2d 302, affirmed. On certiorari granted, the United States Supreme Court, Mr. Justice Frankfurter, held that even if petitioner, an alien, had joined Communist Party without knowledge of its advocacy of violence he was deportable as a party 'member', absent any claim that he had joined the party 'accidentally, artificially, or unconsciously in appearance only.'

Affirmed.

Mr. Justice Black and Mr. Justice Douglas dissented.

West Headnotes

[1] Habeas Corpus ⚿849
197k849 Most Cited Cases
(Formerly 197k114)

Where issues of constitutionality and construction of 1950 Internal Security Act were raised for first time in habeas corpus proceeding, certiorari was granted for review of judgment affirming denial of writ.

[2] Aliens ⚿53.1
24k53.1 Most Cited Cases
(Formerly 24k53)

An alien's membership in a proscribed organization may have been so nominal as to keep him out of the deportable class even though he did not join such organization (1) as a child, (2) by operation of law, or (3) to obtain necessities of life, since those instances, enumerated in 1951 corrective statute, were not intended to be exclusive. Immigration and Nationality Act, § 212(a) (28) (E), (I) (i), 8 U.S.C.A. § 1182(a) (28) (E), (I) (i).

[3] Aliens ⚿53.3
24k53.3 Most Cited Cases
(Formerly 24k53)

For purpose of statutory provision making "membership" in Communist Party a basis for deportation of an alien, it is enough that alien join Party, aware that he was joining an organization known as Communist Party and operating as a distinct and active political organization, and that he did so of his own free will; cognizance of the Party's advocacy of violence not being a prerequisite to deportation. Immigration and Nationality Act, § 212(a) (28) (E), (I) (i), 8 U.S.C.A. § 1182(a) (28) (E), (I) (i); Internal Security Act of 1950, §§ 7, 13, 50 U.S.C.A. §§ 786, 792.

[4] Aliens ⚿54.1(6)
24k54.1(6) Most Cited Cases
(Formerly 24k54(9))

On issue as to alien's deportability, evidence sustained finding that alien had in fact joined Communist Party. Immigration and Nationality Act, § 241(a) (6) (C), 8 U.S.C.A.§ 1251 (a) (6) (C) .

[5] Aliens ⚿53.3
24k53.3 Most Cited Cases
(Formerly 24k53)

Even if alien had joined Communist Party without knowledge of its advocacy of violence, he was deportable as a party "member", absent any claim that he had joined the party "accidentally, artificially, or unconsciously in appearance only." Immigration and Nationality Act, § 212(a) (28) (E), (I) (i), 8 U.S.C.A. § 1182(a) (28) (E), (I) (i); Internal Security Act of 1950, §§ 7, 13, 50 U.S.C.A. §§ 786, 792.

[6] Aliens ⚿39
24k39 Most Cited Cases

The power of Congress over the admission of aliens

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and their right to remain is necessarily very broad, touching as it does basic aspects of national sovereignty, and more particularly our foreign relations and the national security; and formulation of policies pertaining to entry of aliens and their right to remain here is entrusted exclusively to Congress.

[7] Constitutional Law ⚷252
92k252 Most Cited Cases

An "alien" is a "person" entitled to the same protection for his life, liberty and property under the due process clause as is afforded to a citizen. U.S.C.A.Const. Amend. 5.

[8] Constitutional Law ⚷251
92k251 Most Cited Cases

Fair play is the essence of "due process." U.S.C.A.Const. Amend. 5.

[9] Constitutional Law ⚷251
92k251 Most Cited Cases

Substantive due process is a limitation upon all powers of Congress, including the war power. U.S.C.A.Const. Amend. 5.

[10] Constitutional Law ⚷197
92k197 Most Cited Cases

Ex post facto clause of federal Constitution is applicable only to punitive legislation. U.S.C.A.Const. Amend. 5.

[11] Constitutional Law ⚷197
92k197 Most Cited Cases

Ex post facto clause of the federal Constitution has no application to deportation, even though deportation may deprive a man of all that makes life worth living and may at times be the equivalent of banishment or exile. U.S.C.A.Const. Amend. 5.

[12] Constitutional Law ⚷274.3
92k274.3 Most Cited Cases
(Formerly 92k318)

Policies pertaining to entry of aliens and their right to remain here are peculiarly concerned with political conduct of government, and in enforcement of those policies, executive branch of government must respect procedural safeguards of due process. U.S.C.A.Const. Amend 5.

[13] Aliens ⚷40
24k40 Most Cited Cases

[13] Constitutional Law ⚷199
92k199 Most Cited Cases

[13] Constitutional Law ⚷255(2)
92k255(2) Most Cited Cases
(Formerly 92k255)

Statute making present or former membership in Communist Party a basis for deportation of alien was not repugnant to either due process or ex post facto clauses of Federal Constitution. Internal Security Act of 1950, § 2(1), 50 U.S.C.A. § 781(1); U.S.C.A.Const. Amend. 5.

[14] Courts ⚷90(3)
106k90(3) Most Cited Cases

Not being prepared to deem themselves wiser or more sensitive to human rights than their predecessors, especially those who had been most zealous in protecting civil liberties under Constitution, members of Supreme Court could not justifiably overturn a view of the Constitution which was deeply rooted and had been consistently adhered to. U.S.C.A.Const.Amend. 5.

****738** Messrs. ***523** Harry Wolpin and A. L. Wirin, Los Angeles, for petitioner.

Mr. Oscar H. Davis, Washington, D.C., for respondent.

Mr. Justice FRANKFURTER delivered the opinion of the Court.

Petitioner, an alien of Mexican birth, first entered the United States in 1918 and has since resided here with only occasional brief visits to his native country. In the course of two questionings, in March 1948, by the Immigration and ****739** Naturalization Service, he indicated that he had been a member of the Communist Party from 1944 to 1946. In March of 1949, the petitioner was served with a deportation warrant, and on the same day a preliminary deportation hearing was held to acquaint him with the charges against him--that after entry he

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had become a member of an organization which advocated the violent overthrow of the United States Government, and of an organization which distributed material so advocating. In December 1950, petitioner had a de novo hearing at which the transcripts of all earlier proceedings were, by agreement, made part of the record. Shortly after the hearing commenced, the examining officer lodged the additional charge against the petitioner that after entry he had been a member of the Communist Party, membership in which had been made a specific ground for deportation by the Internal Security Act of 1950, 64 Stat. 987, 1006, 1008.

At this final hearing the evidence against the petitioner was derived from two principal sources. The first was ***524** his own testimony during the two interrogations by immigration authorities in 1948. During those interrogations, he had testified as to the time and place he had joined the Communist Party, talked freely about his membership in the Party, and indicated generally that the distinction between the Party and other groups was clear in his mind; he had explained that the reason he had not applied for naturalization was that he feared his former Party membership might be revealed, and had offered to make amends by rejoining the Party as an undercover agent for the Government. At the hearing in December of 1950, petitioner denied that in his prior hearing he had admitted joining the Party, insisting that at the time he thought the question related to labor union activities. In response to a question whether he had ever attended meetings of the Spanish Speaking Club, an alleged Communist Party unit, he replied: 'The only meetings I attended were relating to the Fair Employment Practices Committee.'

The second source of information was the testimony of a Mrs. Meza to the effect that she had been present when petitioner was elected an officer of the Spanish Speaking Club. Petitioner denied the truth of this and other statements of Mrs. Meza calculated to establish his active participation in the Communist Party and said: 'She must have been under great strain to imagine all those things.'

The Hearing Officer found that petitioner had been a member of the Communist Party from 1944 to 1946 and ordered him deported on that specific ground. He did not deem it necessary to make findings on the more general charges contained in the original warrant. The Hearing Officer's decision was adopted by the Assistant Commissioner and an appeal was dismissed by the Board of Immigration Appeals. A petition for a writ of habeas corpus was denied by the District Court, and the dismissal ***525** was affirmed by the Court of Appeals for the Ninth Circuit. 201 F.2d 302.

[1] On certiorari, petitioner challenged the sufficiency of the evidence to sustain deportation under s 22 of the Internal Security Act of 1950 and attacked the validity of the Act as applied to him. [FN1] These are issues that raise the constitutionality and construction of the ****740** 1950 Act for the first time and so we granted certiorari. 346 U.S. 812, 74 S.Ct. 53.

> FN1. In his petition, petitioner also contended that the procedure used against him was unfair because of the new charge lodged by the Examining Officer in the December 1950 hearing. Apart from the fact that this claim was not pressed in the argument or petitioner's brief, it is sufficient to note that there was no element of surprise in the additional charge, since it was simply in more specific terms the same ground for deportation that petitioner already knew he had to defend against, namely, membership in the Communist Party. Furthermore, petitioner declined the Hearing Officer's offer of a continuance to meet the new charge.

Petitioner's contention that there was not sufficient evidence to support the deportation order brings into question the scope of the word 'member' as used by Congress in the enactment of 1950, whereby it required deportation of any alien who at the time of entering the United States, or at any time thereafter, was a 'member' of the Communist Party. [FN2] We are urged to construe the Act as providing for the deportation only of those aliens who joined the Communist Party fully conscious of its advocacy ***526** of violence, and who, by so joining, thereby committed themselves to this violent purpose.

> FN2. Section 22 of the Internal Security Act of 1950 provides that the Attorney General shall take into custody and deport any alien 'who was at the time of entering the United States, or has been at any time thereafter, * * * a member of any one of the classes of aliens enumerated in section 1(2) of this Act * * *.' Subparagraph (C) of s 1(2) lists 'Aliens who are members of or affiliated with (i)

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the Communist Party of the United States * * *.' The substance of this provision was incorporated in the Immigration and Nationality Act of 1952, 66 Stat. 163, 205, 8 U.S.C. s 1251(a)(6)(C), 8 U.S.C.A. s 1251(a)(6)(C).

But the Act itself appears to preclude an interpretation which would require proof that an alien had joined the Communist Party with full appreciation of its purposes and program. In the same section under which the petitioner's deportation is sought here as a former Communist Party member, there is another provision, subsection (2)(E), [FN*] which requires the exclusion or deportation of aliens who are 'members of or affiliated with' an organization required to register under the Internal Security Act of 1950, [FN3] 'unless such aliens establish that they did not know or have reason to believe at the time they became members of or affiliated with such an organization * * * that such organization was a Communist organization.' 64 Stat. 1007. In describing the purpose of this clause, Senator McCarran, the Act's sponsor, said: 'Aliens who were innocent dupes when they joined a Communist Front organization, as distinguished from a Communist political organization (such as the Communist Party), would likewise not ipso facto be excluded or deported.' 96 Cong.Rec. 14180. In view of this specific escape provision for members of other organizations, it seems clear that Congress did not exempt 'innocent' members of the Communist Party.

FN* Now 8 U.S.C.A. s 1182(a)(28)(E).

FN3. Under s 7 of the Internal Security Act of 1950, 50 U.S.C.A. s 786, 'Communist-action' and 'Communist-front' organizations are required to register as such with the Attorney General. Section 13, 50 U.S.C.A. s 792, provides that where such an organization fails to register the Attorney General may institute proceedings requiring such registration.

While the legislative history of the 1950 Act is not illuminating on the scope of 'member,' considerable light was shed by authoritative comment in the debates on the statute which Congress enacted in 1951 to correct what it regarded as the unduly expanded interpretation by the Attorney General of 'member' under the 1950 Act. 65 ***527** Stat. 28. [FN**] The amendatory statute dealt with certain specific situations which had been brought to the attention of Congress and provided that where aliens had joined a proscribed organization (1) when they were children, (2) by operation of law, or (3) to obtain the necessities of life, they were not to be deemed to have been 'members.' In explaining the measure, its sponsor, Senator McCarran, stated repeatedly and emphatically that 'member' was intended to have the same meaning in the 1950 Act as had been given it by the courts and administrative agencies since 1918, 97 Cong.Rec. 2368--2374. See S.Rep. ****741** No. 111, 82d Cong., 1st Sess. 2; H.R.Rep. No. 118, 82d Cong., 1st Sess. 2. To illustrate what 'member' did not cover he inserted in the Record a memorandum containing the following language quoted from Colyer v. Skeffington, D.C., 265 F. 17, 72: 'Congress could not have intended to authorize the wholesale deportation of aliens who, accidentally, artificially, or unconsciously in appearance only, are found to be members of or affiliated with an organization of whose platform and purposes they have no real knowledge.' 97 Cong.Rec. 2373.

FN** Now 8 U.S.C.A. s 1182(a)(28)(I)(i).

[2] This memorandum, as a weighty gloss on what Congress wrote, indicates that Congress did not provide that the three types of situations it enumerated in the 1951 corrective statute should be the only instances where membership is so nominal as to keep an alien out of the deportable class. For example, the circumstances under which the finding of membership was rejected in Colyer v. Skeffington, supra, would not have been covered by the specific language in the 1951 Act. In that case, the aliens passed 'from one organization into another, supposing the change to be a mere change of name, and that by assenting to membership in the new organization they had not really changed their affiliations or political or economic activities.' 265 F. at 72.

***528** [3] On the other hand, the repeated statements that 'member' was to have the same meaning under the 1950 Act as previously, preclude an interpretation limited to those who were fully cognizant of the Party's advocacy of violence. For the judicial and administrative decisions prior to 1950 do not exempt aliens who joined an organization unaware of its program and purposes. See Kjar v. Doak, 7 Cir., 61 F.2d 566; Greco v. Haff, 9 Cir., 63 F.2d 863; In the matter of O.---, 3.

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I. & N. Dec. 736.

It must be concluded, therefore, that support, or even demonstrated knowledge, of the Communist Party's advocacy of violence was not intended to be a prerequisite to deportation. It is enough that the alien joined the Party, aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization, and that he did so of his own free will. A fair reading of the legislation requires that this scope be given to what Congress enacted in 1950, however severe the consequences and whatever view one may have of the wisdom of the means which Congress employed to meet its desired end.

[4][5] On this basis, the Hearing Officer's finding that petitioner here was a 'member' of the Communist Party must be sustained. Petitioner does not claim that he joined the Party 'accidentally, artificially, or unconsciously in appearance only,' to use the words in Senator McCarran's memorandum. The two points on which he bases his defense against the deportation order are, first, that he did not join the Party at all, and that if he did join, he was unaware of the Party's true purposes and program. The evidence which must have been believed and relied upon for the Hearing Officer's finding that petitioner was a 'member' is that petitioner was asked to join the Party by a man he assumed to be an organizer, that he attended a number of meetings and that he did not apply for citizenship because he feared his Party ***529** membership would become known to the authorities. In addition, on the basis of Mrs. Meza's testimony, the Hearing Officer was entitled to conclude that petitioner had been active in the Spanish Speaking Club, and, indeed, one of its officers. Certainly there was sufficient evidence to support a finding of membership. And even if petitioner was unaware of the Party's advocacy of violence, as he attempted to prove, the record does not show a relationship to the Party so nominal as not to make him a 'member' within the terms of the Act.

****742** [6][7][8][9][10][11][12][13][14] This brings us to petitioner's constitutional attack on the statute. Harisiades v. Shaughnessy, 342 U.S. 580, 72 S.Ct. 512, 96 L.Ed. 586, sustained the constitutionality of the Alien Registration Act of 1940. 54 Stat. 670. That Act made membership in an organization which advocates the overthrow of the Government of the United States by force or violence a ground for deportation, notwithstanding that membership in such organization had terminated before enactment of the statute. Under the 1940 Act, it was necessary to prove in each case, where membership in the Communist Party was made the basis of deportation, that the Party did, in fact, advocate the violent overthrow of the government. The Internal Security Act of 1950 dispensed with the need for such proof. On the basis of extensive investigation Congress made many findings, including that in s 2(1) of the Act that the 'Communist movement * * * is a worldwide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship', 50 U.S.C.A. s 781(1) and made present or former membership in the Communist Party, in and of itself, a ground for deportation. Certainly, we cannot say that this classification by Congress is so baseless as to be violative of due process and therefore beyond the power of Congress.

***530** In this respect--the dispensation with proof of the character of the Communist Party--the present case goes beyond Harisiades. But insofar as petitioner's constitutional claim is based on his ignorance that the Party was committed to violence, the same issue was before the Court with respect to at least one of the aliens in Harisiades.

The power of Congress over the admission of aliens and their right to remain is necessarily very broad, touching as it does basic aspects of national sovereignty, more particularly our foreign relations and the national security. Nevertheless, considering what it means to deport an alien who legally became part of the American community, and the extent to which, since he is a 'person,' an alien has the same protection for his life, liberty and property under the Due Process Clause as is afforded to a citizen, deportation without permitting the alien to prove that he was unaware of the Communist Party's advocacy of violence strikes one with a sense of harsh incongruity. If due process bars Congress from enactments that shock the sense of fair play-- which is the essence of due process--one is entitled to ask whether it is not beyond the power of Congress to deport an alien who was duped into joining the Communist Party,particularly when his conduct

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antedated the enactment of the legislation under which his deportation is sought. And this because deportation may, as this Court has said in Ng Fung Ho v. White, 259 U.S. 276, 284, 42 S.Ct. 492, 495, 66 L.Ed. 938, deprive a man 'of all that makes life worth living'; and, as it has said in Fong Haw Tan v. Phelan, 333 U.S. 6, 10, 68 S.Ct. 374, 376, 92 L.Ed. 433; 'deportation is a drastic measure and at times the equivalent of banishment or exile'.

In light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress, even the war power, see Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 155, 40 S.Ct. 106, 107, 64 L.Ed. 194, much could be said for the view, were we writing on a clean slate, that the Due Process ***531** Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. And since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the ex post facto Clause, even though applicable ****743** only to punitive legislation, [FN4] should be applied to deportation.

> FN4. First in Ogden v. Saunders, 12 Wheat. 213, 271, 6 L.Ed. 606, and again in Satterlee v. Matthewson, 2 Pet. 380, 686 (appendix), 7 L.Ed. 458, a characteristically persuasive attack was made by Mr. Justice Johnson on the view that the ex post facto Clause applies only to prosecutions for crime. The Court, however, has undeviatingly enforced the contrary position, first expressed in Calder v. Bull, 3 Dall. 386, 1 L.Ed. 648. It would be an unjustifiable reversal to overturn a view of the Constitution so deeply rooted and so consistently adhered to.

But the slate is not clean. As to the extent of the power of Congress under review, there is not merely 'a page of history,' New York Trust Co. v. Eisner, 256 U.S. 345, 349, 41 S.Ct. 506, 507, 65 L.Ed. 963, but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. Kaoru Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86, 101, 23 S.Ct. 611, 614, 47 L.Ed. 721; Wong Yang Sung v. McGrath, 339 U.S. 33, 49, 70 S.Ct. 445, 453, 94 L.Ed. 616. But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government. And whatever might have been said at an earlier date for applying the ex post facto Clause, it has been the unbroken rule of this Court that it has no application to deportation.

We are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors, especially those who have been most zealous in protecting civil ***532** liberties under the Constitution, and must therefore under our constitutional system recognize congressional power in dealing with aliens, on the basis of which we are unable to find the Act of 1950 unconstitutional. See Bugajewitz v. Adams, 228 U.S. 585, 33 S.Ct. 607, 57 L.Ed. 978, and Ng Fung Ho v. White, 259 U.S. 276, 280, 42 S.Ct. 492, 493, 66 L.Ed. 938.

Judgment affirmed.

Mr. Justice REED concurs in the judgment of the Court and in the opinion as written, except as to the deductions drawn from Senator McCarran's citation of Colyer v. Skeffington, D.C., 265 F. 17, 72.

Mr. Justice BLACK, with whom Mr. Justice DOUGLAS concurs, dissenting.

Petitioner has lived in this country thirty-six years, having come here from Mexico in 1918 when only seven years of age. He has an American wife to whom he has been married for twenty years, four children all born here, and a stepson who served this country as a paratrooper. Since 1940 petitioner has been a laborer at the Van Camp Sea Food Company in San Diego, California. In 1944 petitioner became a member of the Communist Party. Deciding that he no longer wanted to belong to that party, he got out sometime around 1946 or 1947. As pointed out in the Court's opinion, during the period of his membership the Communist Party functioned 'as a distinct and active political organization'. See Communist Party of United States of America v. Peek, 20 Cal.2d 536, 127 P.2d 889. Party candidates appeared on California election ballots, and no federal law then frowned on Communist Party political activities. Now in 1954, however, petitioner is to be deported from this country solely

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because of his past lawful membership in that party. And this is to be done without proof or finding that petitioner knew that the party had any evil purposes or that he **744 agreed *533 with any such purposes that it might have had. On the contrary, there is strong evidence that he was a good, law-abiding man, a steady worker and a devoted husband and father loyal to this country and its form of government.

For joining a lawful political group years ago--an act which he had no possible reason to believe would subject him to the slightest penalty--petitioner now loses his job, his friends, his home, and maybe even his children, who must choose between their father and their native country. Perhaps a legislative act penalizing political activities legal when engaged in is not a bill of attainder. But see United States v. Lovett, 328 U.S. 303, 315--316, 66 S.Ct. 1073, 1078, 1079, 90 L.Ed. 1252. Conceivably an Act prescribing exile for prior innocent conduct does not violate the constitutional prohibition of ex post facto laws. Cf. American Communications Ass'n v. Douds, 339 U.S. 382, 412--415, 70 S.Ct. 674, 690--693, 94 L.Ed. 925. It may be possible that this deportation order for engaging in political activities does not violate the First Amendment's clear ban against abridgment of political speech and assembly. Maybe it is not even a denial of due process and equal protection of the laws. But see dissenting opinions in Carlson v. Landon, 342 U.S. 524, 72 S.Ct. 525, 96 L.Ed. 547, and Harisiades v. Shaughnessy, 342 U.S. 580, 72 S.Ct. 512, 96 L.Ed. 586. I am unwilling to say, however, that despite these constitutional safeguards this man may be driven from our land because he joined a political party that California and the Nation then recognized as perfectly legal.

Mr. Justice DOUGLAS, with whom Mr. Justice BLACK concurs, dissenting.

As Mr. Justice BLACK states in his dissent, the only charge against this alien is an act that was lawful when done. I agree that there is, therefore, no constitutional basis for deportation, if aliens, as well as citizens, are to be the beneficiaries of due process of law.

*534 The case might, of course, be different if the past affiliation with Communism now seized upon as the basis for deportation had continued down to this date. But so far as this record shows, the alien Galvan quit the Communist Party at least six years ago. There is not a word in the present record to show that he continued his affiliations with it sub rosa or espoused its causes or joined in any of its activities since he ceased to be a member of it.

I cannot agree that because a man was once a Communist, he always must carry the curse. Experience teaches otherwise. It is common knowledge that though some of the leading Socialists of Asia once were Communists, they repudiated the Marxist creed when they experienced its ugly operations, and today are the most effective opponents the Communists know. So far as the present record shows, Galvan may be such a man. Or he may be merely one who transgressed and then returned to a more orthodox political faith. The record is wholly silent about Galvan's present political activities. Only one thing is clear: Galvan is not being punished for what he presently is, nor for an unlawful act, nor for espionage or conspiracy or intrigue against this country. He is being punished for what he once was, for a political faith he briefly expressed over six years ago and then rejected.

This action is hostile to our constitutional standards, as I pointed out in Harisiades v. Shaughnessy, 342 U.S. 580, 598, 72 S.Ct. 512, 523, 96 L.Ed. 586. Aliens who live here in peace, who do not abuse our hospitality, who are lawabiding members of our communities, have the right to due process of law. They too are 'persons' within the meaning of the Fifth Amendment. They can be molested by the government in times of peace only when their presence here **745 is hostile to the safety or welfare of the Nation. If they are to be deported, it must be for what they are and do, not for what they once believed.

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Tab 9

Supreme Court of the United States.

GIBBES
v.
ZIMMERMAN et al.

No. 117.

Argued Nov. 17, 1933.
Decided Dec. 4, 1933.

Proceedings by Simpson J. Zimmerman, individually and as conservator of the Central Union Bank of South Carolina, and others, for a writ of prohibition prayed to be directed to Hunter A. Gibbes, representing himself and all other depositors of the Central Union Bank of South Carolina, and another. From a judgment of the Supreme Court of South Carolina (171 S.C. 209, 172 S.E. 130) granting the writ of prohibition, the respondent named appeals.

Affirmed.

West Headnotes

[1] Federal Courts ⚿502
170Bk502 Most Cited Cases
(Formerly 106k391(4))

Where contract clause in Federal Constitution was not relied on in proceeding in state court, question thereunder was not presented for review on appeal to United States Supreme Court. 28 U.S.C.A. §§ 1257, 2103, 2106; U.S.C.A. Const. art. 1, § 10.

[2] Constitutional Law ⚿307
92k307 Most Cited Cases

Person has no property right, in constitutional sense, in any particular form of remedy; only guaranty, under due process clause, being preservation of substantial right to redress by some effective procedure. U.S.C.A. Const.Amend. 14.

[3] Constitutional Law ⚿308
92k308 Most Cited Cases

[3] Banks and Banking ⚿63
52k63 Most Cited Cases

Statute suspending existing statutes applicable to liquidation of state banks, and regulations thereunder authorizing governor to appoint conservator, held not invalid as depriving depositor of property without due process, especially in view of later statute authorizing liquidation by conservator. Act S.C. March 9, 1933, 38 St. at Large S.C. p. 1174; Act S.C. May 16, 1933, 38 St. at Large S.C. p. 489; Code S.C. 1932, §§ 7843, 7844, 7848, § 7852 (repealed 1936) §§ 7854, 7855 (See Code 1942, §§ 7871, 7872), § 7868 (repealed 1935); U.S.C.A.Const.Amend. 14.

[4] Federal Courts ⚿511.1
170Bk511.1 Most Cited Cases
(Formerly 30k843(2), 106k380)

Where Governor appointed conservator for state bank and conservator accepted special trust deposits and permitted such depositors to withdraw same, question whether, in conducting such restricted business, overhead expenses exceeded net income andjeopardized creditors, held moot, where Governor subsequently directed liquidation of bank. Act S.C. March 9, 1933 (38 St. at Large S.C. p. 1174); Act S.C. May 16, 1933 (38 St. at Large S.C. p. 489).

****140 *326** Appeal from the Supreme Court of the State of South Carolina.

***327** Mr. D. W. Robinson, of Columbia, S.C., for appellant.

***328** Mr. Irvine F. Belser, of Columbia, S.C., for appellees.

Mr. Justice ROBERTS delivered the opinion of the Court.

[1] This appeal brings here for review an order of the Supreme Court of South Carolina prohibiting the further prosecution of a bill in equity seeking the appointment of a receiver for the Central Union Bank. An Act of the General Assembly approved March 9, 1933 (38 St. at Large S.C. p. 1174), was held to forbid the maintenance of the proceeding. The appellant, who was plaintiff in the suit asserts that the act impairs the obligation of contract in violation of the Constitution of the United States.

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We cannot consider this contention since in his pleading the appellant relied solely on the provisions of the state Constitution (art. 1, s 8) with respect to the obligation of contracts, and made no reference to section 10, of article 1 of the Federal Constitution; and the Supreme Court, in disposing of the case, did not mention or discuss that section. Rev. St. s 709, U.S.C. tit. 28, s 344 (28 USCA s 344) Chicago & Northwestern Ry. v. Chicago, 164 U.S. 454, 457, 17 S.Ct. 129, 41 L.Ed. 511; Levy v. Superior Court, 167 U.S. 175, 177, 17 S.Ct. 769, 42 L.Ed. 126; Miller v. Cornwall Railroad Co., 168 U.S. 131, 134, 18 S.Ct. 34, 42 L.Ed. 409; Bowe v. Scott, 233 U.S. 658, 665, 34 S.Ct. 769, 58 L.Ed. 1141.

The statute was also assailed below and is challenged here as depriving the appellant of the due process guaranteed by the Fourteenth Amendment. A brief statement of the facts is requisite to an understanding of appellant's argument. Prior to March 9, 1933, the statutory provision as to state banks was, in summary, this: A state official, known as a bank examiner, had general supervision of the operation of these institutions. If a bank became embarrassed or insolvent he might, upon an order of a court, take possession of the assets and business for a period of thirty days, during which time **141 no suits *329 could be brought against the bank. He might restore the bank to the management of its officers, or, if liquidation were required, apply to a court for the appointment of himself or another as receiver. The affairs of the bank were then to be liquidated by the receiver under the suppervision of the court. Stockholders were liable to creditors other than depositors only to the extent of any unpaid balance on their shares; but to depositors, in an amount equal to the face value of their shares. It was the duty of the receiver to demand and collect for the benefit of creditors and depositors the amount due from stockholders, and, if necessary, to sue the stockholders individually and collectively therefor. [FN1]

FN1 Civil Code of South Carolina (1932) ss 7843, 7844, 7848, 7852, 7854, 7855, 7868.

Shortly after the declaration of a banking holiday by the President on March 4, 1933, the Governor of South Carolina issued a proclamation temporarily closing the banks in that state. The General Assembly passed, and on March 9 the Governor approved, an act suspending for eighteen months legislation then applicable to the conduct and liquidation of banks, vesting in the Governor plenary power over state banks, empowering him to extend the time for payment of deposits as the condition of each institution might require; to direct the creation of special trust accounts for receipt of deposits, which should be held separate from other assets and be subject to withdrawal on demand; to determine whether the overhead expenses of any bank exceed its net income, and, if so, to compel it to reduce the expenses or to order immediate liquidation, as might best serve the depositors' interests; and to make all necessary rules and regulations to carry out the intent of the act. The examiner was prohibited from taking possession of any bank unless authorized so to do by the Governor, and all persons were forbidden, while the Governor remained in control of the banks, to institute any action *330 against a bank, except by the Governor's consent. The Governor was authorized to appoint a board of bank control, with whom he might advise and consult, and to whom he might delegate powers under the act. Pursuant to this legislation the Governor appointed a board of bank control and promulgated regulations which provided, inter alia, that upon advice of the board he might, where necessary, appoint a conservator for any bank to conserve its assets for the benefit of depositors and creditors, who should posses himself of all books, records, and assets, and take all necessary action to preserve the property, 'pending further disposition of its business as provided by law.' The regulations provided: 'Such conservator * * * shall have all the rights, powers and privileges now possessed by or hereafter given Receivers of insolvent state banks. * * * During the time that such conservator * * * shall remain in possession of such bank, the rights of all parties with respect thereto shall, subject to the other provisions of this order, be the same as if a receiver had been appointed therefor.' Further regulations dealing with the reopening of solvent banks and reorganization of banks were promulgated, but these are irrelevant to the present case.

The appellee Zimmerman was appointed conservator of the Central Union Bank and entered upon his duties. The appellant, on behalf of himself and other depositors, filed a bill in the common pleas court averring the bank's insolvency, charging that the Act of March 9 is invalid so far as it purports to prevent appellant and other depositors

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from prosecuting the suit, and praying the appointment of a receiver who should proceed to enforce the stockholders' statutory liability to depositors. The defendants named were the conservator, the Governor, and the state treasurer, who was also a member of the board of bank control. The court issued a temporary injunction and a rule on the defendants to show cause.

***331** At this juncture the defendants in the common pleas court prayed a writ of prohibition from the state Supreme Court, addressed to the appellant and to the judge of the common pleas court, to stay the equity proceeding. The judge made return submitting himself to such order as the Supreme Court should enter. The appellant filed a demurrer and motion to dismiss, and a return denying the validity of the Act of March 9 and the regulations, and asserting that his right to proceed for the collection of stockholders' liability was a vested property right, to be enforced through a receiver, of which he could not lawfully be deprived; that the conservator was engaged in receiving and paying trust cash deposits, and the expense of conducting this branch of the business would deplete assets available for payment of depositors. The writ of prohibition was granted.

Subsequent to the judgment of the state Supreme Court certain official action occurred of which we may take judicial notice. On May 16, 1933, there was approved an Act of the General Assembly (38 St. at Large S.C. p. 489), empowering the Governor, whenever he should determine, after advising with the board of bank control, that any bank for which a conservator had been or hereafter might be appointed, was insolvent, or in imminent danger of insolvency, and liquidation was therefore required to protect depositors and creditors, to order liquidation, which should be accomplished by the conservator, who was to have all the powers and be under all the duties of a receiver, and might ****142** apply to a court for instructions on question arising in liquidation. All appointments of conservators theretofore made were ratified and confirmed. On June 22 the Governor issued an order finding the Central Union Bank insolvent, or in imminent danger of insolvency, reciting that he had consulted with the board of bank control and had found that the overhead expense of the bank exceeded its net income, and directing its liquidation.

***332** [2][3] The appellant says the Act of March 9 arbitrarily deprives him of a remedy for the enforcement of stockholders' liability, which remedy was his property, and was taken from him without due process. But although a vested cause of action is property and is protected from arbitrary interference (Pritchard v. Norton, 106 U.S. 124, 132, 1 S.Ct. 102, 27 L.Ed. 104), the appellant has no property, in the constitutional sense, in any particular form of remedy; all that he is guaranteed by the Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure. Iowa Central Ry. Co. v. Iowa, 160 U.S. 389, 393, 16 S.Ct. 344, 40 L.Ed. 467; Backus v. Fort St. Union Depot Co., 169 U.S. 557, 571, 18 S.Ct. 445, 42 L.Ed. 42 S.Ct. 214, 66 L.Ed. 258 U.S. 142, 147, 42 S.Ct. 214, 66 L.Ed. 514; Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co., 284 U.S. 151, 158, 52 S.Ct. 69, 76 L.Ed. 214.

Under the Act of March 9, and the regulations, the conservator was endowed with all the functions of a receiver, one of which is the enforcement on behalf of depositors of stockholders' excess liability. If under that act and the regulations power was lacking the defect was cured by the Act of May 16. Nothing is shown to indicate that the conservator will prosecute the claim against the stockholders in a manner different from that to be pursued under the old law by a receiver or that the state courts will refuse him process to that end. The Act of March 9, the regulations, and the Act of May 16, do not purport, and, so far as we can perceive, do not operate, to deny the depositors participation in the distribution of assets, or in the benefit of the stockholders' excess liability. It is not alleged that the proceedings of the conservator will impose upon creditors of the bank greater burden or expense than would have been the case if a receiver were functioning. The substantive rights existing under the old law are preserved. In no proper sense can it be said that any property of the appellant has been taken, injured or destroyed.

***333** [4] The appellant, however, insists that after the conservator took possession, he accepted special trust deposits which were segregated and against which the depositors were allowed to draw, and in conducting this restricted business the overhead expenses of the institution exceeded its net income. So long as this condition existed, he says his position as a creditor was being jeopardized for the fund to

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which he must look for payment was being depleted. But he has not averred that the conservator's activities will deplete the bank's resources to such extent that depositors cannot be paid in full; and whatever injury might have been inflicted by a continuation of the business has now been abated for the future by the Governor's order of June 22 directing liquidation. No present advantage could accrue to the appellant from the ousting of the conservator and the appointment of a receiver, who could only liquidate by the methods obligatory on the conservator. In this aspect the case is now moot.

The judgment is affirmed.

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Tab 10

Supreme Court of the United States.

COMBES
v.
GETZ.

No. 528.

Argued March 21, 1932.
Decided April 11, 1932.

Mr. Justice CARDOZO, Mr. Justice BRANDEIS, and Mr. Justice STONE, dissenting.

On Writ of Certiorari to the Supreme Court of the State of California.

Suit by Peirce Coombes against Milton E. Getz. Judgment for defendant and appeal therefrom dismissed by the State Supreme Court (1 P.(2d) 992), and plaintiff brings certiorari.

Reversed.

West Headnotes

[1] Constitutional Law ⚿168
92k168 Most Cited Cases

[1] Constitutional Law ⚿253(4)
92k253(4) Most Cited Cases
(Formerly 92k307)

[1] Corporations ⚿326
101k326 Most Cited Cases

[1] Corporations ⚿346
101k346 Most Cited Cases

Repeal of constitutional provision making corporate directors responsible for officer's defalcations held not to affect right of creditor in respect to claim theretofore arising. Const. art. 12, §§ 1, 3; and U.S.C.A.Const. art. 1, § 10, and Amend. 14.

[2] Federal Courts ⚿505
170Bk505 Most Cited Cases
(Formerly 106k366(1), 106k394(3))

Decision of state Supreme Court construing and applying its own Constitution and laws generally is binding on federal courts.

[3] Federal Courts ⚿505
170Bk505 Most Cited Cases
(Formerly 106k365(3), 106k394(9))

Decision of Supreme Court of state construing and applying Constitution and laws is not binding on federal court where contract clause of Federal Constitution is involved.

[4] Constitutional Law ⚿154(2)
92k154(2) Most Cited Cases

[4] Corporations ⚿38
101k38 Most Cited Cases

[4] Constitutional Law ⚿93(1)
92k93(1) Most Cited Cases

Obligations of contract may not be impaired by state in exercise of authority under reserved powers with respect to corporate charters. U.S.C.A.Const. art. 1, § 10, and Amend. 14.

****435 *435** Messrs. Joseph L. Lewinson and W. H. Douglass, both of Los Angeles, Cal., Nat Schmulowitz, J. C. McKinstry, Joseph Haber, Jr., and Charles L. Firebaugh, all of San Francisco, Cal., for petitioner.

***437** Mr. Alfred Sutro, of San Francisco, Cal., for respondent.

***439** Mr. Justice SUTHERLAND delivered the opinion of the Court.

This is a suit brought in a California superior court by petitioner, on behalf of himself and other creditors, to recover from respondent, a director in Getz Bros. & Company, a California corporation, the amount of an indebtedness upon an open account for goods sold to the corporation by petitioner's assignor. The basis of the liability sought to be enforced is found in the following provision of section 3, art. 12, of the California Constitution of 1879: 'The directors or trustees of corporations and joint-stock associations shall be jointly and severally liable to ***440** the creditors and stockholders for all moneys embezzled or misappropriated by the

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officers of such corporation or joint-stock association, during the term of such director or trustee.'

The bill alleges misappropriation and embezzlement of moneys of the corporation by its officers, with appropriate details to bring the respondent within the terms of the foregoing provision. The superior court sustained a demurrer to the complaint, for reasons not material here, and rendered final judgment accordingly. An appeal was taken to the state supreme court; and, while that appeal was pending, the provision of the state constitution above quoted was repealed. Thereupon, respondent moved to dismiss the appeal, on the ground that the cause of action had abated by reason of the repeal of the provision of law upon which it was based. The court sustained the motion and dismissed the appeal, Coombes v. Franklin (Cal. Sup.) 1 P.(2d) 992; and subsequently denied a petition for rehearing (Cal. Sup.) 4 P.(2d) 157.

[1] In substance, it was held that the right accorded to corporate creditors was created by, and dependent alone upon, the constitutional provision, said to have the force of a statute; and that when that was repealed, the right fell with it, being still inchoate, not reduced to possession nor perfected by final judgment. It was conceded that the liability created by the Constitution was in its nature contractual and, as a matter of law, entered into and became a part of every contract between the corporation and its creditors. But this contractual liability, it was said, was conditioned by the power reserved over corporate laws by section 1, art. 12, of the Constitution, as follows: 'All laws now in force in this State concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time or repealed.' ***441** In virtue of this reservation of power, the state court held that the repeal of the liability provision was a known contingency constituting a part of the contract ****436** as much as the provision which imposed the liability.

[2][3] The decision of the Supreme Court of a state construing and applying its own Constitution and laws generally is binding upon this court; but that is not so where the contract clause of the Federal Constitution is involved. In that case this court will give careful and respectful consideration and all due weight to the adjudication of the state court, but will determine independently thereof whether there be a contract, the obligation of which is within the protection of the contract clause, and whether that obligation has been impaired; and, likewise, will determine for itself the meaning and application of state constitutional or statutory provisions said to create the contract or by which it is asserted an impairment has been effected. Scott v. McNeal, 154 U. S. 34, 45, 14 S. Ct. 1108, 38 L. Ed. 896; Mobile & Ohio Railroad v. Tennessee, 153 U. S. 486, 492, etc., 14 S. Ct. 968, 38 L. Ed. 793; Stearns v. Minnesota, 179 U. S. 223, 232, 233, 21 S. Ct. 73, 45 L. Ed. 162; Louisiana Ry. & Nav. Co. v. New Orleans, 235 U. S. 164, 170, 35 S. Ct. 62, 59 L. Ed. 175; Huntington v. Attrill, 146 U. S. 657, 684, 13 S. Ct. 224, 36 L. Ed. 1123; N. O. Waterworks v. La. Sugar Co., 125 U. S. 18, 38, 8 S. Ct. 741, 31 L. Ed. 607; Bridge Proprietors v. Hoboken Co., 1 Wall. 116, 144, 17 L. Ed. 571; Jefferson Branch Bank v. Skelly, 1 Black, 436, 443, 17 L. Ed. 173.

In substance, the contention of respondent here is that the reserved power provision, read into the contract as one of its terms, authorizes an extinction by repeal of the creditor's cause of action, unless previously reduced to final judgment.

[4] The authority of a state under the so-called reserved power is wide; but is not unlimited. The corporate charter may be repealed or amended, and, within limits not now necessary to define, the interrelations of state, corporation, and stockholders may be changed; but ***442** neither vested property rights nor the obligation of contracts of third persons may be destroyed or impaired. Tomlinson v. Jessup, 15 Wall. 454, 459, 21 L. Ed. 204; Lake Shore, etc., Railway Co. v. Smith, 173 U. S. 684, 690, 19 S. Ct. 565, 43 L. Ed. 858. Compare Greenwood v. Freight Co., 105 U. S. 13, 17, 19, 26 L. Ed. 961; Shields v. Ohio, 95 U. S. 319, 324, 24 L. Ed. 357. The right of this petitioner to enforce respondent's liability had become fully perfected and vested prior to the repeal of the liability provision. His cause of action was not purely statutory. It did not arise upon the constitutional rule of law, but upon the contractual liability created in pursuance of the rule. Although the latter derived its being from the former, it immediately acquired an independent existence competent to survive the destruction of the provision which gave it birth. The repeal put an end to the

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rule for the future, but it did not and could not destroy or impair the previously vested right of the creditor (which in every sense was a property right, Ettor v. Tacoma, 228 U. S. 148, 156, 33 S. Ct. 428, 57 L. Ed. 773; Pritchard v. Norton, 106 U. S. 124, 132, 1 S. Ct. 102, 27 L. Ed. 104) to enforce his cause of action upon the contract. Ettor v. Tacoma, supra; Hawthorne v. Calef, 2 Wall. 10, 22, 17 L. Ed. 776; Steamship Company v. Joliffe, 2 Wall. 450, 17 L. Ed. 805; Ochiltree v. Railroad Company, 21 Wall. 249, 252, 253, 22 L. Ed. 546; Harrison v. Remington Paper Co. (C. C. A.) 140 F. 385, 390, etc., 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314; Knickerbocker Trust Co. v. Myers (C. C.) 133 F. 764, 767.

The Ettor Case, supra, involved a statute of the state of Washington which required municipalities to compensate for consequential damages. While that statute was in force actions were brought to recover for damages inflicted upon abutting property in consequence of street grading done by the authority and direction of the city of Tacoma. While these actions were being heard, the statute in respect of this liability was repealed; and the trial court directed a verdict for the city, on the theory that the right of action was statutory and fell with the *443 statute, there being no saving clause. Judgment was affirmed by the state Supreme Court and the case came here on writ of of error. This court reversed the judgment and in the course of its opinion (pages 155-156 of 228 U. S., 33 S. Ct. 428, 430, 57 L. Ed. 773) said:

'The court below gave a retrospective effect to the amendatory and repealing act by holding that the effect of the repeal was to destroy the right to compensation which had accrued while the act was in force. The obligation of the city was fixed. The plaintiffs in error had a claim which the city was as much under obligation to pay as for the labor employed to do the grading. It was a claim assignable and enforceable by a common-law action for a breach of the statutory obligation.

'The necessary effect of the repealing act, as construed and applied by the court below, was to deprive the plaintiffs in error of any remedy to enforce the fixed liability of the city to make compensation. This was to deprive the plaintiffs in error of a right which had vested before the repealing act,-a right which was in every sense a property right. Nothing remained to be done to complete the plaintiffs' right to compensation except the ascertainment of the amount of damage to their property. The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes. **437 and the right so vested cannot be defeated by subsequent legislation.'

In the Hawthorne Case, supra, it was held that a state statute, incorporating a railroad company, which provided that the shares of the stockholders should be liable for the debts of the corporation, in effect pledges the liability or guarantee of the stockholders to the extent of their stock to the creditors of the company. 'They thereby virtually agree to become security to the creditors for the payment of the debts of the company, which have been contracted upon the faith of this liability.' Haw *444 thorne supplied the corporation with materials to build its road and obtained judgment against it. Being unable to satisfy the judgment, he brought suit against Calef, a stockholder. The state Supreme Court rendered judgment against Hawthorne on the ground that the individual liability provision had been repealed by subsequent legislation, passed two months after the debt was contracted, and that such repeal had taken away the right to enforce the stockholders' liability. This court reversed on the ground that when the debt was contracted with the company the creditor held the stockholders' liability as security for its payment and the repealing act, by abolishing it, impaired the obligation of that contract.

In the Joliffe Case, supra, this court had before it for determination substantially the same question that is involved here. There a California statute had created a Board of Pilot Commissioners, and authorized the board to license pilots, prescribe their qualifications, etc. The statute provided, with an exception, that when a vessel was spoken by a pilot and his service was declined he should be entitled to one-half pilotage fees. Joliffe, a pilot licensed under this statute, spoke a vessel of the steamship company and offered his service to pilot her out of the port of San Francisco. This was declined, and the pilot brought suit to recover for one-half the pilotage. Judgment was rendered against the company. Pending review in this court, a new statute was passed and the old act, in terms, repealed. The point was made that the claim to half pilotage fees having been given by statute, the right to recover fell with its repeal, and accordingly that the writ of

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error should be dismissed. This court held the point not well taken and declined to dismiss the writ. The transaction between the pilot and the ship, it was held (pages 457, 458 of 2 Wall., 17 L. Ed. 805), gave rise to a quasi contract. 'The claim of the plaintiff below for half-pilotage fees, resting upon a transaction regarded by the law as a quasi contract, there is no just ground for the position that it fell with the repeal of the statute under which the transaction ***445** was had. When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute. And such is the position of the claim of the plaintiff below in the present action: the pilotage services had been tendered by him; his claim to the compensation prescribed by the statute was then perfect, and the liability of the master or owner of the vessel had become fixed.'

Respondent, however, insists that long prior to the extension of credit to the corporation by petitioner's assignor, the decisions of the Supreme Court of California had established that the repeal of a law creating such a liability as that here involved extinguishes the cause of action; and that this amounted to a construction of the constitutional provision which entered into the contract and will be followed and applied by this court. Warburton v. White, 176 U. S. 484, 495, 20 S. Ct. 404, 44 L. Ed. 555; Ennis Water Works v. Ennis, 233 U. S. 652, 657, 34 S. Ct. 767, 58 L. Ed. 1139. But upon a careful consideration of the California cases referred to, we are of opinion that they fail to establish the premises upon which the conclusion is based.

The decisions chiefly relied upon are Moss v. Smith, 171 Cal. 777, 155 P. 90, and Willcox v. Edwards, 162 Cal. 455, 123 P. 276, Ann. Cas. 1913C, 1392; Moss v. Smith, involved section 309 of the Civil Code of California, which created a liability against directors who had participated in the creation of debts in excess of the subscribed capital stock. Suit was brought to enforce this liability against directors of a public utility company, but it appearing that during the pendency of the suit section 309 had been repealed as to public utility companies without a saving clause, the court held that all pending causes of action were thereby extinguished. The basis of the decision was that the statute was of a penal character; the court, however, saying that ***446** it was not of vital consequence whether it be viewed as penal or remedial. In any event, the liability was not held to be contractual. On the contrary, the court said (page 787 of 171 Cal., 155 P. 90, 94), 'The right of action against these directors conferred by section 309 was a statutory right pure and simple, having no foundation in contract, nor any existence at common law.' And it is significant that the court perceived a determinative distinction between section 309 of the Civil Code, and the provision of the Constitution here under consideration. 'Nothing in Winchester v. Howard, 136 Cal. 441, 64 P. 692, 69 P. 77, 89 Am. St. Rep. 153,' the court said (page 785 of 171 Cal., 155 P. 90, 93), 'is in conflict with this; in the first place, because ****438** the directors, under section 3, art. 12, of the Constitution, which section was the foundation of the action, are liable solely for loss sustained by embezzlement and misappropriation-a liability involving loss, and thus entirely different in character from that which appellants contend is imposed by section 309.' 'And that this statute,' the court already had said (page 783 of 171 Cal., 155 P. 90, 92), 'becomes highly penal in character the moment there is eliminated from it the consideration of compensation for loss is at once apparent.'

As already suggested, Winchester v. Howard, 136 Cal. 432, 64 P. 692, 69 P. 77, 89 Am. St. Rep. 153, arose under section 3, art. 12, of the state Constitution, and the court there, in pointing out the purpose and effect of that provision, said (page 444 of 136 Cal., 69 P. 77, 82, 89 Am. St. Rep. 153): 'The constitution merely makes the directors sureties for their fellow directors and for the officers of the corporation for moneys when so misappropriated as to make the officer misappropriating liable, and authorizing the creditors and stockholders to sue. * * * It is not penal in the technical sense, as it allows no recovery as a punishment, but only to compensate for a loss.'

And again at page 448 of 136 Cal., 69 P. 77, 82, 89 Am. St. Rep. 153: 'There is no difference between this case and the ordinary contract of a surety, unless it can be said that this liability is placed upon the director against his will. ***447** Argument is hardly required to show that such is not

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the case. The state could refuse to grant corporate franchises altogether, or may grant on such terms as it pleases. The right to do business as a corporation, or to be a director, if I may speak of it as a right, is not a natural right. These directors took office knowing the responsibilities they assumed in so doing, and in the eye of the law did so as freely and voluntarily as they would have done had they signed a bond agreeing to be responsible for the corporate officers.'

The distinction between the section of the Code and the constitutional provision, therefore, is clear. In the former the liability is wholly statutory; in the latter it is contractual.

In Willcox v. Edwards, supra, the court had under consideration a constitutional provision repealing a former provision of the constitution making valid certain contracts for the sale of stocks on margin. The right to sue for the recovery of money paid under such a contract, the court held, was not a vested right depending upon a quasi contract arising by operation of law from the terms of the original constitutional provision, but a right dependent upon that provision standing alone; and that upon its repeal, without a saving clause, pending litigation fell for want of authority to maintain it. But it plainly appears that the decision would have been otherwise if the court had deemed the right to be contractual.

Another case relied upon is Napa State Hospital v. Flaherty, 134 Cal. 315, 66 P. 322, 323. There a state statute made certain kindred of indigent insane persons liable for their board at the insane asylum to which such insane persons were committed. The right to maintain an action for nonpayment was conferred upon the board of trustees or directors. Such an action was brought; but the court held that the remedy had been repealed and the cause of action fell with it, putting its decision upon ***448** the ground that 'where a right is created solely by a statute, and is dependent upon the statute alone, and such right is still inchoate, and not reduced to possession, or perfected by final judgment, the repeal of the statute destroys the remedy, unless the repealing statute contains a saving clause.'

The case here is entirely different. There the obligation which was imposed upon the relatives was purely statutory. No act was contemplated on their part by way of assumption of an obligation in order to fix the liability. No element of a contract was present. Here both parties acted. The creditor extended credit to the corporation; and his action in so doing, under the state constitutional provisions, brought into force for his benefit the costitutional obligation of the director, which, by becoming a director, the latter had voluntarily assumed and, thereby, in the eye of the law, created against himself a contractual liability in the nature of a suretyship. Harrison v. Remington Paper Co., supra, page 388 of 140 F., 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314. Doubts which otherwise might have existed in respect of the character and effect of the transaction are no longer open. It is settled by decisions of this and other federal courts (Ettor v. Tacoma, and cases cited in connection therewith, supra) that, upon the facts here disclosed, a contractual obligation arose; and the right to enforce it, having become vested, comes within the protection of both the contract impairment clause in article 1, s 10, and the due process of law clause in the Fourteenth Amendment, of the federal Constitution.

Decree reversed.

Mr. Justice CARDOZO.

I am unable to concur in the reversal of this judgment.

'The directors or trustees of corporations and joint stock associations shall be jointly and severally liable to the creditors and stockholders for all moneys embezzled ***449** or misappropriated by the officers of such corporation or joint stock association during the term ****439** of office of such director or trustee.' Constitution of California, article 12, s 3, repealed November 4, 1930.

The Supreme Court of California has said that the liability thus created is contractual (Dean v. Shingle, 198 Cal. 652, 246 P. 1049); but only in a qualified sense, as the expression of a legal fiction, is the statement true, nor did the court that made it intend otherwise. The liability would not be destroyed though the directors when assuming office and repeatedly thereafter were to repudiate the obligation utterly. They would be held for all their protestations upon a liability imposed by law. Indeed, they would have to answer to the creditors

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though they had ceased to be directors before the debts were in existence. If we put aside deceptive labels, borrowed from the law of quasi contracts, the tangle is unraveled. The petitioner had a contract with the corporation and not with any one else (Crane v. Hahlo, 258 U. S. 142, 146, 42 S. Ct. 214, 66 L. Ed. 514), but annexed by law to the obligation of that contract was a liability purely statutory imposed on the directors. Compare Christopher v. Norvell, 201 U. S. 216, 225, 26 S. Ct. 502, 50 L. Ed. 732, 5 Ann. Cas. 740; Bernheimer v. Converse, 206 U. S. 516, 529, 27 S. Ct. 755, 51 L. Ed. 1163. The decisions in California, when analyzed, will be found to hold nothing to the contrary. They amount merely to this, that the liability created by the statute, which is enforceable also by the shareholders, is not penal but remedial, and is limited to the damage resulting to the corporation from the loss of the embezzled moneys as if the director were a surety to the corporation for the acts of its defaulting officer. Dean v. Shingle, supra; compare, Winchester v. Howard, 136 Cal. 432, 64 P. 692, 69 P. 77, 89 Am. St. Rep. 153. In any event, this Court is not controlled by the label which the state court may affix to a liability growing out of a given state of facts. It determines for itself whether within the meaning of the Constitution the product is a contract to be protected***450** by the power of the nation. Appleby v. City of New York, 271 U. S. 364, 380, 46 S. Ct. 569, 70 L. Ed. 992; Coolidge v. Long, 282 U. S. 582, 597, 51 S. Ct. 306, 75 L. Ed. 562. As to this, its judgment is guided by realities and not by words. The section of the Constitution whereby contracts are secured against impairment is aimed at true agreements, and not at quasi contracts as distinguished from agreements implied in fact. Crane v. Hahlo, 258 U. S. 142, 146, 42 S. Ct. 214, 66 L. Ed. 514; Louisiana v. New Orleans, 109 U. S. 285, 288, 3 S. Ct. 211, 27 L. Ed. 936. Here whatever duty was assumed by a director through the acceptance of his office, was one that he owed in the first instance to the corporation itself, though the creditors and shareholders were privileged to enforce it. Dean v. Shingle, supra. Payment to the corporation before action brought would establish a defense, and even after action brought, any surplus remaining would go into the treasury. A distinction may exist between a liability cast upon directors and one cast upon the shareholders, who are quasi partners in the venture. Corning v. McCullough, 1 N. Y. 47, 49 Am. Dec. 287. To develop the implications of the distinction is unnecessary now.

I start then with the assumption that the petitioner had a contract with a corporation secured in certain contingencies by a statutory liability. I add the assumption that the state of California was not at liberty, after the contract had been made and a cause of action had accrued thereunder, to make the security defeasible if it wasindefeasible in its origin. Either the article of the Constitution prohibiting the impairment of contracts (U. S. Constitution, art. 1, s 10) or the Fourteenth Amendment (which, however, is not invoked) might then stand in the way. Hawthorne v. Calef, 2 Wall. 10, 17 L. Ed. 776; Steamship Co. v. Joliffe, 2 Wall. 450, 17 L. Ed. 805; Ettor v. Tacoma, 228 U. S. 148, 33 S. Ct. 428, 57 L. Ed. 773; Forbes Pioneer Boat Line v. Board of Commissioners, 258 U. S. 338, 42 S. Ct. 325, 66 L. Ed. 647. The difficulty with the petitioner's case is this, that his security in its origin was not vested, but contingent. The meaning of the California Constitution ***451** is whatever the courts of California declare it to be. The obligation of the petitioner's contract is whatever the law of California attached to the contract at the hour of its making. Long before that time, the Supreme Court of that state had held that under the law of California a statutory cause of action, whether penal or remedial, may be canceled or modified by repeal or amendment until it has ripened into a judgment. Moss v. Smith, 171 Cal. 777, 788, 155 P. 90; Napa State Hospital v. Flaherty, 134 Cal. 315, 66 P. 322; Willcox v. Edwards, 162 Cal. 455, 466, 123 P. 276, Ann. Cas. 1913C, 1392. Compare Combes v. Franklin (Cal. Sup.) 1 P.(2d) 992, Id. (Cal. Sup.) 4 P.(2d) 157, the decision under review. Consistent with these decisions is a provision of the Political Code: 'Any statute may be repealed at any time, except when it is otherwise provided therein. Persons acting under any statute are deemed to have acted in contemplation of this power of repeal.' California Political Code, s 327, quoted in Moss v. Smith, supra, at page 787, of 171 Cal., 155 P. 90, 94. I assume for present purposes that the rule thus announced would be held of no effect if the statute and decisions declaring it had been made after Coombes became a creditor. Made as they were before that time they were reservations or conditions limiting the statutory liability, and to be read into the ****440** statute, and hence into any contract to which the statute was an incident, as if written there in words. Citizens' Savings Bank v. Owensboro,

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173 U. S. 636, 644, 19 S. Ct. 530, 43 L. Ed. 840; Farmers' Bank v. Fed. Reserve Bank, 262 U. S. 649, 660, 43 S. Ct. 651, 67 L. Ed. 1157, 30 A. L. R. 635. 'The claim of an irrepealable contract cannot be predicated upon a contract which is repealable.' Hammond Packing Co. v. Arkansas, 212 U. S. 322, 346, 29 S. Ct. 370, 378, 53 L. Ed. 530, 15 Ann. Cas. 645. Either the petitioner took his cause of action subject to such infirmities or contingencies as were attached to it by the law of the state of its creation, or he did not take anything.

This view of the case puts aside as irrelevant the provision of the California Constitution permitting the ***452** amendment of corporate charters, and sustains the repeal upon the ground that the liability by the law of its creation was defeasible in its origin.

Mr. Justice BRANDEIS and Mr. Justice STONE join in this dissent.

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Tab 11

not retroactive

Supreme Court of the United States.

SILVER
v.
SILVER.

No. 24.

Argued Oct. 25, 1929.
Decided Nov. 25, 1929.

Appeal from the Supreme Court of the State of Connecticut.

Action by Mae Silver against Benjamin Silver. From a judgment of the Supreme Court of Connecticut (108 Conn. 371, 143 A. 240), affirming a judgment for defendant, plaintiff appeals. Affirmed.

West Headnotes

[1] Federal Courts ⚿511.1
170Bk511.1 Most Cited Cases
(Formerly 30k1082(1), 106k398(1))

Supreme Court will review only constitutional question considered in lower court's opinion, where record does not disclose others raised by appellant.

[2] Constitutional Law ⚿92
92k92 Most Cited Cases

Constitution does not forbid creation of new rights or abolition of old ones to attain permissible legislative object.

[3] Automobiles ⚿181(1)
48Ak181(1) Most Cited Cases

[3] Constitutional Law ⚿70.3(10)
92k70.3(10) Most Cited Cases
(Formerly 92k70(3))

Wisdom of legislation restricting liability for injuries to gratuitous passengers in automobiles is not for courts.

[4] Automobiles ⚿181(1)
48Ak181(1) Most Cited Cases

[4] Constitutional Law ⚿245(2)
92k245(2) Most Cited Cases
(Formerly 92k243)

Distinction between gratuitous passengers in automobiles and other vehicles by statute prohibiting recovery for injuries to former held not so evidently groundless as to warrant holding it arbitrary. Pub.Acts Conn.1927, p. 4404, c. 308; U.S.C.A.Const. Amend. 14.

[5] Automobiles ⚿181(1)
48Ak181(1) Most Cited Cases

[5] Constitutional Law ⚿245(2)
92k245(2) Most Cited Cases
(Formerly 92k243)

Legislative restriction on vehicle operators' liability for injuries to guests or licensees need not reach every class to which it might be applied. U.S.C.A.Const. Amend. 14.

[6] Automobiles ⚿181(1)
48Ak181(1) Most Cited Cases

[6] Constitutional Law ⚿245(2)
92k245(2) Most Cited Cases

[6] Automobiles ⚿6
48Ak6 Most Cited Cases

Statute prohibiting recovery from automobile owners for injuries to gratuitous passengers held not unconstitutional, though not reaching all abuses. Pub.Acts Conn.1927, p. 4404, c. 308; U.S.C.A.Const. Amend. 14.

****58 *118** Messrs. Thomas R. Robinson, Arthur B. O'Keefe, David M. Reilly and Herman Levine, all of New Haven, Conn., for appellant.

***119** Mr. Wm. L. Hadden, of New Haven, Conn., for appellee.

***121** Mr. Justice STONE delivered the opinion of the Court.

This is an appeal under section 237 of the Judicial Code, as amended by Act of February 13, 1925 (28

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USCA s 344), from a judgment of the Supreme Court of Connecticut upholding the constitutionality of a state statute. Chapter 308 of the Public Acts of Connecticut of 1927 (printed in the margin [FN1]) ***122** provides that no person carried gratuitously as a guest in an automobile may recover from the owner or operator for injuries caused by its negligent operation. The appellant brought suit in the superior court of New Haven county against appellee, her husband, for injuries so sustained. Judgment for the defendant was affirmed by the Supreme Court. Both courts ruled that the statute barred appellant, a guest carried gratuitously, from recovery for injuries caused by ordinary negligence in the operation of the car, and the Supreme Court, by divided bench, held that the statute did not deny to appellant the equal protection of the laws guaranteed by the Fourteenth Amendment. 108 Conn. 371, 143 A. 240.

> FN1 Chapter 308. An Act Releasing Owners Of Motor Vehicles From Responsibility For Injuries To Passengers Therein.
>
> Be it enacted by the Senate and House of Representatives in General Assembly convened:
>
> Section 1. No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident shall have been intentional on the part of said owner or operator or caused by his heedlessness or his reckless disregard of the rights of others.
>
> Sec. 2. This act shall not relieve a public carrier or any owner or operator of a motor vehicle while the same is being demonstrated to a prospective purchaser of responsibility for any injuries sustained by a passenger being transported by such public carrier or by such owner or operator.

[1][2] As the record does not disclose the constitutional grounds on which the appellant challenged the validity of the statute, our review will be limited to the single question arising under the Federal Constitution which was considered in the opinion of the court below. Saltonstall v. Saltonstall, 276 U. S. 260, 48 S. Ct. 225, 72 L. Ed. 565. We need not, therefore, elaborate the rule that the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object. See Louis Pizitz Dry Goods Co. v. Yeldell, 274 U. S. 112, 116, 47 S. Ct. 509, 71 L. Ed. 952, 51 A. L. R. 1376; New York Central Railroad Co. v. White, 243 U. S. 188, 37 S. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629; Mountain Timber Co. v. Washington, 243 U. S. 219, 37 S. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642; Wilmington Star Mining Co. v. Fulton, 205 U. S. 60, 74, 27 S. Ct. 412, 51 L. Ed. 708.

[3] The use of the automobile as an instrument of transportation is peculiarly the subject of regulation. We cannot assume that there are no evils to be corrected or permissible social objects to be gained by the present statute. We are not unaware of the increasing frequency of litigation in which passengers carried gratuitously in automobiles, often casual guests or licensees, have sought the recovery of large sums for injuries alleged to have ***123** been due to negligent operation. In some jurisdictions it has been judicially determined that a lower standard of care should be exacted where the carriage in any type of vehicle is gratuitous. See Massaletti v. Fitzroy, 228 Mass. 487, 118 N. E. 168, L. R. A. 1918C, 264, Ann. Cas. 1918B, 1088; Marcienowski v. Sanders, 252 Mass. 65, 147 N. E. 275; Epps v. Parrish, 26 Ga. App. 399, 106 S. E. 297. Whether there has been a serious increase in the evils of vexatious litigation in this class of cases, where the carriage is by automobile, is for legislative determination, and, if found, may well be the basis of legislative ***59** action further restricting the liability. Its wisdom is not the concern of courts.

[4] It is said that the vice in the statute is not that it distinguishes between passengers who pay and those who do not, but between gratuitous passengers in automobiles and those in other classes of vehicles. But it is not so evident that no grounds exist for the distinction that we can say a priori that the classification is one forbidden as without basis, and arbitrary. See State of Ohio ex rel. Clarke v. Deckebach, 274 U. S. 392, 397, 47 S. Ct. 630, 71 L. Ed. 1115.

[5][6] Granted that the liability to be imposed upon those who operate any kind of vehicle for the benefit of a mere guest or licensee is an appropriate subject of legislative restruction, there is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied-that the Legislature must be held rigidly to the choice of regulating all or none. Patsone v. Pennsylvania, 232 U. S. 138, 144, 34 S.

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Ct. 281, 58 L. Ed. 539; Miller v. Wilson, 236 U. S. 373, 382, 384, 35 S. Ct. 342, 59 L. Ed. 628, L. R. A. 1915F, 829; International Harvester Co. v. Missouri, 234 U. S. 200, 215, 34 S. Ct. 859, 58 L. Ed. 1276, 52 L. R. A. (N. S.) 525; Barrett v. Indiana (1913) 229 U. S. 26, 29, 33 S. Ct. 692, 57 L. Ed. 1050. In this day of almost universal highway transportation by motorcar, we cannot say that abuses originating in the multiplicity of suits growing out of the gratuitous carriage of passengers in automobiles do not present so conspicuous an example of what the Legislature may regard as an evil, as to justify ***124** legislation aimed at it, even though some abuses may not be hit. Carroll v. Greenwich Insurance Co., 199 U. S. 401, 411, 26 S. Ct. 66, 50 L. Ed. 246; People of State of New York ex rel. Bryant v. Zimmerman, 278 U. S. 63, 73, 49 S. Ct. 61, 73 L. Ed. 184. It is enough that the present statute strikes at the evil where it is felt and reaches the class of cases where it most frequently occurs.

Affirmed.

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Tab 12

Supreme Court of the United States

NEW YORK CENTRAL RAILROAD COMPANY, Plff. in Err.,
v.
SARAH WHITE.

No. 320.

Argued February 29 and March 1, 1916.
Restored to docket for reargument November 13, 1916.
Reargued February 1, 1917.
Decided March 6, 1917.

IN ERROR to the Supreme Court Appellate Division, Third Judicial Department, of the State of New York, to review a judgment affirmed by the Court of Appeals of that state, which affirmed an award by the state Workmen's Compensation Commission. Affirmed.

See same case below, in appellate division, 169 App. Div. 903, 152 N. Y. Supp. 1149; in court of appeals, 216 N. Y. 653, 110 N. E. 1051.

The facts are stated in the opinion.

West Headnotes

Commerce ⚿62.21
83k62.21 Most Cited Cases
(Formerly 83k27(8))

A night watchman, injured while guarding tools and material for the erection of a depot, held not engaged in interstate commerce, within the federal Employers' Liability Act of April 22, 1908, 45 U.S.C.A. § 51 et seq., though such depot was intended to be used in interstate commerce.

Constitutional Law ⚿245(4)
92k245(4) Most Cited Cases
(Formerly 92k245)

The exclusion of farm laborers and domestic servants from the New York Workmen's Compensation Act does not render the act violative of the Fourteenth Amendment, as denying equal protection.

Constitutional Law ⚿245(4)
92k245(4) Most Cited Cases
(Formerly 92k245)

The requirement of the New York Workmen's Compensation Act, § 50, that the employer either secure insurance or furnish proof of his financial ability and deposit securities, does not violate the Fourteenth Amendment, U.S.C.A., as denying equal protection of law.

Constitutional Law ⚿301(4)
92k301(4) Most Cited Cases
(Formerly 92k275(2))

The New York Workmen's Compensation Act, providing for compulsory compensation without regard to fault, except willful act of employe to produce injury, or his intoxication, and graduating the compensation according to earning power or dependency of survivors, *held* not to violate the U.S.C.A. Const.Amend. 14, as unwarrantably limiting freedom of contract.

Constitutional Law ⚿301(4)
92k301(4) Most Cited Cases
(Formerly 92k301)

The New York Workmen's Compensation Act, providing for compulsory compensation without regard to fault except willful act of employe to produce injury, or his intoxication, and graduating the compensation according to earning power or dependency of survivors, *held* not to contravene U.S.C.A. Const.Amend. 14, as taking property without due process of law.

Constitutional Law ⚿313
92k313 Most Cited Cases

Trial by jury is not secured by U.S.C.A. Const.Amend. 14.

Workers' Compensation ⚿13
413k13 Most Cited Cases

Workmen's Compensation Acts and Industrial Insurance Acts *held* valid.

****247 *190** Messrs. **William L. Visscher, Frank**

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V. Whiting, Robert E. Whalen, and H. Leroy Austin for plaintiff in error.

Messrs. **Harold J. Hinman** and **E. Clarence Aiken,** and Mr. Egburt E. Woodbury, Attorney General of New York, for defendant in error.

Mr. Justice **Pitney** delivered the opinion of the court:

A proceeding was commenced by defendant in error before the Workmen's Compensation Commission of the State of New York, established by the Workmen's Compensation Law of that state, [FN1] to recover ****248** compensation from the New York Central & Hudson River Railroad Company for the death of her husband, Jacob White, who lost his life September 2, 1914, through an accidental injury arising out of and in the course of his employment under that company. The Commission awarded compensation in accordance with the terms of the law; its award was affirmed, without opinion, by the appellate ***191** division of the supreme court for the third judicial department, whose order was affirmed by the court of appeals, without opinion. 169 App. Div. 903, 152 N. Y. Supp. 1149, 216 N. Y. 653, 110 N. E. 1051. Federal questions having been saved, the present writ of error was sued out by the New York Central Railroad Company, successor, through a consolidation of corporations, to the rights and liabilities of the employing company. The writ was directed to the appellate division, to which the record and proceedings had been remitted by the court of appeals. Sioux Remedy Co. v. Cope, 235 U. S. 197, 200, 59 L. ed. 193, 196, 35 Sup. Ct. Rep. 57.

The errors specified are based upon these contentions: (1) that the liability, if any, of the railroad company for the death of Jacob White, is defined and limited exclusively by the provisions of the Federal Employers' Liability Act of April 22, 1908, chap. 149, 35 Stat. at L. 65, Comp. Stat. 1913, § 8657, and (2) that to award compensation to defendant in error under the provisions of the Workmen's Compensation Law would deprive plaintiff in error of its property without due process of law, and deny to it the equal protection of the laws, in contravention of the 14th Amendment.

The first point assumes that the deceased was employed in interstate commerce at the time he received the fatal injuries. According to the record, he was a night watchman, charged with the duty of guarding tools and materials intended to be used in the construction of a new station and new tracks upon a line of interstate railroad. The Commission found, upon evidence fully warranting the finding, that he was on duty at the time, and at a place not outside of the limits prescribed for the performance of his duties; that he was not engaged in interstate commerce; and that the injury received by him and resulting in his death was an accidental injury arising out of and in the course of his employment.

The admitted fact that the new station and tracks were ***192** designed for use, when finished, in interstate commerce, does not bring the case within the Federal act. The test is, 'Was the employee at the time of the injury engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?' Shanks v. Delaware, L. & W. R. Co. 239 U. S. 556, 558, 60 L. ed. 436, 438, L.R.A.1916C, 797, 31 Sup. Ct. Rep. 188. Decedent's work bore no direct relation to interstate transportation, and had to do solely with construction work, which is clearly distinguishable, as was pointed out in Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 152, 57 L. ed. 1125, 1128, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779. And see Chicago, B. & Q. R. Co. v. Harrington, 241 U. S. 177, 180, 60 L. ed. 941, 942, 36 Sup. Ct. Rep. 517, 11 N. C. C. A. 992; Raymond v. Chicago, M. & St. P. R. Co. this day decided [243 U. S. 43, 61 L. ed. 583, 37 Sup. Ct. Rep. 268]. The first point, therefore, is without basis in fact.

We turn to the constitutional question. The Workmen's Compensation Law of New York establishes forty-two groups of hazardous employments, defines 'employee' as a person engaged in one of these employments upon the premises, or at the plant, or in the course of his employment away from the plant of his employer, but excluding farm laborers and domestic servants; defines 'employment' as including employment only in a trade, business, or occupation carried on by the employer for pecuniary gain, 'injury' and 'personal injury' as meaning only accidental injuries arising out of and in the course of employment, and such disease or infection as naturally and unavoidably may result therefrom; and requires every employer subject to its provisions to pay or provide

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compensation according to a prescribed schedule for the disability or death of his employee resulting from an accidental personal injury arising out of and in the course of the employment, without regard to fault as a cause, except where the injury is occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or of another, or where it results solely ***193** from the intoxication of the injured employee while on duty, in which cases neither the injured employee nor any dependent shall receive compensation. By § 11 the prescribed liability is made exclusive, except that, if an employer fail to secure the payment of compensation as provided in § 50, an injured employee, or his legal representative, in case death results from the injury, may, at his option, elect to claim compensation under the act, or to maintain an action in the courts for damages, and in such an action it shall not be necessary to plead or prove freedom from contributory negligence, nor may the defendant plead as a defense that the injury was caused by the negligence of a fellow servant, that the employee assumed the ****249** risk of his employment, or that the injury was due to contributory negligence. Compensation under the act is not regulated by the measure of damages applied in negligence suits, but, in addition to providing surgical, or other like treatment, it is based solely on loss of earning power, being graduated according to the average weekly wages of the injured employee and the character and duration of the disability, whether partial or total, temporary or permanent; while in case the injury causes death, the compensation is known as a death benefit, and includes funeral expenses, not exceeding $100, payments to the surviving wife (or dependent husband) during widowhood (or dependent widowerhood) of a percentage of the average wages of the deceased, and if there be a surviving child or children under the age of eighteen years an additional percentage of such wages for each child until that age is reached. There are provisions invalidating agreements by employees to waive the right to compensation, prohibiting any assignment, release, or commutation of claims for compensation or benefits except as provided by the act, exempting them from the claims of creditors, and requiring that the compensation and benefits shall be paid only to employees or their dependents. ***194** Provision is made for the establishment of a Workmen's Compensation Commission [FN2] with administrative and judicial functions, including authority to pass upon claims to compensation on notice to the parties interested. The award or decision of the Commission is made subject to an appeal, on questions of law only, to the appellate division of the supreme court for the third department, with an ultimate appeal to the court of appeals in cases where such an appeal would lie in civil actions. A fund is created, known as 'the state insurance fund,' for the purpose of insuring employers against liability under the law, and assuring to the persons entitled the compensation thereby provided. The fund is made up primarily of premiums received from employers, at rates fixed by the Commission in view of the hazards of the different classes of employment, and the premiums are to be based upon the total pay roll and number of employees in each class at the lowest rate consistent with the maintenance of a solvent state insurance fund and the creation of a reasonable surplus and reserve. Elaborate provisions are laid down for the administration of this fund. By § 50, each employer is required to secure compensation to his employees in one of the following ways: (1) By insuring and keeping insured the payment of such compensation in the state fund; or (2) through any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in the state; or (3) 'by furnishing satisfactory proof to the Commission of his financial ability to pay such compensation for himself, in which case the Commission may, in its discretion, require the deposit with the Commission of securities of the kind prescribed in § 13 of the Insurance Law, in an amount to be determined by the Commission, to secure his ***195** liability to pay the compensation provided in this chapter.' If an employer fails to comply with this section, he is made liable to a penalty in an amount equal to the pro rata premium that would have been payable for insurance in the state fund during the period of noncompliance; besides which, his injured employees or their dependents are at liberty to maintain an action for damages in the courts, as prescribed by § 11.

In a previous year, the legislature enacted a compulsory compensation law applicable to a limited number of specially hazardous employments, and requiring the employer to pay compensation without regard to fault. Laws 1910, chap. 674. This was held by the court of appeals in Ives v. South Buffalo R. Co. 201 N. Y. 271, 34 L.R.A.(N.S.) 162, 94 N.

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E. 431, Ann. Cas. 1912B, 156 1 N. C. C. A. 517, to be invalid because in conflict with due process of law provisions of the state Constitution and of the 14th Amendment. Thereafter, and in the year 1913, a constitutional amendment was adopted, effective January 1, 1914, declaring:

'Nothing contained in this Constitution shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health, or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a state or other system of insurance or otherwise, of compensation for injuries to employees or for death of employees resulting from such injuries without regard to fault as a cause thereof, except where the injury is occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty; or for the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation; or to provide that the right of such compensation, and the remedy therefor shall **250 be exclusive of all *196 other rights and remedies for injuries to employees or for death resulting from such injuries; or to provide that the amount of such compensation for death shall not exceed a fixed or determinable sum; provided that all moneys paid by an employer to his employees or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer.'

In December, 1913, the legislature enacted the law now under consideration (Laws 1913, chap. 816), and in 1914 re-enacted it (Laws 1914, chap. 41) to take effect as to payment of compensation on July 1 in that year. The act was sustained by the court of appeals as not inconsistent with the 14th Amendment in Jensen v. Southern P. Co. 215 N. Y. 514, L.R.A.1916A, 403, 109 N. E. 600, Ann. Cas. 1916B, 276; and that decision was followed in the case at bar.

The scheme of the act is so wide a departure from common-law standards respecting the responsibility of employer to employee that doubts naturally have been raised respecting its constitutional validity. The adverse considerations urged or suggested in this case and in kindred cases submitted at the same time are: (a) That the employer's property is taken without due process of law, because he is subjected to a liability for compensation without regard to any neglect or default on his part or on the part of any other person for whom he is responsible, and in spite of the fact that the injury may be solely attributable to the fault of the employee; (b) that the employee's rights are interfered with, in that he is prevented from having compensation for injuries arising from the employer's fault commensurate with the damages actually sustained, and is limited to the measure of compensation prescribed by the act; and (c) that both employer and employee are deprived of their liberty to acquire property by being prevented from making such *197 agreement as they choose respecting the terms of the employment.

In support of the legislation, it is said that the whole common-law doctrine of employer's liability for negligence, with its defenses of contributory negligence, fellow servant's negligence, and assumption of risk, is based upon fictions, and is inapplicable to modern conditions of employment; that in the highly organized and hazardous industries of the present day the causes of accident are often so obscure and complex that in a material proportion of cases it is impossible by any method correctly to ascertain the facts necessary to form an accurate judgment, and in a still larger proportion the expense and delay required for such ascertainment amount in effect to a defeat of justice; that, under the present system, the injured workman is left to bear the greater part of industrial accident loss, which, because of his limited income, he is unable to sustain, so that he and those dependent upon him are overcome by poverty and frequently become a burden upon public or private charity; and that litigation is unduly costly and tedious, encouraging corrupt practices and arousing antagonisms between employers and employees.

In considering the constitutional question, it is necessary to view the matter from the standpoint of the employee as well as from that of the employer. For, while plaintiff in error is an employer, and cannot succeed without showing that its rights as such are infringed (Plymouth Coal Co. v. Pennsylvania, 232 U. S. 571, 576, 59 L. ed. 713, 719, 34 Sup. Ct. Rep. 359; Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 576, 59 L. ed. 364, 368, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570), yet, as

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pointed out by the court of appeals in the Jensen Case (215 N. Y. 526), the exemption from further liability is an essential part of the scheme, so that the statute, if invalid as against the employee, is invalid as against the employer.

The close relation of the rules governing responsibility as between employer and employee to the fundamental rights ***198** of liberty and property is, of course, recognized. But those rules, as guides of conduct, are not beyond alteration by legislation in the public interest. No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit. Munn v. Illinois, 94 U. S. 113, 134, 24 L. ed. 77, 87; Hurtado v. California, 110 U. S. 516, 532, 28 L. ed. 232, 237, 4 Sup. Ct. Rep. 111, 292; Martin v. Pittsburg & L. E. R. Co. 203 U. S. 284, 294, 51 L. ed 184, 191, 27 Sup. Ct. Rep. 100, 8 Ann. Cas. 87; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 50, 56 L. ed. 327, 346, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67, 76, 59 L. ed. 1204, 1210, 35 Sup. Ct. Rep. 678. The common law bases the employer's liability for in juries to the employee upon the ground of negligence; but negligence is merely the disregard of some duty imposed by law;ant the nature and extent of the duty may be modified by legislation, with corresponding change in the test of negligence. Indeed, liability may be imposed for the consequences of a failure to comply with a statutory duty, irrespective of negligence in the ordinary sense; safety appliance acts being a familiar instance. St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. ****251** S. 281, 295, 52 L. ed. 1061, 1068, 28 Sup Ct. Rep. 616, 21 Am. Neg. Rep. 464; Texas & P. R. Co. v. Rigsby, 241 U. S. 33, 39, 43, 60 L. ed. 874, 877, 878, 36 Sup. Ct. Rep 482.

The fault may be that of the employer himself, or--most frequently--that of another for whose conduct he is made responsible according to the maxim respondeat superior. In the latter case the employer may be entirely blameless, may have exercised the utmost human foresight to safeguard the employee; yet, if the alter ego, while acting within the scope of his duties, be negligent,-- in disobedience, it may be, of the employer's positive and specific command,-- the employer is answerable for the consequences. It cannot be that the rule embodied in the maxim is unalterable by legislation.

The immunity of the employer from responsibility to an employee for the negligence of a fellow employee is of comparatively recent origin, it being the product of the judicial conception that the probability of a fellow workman's ***199** negligence is one of the natural and ordinary risks of the occupation, assumed by the employee and presumably taken into account in the fixing of his wages. The earliest reported cases are Murray v. South Carolina R. Co. (1841) 1 McMull. L. 385, 398, 36 Am. Dec. 268; Farwell v. Boston & W. R. Corp. (1842) 4 Met. 49, 57, 38 Am. Dec. 339, 15 Am. Neg. Cas. 407; Hutchinson v. York, N. & B. R. Co. (1850) L. R. 5 Exch. 343, 351, 19 L. J. Exch. N. S. 296, 299, 14 Jur. 837, 840, 6 Eng. Ry. & C. Cas. 580; Wigmore v. Jay (1850) L. R. 5 Exch. 354, 19 L. J. Exch. N. S. 300, 14 Jur. 838, 841; Bartonshill Coal Co. v. Reid (1858) 3 Macq. H. L. Cas. 266, 284, 295, 4 Jur. N. S. 767, 6 Week Rep. 664, 19 Eng. Rul. Cas. 107. And see Randall v. Baltimore & O. R. Co. 109 U. S. 478, 483, 27 L. ed. 1003, 1005, 3 Sup. Ct Rep. 322; Northern P. R. Co. v. Herbert, 116 U. S. 642, 647, 29 L. ed. 755, 758, 6 Sup. Ct. Rep. 590. The doctrine has prevailed generally throughout the United States, but with material differences in different jurisdictions respecting who should be deemed a fellow servant and who a vice principal or alter ego of the master, turning sometimes upon refined distinctions as to grades and departments in the employment. See Knutter v. New York & N. J. Teleph. Co. 67 N. J. L. 646, 650-653, 58 L.R.A. 808, 52 Atl. 565, 12 Am. Neg. Rep. 109. It needs no argument to show that such a rule is subject to modification or abrogation by a state upon proper occasion.

The same may be said with respect to the general doctrine of assumption of risk. By the common law the employee assumes the risks normally incident to the occupation in which he voluntarily engages; other and extraordinary risks and those due to the employer's negligence he does not assume until made aware of them, or until they become so obvious that an ordinarily prudent man would observe and appreciate them; in either of which cases he does assume them, if he continues in the employment without obtaining from the employer an assurance that the matter will be remedied; but if he receive such an assurance, then, pending performance of the promise, the employee does not, in ordinary cases, assume the special risk. Seaboard

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Air Line R. Co. v. Horton, 233 ***200** U. S. 492, 504, 58 L. ed. 1062, 1070, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834, 239 U. S. 595, 599, 60 L. ed 458, 461, 36 Sup. Ct. Rep. 180. Plainly, these rules, as guides of conduct and tests of liability, are subject to change in the exercise of the sovereign authority of the state.

So, also, with respect to contributory negligence. Aside from injuries intentionally self-inflicted, for which the statute under consideration affords no compensation, it is plain that the rules of law upon the subject, in their bearing upon the employer's responsibility, are subject to legislative change; for contributory negligence, again, involves a default in some duty resting on the employee, and his duties are subject to modification.

It may be added, by way of reminder, that the entire matter of liability for death caused by wrongful act, both within and without the relation of employer and employee, is a modern statutory innovation, in which the states differ as to who may sue, for whose benefit, and the measure of damages.

But it is not necessary to extend the discussion. This court repeatedly has upheld the authority of the states to establish by legislation departures from the fellow-servant rule and other common-law rules affecting the employer's liability for personal injuries to the employee. Missouri P. R. Co. v. Mackey, 127 U. S. 205, 208, 32 L. ed. 107, 108, 8 Sup. Ct. Rep. 1161; Minneapolis & St. L. R. Co. v. Herrick, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; Minnesota Iron Co. v. Kline, 199 U. S. 593, 598, 50 L. ed. 322, 325, 26 Sup. Ct. Rep. 159, 19 Am. Neg. Rep. 625; Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 53, 54 L. ed. 921, 928, 47 L.R.A.(N.S.) 84, 30 Sup. Ct. Rep. 676; Chicago, I. & L. R. Co. v. Hackett, 228 U. S. 559, 57 L. ed. 966, 33 Sup. Ct. Rep. 581; Wilmington Star Min. Co. v. Fulton, ****252** 205 U. S. 60, 73, 51 L. ed. 708, 715, 27 Sup. Ct. Rep. 412; Missouri P. R. Co. v. Castle, 224 U. S. 541, 544, 56 L. ed. 875, 878, 32 Sup. Ct. Rep. 606. A corresponding power on the part of Congress, when legislating within its appropriate sphere, was sustained in Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed 327, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875. And see El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 97, 54 L. ed. 106, 111, 30 Sup. Ct. Rep. 21; Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 619, 55 L. ed. 878, 883, 31 Sup. Ct. Rep. 621.

***201** It is true that in the case of the statutes thus sustained there were reasons rendering the particular departures appropriate. Nor is it necessary, for the purposes of the present case, to say that a state might, without violence to the constitutional guaranty of 'due process of law,' suddenly set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute. Considering the vast industrial organization of the state of New York, for instance, with hundreds of thousands of plants and millions of wage earners, each employer, on the one hand, having embarked his capital, and each employee, on the other, having taken up his particular mode of earning a livelihood, in reliance upon the probable permanence of an established body of law governing the relation, it perhaps may be doubted whether the state could abolish all rights of action, on the one hand, or all defenses, on the other, without setting up something adequate in their stead. No such question is here presented, and we intimate no opinion upon it. The statute under consideration sets aside one body of rules only to establish another system in its place. If the employee is no longer able to recover as much as before in case of being injured through the employer's negligence, he is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of the damages. Instead of assuming the entire consequences of all ordinary risks of the occupation, he assumes the consequences, in excess of the scheduled compensation, of risks ordinary and extraordinary. On the other hand, if the employer is left without defense respecting the question of fault, he at the same time is assured that the recovery is limited, and that it goes directly to the relief of the designated beneficiary. And just as the employee's assumption of ordinary risks at common law presumably was taken into account in fixing ***202** the rate of wages, so the fixed responsibility of the employer, and the modified assumption of risk by the employee under the new system, presumably will be reflected in the wage scale. The act evidently

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is intended as a just settlement of a difficult problem, affecting one of the most important of social relations, and it is to be judged in its entirety. We have said enough to demonstrate that, in such an adjustment, the particular rules of the common law affecting the subject matter are not placed by the 14th Amendment beyond the reach of the lawmaking power of the state; and thus we are brought to the question whether the method of compensation that is established as a substitute transcends the limits of permissible state action.

We will consider, first, the scheme of compensation, deferring for the present the question of the manner in which the employer is required to secure payment.

Briefly, the statute imposes liability upon the employer to make compensation for disability or death of the employee resulting from accidental personal injury arising out of and in the course of the employment, without regard to fault as a cause except where the injury or death is occasioned by the employee's wilful intention to produce it, or where the injury results solely from his intoxication while on duty; it graduates the compensation for disability according to a prescribed scale based upon the loss of earning power, having regard to the previous wage and the character and duration of the disability; and measures the death benefits according to the dependency of the surviving wife, husband, or infant children. Perhaps we should add that it has no retrospective effect, and applies only to cases arising some months after its passage.

Of course, we cannot ignore the question whether the new arrangement is arbitrary and unreasonable, from the standpoint of natural justice. Respecting this, it is important to be observed that the act applies only to disabling ***203** or fatal personal injuries received in the course of hazardous employment in gainful occupation. Reduced to its elements, the situation to be dealt with is this: Employer and employee, by mutual consent, engage in a common operation intended to be advantageous to both; the employee is to contribute his personal services, and for these is to receive wages, and, ordinarily, nothing more; the employer is to furnish plant, facilities, organization, capital, credit, is to control and mange the operation, paying the wages and other expenses, disposing of the product at such prices as he can obtain, taking all the profits, ****253** if any there be, and, of necessity, bearing the entire losses. In the nature of things, there is more or less of a probability that the employee may lose his life through some accidental injury arising out of the employment, leaving his widow or children deprived of their natural support; or that he may sustain an injury not mortal, but resulting in his total or partial disablement, temporary or permanent, with corresponding impairment of earning capacity. The physical suffering must be borne by the employee alone; the laws of nature prevent this from being evaded or shifted to another, and the statute makes no attempt to afford an equivalent in compensation. But, besides, there is the loss of earning power,--a loss of that which stands to the employee as his capital in trade. This is a loss arising out of the business, and, however it may be charged up, is an expense of the operation, as truly as the cost of repairing broken machinery or any other expense that ordinarily is paid by the employer. Who is to bear the charge? 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, ***204** 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. Nor can it be deemed arbitrary and unreasonable, from the standpoint of the employee's interest, to supplant a system under which he assumed the entire risk of injury in ordinary cases, and in others had a right to recover an amount more or less speculative upon proving facts of negligence that often were difficult to prove, and substitute a system under which, in all ordinary cases of accidental injury, he is sure of a definite and easily ascertained compensation, not being obliged to assume the entire loss in any case, but in all cases assuming any loss beyond the prescribed scale.

Much emphasis is laid upon the criticism that the act creates liability without fault. This is sufficiently answered by what has been said, but we may add that liability without fault is not a novelty in the law. The common-law liability of the carrier, of the innkeeper, or him who employed fire or other

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dangerous agency or harbored a mischievous animal, was not dependent altogether upon questions of fault or negligence. Statutes imposing liability without fault have been sustained. St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 22, 41 L. ed. 611, 619, 17 Sup. Ct. Rep. 243; Chicago, R. I. & P. R. Co. v. Zernecke, 183 U. S. 582, 586, 46 L. ed. 339, 340, 22 Sup. Ct. Rep. 229.

We have referred to the maxim, respondeat superior. In a well-known English case, Hall v. Smith, 2 Bing. 156, 160, 130 Eng. Reprint, 265, 9 J. B. Moore, 226, 2 L. J. C. P. 113, this maxim was said by Best, Ch. J., to be 'bottomed on this principle, that he who expects to derive advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it.' And this view has been adopted in New York. Cardot v. Barney, 63 N. Y. 281, 287, 20 Am. Rep. 533. The provision for compulsory compensation, in the act under consideration ***205** cannot be deemed to be an arbitrary and unreasonable application of the principle, so as to amount to a deprivation of the employer's property without due process of law. The pecuniary loss resulting from the employee's death or disablement must fall somewhere. It results from something done in the course of an operation from which the employer expects to derive a profit. In excluding the question of fault as a cause of the injury, the act in effect disregards the proximate cause and looks to one more remote,--the primary cause, as it may be deemed,-- and that is, the employment itself. For this, both parties are responsible, since they voluntarily engage in it as coadventurers, with personal injury to the employee as a probable and foreseen result. In ignoring any possible negligence of the employee producing or contributing to the injury, the lawmaker reasonably may have been influenced by the belief that, in modern industry, the utmost diligence in the employer's service is in some degree inconsistent with adequate care on the part of the employee for his own safety; that the more intently he devotes himself to the work, the less he can take precautions for his own security. And it is evident that the consequences of a disabling or fatal injury are precisely the same to the parties immediately affected, and to the community, whether the proximate cause be culpable or innocent. 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 ****254** the common-law liability confined to cases of negligence.

This, of course, is not to say that any scale of compensation, however insignificant, on the one hand, or onerous, on the other, would be supportable. In this case, no criticism is made on the ground that the compensation prescribed ***206** by the statute in question is unreasonable in amount, either in general or in the particular case. Any question of that kind may be met when it arises.

But, it is said, the statute strikes at the fundamentals of constitutional freedom of contract; and we are referred to two recent declarations by this court. The first is this: 'Included in the right of personal liberty and the right of private property--partaking of the nature of each--is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense.' Coppage v. Kansas, 236 U. S. 1, 14, 59 L. ed. 441, 446 L.R.A.1915C, 960, 35 Sup. Ct. Rep. 240. And this is the other: 'It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [14th] Amendment to secure.' Truax v. Raich, 239 U. S. 33, 41, 60 L. ed. 131, 135, L.R.A.1916D, 545, 36 Sup. Ct. Rep. 7.

It is not our purpose to qualify or weaken either of these declarations in the least. And we recognize that the legislation under review does measurably limit the freedom of employer and employee to agree respecting the terms of employment, and that it cannot be supported except on the ground that it is a reasonable exercise of the police power of the state. In our opinion it is fairly supportable upon that ground. And for this reason: The subject matter in respect of which freedom of contract is restricted is the matter of compensation for human life or limb lost or disability incurred in the course of hazardous employment, and the public has a direct interest in this as affecting the common welfare. 'The whole is

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no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the state ***207** must suffer.' Holden v. Hardy, 169 U. S. 366, 397, 42 L. ed. 780, 793, 18 Sup. Ct. Rep. 383. It cannot be doubted that the state may prohibit and punish self-maiming and attempts at suicide; it may prohibit a man from bartering away his life or his personal security; indeed, the right to these is often declared, in bills of rights, to be 'natural and inalienable;' and the authority to prohibit contracts made in derogation of a lawfully-established policy of the state respecting compensation for accidental death or disabling personal injury is equally clear. Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 571, 55 L. ed. 328, 340, 31 Sup. Ct. Rep. 259; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 52, 56 L. ed. 327, 347, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

We have not overlooked the criticism that the act imposes no rule of conduct upon the employer with respect to the conditions of labor in the various industries embraced within its terms, prescribes no duty with regard to where the workmen shall work, the character of the machinery, tools, or appliances, the rules or regulations to be established, or the safety devices to be maintained. This statute does not concern itself with measures of prevention, which presumably are embraced in other laws. But the interest of the public is not confined to these. One of the grounds of its concern with the continued life and earning power of the individual is its interest in the prevention of pauperism, with its concomitants of vice and crime. And, in our opinion, laws regulating the responsibility of employers for the injury or death of employees, arising out of the employment, bear so close a relation to the protection of the lives and safety of those concerned that they properly may be regarded as coming within the category of police regulations. Sherlock v. Alling, 93 U. S. 99, 103, 23 L. ed. 819, 820; Missouri P. R. Co. v. Castle, 224 U. S. 541, 545, 56 L. ed. 875, 879, 32 Sup. Ct. Rep. 606 .

No question is made but that the procedural provisions of the act are amply adequate to afford the notice and opportunity to be heard required by the 14th ***208** Amendment. The denial of a trial by jury is not inconsistent with 'due process.' Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678; Frank v. Mangum, 237 U. S. 309, 340, 59 L. ed. 960, 985, 35 Sup. Ct. Rep. 582.

The objection under the 'equal protection' clause is not pressed. The only apparent basis for it is in the exclusion of farm laborers and domestic servants from the scheme. But, manifestly, this cannot be judicially declared to be an arbitrary classification, since it reasonably may be considered that the risks inherent in these occupations are exceptionally patent, simple, and familiar. Missouri, K. & T. R. Co. v. Cade, 233 U. S. 642, 650, 58 L. ed. 1135, ****255** 1137, 34 Sup. Ct. Rep. 678, and cases there cited.

We conclude that the prescribed scheme of compulsory compensation is not repugnant to the provisions of the 14th Amendment and are brought to consider, next, the manner in which the employer is required to secure payment of the compensation. By § 50, this may be done in one of three ways: (a) State insurance; (b) insurance with an authorized insurance corporation or asso ciation; or (c) by a deposit of securities. The record shows that the predecessor of plaintiff in error chose the third method, and, with the sanction of the Commission, deposited securities to the amount of $300,000, under § 50, and $30,000 in cash as a deposit to secure prompt and convenient payment, under § 25, with an agreement to make a further deposit if required. This was accompanied with a reservation of all contentions as to the invalidity of the act, and had not the effect of preventing plaintiff in error from raising the questions we have discussed.

The system of compulsory compensation having been found to be within the power of the state, it is within the limits of permissible regulation, in aid of the system, to require the employer to furnish satisfactory proof of his financial ability to pay the compensation, and to deposit a reasonable amount of securities for that purpose. The third clause of § 50 has not been, and presumably will ***209** not be, construed so as to give an unbridled discretion to the Commission; nor is it to be presumed that solvent employers will be prevented from becoming self-insurers on reasonable terms. No question is made but that the terms imposed upon this railroad company were reasonable in view of the magnitude of its operations, the number of its employees, and the amount of its pay roll (about $50,000,000

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annually); hence no criticism of the practical effect of the third clause is suggested.

This being so, it is obvious that this case presents no question as to whether the state might, consistently with the 14th Amendment, compel employers to effect insurance according to either of the plans mentioned in the first and second clauses. There is no such compulsion, since self-insurance under the third clause presumably is open to all employers on reasonable terms that it is within the power of the state to impose. Regarded as optional arrangements, for acceptance or rejection by employers unwilling to comply with that clause, the plans of insurance are unexceptionable from the constitutional standpoint. Manifestly, the employee is not injuriously affected in a constitutional sense by the provisions giving to the employer an option to secure payment of the compensation in either of the modes prescribed, for there is no presumption that either will prove inadequate to safeguard the employee's interests.

Judgment affirmed.

FN1 Chap. 816, Laws 1913, as re-enacted and amended by chap. 41, Laws 1914, and amended by chap. 316, Laws 1914.

FN2 By chap. 674, Laws 1915, §§ 2 and 8, this Commission was abolished and its functions were conferred upon the newly created Industrial Commission.

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Tab

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Supreme Court of the United States.

MANLEY ETTOR and Mary T. Ettor, Plffs. in Err.,
v.
CITY OF TACOMA and Chicago, Milwaukee, & St. Paul Railway Company.

No. 68.
EDWIN HOWARD and Emma Howard, Plffs. in Err.,
v.
CITY OF TACOMA and Chicago, Milwaukee, & St. Paul Railway Company.

No. 69.
Nos. 68 and 69.

Argued December 6, 1912.
Decided April 7, 1913.

TWO WRITS OF ERROR to the Supreme Court of the State of Washington to review judgments which affirmed judgments of the Superior Court of Pierce County, in that state, directing verdicts in favor of a municipality in actions to recover damages for injuries to abutting property from an original street grading done under municipaly authority. Reversed and remanded for further proceedings.

See same case below, No. 68, 57 Wash. 50, 106 Pac. 478, 107 Pac. 1061; No. 69, 57 Wash. 698, 106 Pac. 481, 107 Pac. 1064.

The facts are stated in the opinion.

CONSTITUTIONAL LAW ⚷93(1)

92k93(1)

The right of abutting owners to compensation for consequential damages from an original grading under municipal direction given by Laws Wash.1893, c. 840, and Laws 1907, c. 153, is a vested property right which cannot be destroyed by repeal of the compensatory provision after the damage is done.

EMINENT DOMAIN ⚷70
148k70

The right of abutting owners to compensation for consequential damages from an original grading under municipal direction given by Laws Wash.1893, c. 840, and Laws 1907, c. 153, is a vested property right which cannot be destroyed by repeal of the compensatory provision after the damage is done.

****428 *149** Messrs. **Stanton Warburton,** John M. Boyle, E. B. Brockway, and C. M. Boyle for plaintiffs in error.

Messrs. **Heman H. Field,** George W. Korte, and T. L. Stiles for defendants in error.

Mr. Justice **Lurton** delivered the opinion of the court:

These were actions to recover for damage inflicted upon abutting property in consequence of an original street grading done by the railroad company under authority and direction of the city of Tacoma.

At the time the grading was done there was in force an act of the Washington legislature which required the city ***150** to make compensation for consequential damages due to an original street grading. Pending these suits, and while they were actually being heard, the provision of the act referred to which expressly required the city to provide for or make compensation for all such damage was amended so as to provide that the act should not apply to the original grading of any street. Laws of Washington, 1907, p. 316, and Laws of 1909, p. 151. When the attention of the trial court was called to this repealing act, it dircted a verdict for the city upon the theory that the right of action was statutory and fell with the statute, there being no saving clause. This judgment, upon the same ground, was affirmed by the supreme court of the state.

For the plaintiffs in error the contention, shortly stated, is, that the act of 1907 was the sole legislative authority of the city for making the cuts and fills in front of their premises upon the public street, and that that act expressly required the city to make provision for compensating an owner so damaged; and that their right to such compensation, having accrued while the act was in force, cannot be

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destroyed by subsequent legislation without a violation of the rights guaranteed by the 14th Amendment.

In the absence of legislation requiring compensation for such damage the general rule of law is that a municipality, in making, grading, and improving streets, is the agent of the state, exercising in the performance of such work a governmental power, and is not liable for consequential injuries to property abutting, if it keep within the street, and use reasonable care and skill in doing the work. 4 Dill. Mun. Corp. 5th ed. §§ 1674, 1677; Smith v. Washington, 20 How. 135, 15 L. ed. 858; Northern Transp. Co. v. Chicago, 99 U. S. 635, 641, 25 L. ed. 336, 338; Humes v. Knoxville, 1 Humph. 403, 34 Am. Dec. 657. This was the general law as announced by the supreme court of Washington in its first opinion in the case of Fletcher v. Seattle, ***151** 43 Wash. 627, 86 Pac. 1046, 88 Pac. 843, and is the general law of the state, as announced by the court's opinion in the instant case. Where the benefits equaled the injury, there was, of course, no injustice in the application of the general rule. But where the damage exceeded the benefits, there was an apparent injustice in casting upon such an owner an undue share of the cost of an improvement for the public benefit. This was recognized in Northern Transp. Co. v. Chicago, supra, where municipal nonliability was said to be due to the fact that in improving ****429** its highways the municipality was but the agent of the state, and that, as the state could not be sued, its agents were equally immune for improvements authorized by the law of the state, without the consent of the state. But this equity which exists when the benefits are less than the damage affords a strong foundation for legislation requiring compensation in such circumstances. This consideration doubtless led to the legislation of the state, requiring compensation for such damage, under which the rights of the plaintiffs in error are asserted.

Whatever may have been the authority of the city of Tacoma under its charter or the general law of the state, to take or damage property for the purpose of opening, making, improving, or grading its public streets, and its immunity from liability for consequential damages in making an original grading, prior to the legislation found in the two acts of 1893 and 1907, Laws of Washington, 1893, p. 189, and Laws of 1907, p. 316, it is plain that the acts in question cover the whole subject of its authority and its liability for taking private property or 'damaging' it, in either making, grading, or regrading its public streets. The two acts referred to are identical in every essential. The latter is a mere re-enactment of the first, by which its provisions are extended to a larger class of municipal corporations.

The act of 1893 was construed and applied by the ***152** supreme court of the state in Fletcher v. Seattle, supra. The action was by the owner of premises which had sustained damage while the act was in force, in consequence of an original grading. He recovered a judgment, which, upon a first hearing, was reversed by the supreme court, that court holding that consequential damages arising from an original grading, when the work had been done with due care, was neither a taking nor a damaging of private property within the meaning of the Constitution of the state, requiring compensation for taking or damaging private property for public purposes. But, upon a rehearing, the attention of the court was for the first time called to the act of 1893, and the contention advanced that the only authority of the city to take or damage the property of the plaintiff for the purpose of grading the street was under that act, and that, by its terms, the city was required to make compensation for damage arising from an original grading. The construction of that act upon facts like those in the present case was thereby directly involved. It was urged that the 47th section did not require compensation for consequential damages, but in answer to this, the court said:

'We think the word 'damages' used in the section [the 47th] has the same significance and meaning that it has in other sections of the same act, and that it was used in its broad sense and includes consequential damages. We see no reason why this provision of the law should be segregated from the other provisions, and a different construction placed upon it, or why the provisions of the act in relation to the assessment of the damages should not apply to it as it does to the other sections; and if it does, the right of compensation is equally granted.

'It was said that the title of the act shows that it is legislation concerning the exercise of the right of eminent domain, but we think the title is sufficient to cover the ***153** section objected to equally as well as the other sections in the act, and it was evidently

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the intention of the legislature to pass an act covering the whole subject of opening streets, and of providing methods of making compensation for damages where damages followed. The title not only provides for the exercise of the right of eminent domain, but, also, the taking and damaging of land and property for public purposes; and § 1 of the act empowers the city to condemn and also empowers it to *damage* any land or other property for the purpose of opening streets. Section 2 says, when the corporation authorities of any such city shall desire to condemn land or other property, *or damage the same*, for any purpose authorized by this act, such city shall provide, etc. In this case the city had the power to damage the respondents' land, and it was found that it did damage it, and it damaged it in a way that it was authorized by § 47 of this act; namely, by establishing a grade on the street upon which their property abutted. And this idea is manifested throughout the act. That the section does not contemplate such damages as are caused by an encroachment or actual trespass upon the lands of the owner, as is suggested by the appellant, is manifest from the language of the section itself, which evidently contemplates that the work will be upon the street, and not upon the abutting property.

'We are unable to find any more ambiguity in this section than in any other provision of the act; and under its provisions the plaintiffs are entitled to such damages as they can show they have suffered. The question of public policy and expense to the city are questions which are purely legislative.' ****430** THE JUDGMENT OF THE LOWER COURT WAS THEREupOn affirmed.

The opinion so construing the act of 1893 was filed in September, 1906. In March, 1907, the act of 1893, then in force, was extended to a larger class of cities and ***154** re-enacted, without any change in any material respect, the 1st, 2d, and 47th sections being re-enacted, the 47th section becoming in the later act § 48. While this act of 1907 was in force, the city directed the grading in question, and made or caused the railroad company to make cuts and fillsin the street in front of the premises of the plaintiffs in error, which resulted in large injury to their property. The city did not provide for compensation for the damage so done by any special assessment upon the property benefited. This brought into effect the provision of the 2d section, requiring the payment of such damage to be made out of the general funds of the city. Payment not having been made as required, the plaintiffs in error brought these actions to recover compensation.

The defense of the city, that it was but the agent of the state in improving the highways of the city, and therefore immune, because the state was immune, vanishes in the face of the fact that the state had absolutely coupled authority in the matter with an obligation to make compensation. The city had no authority save that which came from the very act which imposed an obligation. It would seem to need no argument to establish the contention that the obligation to make compensation to these plaintiffs in error could not be destroyed by subsequent legislation.

Neither of the acts provided any remedy for the enforcement of the obligation to make compensation. Both provided that the city might by ordinance arrange for the ascertainment of the damages, and for their collection by special assessment on the property benefited, or within a special assessment district. But the plain requirement of the 1st and 2d sections of both acts is that if the city does not so provide for special assessments, that it should make the compensation out of its general treasury. The repealing clause of the act of 1909 does not touch the ***155** general features of the law beyond the provision that the 48th section of the act, which extended the obligation of compensation to original gradings, should not apply to damage arising from such gradings. It is a mistake to say that the act of 1907 gave a remedy where none existed before. What it did was to impose an obligation to compensate abutters injured by an original grading,--an obligation which, however meritorious, had no sanction in positive law. The remedy, if the city disregarded the obligation, was that afforded by the common law for the breach of any valid contractual or statutory duty. That was the remedy which was enforced by the Washington court in Fletcher v. Seattle, 43 Wash. 627, 86 Pac. 1046, 88 Pac. 843.

Statutes concerning remedies are such as relate to the course and mode of procedure to enforce or defend a substantive right. Matters which belong to the remedy are subject to change and alteration, and even repeal, provided the legislation does not operate to impair a contract or deprive one of a vested property right. If the changing or repealing

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statute leaves the parties a substantial remedy, the legislation does not exceed its authority. Rights and remedies shade one into the other so that it is sometimes difficult to say that a particular act creates a right or merely gives a remedy. So, also, a statute, under the form of taking away or changing a particular remedy, may take away an existing property right, or impair the obligation of a contract. That the state court has treated the act of 1907 as merely giving a remedy where none existed before, and the act of 1909, as merely repealing the remedy so given, is plain.

The court below gave a retrospective effect to the amendatory and repealing act by holding that the effect of the repeal was to destroy the right to compensation which had accrued while the act was in force. The obligation of the city was fixed. The plaintiffs in error had a claim which the city was as much under obligation ***156** to pay as for the labor employed to do the grading. It was a claim assignable and enforceable by a common-law action for a breach of the statutory obligation.

The necessary effect of the repealing act, as construed and applied by the court below, was to deprive the plaintiffs in error of any remedy to enforce the fixed liability of the city to make compensation. This was to deprive the plaintiffs in error of a right which had vested before the repealing act,--a right which was in every sense a property right. Nothing remained to be done to complete the plaintiffs' right to compensation except the ascertainment of the amount of damage to their property. The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested cannot be defeated by subsequent legislation. Elgin v. Eaton, 83 Ill. 535, 25 Am. Rep. 412; Healey v. New Haven, 49 Conn. 394; Harrington v. Berkshire, 22 Pick. 263, 33 Am. Dec. 741; People ex rel. Fountain v. Westchester County, 4 Barb. 64, are cases arising under street ****431** or highway statutes. The principle has been applied in reference to rights accruing under a variety of statutes when affected by a subsequent change of the law. Pacific Mail S. S. Co. v. Joliffe, 2 Wall. 450, 17 L. ed. 805; Miller v. Union Mill Co. 45 Wash. 199, 88 Pac. 130; Grey v. Mobile Trade Co. 55 Ala. 388, 28 Am. Rep. 729; Stephens v. Marshall, 3 Pinney (Wis.) 203; Gorman v. McArdle, 67 Hun, 484, 22 N. Y. 202, 62 Am. Dec. 160; Creighton N. W. 202, 62 Am. Dec. 160; Creighton v. Pragg, 21 Cal. 115; State Trust Co. v. Kansas City, P. & G. R. Co. 115 Fed. 367.

Certain cases have been cited in support of the action of the state court, among them Yeaton v. United States, 5 Cranch, 281, 3 L. ed. 101. But that was a case of a forfeiture to the United States. The repeal of the statute was held to end the proceeding, although a sentence had been pronounced and was pending upon appeal when the act under which it had been entered was repealed. No private right had ***157** vested, and the government could abandon its own proceeding, if it saw fit, at any stage. Another case cited is East Saginaw Salt & Mfg. Co. v. East Saginaw, 13 Wall. 373, 20 L. ed. 611. For the purpose of encouraging the manufacture of salt, the state of Michigan, by a general statute addressed to no particular person or corporation, offered a bounty upon salt produced, and exempted from taxation the property engaged in the business. After a time the act was repealed. The claim was that the exemption constituted a contract, and that it could not be repealed without impairing the obligation of the contract. But this court said that the exemption did not constitute a contract, and was nothing more nor less than a law dictated by public policy for the encouragement of an industry. So long as the law was in force, the state promised the exemption and bounty; but there was no pledge that it should not be repealed at any time. In Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, 385, 387, 48 L. ed. 229-232, 24 Sup. Ct. Rep. 107, the case was said to point out the distinction between 'an exemption in a special charter and general encouragement to all persons to engage in a certain enterprise;' and the same principle was applied to an act which provided an exemption to any corporation building a line of railroad north of certain lines of latitude. The court held that it was addressed to no one in particular, and constituted a mere announcement of policy not constituting a contract, and was therefore subject to repeal at any time. The case of Louisiana ex rel. Folson v. New Orleans, 109 U. S. 285, 27 L. ed. 936, 3 Sup. Ct. Rep. 211, has been cited. That case merely held that a judgment against the city under a statute for damage to private property, inflicted by a mob, did not constitute a contract, the obligation of which had been impaired by the repeal of a statute under which the city might have been compelled to levy a special tax for its satisfaction. The case turned upon the distinction between liability for a

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tort and liability under a contract.

In the instant case the action is neither for a tort, nor *158 for a penalty, nor for a forfeiture, but for injury to property, actually accomplished before the repeal of the law under which the street was graded, which required compensation to be made. The right to compensation was a vested property right.

The judgments must be reversed and the cases remanded for further proceedings not inconsistent with this opinion.

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Tab 14

Supreme Court of the United States.

ANGLE
v.
CHICAGO, ST. P., M. & O. RY. CO.

No. 73.

January 3, 1894.

Appeal from the circuit court of the United States for the western district of Wisconsin. Reversed.

****241** Statement by Mr. Justice BREWER:

This is an appeal from a decree of the circuit court of the United States for the western district of Wisconsin dismissing plaintiff's bill.

The bill was filed on the 23d of May, 1888, against the Chicago, Portage & Superior Railway Company, the Chicago, St. Paul, Minneapolis & Omaha Railway Company, and the Farmers' Loan & Trust Company. The Chicago, St. Paul, Minneapolis & Omaha Railway Company was the only defendant served with process. It appeared, and on the 28th of July filed a demurrer to the bill, which, after argument, was sustained, and on September 2, 1889, the decree of dismissal was entered. 39 Fed. 143, 912.

The facts as stated in the bill are as follows: By two acts, of date June 3, 1856, and May 5, 1864, respectively, (11 Stat. 20, and 13 Stat. 66,) congress granted lands to the state of Wisconsin to aid in the construction of certain railroads, among others one 'from a point on the St. Croix river or lake, between townships 25 and 31, to the west end of Lake Superior, and from some point on the line of said railroad, to be selected by said state, to Bayfield.' These land grants were accepted by an act of the legislature approved October 8, 1856, (Laws Wis. 1856, p. 137,) and by a joint resolution of the legislature of the state of date March 20, 1865, (Gen. Laws Wis. 1865, p. 689,) and a map of definite location was duly filed, and accepted by the secretary of the interior.

By an act of March 4, 1874, (Laws Wis. 1874, p. 186,) the state granted to the North Wisconsin Railway Company, whose name was subsequently changed to Chicago, St. Paul, Minneapolis & Omaha Railway Company, and who is the defendant herein, (to be hereafter called the Omaha Company,) that portion of the land grant applicable to the construction of the road from a point on St. Croix river to Bayfield, and to the Chicago & Northern Pacific Air-Line Railway Company, whose name was subsequently, and before 1878, changed to that of the Chicago, Portage & Superior Railway Company, (hereafter called the Portage Company,) so much of said grant as was applicable to the construction of the road from the west end of Lake Superior to a junction with the line running from St. Croix rever to Bayfield.

The eighth section of this act, which is the granting section to the latter company, is as follows:

'There is hereby granted to the Chicago and Northern Pacific Air-Line Railway Company all the right, title, and interest which the state of Wisconsin now has, or may hereafter acquire, in or to that portion of the lands granted to said state by said two acts of congress as is or can be made applicable to the construction of that part of the railway ctober 8, 1856, (Laws Wis. 1856, point of intersection of the branches of said grants, as fixed by the surveys and maps on file in the land office at Washington, and the west end of Lake Superior. This grant is made upon the express condition that said company shall construct, complete, and put in operation that part of its said railway above mentioned as soon as a railway shall be constructed and put in operation from the city of Hudson to said point of intersection, and within five years from its acceptance of said lands as herein provided, and shall also construct and put in operation the railway of said company from Genoa northerly, at the rate of twenty miles per year.'

The value of the lands thus granted was, at the time of the wrongs hereinafter described, $4,000,000.

By section 12 the company was required within 60 days to file with the secretary of state an acceptance of the grant upon the terms and conditions named therein, and also such security for the construction of the road as should be required by the governor. Both of these conditions were complied with.

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Genoa, named in section 8, was the town on the southern boundary of the state of Wisconsin at which the line of the Chicago & Northern Pacific Air-Line Railway entered the state; and Hudson was the place on the St. Croix river, described in the acts of congress as the initial point of the road to be aided.

On March 16, 1878, an act was passed by the legislature of Wisconsin (Laws Wis. 1878, p. 442) extending the time for the construction of the Portage Company's road three years.

In the panic of 1873-74 the Portage Company had broken down under a load of debts and embarrassments, and remained inactive until 1880. At that time it secured the services of Willis Gaylord to assist in extricating it from its embarrassments, and in continuing the construction of its road. William H. Schofield, an experienced railway projector and financier, was induced to accept the office of president, and the co-operation and assistance of the New York, New England & Western Investment Company (hereafter called the Investment Company) was secured.

A new mortgage for $25,000 a mile, and a new issue of stock, was provided for. Seven **242 hundred thousand dollars of the new bonds and one million of the new stock were to be issued in full satisfaction of all outstanding stock, bonds, and other demands. In pursuance of these arrangements, it issued certificates of stock for $1,000,000, in the name of A. A. Jackson, general solicitor of the Portage Company, which, indorsed by him in blank, were deposited with the Trust Company, and it also executed its orders to the number of 90, calling for the delivery to John C. Barnes or bearer or a designated amount of said $1,000,000 of stock in 10 per cent. installments. These orders were in the following form:

'To the Farmers' Loan and Trust Company: This is to certify that, for value received, Mr. John C. Barnes or bearer is entitled to have and receive _____ shares of the capital stock of the Chicago, Portage and Superior Railway Company, which stock has been fully paid for and placed in your keeping as a special trust for delivery upon this order, and you are hereby authorized and directed to accept or certify in the usual manner this order for the delivery of said stock, and to deliver to the bearer hereof _____ shares of the said stock whenever and as often as any two hundred and fifty thousand dollars of the first mortgage bonds of the said railway company are sold or disposed of by said railway company or by its fiscal agent, or whenever and as often as any ten miles of the railroad of said railway company shall be built, as will be certified to by the president of said railway company; and in any event you are hereby directed to deliver to the bearer, on the 1st day of January, A. D. 1883, any of the said _____ shares of capital stock then remaining undelivered upon a surrender of this order therefor. [Seal.] Chicago, Portage and Superior Railway Company. By _____, President.'

On the margin: 'This order for the delivery of the bonds and stock of this company held in special trust is hereby approved and accepted. The Farmers' Loan and Trust Company. [Seal.]'

These orders were all delivered to John C. Barnes in exchange for and redemption of all the theretofore outstanding stock of the Portage Company, which stock was at once canceled, with the exception of two certificates for $25,000, which, by oversight or design on the part of Charles J. Barnes, vice president of the Portage Company, remained in his custody uncanceled.

The situation after these arrangements were made was such that the entire outstanding stock was in the possession and control of C. J. Barnes, J. C. Barnes, and A. A. Jackson, yet held by them in trust for the company. The further stock provided for was to be issued from time to time to assist in the sale of the bonds, until enough of the latter had been disposed of to construct the road. These arrangements having been perfected, the Portage Company, through its president, sought the alliance and support of the Grand Trunk Railway Company of Canada, which had recently completed an extension of its road to Chicago.

Three contracts were entered into of dates June 16, 1881, July 10, 1881, and September 30, 1881, by which the bonds of the company were to be disposed of, and money enough advanced for the construction of the road. The bill sets out fully the nature and scope of these contracts, and copies of them are attached as exhibits. It is unnecessary here to say more than that by them, taken in connection with the prior arrangements of the Portage Company, the

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latter obtained satisfactory assurances of abundant funds, and was placed in a position to fully perform its agreement with the state, and construct the railroad by at least May 5, 1882; all this, of course, upon the condition of no outside and wrongful interference.

Relying upon the sufficiency of its arrangements for money, it, on August 18, 1881, entered into a contract with Horatio G. Angle for the construction of about 65 miles of its railway, being that portion covered by the land grant heretofore referred to. By the terms of that contract Angle was to receive $8,500 per mile in cash and $5,000 per mile in the full-paid stock of the company, on condition that he completed the road on or before May 5, 1882. It also contracted for steel rails and fastenings to be delivered as the work of construction proceeded.

Angle commenced work, and had made such progress that on the 20th of January, 1882, he had 1,600 men employed along the line, and it was an assured fact that, unless interfered with, he would complete the railway, according to the terms of the contract, on or before May 5, 1882.

The bill further charges that about this time the Omaha Company conspired with other parties to wrest from the Portage Company its land grant, and to that end to prevent the completion of the contract by Angle and the construction of the road.

In the carrying out of this conspiracy the conspirators bribed Charles J. Barnes and A. A. Jackson, officers of the Portage Company, and who, either personally or as attorneys in fact for John C. Barnes, had the control of all the outstanding stock of the Portage Company, though holding it in trust for the benefit of the company, to betray their trust, and transfer the stock to one L. J. Gage, for the benefit of the Omaha Company.

Having thus secured the control of the stock, they caused notice thereof to be given to the officers of the Grand Trunk Railway Company. These gentlemen, finding that the control of the Portage Company was passing into the hands of hostile interests, surrendered the collateral which had been already transferred to them, and declined ****243** to proceed further in the contracts which had been entered into.

Continuing the execution of this conspiracy, the Omaha Company notified the general manager of the Portage Company of the purchase of the outstanding stock, and advised and induced him to telegraph officially to the engineer in chief in charge of the work of construction, who had engaged in that work seven engineering corps, to forthwith call in these engineers, suspend their work, and pay them off. They also caused the general manager to notify the contractor, Angle, that the control of the company had been changed, and the English capitalists forced out, and also to telegraph to the merchants at Duluth and Superior City (who were furnishing supplies to the 1,600 men at work) that the company had been sold out, advising them to protect themselves, because the company could not pay or protect them.

In consequence of these notices, the several engineering corps were broken up, the engineers left the work, all the tools, materials, and other personal property belonging to the contractor and the company were attached at the suit of these merchant creditors, and the 1,600 laborers dispersed, and went elsewhere for work.

In further execution of this conspiracy it endeavored to bribe the president and directors of the Portage Company and the Investment Company to turn over the organization of the Portage Company at once to them. Failing in this, it caused a bill to be filed in the circuit court for Cook county, Illinois, falsely charging the president and board of directors with incurring imprudent obligations, and otherwise thus impairing the value of the million and twenty- five thousand of stock, purchased as heretofore set forth, and praying for a temporary injunction, which, on February 11, 1882, was granted without hearing or notice, and restrained the president and other officers of the Portage Company from doing any act or thing whatsoever in the name or behalf of the company during the continuance of the injunction.

In still further execution of the conspiracy, the Omaha Company caused the fact of the abandonment of the work and the dispersion of the laborers engaged thereon to be promptly and widely published throughout Wisconsin, and especially among the members of the legislature, then in session at Madison; concealing at the same time the means by which this had been accomplished.

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Further, through its own agents, and especially through Jackson and Barnes, the corrupted officers of the Portage Company, it falsely represented to the legislature that no special progress had been made in the matter of constructing this road; that no considerable number of men had ever been at work; and that the Portage Company had finally abandoned it, and was wholly without means or credit to prosecute it.

On the strength of these representations the legislature, without inquiry or hearing, on February 16, 1882, (Laws Wis. 1882, p. 11,) hurriedly passed an act forfeiting and revoking the grant to the Portage Company, and bestowing it upon the Omaha Company, which forfeiture and regranting were confirmed by an act passed March 5, 1883.

The contract with Angle having been thus broken by the Portage Company, he commenced an action at law against that company. While this action was pending Angle died, but a revivor was had in the name of the present plaintiff, and on January 31, 1887, she recovered a judgment in the circuit court of the United States for the western district of Wisconsin for $205,803.19.

Upon that judgment execution was issued and returned nulla bona, and thereupon this bill was filed to reach the land grant in the hands of the Omaha Company.

West Headnotes

Action ⚿2
13k2 Most Cited Cases

Torts ⚿12
379k12 Most Cited Cases

A railroad company which, by bribing the officials of a rival company, obtains control of the latter's stock, causes the calling in of its engineering parties so as to stop construction work, spreads abroad notices which break down the credit of the contractor and result in the seizure of his tools, and by such means prevents the completion of the road in time to earn a land grant, and then by false representations to the legislature secures a forfeiture of the lands and a subsequent grant to itself, is liable to such contractor for the damage caused by these wrongful acts, and such damages may be enforced in equity against the lands in its hands, without questioning the validity of the legislature's action.

***10** J. R. Doolittle, Thomas Ewing, M. I. Southard, F. J. Lamb, and B. W. Jones, for appellant.

Thomas Wilson and John F. Dillon, for appellee.

Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

That which attracts notice on even a casual reading of the bill--the truth of all the allegations in which must be taken, upon this record, to be admitted by the demurrer--is the fact that, while Angle was actively engaged in executing a contract which he had with the Portage Company,--a contract whose execution had proceeded so far that its successful completion within the time necessary to secure to the Portage Company its land grant was assured, and when neither he nor the Portage Company was moving or had any disposition to break that contract or stop the work,--through the direct and active efforts of the Omaha Company the performance of that contract was prevented, the profits which Angle would have received from a completion of the contract were lost to him, and the land grant to the Portage Company was wrested from it.

Surely it would seem that the recital of these facts would carry with it an assurance that there was some remedy which the law would give to Angle and the Portage Company for the losses they had sustained, and that such remedy would reach to the party, the Omaha Company, by whose acts these losses were caused.

That there were both wrong and loss is beyond doubt. And, as said by Croke, J., in Baily v. Merrell, 3 Bulst. 94, 95, 'damage without fraud gives no cause of action; but where these two do concur and meet together, there an action lieth.' ***11** The Portage Company held a land grant worth four millions of dollars. It had contracted for the construction of its road, such construction to be completed in time to perfect its title to the ****244** land. The contract had been so far executed that its full completion within the time prescribed was assured. The contractor had 1,600 men employed. The rails had been purchased. The company had lifted itself out of the embarrassments which years

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before had surrounded it. It had taken up all its old stock but $25,000, which was ignorantly or wrongfully withheld by one of its officers. It had issued 1,000,000 of new stock, had authorized a new issue of bonds, and had arranged for the canceling of all its obligations with 700,000 of these bonds and 1,000,000 with 700,000 of these bonds and 1,000,000 with a wealthy company for the advancement of moneys sufficient for its work, and had gone so far as to place in the hands of that company 100,000 of its bonds, upon which $50,000 in cash was to be advanced. Except through some wrongful interference, it was reasonably certain that everything would be carried out as thus planned and arranged.

At this time the Omaha Company, which was a rival in some respects, and which had located a line parallel and contiguous to the line of the Portage Company, interferes, and interferes in a wrongful way. It bribes the trusted officers of the Portage Company to transfer the entire outstanding stock into its hands, or at least place it under its control. Being thus the only stockholder, it induces the general manager to withdraw the several engineering corps, whose presence was necessary for the successful carrying on of the work of constructing the road; to give such notice as to result in the seizure of all the tools and supplies of the contractor and the company, and the dispersion of all laborers employed. To prevent any action by the faithful officers of the Portage Company, it wrongfully obtains an injunction tying their hands. In the face of this changed condition of affairs, the company, which had negotiated with the Portage Company, and was ready to advance it money, surrendered the 100,000 of the bonds, and abandoned the arrangement. ***12** By false representations to the legislature as to the facts of the case, it persuaded that body to revoke the grant to the Portage Company, and bestow the lands upon itself.

That this was a wrongful interference on the part of the Omaha Company, and that it resulted directly in loss to the contractor and to the Portage Company, is apparent. It is not an answer to say that there was no certainty that the contractor would have completed his contract, and so earned these lands for the Portage Company. If such a defense were tolerated, it would always be an answer in case of any wrongful interference with the performance of a contract, for there is always that lack of certainty. It is enough that there should be, as there was here, a reasonable assurance, considering all the surroundings, that the contract would be performed in the manner and within the time stipulated, and so performed as to secure the land to the company.

It certainly does not lie in the mouth of a wrongdoer, in the face of such probabilities as attend this case, to say that perhaps the contract would not have been completed even if no interference had been had, and that, therefore, there being no certainty of the loss, there is no liability.

Neither can it be said that the Omaha Company had a right to contend for these lands; that it simply made an effort, which any one might make, to obtain the benefit of this land grant. No rights of this kind, whatever may be their extent, justify such wrongs as were perpetrated by the Omaha Company. Here, bribery was resorted to to induce the trusted officers of the Portage Company to betray their trust, and to place at least the apparent ownership of the stock in the hands of the rival company.

Without notice, without hearing, and by false allegations, it secured an injunction to stay the hands of the honest officers of the Portage Company. Such wrongful use of the powers and processes of the court cannot be recognized as among the legitimate means of contest and competition. It burdens the whole conduct of the Omaha Company with the curse of wrongdoing, and makes its interference with the affairs of the Portage Company a wrongful interference.

***13** Further, by false representations as to what the Portage Company has done and intends to do, it induced the legislature of the state to revoke the grant to the Portage Company, and bestow it upon itself. The result, and the natural result, of these wrongful actions on the part of the Omaha Company, was the breaking down of the Portage Company, the disabling it from securing the means of carrying on this work, the dispersion of the laborers, and the prevention of the contractor from completing his contract. It will not do to say that the contractor was not bound to quit the work, but might have gone on and completed his contract, and thus earned the lands for the Portage Company; nor that the wrongful act of the trusted officers of the Portage Company in betraying their trust could have

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been corrected by the Portage Company by appropriate suit in the courts; that the law in one shape or another would have offered redress to the Portage Company for all the wrongs that were attempted and done by the Omaha Company. Granting all of this, yet the fact remains that the natural, the intended, result of these wrongful acts was the breaking down of the Portage Company, the unwillingness of the foreign company to furnish it with money, and the prevention of the contractor from completing his contract.

It is not enough to say that order remedies might have existed and been resorted to by the Portage Company, and that notwithstanding the hands of its officers were tied ****245** by this wrongful injunction. It is enough that the Portage Company did break down; that it broke down in consequence of these wrongful acts of the Omaha Company, and that they were resorted to by the latter with the intention of breaking it down.

It has been repeatedly held that, if one maliciously interferes in a contract between two parties, and induces one of them to break that contract to the injury of the other, the party injured can maintain an action against the wrongdoer. Green v. Button, 2 Comp. M. & R. 707, in which the defendant, by falsely pretending to one party to a contract that he had a lien upon certain property, prevented such party from delivering it to the plaintiff, the other party to the contract, and was ***14** held responsible for the loss occasioned thereby. Lumley v. Gye, 2 El. & Bl. 216, in which a singer had entered into a contract to sing only at the theater of the plaintiff, and the defendant maliciously induced her to break that contract, and was held liable to the damages sustained by the plaintiff in consequence thereof. Bowen v. Hall, 6 Q. B. Div. 333, in which it was held that an action lies against a third person who maliciously induces another to break his contract of exclusive personal service with an employer, which thereby would naturally cause, and did in fact cause, an injury to such employer. In the opinion of Brett, L. J., it was said 'that wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie. This is the proposition to be deduced from the case of Ashby v. White, [1 Smith, Lead. Cas. (8th Ed.) *264.] If these conditions are satisfied, the action does not the less lie because the natural and probable consequence of the act complained of is an act done by a third person, or because such act so done by the third person is a breach of duty or contract by him, or an act illegal on his part, or an act otherwise imposing an actionable liability on him.' Walker v. Cronin, 107 Mass. 555, in which a manufacturer was held entitled to maintain an action against a third party who, with the unlawful purpose of preventing him from carrying on his business, willfully induced many of his employes to leave his employment, whereby the manufacturer lost their services, and the profits and advantages which he would have derived therefrom. Benton v. Pratt, 2 Wend. 385. Rice v. Manley, 66 N. Y. 82, in which a party had contracted to sell and deliver to plaintiffs a quantity of cheese, but, having been made to believe through the fraud of the defendant that the plaintiffs did not want the cheese, sold and delivered it to him, and it was held that an action could be maintained against the defendant for the damages which the plaintiffs sustained from failing to get the cheese. Jones v. Stanly, 76 N. C. 355, in which the court said: 'It was decided in Haskins v. Royster, 70 N. C. 601, that if a person ***15** maliciously entices laborers or croppers to break their contracts with their employer, and desert his service, the employer may recover damages against such person. The same reasons cover every case where one person maliciously persuades another to break any contract with a third person. It is not confined to contracts for service.'

Under these authorities, if the Omaha Company had, by its wrongful conduct, simply induced the Portage Company to break its contract with Angle, it would have been liable to him for the damages sustained thereby. A fortiori, when it not only induces a breach of the contract by the Portage Company, but also disables it from performance.

But there is still another aspect in which these transactions may be regarded. The Omaha Company became by its wrongful acts the sole stockholder in the Portage Company. It matters not that it might have been dispossessed of this position by appropriate action in the courts. It was, for the time at least, the sole stockholder. As such sole stockholder, it took advantage of its position and its powers to strip the Portage Company of its property, and secure its transfer to itself.

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Now, what rights, if any, a corporation may have against a sole stockholder who wrongfully causes the transfer of all the property of the corporation to be made to himself, need not be inquired into. It is clear that this stockholder cannot secure this transfer from the corporation to itself of the property of the latter so as to deprive a creditor of the corporation of the payment of his debt.

To put it in another way: The Portage Company, a corporation, owed Angle $200,000. It had property with which that debt could be paid. The Omaha Company became the sole stockholder in the Portage Company. As such sole stockholder, it used its powers to transfer the property of the Portage Company to itself, and its conduct all the way through was marked by wrongdoing.

Whatever the Portage Company might do, Angle may rightfully hold the sole stockholder responsible for that payment, which the corporation would have made but for the wrongful acts of such stockholder.

***16** But the stress of the defendant's contention is not that the bill fails to state a case of wrong, for which, generally speaking, the law would give a remedy, but that the action of the legislature of the state in revoking the land grant to the Portage Company and donating it to the Omaha Company is conclusive upon the courts, and prevents any recovery; and, secondly, that although actionable wrong on the part of the defendant may be disclosed by the bill, the ****246** only remedy which the plaintiff has therefor is an action at law for damages, and no grounds are shown for the interposition of a court of equity.

With respect to the first of these matters, it is insisted that the Portage Company was in default at the very time that these wrongs on the part of the Omaha Company were charged to have been committed and the act of forfeiture was passed. By section 8 (the granting section) of the act of March 4, 1874, it was provided: 'This grant is made upon the express condition that said company shall construct, complete, and put in operation that part of its said railway above mentioned, as soon as a railway shall be constructed and put in operation from the city of Hudson to said point of intersection, and within five years from its acceptance of said lands as herein provided, and shall also construct and put in operation the railway of said company from Genoa northerly, at the rate of twenty miles per year.' The act of March 16, 1878, reads that 'the time limited for the construction of the railway * * * is hereby extended three years.' It is said that this act in effect merely struck out the word 'five' in the clause quoted, and substituted therefor the word 'eight,' leaving the other conditions of the grant unchanged. It is not claimed in the bill that the Portage Company had ever constructed any part of its road from Genoa northward, or that a railway had not been constructed and put in operation from the city of Hudson to the point of intersection, and therefore it is urged that it is not shown that the Portage Company was not in default, or that the legislature had not the absolute right to forfeit, as it did, by the act of February 16, 1882. It is contended, on the other hand, by the plaintiff, that the extension ***17** was an absolute extension of three years from May 5, 1879, irrespective of the other two conditions in the original grant, and gave to the Portage Company an interest in the land grant which the legislature had no power to take away before May 5, 1882. It is further insisted by the defendant that, even if this claim of the plaintiff be sustained, the act of March 5, 1883, confirming the revocation and resumption of the land grant to the Portage Company, and the regranting of the same to the Omaha Company, was after the expiration of the full limit of extended time as thus claimed by the plaintiff, and that then the Portage Company had unquestionably failed to earn the grant, and had lost all right to the land. Hence, it is said that there was, in whatever aspect the matter may be looked at, a valid resumption by the state of the grant which it had made conditionally to the Portage Company, and a regrant of the lands to the Omaha Company; that the act of the legislature cannot be questioned; that full knowledge of all the situation must be presumed, and that no inquiry is permissible as to the motives which actuated the legislature, it being presumed that everything which it did it did rightly.

In this respect, the case of Fletcher v. Peck, 6 Cranch, 87, is relied upon. In that case a purchase of a large body of lands was made by James Gunn and others in the year 1795 from the state of Georgia, the contract for which was made in the form of a bill passed by the legislature. The title to some of these lands thus acquired passed by conveyances to Peck, who conveyed them to Fletcher. An action was brought on certain covenants in that deed. The third covenant was that

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all the title which the state of Georgia ever had in the premises had been legally conveyed to Peck, the guarantor. The second count assigned 'as a breach of this covenant, that the original grantees from the state of Georgia promised and assured divers members of the legislature, then sitting in general assembly, that if the said members would assent to and vote for the passing of the act, and if the said bill should pass, such members should have a share of, and be interested in, all the lands purchased from the said ***18** state by virtue of such law; and that divers of the said members, to whom the said promises were made, were unduly influenced thereby, and, under such influence, did vote for the passing of the said bill; by reason whereof the said law was a nullity,' etc., 'and so the title of the state of Georgia did not pass to the said Peck.' In respect to this matter, the court, by Chief Justice Marshall, observed, among other things, as follows:

'This is not a bill brought by the state of Georgia to annul the contract, nor does it appear to the court by this count that the state of Georgia is dissatisfied with the sale that has been made. The case, as made out in the pleadings, is simply this: One individual, who holds lands in the state of Georgia, under a deed covenanting that the title of Georgia was in the grantor, brings an action of covenant upon this deed, and assigns, as a breach, that some of the members of the legislature were induced to vote in favor of the law, which constituted the contract, by being promised an interest in it, and that, therefore, the act is a mere nullity.

'This solemn question cannot be brought thus collaterally and incidentally before the court. It would be indecent in the extreme, upon a private contract between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of a state. If the title be plainly deduced from a legislative act, which the legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another founded on the allegation that the act is a nullity in consequence of the impure ****247** motives which influenced certain members of the legislature which passed the law.'

The rule upon which this decision rests has been followed in many cases, and has become a settled rule of our jurisprudence. The rule, briefly stated, is that whenever an act of the legislature is challenged in court the inquiry is limited to the question of power, and does notextend to the matter of expediency, the motives of the legislators, or the reasons which were spread before them to induce the passage of the act. ***19** This principle rests upon the independence of the legislature as one of the co-ordinate departments of the government. It would not be seemly for either of the three departments to be instituting an inquiry as to whether another acted wisely, intelligently, or corruptly. Upon that rule it is insisted that these two acts of the state of Wisconsin cannot be impeached; that whatever wrongs may in fact have been done by the Omaha to the Portage Company, the legislature of Wisconsin, in the exercise of its undoubted power, has taken away the lands from the Portage and given them to the Omaha Company, and, as its power is undoubted, no court can interfere or inquire as to why, or under the influence of what motives or information, those acts were passed; nor can any court decree, either directly or indirectly, that those lands, which were taken away from one company and given to the other, either legally or equitably, still remain the property of the first company, and subject to the payment of its debts.

But it must be remembered that the wrongs of the Omaha Company were done before the legislature passed either the act of 1882 or that of 1883, and it is to redress those wrongs that this suit was brought. Can it be that the legislature, by passing those acts, condoned the wrongs, and relieved the Omaha from any liability to the Portage Company? Did the resumption of the land grant and the regrant to the Omaha Company make lawful its acts in bribing the officers of the Portage Company? Did it relieve the Omaha Company from any liability for the wrongful use of the process of the courts in the injunction? Could it act judicially, and in effect decree that the wrongs done by the one company to the other created no cause of action? A right of action to recover damages for an injury is property, and has a legislature the power to destroy such property? An executive may pardon and thus relieve a wrongdoer from the punishment the public exacts for the wrong, but neither executive nor legislature can pardon a private wrong, or relieve the wrongdoer from civil liability to the individual he has wronged. The wrong was not one done by the state or in the act of the legislature in taking away the land grant, but in such proceedings ***20** on the part of the

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Omaha Company as put the Portage Company in a position which apparently called for the action of the legislature. There is no more challenge of the validity of this legislation by suing the Omaha Company for the wrongs it did leading up to this legislation than there is in challenging the validity of a criminal proceeding by an action against the prosecutor for malicious prosecution. It may be, as counsel claim, that the legislature is presumed to act with full knowledge of the situation; that it knew of the wrongs done by the Omaha to the Portage Company; knew that those wrongs had disabled the Portage Company from proceeding with the work; knew that thereby a cause of action had arisen to the contractor, Angle, against the Portage Company, and also against the Omaha Company; and with all that knowledge in possession deliberately passed the statutes referred to, and yet it does not follow that its legislation was intended or was potent to relieve the Omaha Company from liability. There is in this suggestion no impugning the motives, the wisdom, or the power, of the legislature. It acts as the guardian of the public interests, to which all private interests must yield, and it may well have thought that, notwithstanding the wrong that had been done by the Omaha Company, the fact was obvious that the Portage Company had become disabled, and could not go on with the work; and that in subserviency to such public interest it was necessary that the grant be taken away from the former and given to the latter company, in order thus to expedite the construction. As the courts will not interfere with the action of the legislature, so it may rightfully be presumed that the legislature never intends to interfere with the action of the courts, or to assume judicial functions to itself. It may be presumed to have left to the courts the redress of the private wrongs done by the Omaha Company. In other words, it may have acted upon considerations like these: Public interest requires the speedy building of this road. The Portage Company cannot build it. The Omaha Company can, if aided by this grant. Therefore the public interests demand a taking away of the grant from the one company and giving it to the ***21** other. If the disabled condition of the Portage Company has been brought about by the wrongs of the Omaha Company, the courts are open, and the accepted maxim in those tribunals is that, where there is a wrong, there is a remedy. It thus subserves the interests of the public, and leaves the redress of the wrong to that department which has not only the requisite jurisdiction, but also the appropriate machinery, for ascertaining the amount of the injury, and enforcing the due compensation.

Look at this from the opposite standpoint. When this matter was brought to the attention of the legislature, and its action invoked, was it confronted with only these alternatives? ****248** Must it, even if it could, as a condition of subserving the public interests, condone the private wrong done by the one company to the other; or must it let the public interests be neglected until such time as the question of private wrong has been determined; or must it, without the possession of the suitable machinery for investigation, arbitrarily determine--as a condition of this transfer in subservience to public interests--the measure of injury done by the one company to the other, and the amount and character of the compensation to be rendered? Large and unnecessary stress would be laid upon the legislature if the question of public interest was always to be thus hampered by suggestions of injury and compensation between private individuals. While, if there be no such stress, abundant freedom of action is open to the legislature, the distinction between the separate functions of the co-ordinate departments of the government is preserved, and at the same time public interest and private justice may be secured. The legislature may proceed with sole regard in all its actions to the public interests, with the assurance that all questions of wrong and loss between individuals will be settled in the judicial department, and that its own action in subserviency to the public interest will bar no redress of a private wrong unless such bar be absolutely necessary to the accomplishment of the public interest.

But it is said that to permit this suit to be maintained, and to subject these lands in the possession of the Omaha Company ***22** to the satisfaction of the judgment against the Portage Company, is, pro tanto, to nullify the action of the legislature; that in taking the lands away from the one company and giving them to the other it intended that the transfer should be absolute, without limitation, and subject to no contingencies or burdens. But it affirmatively expressed no such intention; it simply made the transfer, leaving the property subject to all the burdens and contingencies which might arise in the ordinary course of law. Suppose at the time of this transfer from the one company to the state, and from the state to the other company, there was an existing judgment in favor of

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the Portage against the Omaha Company, would it be for a moment contended that there was anything in the transfer which prevented the Portage Company from satisfying its judgment by a seizure and sale of the lands thus transferred to the Omaha Company? Unless there were in the words of the grant to the Omaha Company something which expressly tied up that land, it passed to the company, subject to seizure and sale in satisfaction of any of its past or future obligations.

Even if it be conceded that, under a true construction of the grant, taken in connection with the act extending the time for three years, the Portage Company was in default on February 16, 1882, and the legislature had then the absolute right to forfeit the grant, such concession would be no answer to the cause of action set out in the bill. For who can say that the legislature would have exercised that right of forfeiture? The mere fact that the Portage Company could not enforce at the time a legal right to the lands as against the state does not absolve the Omaha Company from liability for those wrongs which resulted in putting the Portage Company in a condition naturally calling for legislative action in furtherance of the public interest. If nothing of the kind had been done by the Omaha Company, and the Portage Company was, as it is stated, proceeding diligently in the work, with reasonable assurance that it would be completed within three or four months, it is fair to presume that the legislature would not have disturbed the grant, but would have permitted the Portage Company to fully earn that which it had already partially ***23** earned. The selection of the Portage Company in tHe first instance was, of course, made by the legislature in good faith, and the time was extended with the intent that the Portage Company should do the work and have the grant; and, if the legislature saw that the company was doing the work, and would have it promptly completed, respect for the good faith of the legislature compels the conclusion that, but for the untoward circumstances precipitated upon the Portage Company by the wrongful acts of the Omaha Company, the act of February 16, 1882, would never have been passed. Assuredly it does not lie in the power of the wrongdoer--the party whose wrongs created that condition which induced the legislative forfeiture--to excuse its wrongs on the grounds that the legislature had the power to forfeit, and might have done it anyway. The cases of Benton v. Pratt, 2 Wend. 385, and Rice v. Manley, 66 N. Y. 82, are suggestive upon this question. In the former of these cases it appeared that certain parties had contracted with the plaintiff to purchase of him 20 hogs, to be delivered at a future day, nothing having been done to make the contract binding under the statute of frauds. While the plaintiff was driving his hogs, and preparing to fulfill his contract, the defendants, knowing the facts, fraudulently represented that he did not intend to deliver them, and thus induced those third parties to buy their hogs; and when the plaintiff arrived with his they refused to take them, simply because they had already a full supply. The point was made that the plaintiff could not recover, because there was no binding contract between him and the third parties; but the point was overruled, the court saying: 'It was not material whether the contract of the plaintiff with Seagraves & Wilson was ****249** binding upon them or not, the evidence established beyond all question that they would have fulfilled it but for the false and fraudulent representations of the defendants.' And in the latter case the plaintiffs had made an agreement with one Stebbins to purchase from him a quantity of cheese, to be delivered at a future day; and that contract, too, was not binding by reason of the statute of frauds. The defendant, knowing of this, fraudulently, by means of a fictitious telegram, ***24** persuaded Stebbins that the plaintiffs did not want the cheese, and would not take it, and thus himself secured a purchase of it. Here, too, it was objected, in defense to an action against him for the damages caused by a failure on the part of the plaintiffs to obtain the cheese from Stebbins, that there was no contract which could be enforced against Stebbins for the sale and delivery of the cheese; but the court overruled the objection, saying: 'Plaintiffs' actual damage is certainly as great as it would have been if Stebbins had been obliged to perform his contract of sale, and greater, for the reason that they cannot indemnify themselves for their loss by a suit against Stebbins to recover damages for a breach of the contract. Suppose a testator designed to give A. a legacy, and was prevented from doing it solely by the fraud of B.; in such case, while A. has no right to the legacy which he can enforce against the estate of the testator, yet both law and equity will furnish him appropriate relief against B., depending upon the facts of the case. Kerr, Fraud & M. 274, and cases cited; Bac. Abr. 'Fraud, B.' Suppose A. made a parol contract with B. for the purchase of land, and B. is ready and

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willing to convey, but is prevented from so doing by the fraudulent representations of C. as to A., by which B. is deceived, and induced to convey to C.; in such case, although A. could not have compelled B. to give him the conveyance, it would be a reproach to the law to hold that C. would not be liable to A. for the damage caused by the fraud.' The same line of thought applies to the case before us. While it cannot be affirmed with certainty that the legislature would not have passed the act of forfeiture, yet it is reasonable to presume that it would not, and that its act was induced by the situation of the Portage Company, which situation was brought about by the wrongful acts of the Omaha Company.

Our conclusions in respect to this matter may be summed up thus: The Portage Company would have completed the work but for the wrongful acts of the Omaha Company. In consequence of the disability thus caused, and also moved by the false representations of the Omaha Company, the legislature resumed its grant, and made a regrant to the Omaha ***25** Company. The validity of that act is conceded. It is to be presumed the legislature acted with proper regard to the public interests, and without any improper motives or inducements. Conceding all this, it is equally to be presumed that it left the redress of private wrongs to the judicial department. It attached no conditions to the grant to the Omaha Company which would prevent the appropriation of those lands to the satisfaction of any claims against that company. And hence to hold the Omaha Company as trustee for the creditors of the Portage Company in respect to these lands neither impeaches the validity of the action of the legislature nor casts any imputation upon its knowledge or motives. It may also be noticed that the purpose of this grant from congress in the first place, and from the state to the companies in the second place, was to aid in the construction of the railroad. That purpose having already been accomplished, there is no thwarting public policy, or the purposes of the grant, if the lands granted shall now be appropriated, through the processes of the courts, to the satisfaction of any claims against the Omaha Company.

Passing now to the other of the two objections, it may be conceded that an action at law would lie for the damages sustained by the Portage Company through the wrongful acts of the Omaha Company. Indeed, that is a fact which underlies this whole case. Yet, while an action at law would lie, it does not follow that such remedy was either full or adequate. Waiving the question as to the solvency of the Omaha Company, and assuming that any judgment against it for damages could be fully satisfied by legal process, there remains the proposition that it is contrary to equity that the defendant should be permitted to enjoy unmolested that particular property, the possession of which it sought to secure, and did in fact secure, by its wrongful acts. Ought the Portage Company to be compelled to experiment with the solvency of the Omaha Company before coming into a court of equity? While no express trust attached to the title to these lands, either in the Portage or in the Omaha Company, while it may be conceded that when the legislature resumed ***26** the grant it took the title discharged of any express trust or liability in favor of the creditors of the Portage Company, and might have transferred an absolute title to any third party beyond the reach or pursuit of the Portage Company, or its creditors, yet it is still true that the lands were given to the Portage Company, as they had been given by congress to the state in the first instance, for the purpose of aiding in the construction of this road; that a part of the work necessary for such construction had been done; and there is, therefore, an equity in securing, to the extent to which the work had been done, the application of these lands in payment thereof. And when the Omaha Company, by its wrongdoings, secured the full legal title to those lands, equity will hold that the party ****250** who has been deprived of payment for his work from the Portage Company by reason of their having been taken away from it shall be able to pursue those lands into the hands of the wrongdoer, and hold them for the payment of that claim which, but for the wrongdoings of the Omaha Company, would have been paid by the Portage Company, partially at least, out of their proceeds. While no express trust is affirmed as to the lands, yet it is familiar doctrine that a party who acquires title to property wrongfully may be adjudged a trustee ex maleficio in respect to that property.

In Pomeroy's Equity Jurisprudence (section 155) the author says, citing many cases: 'If one party obtains the legal title to property, not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which

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really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner.' And again, in section 1053: 'In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means or ***27** under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property, either in the hands of the original wrongdoer or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right, and takes the property relieved from the trust. The forms and varieties of these trusts, which are termed 'ex maleficio' or 'ex delicto,' are practically without limit. The principle is applied wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoer.'

These authorities are ample to sustain this suit. The property was in the Portage Company for the purpose of aiding in the construction of this road. Work was done by the plaintiff in that direction. Equity recognizes a right that that property should be applied in the payment for that work. The wrongdoing of the defendant, the Omaha Company, has wrested the title to this property from the Portage Company, and transferred it to itself. It has become, therefore, a trustee ex maleficio in respect to the property. It follows from these considerations that the court erred in sustaining the demurrer to this bill, and the decree of dismissal must be reversed, and the case remanded, with instructions to overrule the demurrer, and for further proceedings in conformity to law.

Mr. Justice HARLAN dissents from the opinion and judgment for the reasons stated by him at the circuit in Angle v. Railway Co., 39 Fed. 912, and Farmers' Loan & Trust Co. v. Chicago, P. & S. Ry. Co., Id. 143.

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Tab

15

Supreme Court of the United States

UNITED STATES
v.
KLEIN.

December Term, 1871

THIS was a motion by *Mr. Ackerman, Attorney-General*, in behalf of the United States, to remand an appeal from the Court of Claims which the government had taken in June, 1869, with a mandate that the same be dismissed for want of jurisdiction as now required by law.

The case was thus:

Congress, during the progress of the late rebellion, passed various laws to regulate the subject of forfeiture, confiscation, or appropriation to public use without compensation, of private property whether real or personal of non- combatant enemies.

The first was the act of July 13th, 1861. [FN1] It made liable to seizure and forfeiture all property passing to and fro between the loyal and insurrectionary States, and the vessels and vehicles by which it should be attempted to be conveyed.

1. The act of March 12th, 1863 (12 Stat. at Large, 820), to provide for the collection of abandoned and captured property in insurrectionary districts within the United States, does not confiscate, or in any case absolutely divest the property of the original owner, even though disloyal. By the seizure the government constituted itself a trustee for those who were entitled or whom it should thereafter recognize as entitled.

2. By virtue of the act of 17th July, 1862, authorizing the President to offer pardon on such conditions as he might think advisable, and the proclamation of 8th December, 1863, which promised a restoration of all rights ***129** of property, except as to slaves, on condition that the prescribed oath be taken and kept inviolate, the persons who had faithfully accepted the conditions offered became entitled to the proceeds of their property thus paid into the treasury, on application within two years from the close of the war.

3. The repeal, by an act of 21st January, 1867 (after the war had closed), of the act of 17th July, 1862, authorizing the executive to offer pardon, did not alter the operation of the pardon, or the obligation of Congress to give full effect to it if necessary by legislation.

4. The proviso in the appropriation act of July 12th, 1870 (16 Stat. at Large, 235), in substance----

'That no pardon or amnesty granted by the President shall be admissible in evidence on the part of any claimant in the Court of Claims as evidence in support of any claim against the United States, or to establish the standing of any claimant in said court, or his right to bring or maintain suit therein; and that no such pardon or amnesty heretofore put in evidence on behalf of any claimant in that court be considered by it, or by the appellate court on appeal from said court, in deciding upon the claim of such claimant, or any appeal therefrom, as any part of the proof to sustain the claim of the claimant, or to entitle him to maintain his action in the Court of Claims, or on appeal therefrom, . . . but that proof of loyalty (such as the proviso goes on to mention), shall be made irrespective of the effect of any executive proclamation, pardon, amnesty, or other act of condonation or oblivion. And that in all cases where judgment shall have been heretofore rendered in the Court of Claims in favor of any claimant on any other proof of loyalty than such as the proviso requires, this court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction:

'And further, that whenever any pardon shall have heretofore been granted by the President to any person bringing suit in the Court of Claims for the proceeds of abandoned or captured property under the act of March 12th, 1863; and such pardon shall recite, in substance, that such person took part in the late rebellion, or was guilty of any act of rebellion against, or disloyalty to, the United States, and such pardon shall have been accepted, in writing, by the person to whom the same issued, without an express disclaimer of and protestation against such fact of guilt contained in such acceptance, such pardon and acceptance shall be taken and deemed in such suit in the said Court of Claims, and on appeal therefrom,

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conclusive evidence that such person did take part in and give aid and comfort to the late rebellion, and did not maintain true allegiance or consistently adhere to the United States, and on proof of such pardon and acceptance the jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant'----

is in conflict with the views expressed in paragraphs 1, 2, and 3, above; and is unconstitutional and void. Its substance being that an acceptance of a pardon without a disclaimer shall be conclusive evidence of the acts pardoned, but shall be null and void as evidence of rights conferred by it, both in the Court of Claims and in this court; it invades the powers both of the judicial and of the executive departments of the government.***130**

West Headnotes

Pardon and Parole ⚿23.1
284k23.1 Most Cited Cases
(Formerly 284k23, 284k4)

Under the clause of the constitution giving the president "power to grant reprieves and pardons," he may grant a conditional pardon.

Pardon and Parole ⚿24
284k24 Most Cited Cases
(Formerly 284k9)

"Pardon" includes amnesty, and blots out the offense pardoned and removes all its penal consequences, and can be granted on conditions.

Pardon and Parole ⚿26
284k26 Most Cited Cases
(Formerly 284k11)

Act Jan. 21, 1867, 14 Stat. 377, repealing Act July 17, 1862, 12 Stat. 589, which authorized the executive to offer pardon to those engaged in rebellion, did not alter the operation of the general pardon given thereunder, or the obligation of congress to give full effect to such pardon by necessary legislation.

Pardon and Parole ⚿26
284k26 Most Cited Cases
(Formerly 284k11)

Under Act July 17, 1862, 12 Stat. 589, authorizing the president to offer pardon on such conditions as he might think advisable, and the proclamation of December 8, 1863, 13 Stat. 737, promising a restoration of all rights of property, except as to slaves, on condition that the prescribed oath be taken and kept, the persons who complied with the conditions became entitled to the proceeds of their confiscated property, on application within two years from the close of the war.

United States ⚿66
393k66 Most Cited Cases

It is as much the duty of the government as of individuals to fulfil its obligations.

War and National Emergency ⚿12
402k12 Most Cited Cases

Under acts of Congress relating to property of citizens engaged in hostilities against the United States during the Civil War, no titles, except as to property used in actual hostilities, were divested in the insurgent states unless in pursuance of a judgment rendered after due legal proceedings.

War and National Emergency ⚿12
402k12 Most Cited Cases

The abandoned and captured property act of March 12, 1863, 12 Stat. 820, relating to property of citizens engaged in hostilities against the United States during the Civil War, was not intended to divest title to such property absolutely out of the original owners, but it was the purpose of Congress that the proceeds of the property for which the special provision of the act was made should go into the Treasury without change of ownership.

War and National Emergency ⚿12
402k12 Most Cited Cases

During the Civil War, property in certain states belonging to hostile organizations or employed in actual hostilities on land became, wherever taken, ipso facto, the property of the United States.

War and National Emergency ⚿25
402k25 Most Cited Cases

During the Civil War, property in ships and vessels

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was not changed by capture alone but by regular judicial proceeding and sentence.

Constitutional Law ⚿54
92k54 Most Cited Cases

16 Stat. 235, prescribing the mode of proving the loyalty of the claimant, under 12 Stat. 820, 28 U.S.C.A. § 268, providing for the collection of abandoned and captured property in insurrectionary districts, and for the taking possession by the government, for the true owner, of the proceeds of such property, and declaring, in effect, that the unqualified acceptance of a pardon by such claimant, without a disclaimer of guilt, is conclusive evidence of his having committed the acts pardoned, but that it shall be null and void as evidence of the rights conferred by it, both in the court of claims, and in the supreme court on appeal, is unconstitutional, as invading the powers of the judicial branch of the government.

Constitutional Law ⚿72
92k72 Most Cited Cases

The President's power of pardon is not subject to legislation, and Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders.

Constitutional Law ⚿72
92k72 Most Cited Cases

The legislature cannot change the effect of a conditional pardon any more than the executive can change a law.

Courts ⚿448
106k448 k.

The Court of Claims is an inferior court which Congress authorizes, and has jurisdiction of contracts between the government and the citizen, from which appeal regularly lies to the Supreme Court.

Courts ⚿460
106k460 k.

The Congress has complete control over the organization and existence of the Court of Claims, and can confer or withhold the right of appeal from its decisions.

Courts ⚿460
106k460 k.

An act of Congress denying the right of appeal from Court of Claims in a particular class of cases is proper as an exercise of the power of Congress to make "such exceptions from the appellate jurisdiction" as should seem expedient to Congress.

Constitutional Law ⚿58
92k58 Most Cited Cases

The provision of 16 Stat. 235, prescribing the mode of proving the loyalty of the claimant, under 12 Stat. 820, 28 U.S.C.A. § 268, providing for the collection of abandoned and captured property in insurrectionary districts, and for the taking possession by the government, for the true owner, of the proceeds of such property, and declaring, in effect, that the unqualified acceptance of a pardon by such claimant, without a disclaimer of guilt, is conclusive evidence of his having committed the acts pardoned, but that it shall be null and void as evidence of the rights conferred by it, is unconstitutional, as invading the powers of the executive branch of the government.

Pardon and Parole ⚿4
284k4 k.

The president may grant a conditional pardon, provided the condition be compatible with the genius of our constitution and laws; and such condition, when accepted by the convict, will be binding upon him.

FN1 12 Stat. at Large, 257.

So an act of August 6th, 1861, [FN2] subjected to seizure and forfeiture all property of every kind, used or intended to be used in aiding, abetting, or promoting the insurrection, or allowing or permitting it to be so used.

FN2 Ib. 319.

These statutes require judicial condemnation to make the forfeiture complete.

A more general law, and one upon which most of

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the seizures made during the rebellion was founded, is the act of July 17th, 1862. [FN3] It provides for the punishment of treason, and specifies its disqualifications and disabilities. In its sixth section, it provides that every person who shall be engaged in or be aiding the rebellion, and shall not cease and return to his allegiance within sixty days after proclamation made by the President of the United States, shall forfeit all his property, &c. The proclamation required by this act was issued by the President on the 25th day of July, 1862. [FN4] The sixty days expired September 23d, 1862.

FN3 Ib. 589.

FN4 Id. 1266.

On the 12th of March, 1863, Congress passed another species of act--the one entitled 'An act to provide for the ***131** collection of abandoned property, & c., in insurrectionary districts within the United States.' The statute authorized the Secretary of the Treasury to appoint special agents to receive and collect all abandoned or captured property in any State or Territory in insurrection: '*Provided*, That such property shall not include any kind or description which has been used, or which was intended to be used, for waging or carrying on war against the United States, such as arms, ordnance, ships, steamboats, or other watercraft, and their furniture, forage, military supplies, or munitions of war.'

The statute went on:

'And any person claiming to have been the owner of any such abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims; *and on proof to the satisfaction of said court* of his ownership of said property, of his right to the proceeds thereof, and *that he has never given any aid or comfort to the present rebellion*, to receive the residue of such proceeds after the deduction of any purchase-money which may have been paid, together with the expense of transportation and sale of said property, and any other lawful expenses attending the disposition thereof.'

Some other acts, amendatory of this one or relating to the Court of Claims, required proof of the petitioner's loyalty during the rebellion as a condition precedent to recovery.

By the already-mentioned confiscation act of July 17th, 1862, the President was authorized by proclamation to extend to persons who had participated in rebellion, pardon, and amnesty, with such exceptions, and at such times, and on such conditions as he should deem expedient for the public welfare.

And on the 8th of December, 1863, he did issue his proclamation, reciting the act, and that certain persons who had been engaged in the rebellion desired to resume their allegiance and reinaugurate loyal State governments within and for their respective States. And thereupon proclaimed ***132** that a full pardon should be thereby granted to them, with restoration of all rights of property, except as to slaves, and in property cases where rights of third parties shall have intervened; and upon condition that every such person shall take and subscribe a prescribed oath of allegiance, and thenceforward keep and maintain said oath inviolate, &c.

Under this proclamation, V. F. Wilson, who during the rebellion had voluntarily become the surety on the official bonds of certain officers of the rebel confederacy, and so given aid and comfort, to it, took, February 15th, 1864, this oath of allegiance, and had kept the same inviolate.

He himself having died in 1865, one Klein, his administrator, filed a petition in the Court of Claims, setting forth Wilson's ownership of certain cotton which he had abandoned to the treasury agents of the United States, and which they had sold; putting the proceeds into the Treasury of the United States, where they now were, and from which the petitioner sought to obtain them. This petition was filed December 26th, 1865.

The section of the act of 1862, by which the President was authorized to extend pardon and amnesty on such conditions as he should deem expedient for the public welfare, was repealed on the 21st of January, 1867. [FN5]

FN5 14 Stat. at Large, 377.

The Court of Claims, on the 26th May, 1869, decided that Wilson had been entitled to receive the

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proceeds of his cotton, and decreed $125,300 to Klein, the administrator of his estate. An appeal was taken by the United States June 3d, following, and filed in this court on the 11th December, of the same year.

Previously to this case of Klein's the Court of Claims had had before it the case of one Padelford, quite like this one; for there also the claimant, who had abandoned his cotton and now claimed its proceeds, having participated in the rebellion, had taken the amnesty oath. The Court of Claims held that the oath cured his participation in the rebellion, ***133** and so it gave him a decree for the proceeds of his cotton in the treasury. The United States brought that case here by appeal, [FN6] and the decree of the Court of Claims was affirmed; this court declaring that although Padelford had participated in the rebellion, yet, that having been pardoned, he was as innocent in law as though he had never participated, and that his property was purged of whatever offence he had committed and relieved from any penalty that he might have incurred. The judgment of this court, to the effect above mentioned, was publicly announced on the 30th of April, 1870.

FN6 United States *v.* Padelford, 9 Wallace, 531.

Soon after this--the bill making appropriations for the legislative, executive, and judicial expenses of the government for the year 1870-71, then pending in Congress--the following was introduced as a proviso to an appropriation of $100,000, in the first section, for the payment of judgments in the Court of Claims, and with this proviso in it the bill became a law July 12th, 1870: [FN7]

FN7 16 Stat. at Large, 235.

'*Provided*, That no pardon or amnesty granted by the President, whether general or special, by proclamation or otherwise, nor any acceptance of such pardon or amnesty, nor oath taken, or other act performed in pursuance or as a condition thereof, shall be admissible in evidence on the part of any claimant in the Court of Claims as evidence in support of any claim against the United States, or to establish the standing of any claimant in said court, or his right to bring or maintain suit therein; nor shall any such pardon, amnesty, acceptance, oath, or other act as aforesaid, heretofore offered or put in evidence on behalf of any claimant in said court, be used or considered by said court, or by the appellate court on appeal from said court, in deciding upon the claim of said claimant, or any appeal therefrom, as any part of the proof to sustain the claim of the claimant, or to entitle him to maintain his action in said Court of Claims, or on appeal therefrom; but the proof of loyalty required by the Abandoned and Captured Property Act, and by the sections of several acts quoted, shall be made by proof of the matters required, ***134** irrespective of the effect of any executive proclamation, pardon, amnesty, or other act of condonation or oblivion. And in all cases where judgment shall have been heretofore rendered in the Court of Claims in favor of any claimant, on any other proof of loyalty than such as is above required and provided, and which is hereby declared to have been and to be the true intent and meaning of said respective acts, the Supreme Court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction.

'*And provided further*, That whenever any pardon shall have heretofore been granted by the President of the United States to any person bringing suit in the Court of Claims for the proceeds of abandoned or captured property under the said act, approved 12th March, 1863, and the acts amendatory of the same, and such pardon shall recite in substance that such person took part in the late rebellion against the government of the United States, or was guilty of any act of rebellion against, or disloyalty to, the United States; and such pardon shall have been accepted in writing by the person to whom the same issued without an express disclaimer of, and protestation against, such fact of guilt contained in such acceptance, such pardon and acceptance shall be taken and deemed in such suit in the said Court of Claims, and on appeal therefrom, conclusive evidence that such person did take part in, and give aid and comfort to, the late rebellion, and did not maintain true allegiance or consistently adhere to the United States; and on proof of such pardon and acceptance, which proof may be heard summarily on motion or otherwise, the jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant.'

The motion already mentioned, of the Attorney-General, that the case be remanded to the Court of Claims with a mandate that the same be dismissed

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for want of jurisdiction, as *now* required by law, was, of course, founded on this enactment in the appropriation bill of July 12th, 1870.

Mr. Akerman, Attorney-General, Mr. Bristow, Solicitor-General, and Mr. C. H. Hill, Assistant Attorney-General, in support of the motion:

The United States as sovereign are not liable to suit at ***135** all, and if they submit themselves to suit it is *ex gratia*, and on such terms as they may see fit.

Accordingly the right of the Court of Claims to entertain jurisdiction of cases in which the United States are defendants, and to render judgments against them, exists only by virtue of acts of Congress granting such jurisdiction, and it is limited precisely to such cases, both in regard to *parties* and to the *cause of action*, as Congress has prescribed, which body may also define *the terms on which judgments shall be rendered against the government*, either as to classes of cases or as to individual cases.

Rules of evidence are at all times subject to legislative modification and control, and the alterations which are enacted therein by the legislature may be made applicable as well to existing as to future causes of action. In prescribing the evidence which shall be received in its courts, and the effect of that evidence, the state is exercising its acknowledged powers.

From the foregoing propositions it follows:

1. That Congress may prescribe what shall or shall not be received in evidence in support of a claim on which suit is brought against the government, or in support of the right of the claimant to maintain his suit, and, on the other hand, may declare what shall be the effect of certain evidence when offered in behalf of the government.

2. That it may withdraw entirely from the consideration of the court evidence of a particular kind in behalf of the claimant, even after the same has been submitted to and received by the court.

3. That it may, upon the presentation of proof of a certain description in behalf of the government, determine the jurisdiction of the court over the particular subject.

4. That it may, even in cases where judgment has been rendered in favor of the claimant on certain proof, and notwithstanding the proof was competent at the time of the rendering of the judgment, interpose when such cases are afterwards brought before the appellate court and require the same to be dismissed by the latter.***136**

These different things are what are done, and no more is done by different parts of the proviso in question.

Messrs. Bartley and Casey, P. Phillips, Carlisle, McPherson, and T. D. Lincoln, arguing in this or similar cases against the motion.

The CHIEF JUSTICE delivered the opinion of the court.

The general question in this case is whether or not the proviso relating to suits for the proceeds of abandoned and captured property in the Court of Claims, contained in the appropriation act of July 12th, 1870, debars the defendant in error from recovering, as administrator of V. F. Wilson, deceased, the proceeds of certain cotton belonging to the decedent, which came into the possession of the agents of the Treasury Department as captured or abandoned property, and the proceeds of which were paid by them according to law into the Treasury of the United States.

The answer to this question requires a consideration of the rights of property, as affected by the late civil war, in the hands of citizens engaged in hostilities against the United States.

It may be said in general terms that property in the insurgent States may be distributed into four classes:

1st. That which belonged to the hostile organizations or was employed in actual hostilities on land.

2d. That which at sea became lawful subject of capture and prize.

3d. That which became the subject of confiscation.

4th. A peculiar description, known only in the recent war, called captured and abandoned property.

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The first of these descriptions of property, like property of other like kind in ordinary international wars, became, wherever taken, *ipso facto*, the property of the United States. [FN8]

FN8 Halleck's International Law.

The second of these descriptions comprehends ships and vessels with their cargoes belonging to the insurgents or ***137** employed in aid of them; but property in these was not changed by capture alone but by regular judicial proceeding and sentence.

Accordingly it was provided in the Abandoned and Captured Property Act of March 12th, 1863, [FN9] that the property to be collected under it 'shall not include any kind or description used or intended to be used for carrying on war against the United States, such as arms, ordnance, ships, steamboats and their furniture, forage, military supplies, or munitions of war.'

FN9 12 Stat. at Large, 820.

Almost all the property of the people in the insurgent States was included in the third description, for after sixty days from the date of the President's proclamation of July 25th, 1862, [FN10] all the estates and property of those who did not cease to aid, countenance, and abet the rebellion became liable to seizure and confiscation, and it was made the duty of the President to cause the same to be seized and applied, either specifically or in the proceeds thereof, to the support of the army. [FN11] But it is to be observed that tribunals and proceedings were provided, by which alone such property could be condemned, and without which it remained unaffected in the possession of the proprietors.

FN10 Ib. 1266.

FN11 Ib. 590.

It is thus seen that, except to property used in actual hostilities, as mentioned in the first section of the act of March 12th, 1863, no titles were divested in the insurgent States unless in pursuance of a judgment rendered after due legal proceedings. The government recognized to the fullest extent the humane maxims of the modern law of nations, which exempt private property of non-combatant enemies from capture as booty of war. Even the law of confiscation was sparingly applied. The cases were few indeed in which the property of any not engaged in actual hostilities was subjected to seizure and sale.

The spirit which animated the government received special illustration from the act under which the present case arose. We have called the property taken into the custody ***138** of public officers under that act a peculiar species, and it was so. There is, so far as we are aware, no similar legislation mentioned in history.

The act directs the officers of the Treasury Department to take into their possession and make sale of all property abandoned by its owners or captured by the national forces, and to pay the proceeds into the national treasury.

That it was not the intention of Congress that the title to these proceeds should be divested absolutely out of the original owners of the property seems clear upon a comparison of different parts of the act.

We have already seen that those articles which became by the simple fact of capture the property of the captor, as ordnance, munitions of war, and the like, or in which third parties acquired rights which might be made absolute by decree, as ships and other vessels captured as prize, were expressly excepted from the operation of the act; and it is reasonable to infer that it was the purpose of Congress that the proceeds of the property for which the special provision of the act was made should go into the treasury without change of ownership. Certainly such was the intention in respect to the property of loyal men. That the same intention prevailed in regard to the property of owners who, though then hostile, might subsequently become loyal, appears probable from the circumstance that no provision is anywhere made for confiscation of it; while there is no trace in the statute book of intention to divest ownership of private property not excepted from the effect of this act, otherwise than by proceedings for confiscation.

In the case of Padelford we held that the right to the possession of private property was not changed until actual seizure by proper military authority, and that actual seizure by such authority did not divest the title under the provisions of the Abandoned and

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Captured Property Act. The reasons assigned seem fully to warrant the conclusion. The government constituted itself the trustee for those who were by that act declared entitled to the proceeds of captured and abandoned property, and for those whom it should thereafter ***139** recognize as entitled. By the act itself it was provided that any person claiming to have been the owner of such property might prefer his claim to the proceeds thereof, and, on proof that he had never given aid or comfort to the rebellion, receive the amount after deducting expenses.

This language makes the right to the remedy dependent upon proof of loyalty, but implies that there may be proof of ownership without proof of loyalty. The property of the original owner is, in no case, absolutely divested. There is, as we have already observed, no confiscation, but the proceeds of the property have passed into the possession of the government, and restoration of the property is pledged to none except to those who have continually adhered to the government. Whether restoration will be made to others, or confiscation will be enforced, is left to be determined by considerations of public policy subsequently to be developed.

It is to be observed, however, that the Abandoned and Captured Property Act was approved on the 12th of March, 1863, and on the 17th of July, 1862, Congress had already passed an act--the same which provided for confiscation-- which authorized the President, 'at any time hereafter, by proclamation, to extend to persons who may have participated in the existing rebellion, in any State or part thereof, pardon and amnesty, with such exceptions and at such time and on such conditions as he may deem expedient for the public welfare.' The act of the 12th of March, 1863, provided for the sale of enemies' property collected under the act, and payment of the proceeds into the treasury, and left them there subject to such action as the President might take under the act of the 17th of July, 1862. What was this action?

The suggestion of pardon by Congress, for such it was, rather than authority, remained unacted on for more than a year. At length, however, on the 8th of December, 1863, [FN12] the President issued a proclamation, in which he referred to that act, and offered a full pardon, with restorationof all ***140** rights of property, except as to slaves and property in which rights of third persons had intervened, to all, with some exceptions, who, having been engaged in the rebellion as actual participants, or as aiders or abettors, would take and keep inviolate a prescribed oath. By this oath the person seeking to avail himself of the offered pardon was required to promise that he would thenceforth support the Constitution of the United States and the union of the States thereunder, and would also abide by and support all acts of Congress and all proclamations of the President in reference to slaves, unless the same should be modified or rendered void by the decision of this court.

FN12 13 Stat. at Large, 737.

In his annual message, transmitted to Congress on the same day, the President said 'the Constitution authorizes the Executive to grant or withhold pardon at his own absolute discretion.' He asserted his power 'to grant it on terms as fully established,' and explained the reasons which induced him to require applicants for pardon and restoration of property to take the oath prescribed, in these words: 'Laws and proclamations were enacted and put forth for the purpose of aiding in the suppression of the rebellion. To give them their fullest effect there had to be a pledge for their maintenance. In my judgment they have aided, and will further aid, the cause for which they were intended. To now abandon them would not only be to relinquish a lever of power, but would also be a cruel and astounding breach of faith . . . For these and other reasons it is thought best that support of these measures shall be included in the oath, and it is believed the Executive may lawfully claim it in return for pardon and restoration of forfeited rights, which he has clear constitutional power to withhold altogether or grant upon the terms which he shall deem wisest for the public interest.'

The proclamation of pardon, by a qualifying proclamation issued on the 26th of March, 1864, [FN13] was limited to those persons only who, being yet at large and free from confinement ***141** or duress, shall voluntarily come forward and take the said oath with the purpose of restoring peace and establishing the national authority.

FN13 13 Stat. at Large, 741.

On the 29th of May, 1865, [FN14] amnesty and pardon, with the restoration of the rights of property

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except as to slaves, and that as to which legal proceedings had been instituted under laws of the United States, were again offered to all who had, directly or indirectly, participated in the rebellion, except certain persons included in fourteen classes. All who embraced this offer were required to take and subscribe an oath of like tenor with that required by the first proclamation.

FN14 13 Stat. at Large, 758.

On the 7th of September, 1867, [FN15] still another proclamation was issued, offering pardon and amnesty, with restoration of property, as before and on the same oath, to all but three excepted classes.

FN15 15 Id. 699.

And finally, on the 4th of July, 1868, [FN16] a full pardon and amnesty was granted, with some exceptions, and on the 25th of December, 1868, [FN17] without exception, unconditionally and without reservation, to all who had participated in the rebellion, with restoration of rights of property as before. No oath was required.

FN16 Ib. 702.

FN17 Ib. 711.

It is true that the section of the act of Congress which purported to authorize the proclamation of pardon and amnesty by the President was repealed on the 21st of January, 1867; but this was after the close of the war, when the act had ceased to be important as an expression of the legislative disposition to carry into effect the clemency of the Executive, and after the decision of this court that the President's power of pardon 'is not subject to legislation;' that 'Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders.' [FN18] It is not important, therefore, to refer to this repealing act further than to say that it is impossible to believe, while the repealed provision was in full force, and the faith of the legislature ***142** as well as the Executive was engaged to the restoration of the rights of property promised by the latter, that the proceeds of property of persons pardoned, which had been paid into the treasury, were to be withheld from them. The repeal of the section in no respect changes the national obligation, for it does not alter at all the operation of the pardon, or reduce in any degree the obligations of Congress under the Constitution to give full effect to it, if necessary, by legislation.

FN18 14th January, 1867.

We conclude, therefore, that the title to the proceeds of the property which came to the possession of the government by capture or abandonment, with the exceptions already noticed, was in no case divested out of the original owner. It was for the government itself to determine whether these proceeds should be restored to the owner or not. The promise of the restoration of all rights of property decides that question affirmatively as to all persons who availed themselves of the proffered pardon. It was competent for the President to annex to his offer of pardon any conditions or qualifications he should see fit; but after those conditions and qualifications had been satisfied, the pardon and its connected promises took full effect. The restoration of the proceeds became the absolute right of the persons pardoned, on application within two years from the close of the war. It was, in fact, promised for an equivalent. 'Pardon and restoration of political rights' were 'in return' for the oath and its fulfilment. To refuse it would be a breach of faith not less 'cruel and astounding' than to abandon the freed people whom the Executive had promised to maintain in their freedom.

What, then, was the effect of the provision of the act of 1870 [FN19] upon the right of the owner of the cotton in this case? He had done certain acts which this court [FN20] has adjudged to be acts in aid of the rebellion; but he abandoned the cotton to the agent of the Treasury Department, by whom it has been sold and the proceeds paid into the Treasury of the ***143** United States; and he took, and has not violated, the amnesty oath under the President's proclamation. Upon this case the Court of Claims pronounced him entitled to a judgment for the net proceeds in the treasury. This decree was rendered on the 26th of May, 1869; the appeal to this court made on the 3d of June, and was filed here on the 11th of December, 1869.

FN19 16 Stat. at Large, 235.

FN20 United States *v.* Padelford, 9 Wallace, 531.

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The judgment of the court in the case of Padelford, which, in its essential features, was the same with this case, was rendered on the 30th of April, 1870. It affirmed the judgment of the Court of Claims in his favor.

Soon afterwards the provision in question was introduced as a proviso to the clause in the general appropriation bill, appropriating a sum of money for the payment of judgments of the Court of Claims, and became a part of the act, with perhaps little consideration in either House of Congress.

This proviso declares in substance that no pardon, acceptance, oath, or other act performed in pursuance, or as a condition of pardon, shall be admissible in evidence in support of any claim against the United States in the Court of Claims, or to establish the right of any claimant to bring suit in that court; nor, if already put in evidence, shall be used or considered on behalf of the claimant, by said court, or by the appellate court on appeal. Proof of loyalty is required to be made according to the provisions of certain statutes, irrespective of the effect of any executive proclamation, pardon, or amnesty, or act of oblivion; and when judgment has been already rendered on other proof of loyalty, the Supreme Court, on appeal, shall have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction. It is further provided that whenever any pardon, granted to any suitor in the Court of Claims, for the proceeds of captured and abandoned property, shall recite in substance that the person pardoned took part in the late rebellion, or was guilty of any act of rebellion or disloyalty, and shall have been accepted in writing without express disclaimer and protestation against the fact so recited, such pardon or acceptance shall be taken as conclusive evidence ***144** in the Court of Claims, and on appeal, that the claimant did give aid to the rebellion; and on proof of such pardon, or acceptance, which proof may be made summarily on motion or otherwise, the jurisdiction of the court shall cease, and the suit shall be forthwith dismissed.

The substance of this enactment is that an acceptance of a pardon, without disclaimer, shall be conclusive evidence of the acts pardoned, but shall be null and void as evidence of the rights conferred by it, both in the Court of Claims and in this court on appeal.

It was urged in argument that the right to sue the government in the Court of Claims is a matter of favor; but this seems not entirely accurate. It is as much the duty of the government as of individuals to fulfil its obligations. Before the establishment of the Court of Claims claimants could only be heard by Congress. That court was established in 1855 [FN21] for the triple purpose of relieving Congress, and of protecting the government by regular investigation, and of benefiting the claimants by affording them a certain mode of examining and adjudicating upon their claims. It was required to hear and determine upon claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States. [FN22] Originally it was a court merely in name, for its power extended only to the preparation of bills to be submitted to Congress.

FN21 10 Stat. at Large, 612.

FN22 Ib.

In 1863 the number of judges was increased from three to five, its jurisdiction was enlarged, and, instead of being required to prepare bills for Congress, it was authorized to render final judgment, subject to appeal to this court and to an estimate by the Secretary of the Treasury of the amount required to pay each claimant. [FN23] This court being of opinion [FN24] that the provision for an estimate was inconsistent with the finality essential to judicial decisions, Congress repealed that provision. [FN25] Since then the Court of Claims has exercised ***145** all the functions of a court, and this court has taken full jurisdiction on appeal. [FN26]

FN23 12 Ib. 765.

FN24 2 Wallace, 561.

FN25 14 Stat. at Large, 9.

FN26 14 Stat. at Large, 44, 391, 444.

The Court of Claims is thus constituted one of those inferior courts which Congress authorizes, and has jurisdiction of contracts between the government and the citizen, from which appeal regularly lies to this

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court.

Undoubtedly the legislature has complete control over the organization and existence of that court and may confer or withhold the right of appeal from its decisions. And if this act did nothing more, it would be our duty to give it effect. If it simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make 'such exceptions from the appellate jurisdiction' as should seem to it expedient.

But the language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have. The proviso declares that pardons shall not be considered by this court on appeal. We had already decided that it was our duty to consider them and give them effect, in cases like the present, as equivalent to proof of loyalty. It provides that whenever it shall appear that any judgment of the Court of Claims shall have been founded on such pardons, without other proof of loyalty, the Supreme Court shall have no further jurisdiction of the case and shall dismiss the same for want of jurisdiction. The proviso further declares that every pardon granted to any suitor in the Court of Claims and reciting that the person pardoned has been guilty of any act of rebellion or disloyalty, shall, if accepted in writing without disclaimer of the fact recited, be taken as conclusive evidence in that court and on appeal, of the act recited; and on proof of pardon or acceptance, summarily made on motion ***146** or otherwise, the jurisdiction of the court shall cease and the suit shall be forthwith dismissed.

It is evident from this statement that the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.

It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.

The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way? In the case before us, the Court of Claims has rendered judgment for the claimant and an appeal has been taken to this court. We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it?

We think not; and thus thinking, we do not at all question what was decided in the case of *Pennsylvania* v. *Wheeling Bridge Company*. [FN27] In that case, after a decree in this court that the bridge, in the then state of the law, was a nuisance and must be abated as such, Congress passed an act legalizing the structure and making it a post-road; and the court, on a motion for process to enforce the decree, held that the bridge had ceased to be a nuisance by the exercise of the constitutional powers of Congress, and denied the motion. No arbitrary rule of decision was prescribed in that case, ***147** but the court was left to apply its ordinary rules to the new circumstances created by the act. In the case before us no new circumstances have been created by legislation. But the court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary.

FN27 18 Howard, 429.

We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.

It is of vital importance that these powers be kept distinct. The Constitution provides that the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress shall from time to time ordain and establish. The same instrument, in the last clause of

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the same article, provides that in all cases other than those of original jurisdiction, 'the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make.'

Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the Court of Claims on appeal. Can it prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself.

The rule prescribed is also liable to just exception as impairing the effect of a pradon, and thus infringing the constitutional power of the Executive.

It is the intention of the Constitution that each of the great co-ordinate departments of the government--the Legislative, the Executive, and the Judicial--shall be, in its sphere, independent of the others. To the executive alone is intrusted the power of pardon; and it is granted without limit. Pardon includes amnesty. It blots out the offence pardoned and removes all its penal consequences. It may be granted on conditions. In these particular pardons, ***148** that no doubt might exist as to their character, restoration of property was expressly pledged, and the pardon was granted on condition that the person who availed himself of it should take and keep a prescribed oath.

Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration. The court is required to receive special pardons as evidence of guilt and to treat them as null and void. It is required to disregard pardons granted by proclamation on condition, though the condition has been fulfilled, and to deny them their legal effect. This certainly impairs the executive authority and directs the court to be instrumental to that end.

We think it unnecessary to enlarge. The simplest statement is the best.

We repeat that it is impossible to believe that this provision was not inserted in the appropriation bill through inadvertence; and that we shall not best fulfil the deliberate will of the legislature by DENYING the motion to dismiss and AFFIRMING the judgment of the Court of Claims; which is

ACCORDINGLY DONE.

Mr. Justice MILLER (with whom concurred Mr. Justice BRADLEY), dissenting.

I cannot agree to the opinion of the court just delivered in an important matter; and I regret this the more because I do agree to the proposition that the proviso to the act of July 12th, 1870, is unconstitutional, so far as it attempts to prescribe to the judiciary the effect to be given to an act of pardon or amnesty by the President. This power of pardon is confided to the President by the Constitution, and whatever may be its extent or its limits, the legislative branch of the government cannot impair its force or effect in a judicial proceeding in a constitutional court. But I have not been able to bring my mind to concur in the proposition that, under the act concerning captured and abandoned property, there remains in the former owner, who had given aid and ***149** comfort to the rebellion, any interest whatever in the property or its proceeds when it had been sold and paid into the treasury or had been converted to the use of the public under that act. I must construe this act, as all others should be construed, by seeking the intention of its framers, and the intention to restore the proceeds of such property to the loyal citizen, and to transfer it absolutely to the government in the case of those who had given active support to the rebellion, is to me too apparent to be disregarded. In the one case the government is converted into a trustee for the former owner; in the other it appropriates it to its own use as the property of a public enemy captured in war. Can it be inferred from anything found in the statute that Congress intended that this property should ever be restored to the disloyal? I am unable to discern any such intent. But if it did, why was not some provision made by which the title of the government could at some time be made perfect, or that of the owner established? Some judicial proceeding for confiscation would seem to be necessary if there remains in the disloyal owner any right or interest whatever. But there is no such provision, and unless the *act* intended to forfeit absolutely the right of the disloyal owner, the proceeds remain in a condition where the owner

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cannot maintain a suit for its recovery, and the United States can obtain no perfect title to it.

This statute has recently received the attentive consideration of the court in two reported cases.

In the case of the *United States* v. *Anderson*, [FN28] in reference to the relation of the government to the money paid into the treasury under this act, and the difference between the property of the loyal and disloyal owner, the court uses language hardly consistent with the opinion just read. It says that Congress, in a spirit of liberality, constituted the government a trustee for *so much* of this property as belonged to the faithful Southern people, and while it directed that *all* of it should be sold and its proceeds paid into the treasury, gave to *this class* of persons an opportunity to establish ***150** their right to the proceeds. Again, it is said, that 'the measure, in itself of great beneficence, was practically important only in its application to the *loyal Southern* people, and sympathy for their situation doubtless prompted Congress to pass it.' These views had the unanimous concurrence of the court. If I understand the present opinion, however, it maintains that the government, in taking possession of this property and selling it, became the trustee of all the former owners, whether loyal or disloyal, and holds it for the latter until pardoned by the President, or until Congress orders it to be restored to him.

FN28 9 Wallace, 65.

The other case which I refer to is that of *United States* v. *Padelford*. [FN29] In that case the opinion makes a labored and successful effort to show that Padelford, the owner of the property, had secured the benefit of the amnesty proclamation *before* the property was seized under the same statute we are now considering. And it bases the right of Padelford to recover its proceeds in the treasury on the fact that *before the capture* his *status* as a loyal citizen had been restored, and with it all his rights of property, although he had previously given aid and comfort to the rebellion. In this view I concurred with all my brethren. And I hold now that as long as the possession or title of property remains in the party, the pardon or the amnesty remits all right in the government to forfeit or confiscate it. But where the property has already been seized and sold, and the proceeds paid into the treasury, and it is clear that the statute contemplates no further proceeding as necessary to divest the right of the former owner, the pardon does not and cannot restore that which has thus completely passed away. And if such was not the view of the court when Padelford's case was under consideration I am at a loss to discover a reason for the extended argument in that case, in the opinion of the court, to show that he had availed himself of the amnesty before the seizure of the property. If the views now advanced are sound, it was wholly immaterial whether Padelford was pardoned before or after the seizure.

FN29 9 Wallace, 531.

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Tab 16

United States Court of Appeals,
Fourth Circuit.

Kenneth M. ZERAN, Plaintiff-Appellant,
v.
AMERICA ONLINE, INCORPORATED,
Defendant-Appellee.

No. 97-1523.

Argued Oct. 2, 1997.
Decided Nov. 12, 1997.

Negligence action was brought against commercial interactive computer service provider alleging that provider unreasonably delayed in removing defamatory messages posted by unidentified third party, refused to post retractions of those messages, and failed to screen for similar postings thereafter. The United States District Court for the Eastern District of Virginia, T.S. Ellis, III, J., 958 F.Supp. 1124, granted provider's motion for judgment on pleadings. Plaintiff appealed. The Court of Appeals, Wilkinson, Chief Judge, held that: (1) Communications Decency Act (CDA) barred claims, and (2) CDA applies to any complaint instituted after its effective date, regardless of when relevant conduct giving rise to claims occurred.

Affirmed.

West Headnotes

[1] Federal Courts ⚿794
170Bk794 Most Cited Cases

On appeal of grant of motion for judgment on pleadings, Court of Appeals accepts facts alleged in complaint as true.

[2] Libel and Slander ⚿28
237k28 Most Cited Cases

Communications Decency Act (CDA) immunized commercial interactive computer service provider from liability for defamatory information posted by third parties. Telecommunications Act of 1996, § 509(c)(1), 47 U.S.C.A. § 230(c)(1).

[3] Telecommunications ⚿262
372k262 Most Cited Cases

Communications Decency Act (CDA) creates federal immunity to any cause of action that would make interactive computer service providers liable for information originating with third-party user of service. Telecommunications Act of 1996, § 509(c)(1), 47 U.S.C.A. § 230(c)(1).

[4] Telecommunications ⚿262
372k262 Most Cited Cases

Communications Decency Act (CDA) bars lawsuits seeking to hold interactive computer service provider liable for its exercise of publisher's traditional editorial functions, such as deciding whether to publish, withdraw, postpone or alter content.

[5] Telecommunications ⚿262
372k262 Most Cited Cases

Communications Decency Act (CDA) was enacted, in part, to maintain robust nature of Internet communication and, accordingly, to keep government interference therein to minimum. Telecommunications Act of 1996, § 509(c)(1), 47 U.S.C.A. § 230(c)(1).

[6] Telecommunications ⚿262
372k262 Most Cited Cases

One important purpose of Communications Decency Act (CDA) was to encourage interactive computer service providers to self-regulate dissemination of offensive material over their services. Telecommunications Act of 1996, § 509(c)(1), 47 U.S.C.A. § 230(c)(1).

[7] Libel and Slander ⚿28
237k28 Most Cited Cases

While publishers may be liable for defamatory statement in their works even if they lacked specific knowledge that such statement was included, distributors are free from liability for defamatory statements in materials they distribute unless, at minimum, they actually knew of defamatory statements upon which liability is based.

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[8] Libel and Slander ⚿28
237k28 Most Cited Cases

Interactive computer service provider was "publisher" under Communications Decency Act (CDA) with respect to claim that provider failed to promptly remove defamatory statements posted by third party when informed of those statements; thus, CDA precluded provider's liability on that claim. Telecommunications Act of 1996, § 509(c)(1), 47 U.S.C.A. § 230(c)(1).

[9] Telecommunications ⚿262
372k262 Most Cited Cases

Communications Decency Act (CDA) applies to any complaint instituted after its effective date, regardless of when relevant conduct giving rise to claims occurred. Telecommunications Act of 1996, § 509(d)(3), 47 U.S.C.A. § 230(d)(3).

***328 ARGUED:** John Saul Edwards, Law Offices of John S. Edwards, Roanoke, VA; Leo Kayser, III, Kayser & Redfern, New York City, for Appellant. Patrick Joseph Carome, Wilmer, Cutler & Pickering, Washington, DC, for Appellee. **ON BRIEF:** John Payton, Samir Jain, Wilmer, Cutler & Pickering, Washington, DC; Randall J. Boe, America Online, Inc., Dulles, VA, for Appellee.

Before WILKINSON, Chief Judge, RUSSELL, Circuit Judge, and BOYLE, Chief United States District Judge for the Eastern District of North Carolina, sitting by designation.

Affirmed by published opinion. Chief Judge WILKINSON wrote the opinion, in which Judge RUSSELL and Chief Judge BOYLE joined.

OPINION

WILKINSON, Chief Judge:

Kenneth Zeran brought this action against America Online, Inc. ("AOL"), arguing that AOL unreasonably delayed in removing defamatory messages posted by an unidentified third party, refused to post retractions of those messages, and failed to screen for similar postings thereafter. The district court granted judgment for AOL on the grounds that the Communications Decency Act of 1996 ("CDA")--47 U.S.C. § 230--bars Zeran's claims. Zeran appeals, arguing that § 230 leaves intact liability for interactive computer service providers who possess notice of defamatory material posted through their services. He also contends that § 230 does not apply here because his claims arise from AOL's alleged negligence prior to the CDA's enactment. Section 230, however, plainly immunizes computer service providers like AOL from liability for information that originates with third parties. Furthermore, Congress clearly expressed its intent that § 230 apply to lawsuits, like Zeran's, instituted after the CDA's enactment. Accordingly, we affirm the judgment of the district court.

I.

"The Internet is an international network of interconnected computers," currently used by approximately 40 million people worldwide. *Reno v. ACLU,* 521 U.S. 844, ----, 117 S.Ct. 2329, 2334, 138 L.Ed.2d 874 (1997). One of the many means by which individuals access the Internet is through an interactive computer service. These services offer not only a connection to the Internet as a whole, ***329** but also allow their subscribers to access information communicated and stored only on each computer service's individual proprietary network. *Id.* AOL is just such an interactive computer service. Much of the information transmitted over its network originates with the company's millions of subscribers. They may transmit information privately via electronic mail, or they may communicate publicly by posting messages on AOL bulletin boards, where the messages may be read by any AOL subscriber.

[1] The instant case comes before us on a motion for judgment on the pleadings, see Fed.R.Civ.P. 12(c), so we accept the facts alleged in the complaint as true. *Bruce v. Riddle,* 631 F.2d 272, 273 (4th Cir.1980). On April 25, 1995, an unidentified person posted a message on an AOL bulletin board advertising "Naughty Oklahoma T-Shirts." The posting described the sale of shirts featuring offensive and tasteless slogans related to the April 19, 1995, bombing of the Alfred P. Murrah Federal Building in Oklahoma City. Those interested in purchasing the shirts were instructed to call "Ken" at Zeran's home phone number in Seattle, Washington. As a result of this anonymously perpetrated prank, Zeran received a high volume of calls, comprised primarily of angry

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and derogatory messages, but also including death threats. Zeran could not change his phone number because he relied on its availability to the public in running his business out of his home. Later that day, Zeran called AOL and informed a company representative of his predicament. The employee assured Zeran that the posting would be removed from AOL's bulletin board but explained that as a matter of policy AOL would not post a retraction. The parties dispute the date that AOL removed this original posting from its bulletin board.

On April 26, the next day, an unknown person posted another message advertising additional shirts with new tasteless slogans related to the Oklahoma City bombing. Again, interested buyers were told to call Zeran's phone number, to ask for "Ken," and to "please call back if busy" due to high demand. The angry, threatening phone calls intensified. Over the next four days, an unidentified party continued to post messages on AOL's bulletin board, advertising additional items including bumper stickers and key chains with still more offensive slogans. During this time period, Zeran called AOL repeatedly and was told by company representatives that the individual account from which the messages were posted would soon be closed. Zeran also reported his case to Seattle FBI agents. By April 30, Zeran was receiving an abusive phone call approximately every two minutes.

Meanwhile, an announcer for Oklahoma City radio station KRXO received a copy of the first AOL posting. On May 1, the announcer related the message's contents on the air, attributed them to "Ken" at Zeran's phone number, and urged the listening audience to call the number. After this radio broadcast, Zeran was inundated with death threats and other violent calls from Oklahoma City residents. Over the next few days, Zeran talked to both KRXO and AOL representatives. He also spoke to his local police, who subsequently surveilled his home to protect his safety. By May 14, after an Oklahoma City newspaper published a story exposing the shirt advertisements as a hoax and after KRXO made an on-air apology, the number of calls to Zeran's residence finally subsided to fifteen per day.

Zeran first filed suit on January 4, 1996, against radio station KRXO in the United States District Court for the Western District of Oklahoma. On April 23, 1996, he filed this separate suit against AOL in the same court. Zeran did not bring any action against the party who posted the offensive messages. [FN1] After Zeran's suit against AOL was transferred to the Eastern District of Virginia pursuant to 28 U.S.C. § 1404(a), AOL answered Zeran's complaint and interposed 47 U.S.C. § 230 as an affirmative defense. AOL then moved for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c). ***330** The district court granted AOL's motion, and Zeran filed this appeal.

FN1. Zeran maintains that AOL made it impossible to identify the original party by failing to maintain adequate records of its users. The issue of AOL's record keeping practices, however, is not presented by this appeal.

II.

A.

[2] Because § 230 was successfully advanced by AOL in the district court as a defense to Zeran's claims, we shall briefly examine its operation here. Zeran seeks to hold AOL liable for defamatory speech initiated by a third party. He argued to the district court that once he notified AOL of the unidentified third party's hoax, AOL had a duty to remove the defamatory posting promptly, to notify its subscribers of the message's false nature, and to effectively screen future defamatory material. Section 230 entered this litigation as an affirmative defense pled by AOL. The company claimed that Congress immunized interactive computer service providers from claims based on information posted by a third party.

[3][4] The relevant portion of § 230 states: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). [FN2] By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions--such as deciding

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whether to publish, withdraw, postpone or alter content--are barred.

> FN2. Section 230 defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(e)(2). The term"information content provider" is defined as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." *Id.* § 230(e)(3). The parties do not dispute that AOL falls within the CDA's "interactive computer service" definition and that the unidentified third party who posted the offensive messages here fits the definition of an "information content provider."

[5] The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum. In specific statutory findings, Congress recognized the Internet and interactive computer services as offering "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." *Id.* § 230(a)(3). It also found that the Internet and interactive computer services "have flourished, to the benefit of all Americans, *with a minimum of government regulation.*" *Id.* § 230(a)(4) (emphasis added). Congress further stated that it is "the policy of the United States ... to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation.*" *Id.* § 230(b)(2) (emphasis added).

None of this means, of course, that the original culpable party who posts defamatory messages would escape accountability. While Congress acted to keep government regulation of the Internet to a minimum, it also found it to be the policy of the United States "to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer." *Id.* § 230(b)(5). Congress made a policy choice, however, not to deter harmful online speech through the separate route of imposing tort liability on companiesthat serve as intermediaries ***331** for other parties' potentially injurious messages.

Congress' purpose in providing the § 230 immunity was thus evident. Interactive computer services have millions of users. *See Reno v. ACLU,* 521U.S. at ----, 117 S.Ct. at 2334 (noting that at time of district court trial, "commercial online services had almost 12 million individual subscribers"). The amount of information communicated via interactive computer services is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.

[6] Another important purpose of § 230 was to encourage service providers to self-regulate the dissemination of offensive material over their services. In this respect, § 230 responded to a New York state court decision, *Stratton Oakmont, Inc. v. Prodigy Servs. Co.,* 1995 WL 323710 (N.Y.Sup.Ct. May 24, 1995). There, the plaintiffs sued Prodigy--an interactive computer service like AOL--for defamatory comments made by an unidentified party on one of Prodigy's bulletin boards. The court held Prodigy to the strict liability standard normally applied to original publishers of defamatory statements, rejecting Prodigy's claims that it should be held only to the lower "knowledge" standard usually reserved for distributors. The court reasoned that Prodigy acted more like an original publisher than a distributor both because it advertised its practice of controlling content on its service and because it actively screened and edited messages posted on its bulletin boards.

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Congress enacted § 230 to remove the disincentives to selfregulation created by the *Stratton Oakmont* decision. Under that court's holding, computer service providers who regulated the dissemination of offensive material on their services risked subjecting themselves to liability, because such regulation cast the service provider in the role of a publisher. Fearing that the specter of liability would therefore deter service providers from blocking and screening offensive material, Congress enacted § 230's broad immunity "to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material." 47 U.S.C. § 230(b)(4). In line with this purpose, § 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.

B.

[7][8] Zeran argues, however, that the § 230 immunity eliminates only publisher liability, leaving distributorliability intact. Publishers can be held liable for defamatory statements contained in their works even absent proof that they had specific knowledge of the statement's inclusion. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 113, at 810 (5th ed.1984). According to Zeran, interactive computer service providers like AOL are normally considered instead to be distributors, like traditional news vendors or book sellers. Distributors cannot be held liable for defamatory statements contained in the materials they distribute unless it is proven at a minimum that they have actual knowledge of the defamatory statements upon which liability is predicated. *Id.* at 811 (explaining that distributors are not liable "in the absence of proof that they knew or had reason to know of the existence of defamatory matter contained in matter published"). Zeran contends that he provided AOL with sufficient notice of the defamatory statements appearing on the company's bulletin board. This notice is significant, says Zeran, because AOL could be held liable as a distributor only if it acquired knowledge of the defamatory statements' existence.

Because of the difference between these two forms of liability, Zeran contends that the term "distributor" carries a legally distinct meaning from the term "publisher." ***332** Accordingly, he asserts that Congress' use of only the term "publisher" in § 230 indicates a purpose to immunize service providers only from publisher liability. He argues that distributors are left unprotected by § 230 and, therefore, his suit should be permitted to proceed against AOL. We disagree. Assuming *arguendo* that Zeran has satisfied the requirements for imposition of distributor liability, this theory of liability is merely a subset, or a species, of publisher liability, and is therefore also foreclosed by § 230.

The terms "publisher" and "distributor" derive their legal significance from the context of defamation law. Although Zeran attempts to artfully plead his claims as ones of negligence, they are indistinguishable from a garden variety defamation action. Because the publication of a statement is a necessary element in a defamation action, only one who publishes can be subject to this form of tort liability. Restatement (Second) of Torts § 558(b) (1977); Keeton et al., *supra,* § 113, at 802. Publication does not only describe the choice by an author to include certain information. In addition, both the negligent communication of a defamatory statement and the failure to remove such a statement when first communicated by another party--each alleged by Zeran here under a negligence label--constitute publication. Restatement (Second) of Torts § 577; *see also Tacket v. General Motors Corp.,* 836 F.2d 1042, 1046-47 (7th Cir.1987). In fact, every repetition of a defamatory statement is considered a publication. Keeton et al., *supra,* § 113, at 799.

In this case, AOL is legally considered to be a publisher. "[E]very one who takes part in the publication ... is charged with publication." *Id.* Even distributors are considered to be publishers for purposes of defamation law:

> Those who are in the business of making their facilities available to disseminate the writings composed, the speeches made, and the information gathered by others may also be regarded as participating to such an extent in making the books, newspapers, magazines, and information available to others as to be regarded as publishers. They are intentionally making the contents available to others, sometimes without knowing all of the contents--including the defamatory content--and sometimes without any opportunity to ascertain, in advance, that any defamatory matter was to be included in the matter published.

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Id. at 803. AOL falls squarely within this traditional definition of a publisher and, therefore, is clearly protected by § 230's immunity.

Zeran contends that decisions like *Stratton Oakmont* and *Cubby, Inc. v. CompuServe Inc.*, 776 F.Supp. 135 (S.D.N.Y.1991), recognize a legal distinction between publishers and distributors. He misapprehends, however, the significance of that distinction for the legal issue we consider here. It is undoubtedly true that mere conduits, or distributors, are subject to a different standard of liability. As explained above, distributors must at a minimum have knowledge of the existence of a defamatory statement as a prerequisite to liability. But this distinction signifies only that different standards of liability may be applied *within* the larger publisher category, depending on the specific type of publisher concerned. *See* Keeton et al., *supra,* § 113, at 799-800 (explaining that every party involved is charged with publication, although degrees of legal responsibility differ). To the extent that decisions like *Stratton* and *Cubby* utilize the terms "publisher" and "distributor" separately, the decisions correctly describe two different standards of liability. *Stratton* and *Cubby* do not, however, suggest that distributors are not also a type of publisher for purposes of defamation law.

Zeran simply attaches too much importance to the presence of the distinct notice element in distributor liability. The simple fact of notice surely cannot transform one from an original publisher to a distributor in the eyes of the law. To the contrary, once a computer service provider receives notice of a potentially defamatory posting, it is thrust into the role of a traditional publisher. The computer service provider must decide whether to publish, edit, or withdraw the posting. In this respect, Zeran seeks to impose liability on AOL for assuming the ***333** role for which § 230 specifically proscribes liability--the publisher role.

Our view that Zeran's complaint treats AOL as a publisher is reinforced because AOL is cast in the same position as the party who originally posted the offensive messages. According to Zeran's logic, AOL is legally at fault because it communicated to third parties an allegedly defamatory statement. This is precisely the theory under which the original poster of the offensive messages would be found liable. If the original party is considered a publisher of the offensive messages, Zeran certainly cannot attach liability to AOL under the same theory without conceding that AOL too must be treated as a publisher of the statements.

Zeran next contends that interpreting § 230 to impose liability on service providers with knowledge of defamatory content on their services is consistent with the statutory purposes outlined in Part IIA. Zeran fails, however, to understand the practical implications of notice liability in the interactive computer service context. Liability upon notice would defeat thedual purposes advanced by § 230 of the CDA. Like the strict liability imposed by the *Stratton Oakmont* court, liability upon notice reinforces service providers' incentives to restrict speech and abstain from self-regulation.

If computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement--from any party, concerning any message. Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information's defamatory character, and an on-the-spot editorial decision whether to risk liability by allowing the continued publication of that information. Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context. *Cf. Auvil v. CBS 60 Minutes,* 800 F.Supp. 928, 931 (E.D.Wash.1992) (recognizing that it is unrealistic for network affiliates to "monitor incoming transmissions and exercise on-the-spot discretionary calls"). Because service providers would be subject to liability only for the publication of information, and not for its removal, they would have a natural incentive simply to remove messages upon notification, whether the contents were defamatory or not. *See Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 777, 106 S.Ct. 1558, 1564, 89 L.Ed.2d 783 (1986) (recognizing that fears of unjustified liability produce a chilling effect antithetical to First Amendment's protection of speech). Thus, like strict liability, liability upon notice has a chilling effect on the freedom of Internet speech.

Similarly, notice-based liability would deter service

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providers from regulating the dissemination of offensive material over their own services. Any efforts by a service provider to investigate and screen material posted on its service would only lead to notice of potentially defamatory material more frequently and thereby create a stronger basis for liability. Instead of subjecting themselves to further possible lawsuits, service providers would likely eschew any attempts at self-regulation.

More generally, notice-based liability for interactive computer service providers would provide third parties with a no-cost means to create the basis for future lawsuits. Whenever one was displeased with the speech of another party conducted over an interactive computer service, the offended party could simply "notify" the relevant service provider, claiming the information to be legally defamatory. In light of the vast amount of speech communicated through interactive computer services, these notices could produce an impossible burden for service providers, who would be faced with ceaseless choices of suppressing controversial speech or sustaining prohibitive liability. Because the probable effects of distributor liability on the vigor of Internet speech and on service provider self-regulation are directly contrary to § 230's statutory purposes, we will not assume that Congress intended to leave liability upon notice intact.

Zeran finally contends that the interpretive canon favoring retention of common law principles unless Congress speaks directly to the issue counsels a restrictive reading of the ***334** § 230 immunity here. *See United States v. Texas,* 507 U.S. 529, 534, 113 S.Ct. 1631, 1634-35, 123 L.Ed.2d 245 (1993). This interpretive canon does not persuade us to reach a different result. Here, Congress has indeed spoken directly to the issue by employing the legally significant term "publisher," which has traditionally encompassed distributors and original publishers alike.

The decision cited by Zeran, *United States v. Texas,* also recognized that abrogation of common law principles is appropriate when a contrary statutory purpose is evident. *Id.* This is consistent with the Court's earlier cautions against courts' application of the canon with excessive zeal: " 'The rule that statutes in derogation of the common law are to be strictly construed does not require such an adherence to the letter as would defeat an obvious legislative purpose or lessen the scope plainly intended to be given to the measure.' " *Isbrandtsen Co. v. Johnson,* 343 U.S. 779, 783, 72 S.Ct. 1011, 1014, 96 L.Ed. 1294 (1952) (quoting *Jamison v. Encarnacion,* 281 U.S. 635, 640, 50 S.Ct. 440, 442, 74 L.Ed. 1082 (1930)); *cf. Astoria Fed. Sav. & Loan Ass'n v. Solimino,* 501 U.S. 104, 110-11, 111 S.Ct. 2166, 2170-71, 115 L.Ed.2d 96 (1991) (statute need not expressly delimit manner in which common law principle is abrogated). Zeran's argument flies in the face of this warning. As explained above, interpreting § 230 to leave distributor liability in effect would defeat the two primary purposes of the statute and would certainly "lessen the scope plainly intended" by Congress' use of the term "publisher."

Section 230 represents the approach of Congress to a problem of national and international dimension. The Supreme Court underscored this point in *Reno v. ACLU,* finding that the Internet allows "tens of millions of people to communicate with one another and to access vast amounts of information from around the world.[It] is 'a unique and wholly new medium of worldwide human communication.' " 521 U.S. at ----, 117 S.Ct. at 2334 (citation omitted). Application of the canon invoked by Zeran here would significantly lessen Congress' power, derived from the Commerce Clause, to act in a field whose international character is apparent. While Congress allowed for the enforcement of "any State law that is consistent with [§ 230]," 47 U.S.C. § 230(d)(3), it is equally plain that Congress' desire to promote unfettered speech on the Internet must supersede conflicting common law causes of action. Section 230(d)(3) continues: "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." With respect to federal-state preemption, the Court has advised: "[W]hen Congress has 'unmistakably ... ordained,' that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. The result is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.,* 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977) (citations omitted). Here, Congress' command is explicitly stated. Its exercise of its commerce power is clear and

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counteracts the caution counseled by the interpretive canon favoring retention of common law principles.

III.

[9] The CDA was signed into law and became effective on February 8, 1996. Zeran did not file his complaint until April 23, 1996. Zeran contends that even if § 230 does bar the type of claim he brings here, it cannot be applied retroactively to bar an action arising from AOL's alleged misconduct prior to the CDA's enactment. We disagree. Section 230 applies by its plain terms to complaints brought after the CDA became effective. As noted in Part IIB, the statute provides, in part: "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(d)(3).

Initially, it is doubtful that a retroactivity issue is even presented here. Retroactivity concerns arise when a statute applies to conduct predating its enactment. Section 230 does not directly regulate the activities of interactive computer service providers like AOL. Instead, § 230 is addressed only to the bringing of a cause of action. Here, Zeran ***335** did not file his complaint until over two months after § 230's immunity became effective. Thus, the statute's application in this litigation is in fact prospective. *See St. Louis v. Texas Worker's Compensation Comm'n,* 65 F.3d 43, 46 (5th Cir.1995) (holding "issue is not technically one of retroactivity" when statute applies to "filing of the complaint"), *cert. denied,* 518 U.S. 1024, 116 S.Ct. 2563, 135 L.Ed.2d 1080 (1996); *Vernon v. Cassadaga Valley Central Sch. Dist.,* 49 F.3d 886, 889 (2d Cir.1995) (same).

Even if this were a case implicating the application of a federal statute to pre-enactment events, the Supreme Court's *Landgraf* framework would nevertheless require § 230's application to Zeran's claims. *Landgraf* instructs us first "to determine whether Congress has expressly prescribed the statute's proper reach." *Landgraf v. USI Film Prods.,* 511 U.S. 244, 280, 114 S.Ct. 1483, 1505, 128 L.Ed.2d 229 (1994). This case can be resolved at this first step. In § 230(d)(3), Congress clearly expressed its intent that the statute apply to any complaint instituted after its effective date, regardless of when the relevant conduct giving rise to the claims occurred. Other circuits have interpreted similar statutory language to clearly express Congress' intent that the relevant statutes apply to bar new actions under statutorily specified conditions. *See Wright v. Morris,* 111 F.3d 414, 418 (6th Cir.1997) (holding language "No action shall be brought ...," 42 U.S.C. § 1997e(a), to "expressly govern[ ] the bringing of new actions"), *cert. denied,* 522 U.S. 906, 118 S.Ct. 263, 139 L.Ed.2d 190 (1997); *Abdul-Wadood v. Nathan,* 91 F.3d 1023, 1025 (7th Cir.1996) (holding language "In no event shall a prisoner bring a civil action or appeal a judgment ...," 28 U.S.C. § 1915(g), to govern the bringing of new actions or filing of new appeals).

If we were to find a directive as plain as § 230(d)(3) to be ambiguous as to Congress' intent, we would be announcing a new superclear-statement condition for the retroactive operation of statutes. Such a jurisprudential shift would be both unwise and contrary to the Court's admonitions in *Landgraf:* "Retroactivity provisions often serve entirely benign and legitimate purposes, whether to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary." 511 U.S. at 267-68, 114 S.Ct. at 1498. Here, Congress decided that free speech on the Internet and self-regulation of offensive speech were so important that § 230 should be given immediate, comprehensive effect.

There finally is a significant contrast between statutes that impose new liabilities for already-completed conduct and statutes that govern litigants' access to courts. For example, courts often apply intervening statutes that restrict a court's jurisdiction. *See Landgraf,* 511 U.S. at 274, 114 S.Ct. at 1501-02. Section 230 neither imposes any new liability on Zeran nor takes away any rights acquired under prior law. No person has a vested right in a nonfinal tort judgment, much less an unfiled tort claim. *Hammond v. United States,* 786 F.2d 8, 12 (1st Cir.1986). Furthermore, Zeran cannot point to any action he took in reliance on the law prior to § 230's enactment. Because § 230 has no untoward retroactive effect, even the presumption against statutory retroactivity absent an express directive from Congress is of no help to Zeran here.

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IV.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

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Tab 17

United States Court of Appeals,
Eighth Circuit.

HONEYWELL, INC.; Honeywell Pension and Retirement Committee, on their own behalf and on behalf of the Honeywell Retirement Investment Plan; Investment Plus Plan of Honeywell, Inc.; Honeywell Retirement Savings Plan; First Trust National Association, Plaintiffs-Appellants,

v.

MINNESOTA LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATION, Defendant-Appellee.

No. 95-1754.

Submitted Oct. 22, 1996.
Decided April 2, 1997.

Sponsor of employee benefit and retirement plans sued state life and health insurance guaranty association in state court, seeking declaration that retroactive application of statutory amendment restricting to residents the right to receive guaranty payments was unconstitutional. Association removed. The United States District Court for the District of Minnesota, Richard H. Kyle, J., granted summary judgment to association, and sponsor appealed. A panel of the Court of Appeals affirmed, 86 F.3d 766, but opinion was vacated upon grant of sponsor's request for en banc review. After en banc hearing, the Court of Appeals, Hansen, Circuit Judge, held that: (1) amendment was not unconstitutional under contract clause of Federal Constitution; and (2) retroactive application of amendment did not violate due process; and in an opinion by Loken, Circuit Judge, held that: (3) statutory right to guaranty payments was contractual in nature; and (4) amendment effected substantial impairment of guaranty rights of sponsor's nonresident employees.

Affirmed.

Loken, Circuit Judge, filed concurring opinion in which Bowman, Circuit Judge, joined.

Richard S. Arnold, Chief Judge, filed dissenting opinion in which McMillian, Magill, Beam, and Morris Sheppard Arnold, Circuit Judges, joined.

See also, 518 N.W.2d 557.

West Headnotes

[1] Constitutional Law ⚿154(3)
92k154(3) Most Cited Cases

[1] Insurance ⚿1490
217k1490 Most Cited Cases
(Formerly 217k4(2))

Retroactively applicable state statutory amendment restricting to residents the right to receive life and health insurance guaranty payments was not unconstitutional under contract clause of Federal Constitution. U.S.C.A. Const. Art. 1, § 10, cl. 1; Minn.St.1992, §§ 61B.01-61B.16.

[2] Constitutional Law ⚿251.3
92k251.3 Most Cited Cases

Modern framework for substantive due process analysis concerning economic legislation only requires inquiry into whether legislation is reasonably related to legitimate governmental purpose; "vested rights" analysis appears to have been supplanted. U.S.C.A. Const.Amend. 14.

[3] Constitutional Law ⚿253(4)
92k253(4) Most Cited Cases

[3] Insurance ⚿1490
217k1490 Most Cited Cases
(Formerly 217k4.4)

Due process was not violated by retroactive application of amendment to former version of state statute creating life and health insurance guaranty association, which amendment restricted to residents the right to receive guaranty payments, as retroactive application achieved legitimate legislative purposes by rational means. U.S.C.A. Const.Amend. 14; Minn.St.1992, §§ 61B.01 -61B.16, 61B.06, subd. 2.

[4] Constitutional Law ⚿253(4)
92k253(4) Most Cited Cases

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Retroactive application of legislation satisfies reasonableness test for due process if it is justified by rational legislative purpose, even where it destroys settled expectancy or imposes new liability. U.S.C.A. Const.Amend. 14.

[5] Statutes ⚿268
361k268 Most Cited Cases

"Curative legislation" corrects unintended and unanticipated mistake in underlying legislation which went undetected until some time after original enactment.

[6] Statutes ⚿4
361k4 Most Cited Cases

Legislatures have authority to cure inadvertent defects in their legislation.

[7] Constitutional Law ⚿154(3)
92k154(3) Most Cited Cases

[7] Insurance ⚿1494
217k1494 Most Cited Cases
(Formerly 217k4(2))

Right to payment under former version of state statute creating life and health insurance guaranty association was contractual in nature, such that statutory amendment affecting that right implicated contract clause of Federal Constitution. U.S.C.A. Const. Art. 1, § 10, cl. 1; Minn.St.1992, §§ 61B.01-61B.16.

[8] Constitutional Law ⚿154(3)
92k154(3) Most Cited Cases

[8] Insurance ⚿1490
217k1490 Most Cited Cases
(Formerly 217k4(2))

Retroactively applicable state statutory amendment restricting to residents the right to receive life and health insurance guaranty payments effected substantial impairment of guaranty rights of nonresident employees participating in employee benefit and retirement plans sponsored by resident employer, for purposes of contract clause analysis under Federal Constitution, where plans lost 75% of their guaranty rights, based on percentage of nonresident employees. U.S.C.A. Const. Art. 1, § 10, cl. 1; Minn.St.1992, §§ 61B.01-61B.16.

***548** David L. Hashmall, Minneapolis, MN (argued), Karen R. Cole, Paul A. Koches, Joseph Brooks, on the brief, for Plaintiffs-Appellants.

Gary J. Haugen, Minneapolis, MN (argued), Jonathan S. Parritz, on the brief, for Defendant-Appellee.

Before RICHARD S. ARNOLD, Chief Judge, McMILLIAN, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, LOKEN, HANSEN, MORRIS SHEPPARD ARNOLD, and MURPHY, Circuit Judges, en banc.

***549** HANSEN, Circuit Judge.

The plaintiffs (collectively referred to as Honeywell) appeal the district court's [FN1] grant of summary judgment for the defendant, Minnesota Life and Health Insurance Guaranty Association (the Association), in this declaratory judgment suit. At issue is whether an amendment to a Minnesota statute, which amendment applies retroactively, violates either the Contract Clause or the Due Process Clause of the Constitution of the United States. The district court granted the Association's motion for summary judgment and dismissed Honeywell's complaint, concluding that the amendment passes constitutional muster.

FN1. The Honorable Richard H. Kyle, United States District Judge for the District of Minnesota.

A panel of this court unanimously affirmed the judgment of the district court. *Honeywell v. Minnesota Life & Health Ins. Guaranty Assoc.*, 86 F.3d 766 (1996). Honeywell requested en banc review. We granted this request, vacated the panel's opinion on August 27, 1996, and heard the case en banc. We now affirm the judgment of the district court.

I. BACKGROUND

Honeywell, Inc. is a Delaware corporation with its principal place of business in Minnesota. Honeywell sponsors certain defined contribution benefit and retirement plans for its employees. These plans include the Honeywell Retirement Investment Plan, the Investment Plus Plan of Honeywell Inc., and the Honeywell Retirement

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Savings Plan. The current trustee of the Honeywell plans is First Trust National Association, which has its principal place of business in Minnesota.

The Association is a nonprofit Minnesota corporation created pursuant to the Minnesota Life and Health Insurance Guaranty Association Act (the Act), Minn.Stat.Ann. §§ 61B.01-61B.16 (West 1986). [FN2] The Association exists to protect the contractual rights of policy owners and beneficiaries of life insurance policies, health insurance policies, and annuity contracts (subject to certain definitions and limitations), when the insurer that issued the life insurance, health insurance, or annuity contract becomes financially unable to perform its obligations. *See* Minn.Stat.Ann. § 61B.02, subd. 2. *See also Minnesota Life & Health Ins. Guar. Assoc. v. Department of Commerce,* 400 N.W.2d 769, 770 (Minn.Ct.App.1987). To provide this protection, all insurance companies that deal in life, health, and annuity contracts and elect to do business in Minnesota are required to join and contribute to the Association. *Minnesota Life,* 400 N.W.2d at 770. The dispute in this case arose following the 1991 insolvency of an out-of-state member insurance company and the 1992 enactment by the Minnesota legislature of an amendment that retroactively redefines the term "contractual obligation" under the Act.

> FN2. This Act has been repealed and was replaced in 1993 with Minn.Stat.Ann. §§ 61B.18--61B.32 (West Supp.1996). The legislature provided, however, that §§ 61B.01--61B.16, as amended in 1992, remain applicable to the subject of this suit. *Honeywell, Inc. v. Minnesota Life & Health Ins. Guar. Assoc.,* 518 N.W.2d 557, 558 n. 4 (Minn.1994). The issue in this case deals with a 1992 amendment to the Act, and not the new 1993 version of the Act.

In 1988, the Honeywell plans' trustee, who was a Minnesota resident (as is the current trustee), invested in Guaranteed Investment Contracts (GICs) issued by Executive Life Insurance Company of California (ELIC), a member of the Association. GICs are unallocated annuity contracts, or annuity contracts "not issued to or owned by a named individual." *Id.* GICs are investments made by the trustee for the benefit of the plan participants and are considered covered policies under the Act. *See id.* at 775 (holding that GICs are covered annuities under Minn.Stat. § 61B.03, subd. 3 (1984)). The Honeywell GICs expressly name the Honeywell trustee as the policy owner, and not the individual plan participants for whom the investment was made. *Honeywell,* 518 N.W.2d at 561.

In 1991, ELIC became insolvent and unable to fulfill its contractual obligations on the Honeywell GICs, which amounted to $111,000,000. By letter dated January 10, 1992, the Honeywell trustee, as the resident policy owner, submitted to the Association a claim for guaranty coverage under the Act. ***550** Honeywell sought coverage for ELIC's entire obligation to the Honeywell trustee, which would inure not only to the benefit of Honeywell's 9,000 Minnesota resident plan participants but also to Honeywell's 27,000 nonresident plan participants.

The Association neither granted nor denied Honeywell's claim initially. ELIC's insolvency had also affected approximately 10,000 other Minnesota residents who were employed in Minnesota by other companies whose plan trustees owned GICs but which trustees were *not* Minnesota residents. At that time, the Act required the Association to guarantee the covered policies of "residents" to whom any "contractual obligation" was owed from an out-of-state insurer. Minn.Stat.Ann. § 61B.06, subd. 2 (West 1986). *See Honeywell,* 518 N.W.2d at 558. The term "resident," defined as "any person who resides in this state at the time the impairment is determined and to whom contractual obligations are owed," Minn.Stat.Ann. § 61B.03, subd. 13 (West 1986), was broad enough to include a trustee who resided in Minnesota. *Honeywell,* 518 N.W.2d at 560-61. The term "contractual obligation," defined as "any obligation under covered policies," Minn.Stat.Ann. § 61B.03, subd. 5 (West 1986), was broad enough to include a GIC obligation owed to a resident trustee. *Honeywell,* 518 N.W.2d at 560-61. Thus, as then codified, the Act, combined with ELIC's insolvency, created the potential that all the Honeywell plan participants, thousands of whom were not residents of Minnesota, might be entitled to coverage under the Minnesota Act because their plan trustee happened to be a Minnesota resident. Whereas, many other Minnesota non-Honeywell employed resident plan participants, who worked for companies whose plan trustee resided in a different state, might not be entitled to any coverage because their trustee (the one to whom the contractual obligation was owed) was not a Minnesota resident.

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Faced with this dilemma, on January 21, 1992, the Minnesota Department of Commerce (which supervises and regulates the Association and to whom appeals may be taken from the Association's determinations, *see* Minn.Stat.Ann. § 61B.09(c)), issued an opinion, advising the Association chairman on the coverage problems created by the ELIC insolvency:

> The Department believes it is the clear intent of the Act to cover the people of Minnesota. Accordingly, it is the Department's position that the Guaranty Association Act provides coverage to Minnesota resident employees who are the beneficiaries of defined-contribution pension plans funded by Guaranteed Investment Contracts purchased from Executive Life.
>
> Consistent with that position the Department has determined that non- resident employees of such a plan, regardless of the residency of the trustee or plan sponsor, are not covered under the Act.

(Appellee's App. at GA-59.)

Subsequently, on April 27, 1992, the governor signed into law an amendment to the definition of the term "contractual obligation," in a purported attempt to retroactively "clarify" the statutory coverage in a manner consistent with the Department of Commerce opinion. *Honeywell,* 518 N.W.2d at 562. The 1992 amendment, which specifically applies retroactively, narrowed the definition of "contractual obligation" to specifically *exclude* any obligation owed "to nonresident participants of a covered plan or to the plan sponsor, employer, trustee, or other party who owns the contract; in such cases, the association is obligated under this chapter only to participants in a covered plan who are residents of the state of Minnesota on the date of impairment." 1992 Minn.Laws, ch. 540. Thus, the amendment expressly provides coverage only to plan participants who are Minnesota residents. In light of the opinion of the Department of Commerce and the retroactive 1992 amendment, the Association took the position that its guaranty obligation to Honeywell covers only those Honeywell plan participants who resided in Minnesota when ELIC became insolvent.

Honeywell then brought an action for declaratory and injunctive relief and monetary damages in Minnesota state court based on the Association's refusal to fully guaranty the whole of the trustee's claim. Honeywell ***551** sought a declaration that retroactive application of the 1992 amendment violates both the Contract Clause and the Due Process Clause of the Constitution because Honeywell's entitlement to coverage and payment under the prior statute had fully accrued before the enactment of the 1992 amendment. The Association removed the case to federal district court pursuant to 28 U.S.C. § 1441.

After removal, the parties filed cross motions for summary judgment. The district court ruled in favor of Honeywell, holding that the retroactive abrogation of Honeywell's guaranty coverage rights impermissibly destroyed vested rights in violation of both the Contract Clause and the Due Process Clause of the Constitution. After the Association moved for reconsideration, however, the district court vacated its initial opinion and certified two questions to the Supreme Court of Minnesota: (1) Did the 1992 amendment to the Act's definition of "contractual obligation" effect a substantive change in the Association's obligations or merely clarify existing obligations? (2) Is the annuity contract owner's (the trustee's) right to guaranty payment from the Association a purely statutory right or is it contractual in nature? The Supreme Court of Minnesota ruled on the certified questions, holding that (1) the 1992 amendment to the definition of "contractual obligation" substantively changed the Association's coverage obligations, and (2) the right to payment from the Association is a purely statutory right under state law. *See Honeywell,* 518 N.W.2d at 563.

After the Supreme Court of Minnesota responded to the certified questions, the parties again filed cross motions for summary judgment. This time, the district court granted the Association's motion for summary judgment, concluding that retroactive application of the 1992 amendment did not violate either the Contract Clause or the Due Process Clause, and dismissed Honeywell's complaint with prejudice. Honeywell appeals.

II. DISCUSSION

Honeywell contends that its preamendment right to insurance guaranty coverage is contractual in nature and that retroactive application of the amendment constitutes the impairment of its contractual rights in violation of the Contract Clause. Honeywell also

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argues that the 1992 amendment arbitrarily and irrationally destroyed its accrued, vested right to guaranty coverage, in violation of the Due Process Clause. We begin our analysis with the Contract Clause.

A. CONTRACT CLAUSE

The Constitution provides, "No State shall ... pass any Law impairing the Obligation of Contracts...." U.S. CONST. art. I, § 10, cl. 1. Read literally, this constitutional prohibition bans any interference with contracts, but cases interpreting the clause clearly indicate that this prohibition "is not an absolute one and is not to be read with literal exactness like a mathematical formula." *Home Bldg. & Loan Ass'n v. Blaisdell,* 290 U.S. 398, 428, 54 S.Ct. 231, 236, 78 L.Ed. 413 (1934). Instead, when a litigant contends that a legislative amendment has impermissibly impaired contractual obligations, our inquiry initially focuses on "whether the change in state law has 'operated as a substantial impairment of a contractual relationship.' " *General Motors Corp. v. Romein,* 503 U.S. 181, 186, 112 S.Ct. 1105, 1109, 117 L.Ed.2d 328 (1992) (quoting *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 244, 98 S.Ct. 2716, 2722, 57 L.Ed.2d 727 (1978)) (other citation omitted). Three basic components are essential to this inquiry: (1) Does a contractual relationship exist, (2) does the changein the law impair that contractual relationship, and if so, (3) is the impairment substantial? *Id.* If we conclude that a substantial impairment of a contractual relationship exists, we must then carefully examine "the nature and purpose of the state legislation." *Allied Structural Steel Co.,* 438 U.S. at 244, 98 S.Ct. at 2722.

We first consider whether a contractual relationship exists. In this case, the district court certified to the state supreme court the question of whether the Association's guaranty obligation to GIC owners, such as the Honeywell trustee, is a contractual or a statutory obligation. The Supreme Court of Minnesota determined that the right to payment ***552** from the Association is a purely statutory right under *state* law. *Honeywell,* 518 N.W.2d at 563. Honeywell first contends that the district court erroneously certified a question of federal constitutional law to the state court.

While federal courts "accord respectful consideration and great weight to the views of the State's highest court," the determination of whether the Act created a contractual obligation "is a federal question for purposes of Contract Clause analysis, and whether it turns on issues of general or purely local law, we can not surrender the duty to exercise our own judgment." *Romein,* 503 U.S. at 187, 112 S.Ct. at 1110 (internal quotations omitted). Contrary to Honeywell's assertion, however, the district court did not avoid its duty to determine the constitutional issue by certifying a question to the state supreme court. Instead, the district court gave proper consideration to the state court's views but independently determined that the right to payment under the Act is not contractual within the meaning of the Contract Clause. We review de novo the district court's judgment on this constitutional question. *See United States v. Bates,* 77 F.3d 1101, 1104 (8th Cir.), *cert. denied,* 519 U.S. 884, 117 S.Ct. 215, 136 L.Ed.2d 149 (1996).

Our independent review leads us to agree with the district court that the rights at issue are statutory in nature and therefore, no contractual relationship existed between Honeywell and the Association. Two factors lead us to this conclusion: (1) the Act itself does not create a contract, and (2) the GICs do not specifically incorporate the terms of the Act.

First, the Act's guaranty is not itself a contract between the Association and those who qualify for the Act's protection. "In general, a statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State." *United States Trust Co. v. New Jersey,* 431 U.S. 1, 17 n. 14, 97 S.Ct. 1505, 1516, 52 L.Ed.2d 92 (1977). The right to payment under the Act is not enforceable against the state of Minnesota but is an obligation imposed upon the Association. The Association is a nonprofit legal entity and not a state agency. Minn.Stat.Ann. § 61B.04, subd. 1 (West 1986). *See also* Minn.Stat.Ann. § 61B.21, subd. 1 (West Supp.1996). Even if the Association were a state agency, the Act contains no "clear indication that the legislature intends to bind itself contractually," which is necessary in order to overcome the general presumption "that a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.,* 470

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U.S. 451, 465-66, 105 S.Ct. 1441, 1451, 84 L.Ed.2d 432 (1985) (quotations omitted). Rather, the Act creates an insurance guaranty association with attendant statutory obligations to safeguard the financial well-being of Minnesota residents to whom contractual obligations are owed by its member insurance companies. The Act does not create a contract; instead, it creates a statutory safety net to protect the economic well-being of Minnesota resident policy owners in the event a member insurer becomes insolvent.

Second, while the Association has the power to enter into contracts, Minn.Stat.Ann. § 61B.06, subd. 9(a) (West 1986), the Association is not a party to the GICs involved here. The GICs at issue are contracts between the Honeywell trustee and the impaired ELIC, not the Association. The Honeywell trustee did not specifically bargain for protection under the Act, and the Act is not expressly or impliedly incorporated into the terms of the GICs. "For the most part, state laws are implied into private contracts regardless of the assent of the parties only when those laws affect the validity, construction, and enforcement of contracts." *Romein,* 503 U.S. at 189, 112 S.Ct. at 1111. The Association's statutory obligation to guaranty the insurance coverage of residents protected by the Act does not in any way affect the validity, construction, or enforcement of ELIC's obligation on the GICs. Moreover, there is no evidence that the GICs were created in pursuance of the statutory obligation. *Cf. Coombes v. Getz,* 285 U.S. 434, 442, 448, 52 S.Ct. 435, 436, 438, 76 L.Ed. ***553** 866 (1932) (upholding the contractual liability created pursuant to a state constitutional rule of law that was repealed). The 1992 amendment merely altered definitions under the Act, which in turn affect the Association's statutory obligation to the Honeywell trustee, but the amendment did not alter or affect any bargained-for agreement between the Association and the Honeywell trustee. The Contract Clause does not "protect against all changes in legislation, regardless of the effect of those changes on bargained-for agreements." *Romein,* 503 U.S. at 190, 112 S.Ct. at 1107.

[1] We conclude that the Association's obligations are statutory in nature rather than contractual. Absent the existence of a contractual relationship, our Contract Clause inquiry is finished. Accordingly, we affirm the district court's conclusion that the 1992 amendment did not unconstitutionally impair a contractual relationship in violation of the Contract Clause.

B. DUE PROCESS

Honeywell's due process claim presents a closer question. Honeywell argues that retroactive application of the 1992 amendment defeats its vested right to payment under the Act, in violation of the Due Process Clause. Honeywell relies on *Coombes,* 285 U.S. at 439-48, 52 S.Ct. at 437-38, where the Supreme Court held unconstitutional the repeal of a California state constitutional provision that provided a cause of action against corporate directors. The Court stated in absolute terms that "neither vested property rights nor the obligation of contracts of third persons may be destroyed or impaired." *Id.* at 442, 52 S.Ct. at 436. More specifically, the Court in *Coombes* held, "a contractual obligation arose; and the right to enforce it, having become vested, comes within the protection of both the contract impairment clause in Art. 1, § 10, and the due process of law clause in the Fourteenth Amendment, of the Federal Constitution." *Id.* at 448, 52 S.Ct. at 438. Honeywell also relies on *Ettor v. City of Tacoma,* 228 U.S. 148, 158, 33 S.Ct. 428, 431, 57 L.Ed. 773 (1913), where the Supreme Court held that a statutory right to compensation for property damage caused by the city in the course of grading streets, which right to compensation was complete before a repeal of the cause of action, was a vested property right that could not be retroactively destroyed. Claiming that these cases control the outcome of the case at hand, the Honeywell trustee asserts a vested right to payment under the Act as it existed when ELIC became insolvent, prior to the 1992 amendment.

The Association, on the other hand, urges us to follow more recent Supreme Court precedents in which the Court reviews economic legislation with a very deferential eye and does not accord vested rights status to economic rights. The Association observes that under this modern approach, due process is satisfied as long as a reasonable legislative purpose supports the retroactive application of the legislation. The Association contends that the retroactive 1992 amendment is supported by a reasonable legislative purpose, and alternatively, that no vested rights accrued in favor of the

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Honeywell trustee upon ELIC's insolvency.

In one sense, both arguments are right. The Supreme Court has never expressly overruled the reasoning of *Ettor* and *Coombes,* which accords great protection to accrued statutory causes of action. In the area of economic legislation, however, we cannot ignore the abundance of cases where substantive due process has evolved into a deferential rational basis analysis. We believe that an understanding of the historical context of *Ettor* and *Coombes* is essential to divine accurately the present weight of their authority on the issue before us. *See Hammond v. United States,* 786 F.2d 8, 11 (1st Cir.1986) (questioning the continued vitality of *Coombes* and *Ettor* because recent cases have retroactively abridged economic and real property rights without always carefully distinguishing these prior cases). *See also* W. David Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking,* 48 Cal.L.Rev. 216, 232 (1960) ("The decision [of *Coombes v. Getz*] seems far too rigid in its conception of permissible legislative change and would almost certainly not be followed today.").

***554** *Ettor* and *Coombes* were decided during what is referred to in the history of American jurisprudence as the *Lochner* era, named for the pivotal case of judicial activism, *Lochner v. New York,* 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905) (invalidating maximum work hours legislation as an unconstitutional exercise of police power). Cases of that era frequently invalidated statutes that limited economic autonomy in a manner thought by the Court to be unnecessary or unwise, but in more recent decisions, the Court plainly sees its role differently: "[W]e do not sit as a super legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare." *Day-Brite Lighting, Inc. v. Missouri,* 342 U.S. 421, 423, 72 S.Ct. 405, 407, 96 L.Ed. 469 (1952). The reasoning prevalent during the "*Lochner* [era] has been implicitly rejected many times." *Whalen v. Roe,* 429 U.S. 589, 597 & n. 18, 97 S.Ct. 869, 875, 51 L.Ed.2d 64 (1977). *See also United States v. Carlton,* 512 U.S. 26, 31- 34, 114 S.Ct. 2018, 2023-24, 129 L.Ed.2d 22 (1994) (recognizing that three tax cases from the *Lochner* era "were decided during an era characterized by exacting review of economic legislation under an approach that 'has long since been discarded' " (citation omitted)); *Planned Parenthood of S.E. Pa. v. Casey,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674, 861 (1992) (recognizing that the demise of *Lochner* era reasoning began in *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937)).

Within two years of the *Coombes* decision, substantive due process analysis in the area of retroactive economic legislation began to be framed in terms of reasonableness, drifting away from the *Lochner* era's strict protection of economic freedom and vested rights. *See Blaisdell,* 290 U.S. at 438, 54 S.Ct. at 240 (upholding as an emergency measure a mortgage moratorium law that impaired obligations on mortgage contracts). The Court acknowledged that even the expressly protected obligation of contracts (and similarly, we believe, the concept of vested rights) may be impaired by economic legislation if "the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end." *Id.* This rational basis substantive due process test appears to have supplanted the legislatively restrictive vested rights mode of analysis, and allows legislatures more freedom in dealing with economic situations. *See, e.g.,* James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights,* 79 Cornell L.Rev. 87, 119 (Nov.1993) ("Modern jurists reject the categorical logic of vesting and consider the statute's justifications under the rubric of substantive due process."); Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation,* 73 Harv.L.Rev. 692, 696-97 (1959- 60) (noting that the vested rights analysis has been replaced by balancing three factors: (1) the nature and strength of the public interest served by the statute, (2) the extent to which the statute modifies or abrogates a preenactment right, and (3) the nature of the right altered by the statute).

[2] In 1976, the Court announced, "It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on the one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 15, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752 (1976). These authorities leave no doubt that, even though

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Coombes and *Ettor* have never been overruled by the Supreme Court, the modern framework for substantive due process analysis concerning economic legislation requires only an inquiry into whether the legislation is reasonably related to a legitimate governmental purpose. Given the criticism surrounding the Court's *Lochner* era decisions in general, coupled with the development of judicial deference to economic legislation since then, we join those who question the continued validity of the vested rights analysis of *Coombes* and *Ettor* when reviewing the constitutionality of economic legislation, recognizing as we must that only the Supreme Court itself can overrule its precedents. We rely instead on the more recent Supreme Court pronouncements of substantive due process analysis for economic ***555** legislation, which articulate a rational basis test.

[3][4] Our task, then, is to determine whether the retroactive application of the 1992 amendment is justified by a rational legislative purpose, or whether it is illegitimate and arbitrary. Retroactive legislation, like prospective legislation, must meet the reasonableness test of due process. *Usery,* 428 U.S. at 17, 96 S.Ct. at 2893. "But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Pension Benefit Guar. Corp. v. R.A. Gray & Co.,* 467 U.S. 717, 730, 104 S.Ct. 2709, 2718, 81 L.Ed.2d 601 (1984). Retroactive economic legislation has been upheld as reasonable even in circumstances where it destroys a settled expectancy or imposes a new liability. *See, e.g., Carlton,* 512 U.S. at 30-31, 114 S.Ct. at 2022-23 (upholding a curative measure that took away an expected and relied upon deduction for estate tax); *Gray,* 467 U.S. at 734, 104 S.Ct. at 2720 (upholding retroactive application of ERISA's withdrawal liability as supported by rational legislative purpose); *Usery,* 428 U.S. at 19-20, 96 S.Ct. at 2894-95 (upholding retroactive aspects of Black Lung Benefits Act of 1972, which required employers to compensate former employees disabled by a work- related disease). The Court has repeatedly noted that although certain economic liabilities or burdens were not anticipated, nevertheless, " ' "our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." ' " *Concrete Pipe & Prod. v. Constr. Laborers Pension Trust,* 508 U.S. 602, 637, 113 S.Ct. 2264, 2287, 124 L.Ed.2d 539 (1993) (quoting *Gray,* 467 U.S. at 729, 104 S.Ct. at 2717-18, quoting *Usery,* 428 U.S. at 16, 96 S.Ct. at 2892-93).

Using these standards, we conclude that the 1992 amendment redefining "contractual obligation" was neither arbitrary nor illegitimate. The state has a legitimate interest in regulating the insurance industry, easing the economic burdens of its own residents, and ensuring the economic life of an association created by its statute to protect its residents. The general purpose of the Act at issue in this case "is to protect the future financial stability of individuals," *Minnesota Life & Health Ins.,* 400 N.W.2d at 773, and the preamendment Act expressly provided protection to "residents" to whom "contractual obligations" are owed. Minn.Stat. § 61B.06, subd. 2 (1986). The 1992 amendment serves to narrow the definition of contractual obligation, explicitly providing coverage only to resident plan participants. This is a legitimate purpose.

[5][6] The 1992 amendment is also curative in nature, even though it worked a substantive change in the law. *See Honeywell,* 518 N.W.2d at 560- 63 (holding that the amendment worked a substantive change in the law because before the amendment, it plainly entitled resident policy owners, including trustees, to coverage). Curative legislation corrects an unintended and unanticipated mistake in the underlying legislation, which went undetected until some time after the original enactment. Certainly, legislatures have the authority to cure inadvertent defects in their legislation. *See Carlton,* 512 U.S. at 30, 114 S.Ct. at 2022 (upholding Congress's attempt to cure a defect in the tax code). In *Carlton,* the Court concluded that Congress's purpose in retroactively taking away an estate tax deduction, even though the decedent's executor had relied upon it, was neither illegitimate nor arbitrary because "Congress acted to correct what it reasonably viewed as a mistake in the original 1986 provision that would have created a significant and unanticipated revenue loss." 512 U.S. at 31, 114 S.Ct. at 2023. We also note the observation of one commentator that "the individual who claims that a vested right has arisen from the defect is seeking a windfall since, had the legislature's ... action had the effect it was intended to and could have had, no such right would have arisen." Hochman, *supra* at 705.

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Here, the Minnesota legislature acted reasonably when it gave retroactive effect to the 1992 amendment in order to cure a drafting defect that might have inadvertently left thousands of Minnesota residents without coverage under the Act due to the ELIC debacle. We agree with the observation of the Supreme Court of Minnesota: "Given ***556** that unallocated annuity contracts were not prevalent at the time of the statute's enactment in 1977, the legislature likely did not contemplate how the Act specifically applied to these contracts." *Honeywell,* 518 N.W.2d at 561. Absent retroactive effect, an unintended gap in coverage would have left many Minnesota resident workers (whose trustee resided elsewhere) without coverage, while an unintended windfall in favor of nonresident workers who had a Minnesota trustee would have strained the financial capabilities of the Association and required Minnesota residents to pay higher premiums to finance the Association's obligation to out-of-state residents. In sum, "the interest in the retroactive curing of such a defect in the administration of government outweighs the individual [trustee's] interest in benefiting from the defect." Hochman, *supra* at 705-06. Thus, we conclude that retroactive application of the 1992 amendment was a rational means by which to accomplish the state's legitimate goals.

Honeywell contends that retroactive application is arbitrary and irrational because there is no connection linking the Honeywell trustee to the ELIC failure that triggered coverage and because the amendment has a disparate impact on non-residents. Neither contention has merit. We have already determined that the retroactive application of the amendment was rational and prevented an unanticipated gap in coverage for resident plan participants and an unexpected windfall for nonresident plan participants. Because the context here is curative in nature, there is no need to demonstrate any connection of the Honeywell trustee to the ELIC failure in order for the legislation to be rational. We agree with the Association's contention that the amendment actually eliminates the arbitrary aspect of the prior legislation under which Minnesota residents may or may not have had coverage for their plan funds, depending solely upon the arbitrary residence of their plan trustee, over which they have no control. Additionally, the disparate impact results only from the state's legitimate interest in maintaining the welfare of its own citizens, not from arbitrariness or discrimination. Retroactive application does not deprive nonresidents of any rights (except the expectation of coverage based on the arbitrary residence of their trustee), and it does not place any added burdens or liabilities on nonresidents.

To the extent Honeywell argues that this case is fully controlled by *Coombes* and *Ettor,* we also disagree. As already noted, we question the continued vitality of these cases. Furthermore, even assuming they remain authoritative, we conclude that they do not control the outcome in this situation. In our view, *Ettor* and *Coombes* do not stand for the proposition that an inviolable vested right exists whenever a statutory economic right accrues. In *Coombes,* the Court expressly protected what had become a vested contract right, independent of the statute. 285 U.S. at 448, 52 S.Ct. at 438. We have previously concluded that no contract rights are implicated by the 1992 amendment. This case involves legislation of economic matters which exist only by statute and have not been integrated into a private contract, and Honeywell did not even make choices in reliance on the preamendment Act. In *Ettor,* the Court protected a cause of action that provided a remedy for property damage to private property that occurred while the city graded streets for public use. 228 U.S. at 156, 33 S.Ct. at 430- 31. In the present case, neither the state nor the Association caused a harm and then took away a remedy for the injury caused, as the city and state did in *Ettor.*

In sum, *Coombes* and *Ettor* are not directly applicable to the case at hand because each involves an element distinguishable from the type of economic legislation at issue here. Thus, even if *Coombes* and *Ettor* apply, they do not dictate a conclusion that accrued economic rights under the preamendment Act rise to the level of a vested right. Rather, in spite of the expectancies that may have been based upon the preamendment Act, the retroactive 1992 amendment was a rational means by which to accomplish the legitimate economic goal of ensuring the welfare of Minnesota resident workers.

III. CONCLUSION

Finding no violation of either the Contract Clause or the Due Process Clause through ***557** retroactive

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application of the 1992 amendment, we affirm the judgment of the district court.

LOKEN, Circuit Judge, with whom BOWMAN, Circuit Judge, joins, concurring.

I concur in Part II.B. of the court's opinion, concluding that the Minnesota statute at issue does not violate Honeywell's right to substantive due process, except to the extent that the rollover paragraph on pages 18 and 19 is inconsistent with my view of the Contract Clause issue. As to that issue, I respectfully disagree with the court's conclusion that no contract has been impaired, but I agree that there has been no *unconstitutional* impairment. Accordingly, I concur in the court's decision to affirm.

As the court explains, the modern Contract Clause analysis is (1) has the State impaired a contract, (2) is the impairment substantial, and (3) is the statute nevertheless a permissible exercise of the State's police power. *See General Motors v. Romein,* 503 U.S. 181, 186, 112 S.Ct. 1105, 1109, 117 L.Ed.2d 328 (1992); *Energy Reserves, Inc. v. Kansas Power & Light Co.,* 459 U.S. 400, 410, 103 S.Ct. 697, 703-04, 74 L.Ed.2d 569 (1983). The latter two factors are interrelated. "The severity of the impairment measures the height of the hurdle the state legislation must clear." *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 245, 98 S.Ct. 2716, 2723, 57 L.Ed.2d 727 (1978).

[7] *1. Was There a Contract.* My starting point on this question is *Coombes v. Getz,* 285 U.S. 434, 440-42, 52 S.Ct. 435, 435-36, 76 L.Ed. 866 (1932), in which California repealed a constitutional provision holding corporate directors personally liable to creditors for embezzled or misappropriated corporate funds. In holding that the repeal unconstitutionally impaired a creditor's contract with a corporation, the Court described the repealed liability as "in its nature contractual." Justice Cardozo in dissent observed that to call the liability contractual was "a legal fiction ... borrowed from the law of quasi contracts." But he nonetheless agreed that the Contract Clause may protect a creditor's "contract with a corporation secured in certain contingencies by a statutory liability."

To me, *Coombes* confirms that a statute may create a contract between private parties that the Contract Clause protects. *See also Steamship Co. v. Joliffe,* 2 Wall. 450, 69 U.S. 450, 456-57, 17 L.Ed. 805 (1864) (statute created contract between shipping company and harbor pilots); *Hawthorne v. Calef,* 2 Wall. 10, 69 U.S. 10, 22, 17 L.Ed. 776 (1864) (statute providing that stock is security for railroad's creditors created contract between creditors and shareholders). All recent Supreme Court cases analyzing whether a statute had created a contract for Contract Clause purposes dealt with obligations of the State, rather than, as in *Coombes,* obligations the State has compelled private parties to assume. But that should not alter the analysis. For example, even if a statute mandates the terms of a fire insurance policy, the policy is still a contract. *Accord In re Workers' Compensation Refund,* 46 F.3d 813, 818 (8th Cir.1995).

In this case, the statute created the Guaranty Association, a private non- profit entity consisting of all insurers wishing to do business in the State, and required that entity to guarantee the "covered policies" of its members in the event of an insolvency. That third party guaranty looks much like the statutory liability in *Coombes.* "In determining whether a particular statute gives rise to a contractual obligation, it is of first importance to examine the language of the statute." *National R.R. Passenger Corp. v. Atchison, Topeka & S.F. Ry.,* 470 U.S. 451, 466, 105 S.Ct. 1441, 1452, 84 L.Ed.2d 432 (1985). Here, the statute uses the word "guaranty" in its title and provides that the Association "shall ... guarantee, assume, or reinsure" the obligations of its members. Minn.Stat. § 61B.06, subd. 1 (1986). A guaranty is a contract under Minnesota law. *See Baker v. Citizens State Bank of St. Louis Park,* 349 N.W.2d 552, 557-58 (Minn.1984). In these circumstances, Honeywell has had a "contract" impaired, either its underlying investment contracts with ELIC or, more directly, the guaranty by the Guaranty Association. The contrary conclusion of the Minnesota Supreme Court, though entitled to deference in its construction of state law, is not binding ***558** on us for Contract Clause purposes. *See Romein,* 503 U.S. at 187, 112 S.Ct. at 1110.

[8] *2. Was the Contract Substantially Impaired.* Total destruction of a contract is a substantial impairment. *Home Building & Loan Ass'n v. Blaisdell,* 290 U.S. 398, 431, 54 S.Ct. 231, 237, 78 L.Ed. 413 (1934). At first glance, this case seems

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to involve total destruction of the guaranty rights of non-resident Honeywell employees. But that ignores the nature of the guaranteed contracts. As a GIC trade association monograph explained, "GICs are assets of the pension plan. Individual employees do not own any part of a GIC, nor do employees have any individual rights under the contract." Thus, properly viewed, the impairment is partial--a reduction in the Association's guaranty obligation to the Honeywell Plan. (Whether that loss to the Plan must ultimately be borne only by non-resident beneficiaries is an issue not before us.)

Though partial, the impairment is quantitatively substantial--based on the percentage of non-resident Honeywell employees, the statutory amendment deprived the Plan of some 75% of its guaranty claim against the Association. In addition, the impairment was not merely incidental to another legislative purpose; the statute was enacted to impair. *Compare Energy Reserves,* 459 U.S. at 418, 103 S.Ct. at 708; *Exxon v. Eagerton,* 462 U.S. 176, 194 n. 14, 103 S.Ct. 2296, 2307, 76 L.Ed.2d 497 (1983).

Beyond the sheer magnitude of an impairment, the Supreme Court looks at whether the impaired term was central to the contract, whether settled expectations have been disrupted, and whether the impaired right was reasonably relied on. *See El Paso v. Simmons,* 379 U.S. 497, 514, 85 S.Ct. 577, 586- 87, 13 L.Ed.2d 446 (1965); *Spannaus,* 438 U.S. at 243 n. 14, 98 S.Ct. at 2722 n. 14. In general, when an industry is heavily regulated, parties are considered to have less reasonable expectation that legislation will not alter their contractual arrangements. *See Energy Reserves,* 459 U.S. at 411, 103 S.Ct. at 704. These other factors cut against the substantiality of this impairment. As in *Veix v. Sixth Ward Bldg. & Loan Ass'n of Newark,* 310 U.S. 32, 38, 60 S.Ct. 792, 794-95, 84 L.Ed. 1061 (1940), the industry is both heavily regulated and "regulated in the particular to which [Honeywell] now objects," since the State created the impaired guaranty. Honeywell cannot show substantial reliance on the Association's guaranty when it purchased the GICs in 1988 because the Association has broad power to unilaterally impose conditions on its guaranty obligations, subject to the Commissioner's approval, including the power to declare a moratorium on payments. *See* Minn.Stat. § 61B.06, subds. 1-3 (1986); *Honeywell v. Minnesota Life & Health Ins. Guar. Ass'n,* 518 N.W.2d 557, 563 (Minn.1994).

On the other hand, recent Eighth Circuit cases have looked unfavorably on retroactive legislation impairing contracts, even in heavily regulated industries. *See Workers' Compensation Refund,* 46 F.3d at 820 (statute confiscating excess reinsurance premiums invalid though reinsurance plan documents incorporated changes in state law); *Holiday Inns Franchising, Inc. v. Branstad,* 29 F.3d 383, 384 (8th Cir.), (statute retroactively restricting franchisor termination rights invalid), *cert. denied,* 513 U.S. 1032, 115 S.Ct. 613, 130 L.Ed.2d 522 (1994); *Minnesota Ass'n of Health Care Facilities, Inc. v. Minnesota Dept. of Public Welfare,* 742 F.2d 442, 451 (8th Cir.1984) (statute retroactively reducing nursing home rates for medicaid patients invalid "because it disrupts settled and completed financial arrangements under contracts made in reliance on existing law"), *cert. denied,* 469 U.S. 1215, 105 S.Ct. 1191, 84 L.Ed.2d 337 (1985).

On balance, I conclude this impairment is substantial. Honeywell lost 75% of its guaranty benefit. *Cf. Spannaus,* 438 U.S. at 247, 438 U.S. at 239-40 (statute imposing $185,000 pension charge on employer closing state office was substantial impairment). Thus, on the sliding scale the Supreme Court uses for the last two Contract Clause factors, this impairment requires close scrutiny of the State's justification.

3. Is the Substantial Impairment Justified. The economic interests of a state may justify its impairing contracts, *see, e.g., Blaisdell,* 290 U.S. at 437, 54 S.Ct. at 239-40, but the Contract Clause imposes limits on that ***559** power. "Legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." *United States Trust Co. of New York v. New Jersey,* 431 U.S. 1, 22, 97 S.Ct. 1505, 1518, 52 L.Ed.2d 92 (1977). Given the deference paid to state legislatures, especially when the State is not a party to the impaired contract, most claims founder on this aspect of the modern Contract Clause analysis. The Supreme Court looks hard at whether there is a legitimate public purpose and then defers to the legislative judgment as to the reasonableness of a particular remedy. *See Energy Reserves,* 459 U.S

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at 412-13, 103 S.Ct. at 704-06.

Of particular importance in this case, the Court has stated that it is reasonable to amend a statute to eliminate unforeseen consequences or windfall benefits, even if that impairs existing contracts. *See U.S. Trust,* 431 U.S. at 31 & n. 30, 97 S.Ct. at 1522 & n. 30; *Energy Reserves,* 459 U.S. at 412, 103 S.Ct. at 704-05. For example, the Court in *U.S. Trust* explained that the amendment in *El Paso* was valid because it simply limited parties "to those gains reasonably to be expected from the [original] contract." Conversely, the amendment struck down in *U.S. Trust* was not in response to windfall benefits or unforeseen consequences because it repealed a provision expressly prohibiting the use of Port Authority revenues for transportation subsidies.

In this case, the Minnesota Legislature based its initial 1977 statute on the NAIC Model Life & Health Guaranty Association Act. The Model Act at that time provided that the association must guarantee all obligations of an insolvent *domestic* insurer. For an insolvent foreign or out-of-state insurer, however, the association only guaranteed "the covered policies of residents," and it would have "no liability" if that insurer's home State provided "substantially similar" protection "for residents of other states." *See*Minn.Stat. § 61B.06, subds. 2 and 4 (1986). In other words, if every State had enacted this Model Act and uniformly applied it, the association in an insolvent U.S. insurer's home State would pay *all* guaranty claims. But if an offshore insurer grabbed everyone's money and went under, each State's association would guarantee the covered policies of that State's residents.

In this environment, Honeywell's guaranty claim for its investment in ELIC GICs posed a substantial unforeseen consequence in Minnesota for three reasons. First, the legislators who enacted the initial Minnesota statute in 1977 did not foresee that, unlike regulators in most every other State, Minnesota's Commissioner would take the position in the 1980s, before ELIC became insolvent, that GICs are "covered policies," and the Supreme Court of Minnesota would agree in *Minnesota Life & Health Ins. Guar. Ass'n v. Department of Commerce,* 400 N.W.2d 769, 773-74 (1987). As a result of this lack of uniform implementation, when Honeywell sent its ELIC claims to all fifty States, it received blanket denials from most everyone except Minnesota.

Second, the Legislature did not foresee that "covered policies" would include group annuities in which a single contract holder, rather than thousands of beneficiaries, is the "resident." One can argue that this issue was reasonably foreseeable. But I see no indication that even the drafters of the various Model Acts anticipated the problem before 1985. That the issue was unforeseen is confirmed by the fact that any careful drafter familiar with ERISA insurance-funded group life and health plans would not try to solve this complex an issue with the single word "resident."

Third, Honeywell took the position that the $300,000 statutory ceiling on the Association's liability "for all benefits ... with respect to any one life," Minn.Stat. § 61B.06, subd. 8 (1986), does not apply to its GIC claims. That exposed the Association to a $111,000,000 claim, far more than any State has allowed in *expressly* covering GICs. *See* Minn.Stat. § 61B.19, subd. 4(6) (1996) ($7,500,000 limit on claims regarding "unallocated annuities of a retirement plan"); 1985 NAIC Model Act § 3(c)(2)(B) ($5,000,000 limit).

Faced with this surprising confluence of factors that produced a genuinely unforeseen consequence and arguable windfall benefit, ***560** the Legislature enacted an amendment that reduced the Association's statutory guaranty to a level that Honeywell (or any other plan sponsor) should reasonably have expected from the statute as originally enacted: because GICs are not "covered policies" in California, ELIC's home State, the Minnesota Association must guarantee ELIC's GIC obligations to Minnesota residents; therefore, the Honeywell Plan is entitled to a guaranty benefit equal to that portion of its GIC contracts that represent investments on behalf of its Minnesota resident beneficiaries.

In enacting this amendment, the State acted in furtherance of the legitimate economic interests of its citizens. [FN3] The effect of its action was to reduce a state-mandated private benefit in a manner not inconsistent with the reasonable expectations of the parties to that "contract." In these circumstances, I concur in the court's conclusion that Minnesota did not unconstitutionally impair the

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Contract Clause rights of the Honeywell Plan trustee or the Plan's ultimate employee beneficiaries.

> FN3. As the court observes in its substantive due process discussion, because the Association's liabilities are unfunded--claims are paid by post-insolvency assessments of the remaining, solvent members--it does not take a team of actuaries to deduce that if Minnesota compels the Association to bestow uniquely generous guaranty benefits on the non- Minnesota customers of this year's insolvent insurer, ELIC, the Association's members must eventually recoup those benefits by imposing higher insurance premiums on future Minnesota policyholders.

RICHARD S. ARNOLD, Chief Judge, with whom McMILLIAN, MAGILL, BEAM, and MORRIS SHEPPARD ARNOLD, Circuit Judges, join, dissenting.

I agree with Judge Loken that a contract was impaired by the Minnesota Legislature's amendment of section 61B. I also believe that impairment was substantial within the meaning of the Contracts Clause, and not sufficiently justified. I therefore respectfully dissent.

The lead opinion holds that there was no contract to be impaired when the Minnesota Legislature amended § 61B to exclude out-of-state-resident life-insurance policyholders and other beneficiaries from its coverage. As Judge Loken's opinion explains, it is settled law that obligations between private parties which are mandated by statute may nonetheless be contractual and enforceable as such. The statute which created the Minnesota Life and Health Insurance Guaranty Association states that the Association was created to protect the rights of policyowners and other beneficiaries by guaranteeing the obligations owed them by insurance companies. Minn.Stat. § 61B.02 subd. 2 (1990) ("The purpose of sections 61B.01 to 61B.16, is to protect policyowners, death benefit certificate holders, insureds, beneficiaries, annuitants, payees, and assignees of life insurance policies, health insurance policies, annuity contracts and supplemental contracts...."). The duty to guarantee the obligations of member insurance companies appears to be the Association's primary reason for existence. The power to collect assessments from member companies exists to enable the Association to fulfill that duty. A guaranty is itself a kind of contract, an undertaking to fulfill the obligation of another if that other is in default.

It seems improbable that the Legislature would create a separate, nonprofit legal entity and endow it with the power to collect assessments from member insurance companies without demanding reciprocal performance from the Association. The words of the statute belie such a possibility: "If a domestic insurer is an impaired insurer [unable to meet its obligations to policyholders and other beneficiaries], the association shall ... guarantee, assume, or reinsure, or cause to be guaranteed, assumed, or reinsured, the covered policies of the impaired insurer...." Minn.Stat. § 61B.06 subd. 1(b); see also § 61B.06 subd. 2 (pertaining to foreign insurers). The lead opinion today holds the Association did not owe a contractual duty to guarantee all covered policies because a legislature must exhibit a clear indication that it intends to bind itself contractually before it will be considered to be so bound. The Legislature in the instant case did not bind itself, however; it bound the Association. The Legislature created the Association to collect membership fees from insurance companies and to assume the obligations of those ***561** companies should they become "impaired." I therefore agree with Judge Loken that the obligations owed by the Association, even though their origin is in the statute, are nonetheless contractual and not merely "statutory."

It follows that the Minnesota Legislature's amendment of the statute was an impairment of a contract. Two sets of contractual relationships were impaired by the Legislature's action: that between Honeywell's trustee and the Association, and that between the trustee and ELIC. The former is affected because the Association, under the amended statute, is released from most of its duty to guarantee the obligation owed the trustee. The latter is affected because the trustee contracted with ELIC under the prior version of the statute, and consequently under the assumption that the GICs were fully guaranteed by the Association.

Judge Loken's concurring opinion concludes that there was only a partial destruction of the contract in this case, because the amendment merely diminished the Association's obligation to guarantee the GICs, rather than destroying that obligation completely. As Judge Loken recognizes, a substantial

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impairment need not be a total destruction to violate the Contracts Clause. I agree that the impairment in this case was substantial. Indeed, the Minnesota Legislature chose which investments to protect and which to abandon at the level of the individual, according to the individual's state of residence. It specifically intended to abrogate the Association's duty to guarantee a given obligation based on the individual investor to whom that duty was owed. It therefore seems appropriate to view the Legislature's action as a complete destruction of those individual contractual relationships.

The Supreme Court has held that the Constitution does not prevent a legislature from working a substantive change in the law, and impairing contracts thereby, as long as it had sufficient justification for doing so. "[L]egislation adjusting the rights and responsibilities of contracting parties" will not violate the Contracts Clause if it is created "upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." *Allied Structural Steel v. Spannaus,* 438 U.S. 234, 244, 98 S.Ct. 2716, 2722, 57 L.Ed.2d 727 (1978) (internal quotation omitted).

One possible justification for the amendment could be to avoid unforeseen consequences or windfall benefits. Under that view, the Legislature could not have foreseen that Minnesota's Association would be the only one which guaranteed GICs as "covered policies." To the contrary, it was not only foreseeable, but readily ascertainable, that other states did not treat GICs the way Minnesota did. Minnesota's Commissioner and its State Supreme Court both came to that conclusion in the 1980s.

Minnesota also, it is argued, could not have intended to guarantee coverage of policies based simply on the residence of a trustee. The coverage mandated by such a rule, the argument continues, is far more expansive than the Legislature could have anticipated. Perhaps the Legislature did not anticipate that the Association would incur such a large obligation. But it should have; the language of the statute is not so ambiguous that such a reading should be surprising. Under the subdivision which applies to out-of-state impaired insurers, the statute requires the Association to "guarantee, assume, or reinsure or cause to be guaranteed, assumed, or reinsured, the covered policies of residents, and shall make or cause to be made prompt payment of the impaired insurer's contractual obligations which are due and owing to residents." Minn.Stat. § 61B.06 subd. 2. It was clear when Honeywell applied for coverage of its ELIC GICs that GICs were already "covered policies" in Minnesota. The ambiguity is allegedly whether "residents" could foreseeably have included a trustee which held several "covered policies" on behalf of both resident and non-resident beneficiaries. The statute defines "resident" in § 61B.03: " 'Resident' means any person who resides in this state at the time the impairment is determined and to whom contractual obligations are owed." "Person," according to the statute, "means any individual, corporation, partnership, association or voluntary organization." Minn.Stat. § 61B.03 subd. 12-13. The drafters should have realized ***562** that individual corporations, partnerships, associations, and voluntary organizations could hold numerous covered policies on behalf of employees or other beneficiaries. I therefore cannot agree that the Legislature's amendment of the statute is justified because of unforeseeable consequences.

That the amendment imposed a retroactive change raises the "hurdle" the state must clear in order to justify a substantial impairment of contracts. Legislation which makes prospective changes affecting private contracts is an appropriate and commonplace legislative function; private contracting parties, especially in regulated industries, should expect that laws and regulations may change and affect their future dealings. We examine the state's justification for retroactive changes more carefully because the opposite is generally true: private contracting parties should and do expect that the conditions under which they contracted will remain in effect unless and until there is a change. They do not normally expect lawmakers to change the basic assumptions underlying those agreements so as to affect legal obligations incurred, or rights vested, in the past. See *Minnesota Ass'n of Health Care Facilities, Inc. v. Minnesota Dep't of Pub. Welfare,* 742 F.2d 442, 450-51 (8th Cir.1984) (upholding prospective change but striking down retroactive change because it "disrupt[ed] settled and completed financial arrangements under contracts made in reliance on existing law"), *cert. denied,* 469 U.S. 1215, 105 S.Ct. 1191, 84 L.Ed.2d 337 (1985); *Holiday Inns Franchising, Inc. v. Branstad,* 29 F.3d 383, 385

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(8th Cir.) (observing that retroactive changes which alter prior contractual relationships have "almost uniformly been declared unconstitutional," and that "this is a datum on which [parties] are presumably allowed to rely while bargaining"), *cert. denied,* 513 U.S. 1032, 115 S.Ct. 613, 130 L.Ed.2d 522 (1994).

The Minnesota Legislature in this case deliberately effected a retroactive change in the law to allow the Association to avoid a $110 million payout. The Minnesota Supreme Court has held that the Legislature's amendment was a change, and not a clarification of the statute. *Honeywell, Inc. v. Minnesota Life & Health Ins. Guar. Ass'n,* 518 N.W.2d 557, 562 (Minn.1994). The Legislature's action was a deliberate, retroactive change in the law which altered the settled contractual duties of the Association, and greatly impaired Honeywell's right to payment. The size of the payout, while substantial, does not seem to me to provide sufficient justification for the change. Indeed, the large size of the payout serves only to underscore the substantiality of the obligation that the Legislature has nullified.

Many reasons underlay the determination of the Framers to create a new Constitution. Perhaps none was more prominent than their conviction that States should not be allowed to destroy or water down contracts for the payment of money. The Contracts Clause "was perhaps the strongest single constitutional check on state legislation during our early years as a Nation...." *Allied Structural Steel Co. v. Spannaus, supra,* 438 U.S. at 241, 98 S.Ct. at 2720-21 (footnote omitted). I regret that this Court today shrinks from enforcing this part of the Constitution, which is designed to safeguard a basic human right, the right to make private contracts. It is not a coincidence that most of the people injured by this statute cannot vote for the Minnesota Legislature.

I respectfully dissent.

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Tab 18

United States Court of Appeals,
Third Circuit.

In re TMI,
Dorothy L. Aldrich; Faith Alleman; Philip Angeli; Michael J. Anoka; Ruth V. Anoka; Catherine J. Balinosky; Regis E. Beasley; Louis Borda; Betty Marie Boylestein; George L. Boylestein; Shirlean Burhanan; Ruth E. Butler; Frank J. Caka; Susan H. Chynoweth; Daniel M. Chynoweth; Catherine Costello; John T. Costello; Martha A. Costik; Richard N. Costik; Mary Margaret Earhart; Edward Ferguson; Marco G. Glad, Jr.; Linda I. Glad; Barbara Grandon; Helen M. Hank; Edward John Hertzog; Marie H. Hertzog; Dianne Hindermyer; George Vance Hitz; Marjorie B. Hitz; Carol C. Hoch; Louis A. Hoch; Estate Of Robert P. Holmes; Thelma M. Nagy; Barry Obercash; Georgeann Pristello; James J. Pristello; Jamie Lynn Pristello; Kenneth R. Snyder; Patricia Southard; Joseph Stewart; Charlotte Evelyn Stewart, Appellants.

No. 94-7598.

Argued May 1, 1995.
Decided July 18, 1996.

Pennsylvania residents brought actions in Pennsylvania state court, Mississippi state court, and federal district court in Mississippi seeking to recover for injuries allegedly sustained as result of Three Mile Island nuclear accident. After dismissal of Pennsylvania state claims based on statute of limitations was affirmed, and Price-Anderson Amendments Act was amended, claims were transferred to federal district court in Pennsylvania and consolidated, and defendants moved for summary judgment on claims originally brought in Mississippi state and federal court. The United States District Court for the Middle District of Pennsylvania, Sylvia H. Rambo, J., granted summary judgment on claims originally brought in Mississippi and adopted prior summary judgment by Pennsylvania state court. Plaintiffs appealed, and the Court of Appeals, Scirica, Circuit Judge, held that: (1) under Act, Pennsylvania statute of limitations applied retroactively to actions properly filed and pending in Mississippi at time of Act's enactment; (2) retroactive application of Act did not violate due process clause; (3) plaintiffs were not entitled to grace period following retroactive application; and (4) discovery rule and doctrine of fraudulent concealment could not be applied to extend period.

Affirmed.

Sarokin, Circuit Judge, dissented and filed opinion.

West Headnotes

[1] Federal Courts ⚿766
170Bk766 Most Cited Cases

Review by Court of Appeals of district court's grant of summary judgment is plenary.

[2] Federal Courts ⚿754.1
170Bk754.1 Most Cited Cases

Court of Appeals exercises plenary review of district court's construction of statute.

[3] Limitation of Actions ⚿6(1)
241k6(1) Most Cited Cases

Under Price-Anderson Amendments Act, Pennsylvania statute of limitations applied retroactively to actions filed in Mississippi state court prior to effective date of Act to recover for injuries allegedly suffered as result of Three Mile Island nuclear accident. Atomic Energy Act of 1954, § 11(hh), as amended, 42 U.S.C.A. § 2014 (hh); Price-Anderson Amendments Act of 1988, § 20(b), 42 U.S.C.A. § 2014 note.

[4] Federal Courts ⚿425
170Bk425 Most Cited Cases

Statutes of limitations are treated as substantive rules of decision, as to which state law is applicable in federal diversity action, for purposes of *Erie* doctrine.

[5] Federal Courts ⚿372

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170Bk372 Most Cited Cases

Intent of *Erie* doctrine is to ensure that outcome of litigation in diversity action in federal court should be substantially the same, so far as legal rules determine outcome of litigation, as it would be if tried in state court.

[6] Electricity ⚷16(1)
145k16(1) Most Cited Cases

Intent of Congress in enacting provision of Price-Anderson Amendments Act under which substantive rules for decision in any public liability action are derived from law of state in which nuclear incident occurs was to ensure that outcome of any public liability action arising from single nuclear incident should be substantially the same as it would be if tried in state where incident occurred. Atomic Energy Act of 1954, § 11(hh), as amended, 42 U.S.C.A. § 2014(hh).

[7] Limitation of Actions ⚷2(1)
241k2(1) Most Cited Cases

Pennsylvania courts generally apply Pennsylvania's statute of limitations not only to wholly domestic causes of action but also to causes of action arising in other jurisdictions unless, pursuant to Pennsylvania's borrowing statute, Pennsylvania court is directed to apply shorter limitation statute of another jurisdiction.

[8] Constitutional Law ⚷305(1)
92k305(1) Most Cited Cases

Legislation affecting pending tort claim is not subject to heightened scrutiny review under due process clause, because pending tort claim does not constitute vested right. U.S.C.A. Const.Amend. 5.

[9] Constitutional Law ⚷253(4)
92k253(4) Most Cited Cases

Challenge under due process clause to retroactive application under Price- Anderson Amendments Act of Pennsylvania statute of limitations to actions arising from Three Mile Island nuclear accident which were already filed and pending in Mississippi state court at time of Act's enactment was reviewed under rational basis standard. U.S.C.A. Const.Amend. 5; Atomic Energy Act of 1954, § 11(hh), as amended, 42 U.S.C.A. § 2014(hh); Price-Anderson Amendments Act of 1988, § 20(b), 42 U.S.C.A. § 2014 note.

[10] Constitutional Law ⚷253(4)
92k253(4) Most Cited Cases

[10] Limitation of Actions ⚷6(1)
241k6(1) Most Cited Cases

Retroactive application pursuant to Price-Anderson Amendments Act of Pennsylvania statute of limitations to actions arising from Three Mile Island nuclear accident which were already properly filed and pending in Mississippi state court at time of Act's enactment was supported by rational basis and did not violate due process clause; retroactive application uniformly applied to all plaintiffs and advanced equity by applying same law to similarly situated plaintiffs, and promoted efficiency by allowing exercise of federal jurisdiction over, and consolidation of, claims arising from accident. U.S.C.A. Const.Amend. 5; Atomic Energy Act of 1954, § 11(hh), as amended, 42 U.S.C.A. § 2014 (hh); Price-Anderson Amendments Act of 1988, § 20(b), 42 U.S.C.A. § 2014 note.

[11] Federal Courts ⚷1.1
170Bk1.1 Most Cited Cases

Congress cannot confer subject matter jurisdiction on federal courts where there is no underlying federal statute creating federal question.

[12] Limitation of Actions ⚷6(1)
241k6(1) Most Cited Cases

Pennsylvania residents who had filed actions to recover for injuries allegedly suffered in Three Mile Island nuclear accident in Mississippi state court after failing to timely bring claims under two-year Pennsylvania statute of limitations were not entitled to grace period after retroactive application of Pennsylvania statute of limitations to Mississippi claims under Price-Anderson Amendments Act rendered those actions untimely; even if Pennsylvania law still requires grace period after retroactive application of statute, Pennsylvania Supreme Court would not apply grace period to plaintiffs who missed Pennsylvania limitations period and brought suit in another state. Atomic Energy Act of 1954, § 11(hh), as amended, 42

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U.S.C.A. § 2014(hh); Price- Anderson Amendments Act of 1988, § 20(b), 42 U.S.C.A. § 2014 note.

[13] Limitation of Actions ⚿2(1)
241k2(1) Most Cited Cases

Pennsylvania borrowing statute accurately reflects state policy against forum shopping by applying to claims arising in another state either the other state's statute of limitations or Pennsylvania statute of limitations, whichever is shorter, and unequivocally evinces legislativeintent to prevent plaintiff who sues in Pennsylvania from obtaining greater rights than those available in state where cause of action arose. 42 Pa.C.S.A. § 5521.

[14] Limitation of Actions ⚿95(1)
241k95(1) Most Cited Cases

Under Pennsylvania law, "discovery rule" tolls running of statute of limitations until plaintiff knows, or reasonably should know, that he has been injured and that his injury has been caused by another party's conduct.

[15] Limitation of Actions ⚿195(3)
241k195(3) Most Cited Cases

Under Pennsylvania law, plaintiff bears burden of proving that claim was filed within applicable statute of limitations.

[16] Federal Civil Procedure ⚿2466
170Ak2466 Most Cited Cases

Where nonmoving party bears burden of proof at trial, summary judgment is appropriate if nonmovant fails to make showing sufficient to establish existence of element essential to its case.

[17] Federal Civil Procedure ⚿2544
170Ak2544 Most Cited Cases

In responding to motion for summary judgment, nonmoving party must go beyond pleadings and by her own affidavits, or by depositions, answers to interrogatories, and admissions on file, designate specific facts showing there is genuine issue for trial.

[18] Limitation of Actions ⚿95(4.1)
241k95(4.1) Most Cited Cases

Under Pennsylvania law, plaintiffs who brought actions to recover for injuries allegedly sustained as result of Three Mile Island nuclear accident could not rely on discovery rule to toll running of statute of limitations; plaintiffs knew of accident and knew or should have known that exposure to radiation as result of accident could cause adverse health affects.

[19] Limitation of Actions ⚿104(2)
241k104(2) Most Cited Cases

Under Pennsylvania law, in order to establish fraudulent concealment by defendant as will toll statute of limitations plaintiff must prove affirmative or independent act of concealment that would divert or mislead plaintiff from discovering injury or its cause.

[20] Limitation of Actions ⚿104(2)
241k104(2) Most Cited Cases

Under Pennsylvania law, plaintiffs who sought to recover for injuries allegedly sustained as result of Three Mile Island nuclear accident could not rely on doctrine of fraudulent concealment to extend statute of limitations on actions; even though plaintiffs pointed to statements by workers of utility downplaying seriousness of accident immediately after it occurred, voluminous information about accident was in public domain.

***1109** Arnold Levin (argued), Levin, Fishbein, Sedran & Berman, Philadelphia, Pennsylvania, Lee C. Swartz, Hepford, Swartz & Morgan, Harrisburg, Pennsylvania, William R. Wilson, Jr., Jackson, Mississippi, for Appellants.

Ellen K. Scott (argued), Alfred H. Wilcox, Pepper, Hamilton & Scheetz, Philadelphia, Pennsylvania, for Appellees.

Before: SCIRICA, McKEE and SAROKIN, Circuit Judges.

OPINION OF THE COURT

SCIRICA, Circuit Judge.

In the wake of the Three Mile Island nuclear accident in 1979, more than two thousand individuals brought suit for personal injuries. The

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forty-two plaintiffs in this appeal missed Pennsylvania's two year limitations date, and filed suit in Mississippi in order to fall within that state's six year statute of limitations. These plaintiffs now challenge the retroactive application of the choice of law provision of the Price-Anderson Amendments Act of 1988, Pub.L. No. 100-408, 102 Stat. 1066. Retroactive application of the choice of law provision would require application of Pennsylvania's statute of limitations to all actions arising from the Three Mile Island accident and would bar plaintiffs' claims filed in Mississippi. Plaintiffs argue retroactive application of the choice of law provision violates federal constitutional guarantees of due process. Alternatively they argue that even if the Pennsylvania statute of limitations applies, Pennsylvania law provides for a grace period in which to file their claims. Because retroactive application of the choice of law provision was a rational exercise of Congress' legislative power, we hold it does not violate due process. Additionally, we hold Pennsylvania law does not provide for a grace period under the circumstances of this case.

The same plaintiffs also challenge summary judgment rendered against them in actions they filed in Pennsylvania state court after the two year limitation date. They assert the statute of limitations should have been tolled under Pennsylvania law. Because plaintiffs have failed to raise a material issue of fact, we will affirm summary judgment.

I. Facts and Procedural History

On March 28, 1979, the Three Mile Island nuclear power facility located near Harrisburg, Pennsylvania released radiation into the atmosphere. As a result, thousands of area residents and businesses filed suit ***1110** against the owners and operators of the facility, alleging various injuries. [FN1] In 1985, each of the forty-two plaintiffs involved in this appeal filed suit in Pennsylvania state court, Mississippi state court, and Mississippi federal court to recover for personal injuries allegedly suffered in the incident. The Mississippi actions were filed within that state's six year statute of limitations for personal injury actions.

FN1. Over two thousand plaintiffs' claims for personal injuries have been consolidated in the present litigation. *See In re TMI,* 67 F.3d 1103, 1105 (3d Cir.1995), *cert. denied sub nom. General Public Util. Corp. v. Dodson,* 516 U.S. 1154, 116 S.Ct. 1034, 134 L.Ed.2d 111 (1996). Some plaintiffs filed duplicative claims in both Pennsylvania and Mississippi.

In 1981, defendants settled non-personal injury claims brought by individuals, businesses, and non-profit organizations within a twenty-file mile radius of the Three Mile Island facility. *See Stibitz v. General Pub. Util. Corp.,* 746 F.2d 993, 995 n. 1 (3d Cir.1984) (citing *In Re Three Mile Island Litig.,* No. 79-0432 (M.D.Pa. Sept. 9, 1981)), *cert. denied,* 469 U.S. 1214, 105 S.Ct. 1187, 84 L.Ed.2d 334 (1985). In addition, hundreds of claims involving allegations of personal injury were settled in 1985.

We have already resolved other issues raised on appeal by the plaintiffs. *See In re TMI,* 67 F.3d 1103 (duty of care); *In re TMI,* 67 F.3d 1119 (3d Cir.1995) (punitive damages), *cert. denied sub nom. Metropolitan Edison Co. v. Dodson,* 517 U.S. 1163, 116 S.Ct. 1560, 134 L.Ed.2d 660 (1996).

In September 1986, defendants moved for summary judgment in plaintiffs' Pennsylvania state court actions contending each claim related to health problems diagnosed more than two years before plaintiffs commenced their suits. The Court of Common Pleas of Dauphin County, Pennsylvania entered summary judgment for defendants, finding plaintiffs' claims barred by Pennsylvania's two year statute of limitations. *In re TMI Litig. Cases Consolidated II,* No. 426 S (1985) (Dauphin Co. February 20, 1987); *In re TMI Litig. Cases Consolidated II,* No. 426 S (1985) (Dauphin Co. July 6, 1987). The Pennsylvania Superior Court affirmed. *In re TMI Litig. Cases Consolidated II,* 383 Pa.Super. 672, 550 A.2d 255 (1988).

Subsequently, Congress enacted the Price-Anderson Amendments Act of 1988, Pub.L. No. 100-408, 102 Stat. 1066, which created a federal cause of action--the "public liability action"--for injuries resulting from nuclear incidents, 42 U.S.C. § 2014 (hh) (1988), [FN2] and provided for jurisdiction over and the consolidation of such actions in the federal district court in the district where the accident occurred, 42 U.S.C. § 2210(n)(2). [FN3] Defendants removed the Pennsylvania and Mississippi state cases to federal court in the Middle District of Pennsylvania pursuant to 42 U.S.C. § 2210(n)(2). At the time of removal of the

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Pennsylvania state cases, the time to ***1111** appeal the grant of summary judgment to the Pennsylvania Supreme Court had not yet expired. The Mississippi federal actions were transferred to the Middle District of Pennsylvania pursuant to 28 U.S.C. § 1404(a).

FN2. The definition of "public liability action" appears at 42 U.S.C. § 2014(hh):

(hh) The term 'public liability action', as used in [section 2210 of this title], means any suit asserting public liability. A public liability action shall be deemed to be an action arising under [section 2210 of this title], and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident occurs, unless such law is inconsistent with the provisions of such section.

42 U.S.C. § 2014(hh); *see also* Price-Anderson Amendments Act of 1988, Pub.L. 100-408, § 11(b), 102 Stat. 1066, 1076.

FN3. The Price-Anderson Act, Pub.L. No. 85-256, 71 Stat. 576 (1957) (codified as amended in scattered sections of 42 U.S.C.), did not originally grant the federal courts jurisdiction over all claims arising out of nuclear accidents. The Price-Anderson Amendments Act expanded federal jurisdiction to reach all "public liability actions." After amendment by the Price Anderson Amendments Act, the jurisdiction, removal, and consolidation provision of the Price-Anderson Act provided:

With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the nuclear incident takes place ... shall have original jurisdiction without regard to the citizenship of any party or the amount in controversy. Upon motion of the defendant or of the Commission, or the Secretary, as appropriate any such action pending in any State court (including any such action pending on August 20, 1988) or United States district court shall be removed or transferred to the United States district court having venue under this subsection ... 42 U.S.C. § 2210(n)(2) (1988); *see also* Price-Anderson Amendments Act of 1988, Pub.L. 100-408, § 11(a), 102 Stat. 1066, 1076.

In *In re TMI Litig. Cases Consol. II,* 940 F.2d 832 (3d Cir.1991), *cert. denied sub nom. Gumby v. General Pub. Utils. Corp.,* 503 U.S. 906, 112 S.Ct. 1262, 117 L.Ed.2d 491 (1992), we upheld the constitutionality of the retroactive application of this provision to cases arising from the Three Mile Island accident.

After consolidation of the cases in the Middle District of Pennsylvania, defendants filed a motion for summary judgment with respect to the Mississippi state and federal court actions on the grounds that plaintiffs' claims were untimely under the Price-Anderson Amendments Act of 1988. Section 11(b) of the Amendments Act, the choice of law provision (codified at 42 U.S.C. § 2014(hh) (1988)), provides that "the substantive rules of decision in [any public liability action] shall be derived from the law of the State in which the nuclear incident involved occurs." Section 20(b) of the Amendments Act, the effective date provision (codified as a note to 42 U.S.C. § 2014), provides that "the amendments made by Section 11" of the Amendments Act "shall apply to nuclear incidents occurring *before,* on, or after the date of the enactment of this Act." 42 U.S.C. § 2014 note (emphasis added). The district court held that § 20(b), read in conjunction with § 11(b), compels retroactive application of Pennsylvania's two year statute of limitations to the causes of action brought by the plaintiffs, mandating the dismissal of the Mississippi state and federal cases as time barred. *In re TMI Litig. Cases Consol. II,* No. 88-1452, slip. op. at 2-6 (M.D.Pa. Aug. 16, 1993). Plaintiffs do not dispute this reading of the AmendmentsAct on appeal.

Plaintiffs asserted before the district court that retroactive application of the choice of law provision would violate constitutional guarantees of due process. They also argued that Pennsylvania law, incorporated as federal law by the Amendments Act, would provide a grace period in which to file their claims. The district court rejected both arguments, *id.* at 15-20, and plaintiffs now appeal the district court's grant of summary judgment.

The district court also adopted the prior judgment rendered by the Court of Common Pleas against plaintiffs in the Pennsylvania state cases. *Id.* at 23. Plaintiffs sought reconsideration of the grant of summary judgment, arguing that under the intervening holding of the Pennsylvania Superior Court in *Marinari v. Asbestos Corp.,* 417 Pa.Super. 440, 612 A.2d 1021 (1992), their claims arising from "second injuries" should not have been dismissed. [FN4] Upon reconsideration, the district court ordered plaintiffs to specify which plaintiffs had "second injuries" subject to the *Marinari* rule. *In re TMI Litig. Cases Consol. II,* No. 88-1452,

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slip. op. at 13 (M. D. Pa. June 1, 1994). On July 12, 1994, the parties entered into a stipulation that *Marinari* did not relate to the "initial injury" claims which were the subject of defendants' motion for summary judgment and that any "second injury" claims would be treated in a separate class action. *In re TMI Litig. Cases Consol. II,* No. 88-1452 (M.D.Pa. July 14, 1994). The district court then entered summary judgment against plaintiffs on the "initial injury" claims and dismissed them as time barred. *In re TMI Litig. Cases Consol. II,* No. 88-1452 (M.D.Pa. July 22, 1994). Plaintiffs appeal this order, arguing the statute of limitations had not expired on "initial injury" claims.

> FN4. When the Court of Common Pleas granted summary judgment, Pennsylvania was a "one-disease" state. This meant the statute of limitations for any claim arising out of exposure to a toxic substance began to run when the plaintiff knew or should have known of his "initial injury" resulting from exposure. *See Cathcart v. Keene Indus. Insulation,* 324 Pa.Super. 123, 471 A.2d 493 (1984) (in banc). Subsequently, Pennsylvania became a "two disease" state. Under this rule, the statute of limitations on a claim for a separate and distinct "second injury" related to a prior toxic exposure would not begin to run until the second injury manifested itself. *See Marinari v. Asbestos Corp.,* 417 Pa.Super. 440, 612 A.2d 1021 (1992).

[1] The district court had jurisdiction over these "public liability actions" under 42 U.S.C. § 2210(n)(2), and we exercise jurisdiction over the district court's final orders under 28 U.S.C. § 1291. Our review of the district court's grant of summary judgment is plenary. *See F.D.I.C. v. Bathgate,* 27 F.3d 850, 860 (3d Cir.1994).

II. Statutory Construction

[2] The district court held the language of § 20(b) is unambiguous and "by its very ***1112** terms clearly requires the retroactive application of all of the provisions of § 11, including the choice of law provision." *Inre TMI Litig. Cases Consol. II,* No. 88-1452, slip. op. at 3 (M.D.Pa. Aug. 16, 1993). Although plaintiffs have not challenged the district court's reading of the Amendments Act on appeal, we exercise plenary review of the district court's construction of the Act. *Moody v. Sec. Pac. Business Credit, Inc.,* 971 F.2d 1056, 1063 (3d Cir.1992).

[3][4][5][6][7] Section 20(b) unambiguously calls for the retroactive application of the choice of law provision in § 11(b). The choice of law provision in turn provides that "the substantive rules for decision" shall be derived from Pennsylvania law. Since the statute of limitations is a substantive rule of decision, *Menichini v. Grant,* 995 F.2d 1224, 1228 n. 2 (3d Cir.1993); 42 Pa. Cons.Stat. Ann. § 5524 (1981), we believe the Pennsylvania statute of limitations applies retroactively to plaintiffs' causes of action filed in Mississippi. [FN5] Congress could have exempted statutes of limitations from retroactive application, but it did not. Accordingly, plaintiffs' Mississippi causes of action are time-barred, unless some constraint imposed by the Constitution or state law prevents this result. [FN6]

> FN5. Statutes of limitations are treated as substantive rules of decision for purposes of the doctrine of *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). As the dissent points out, the intent of *Erie* was to ensure that "the outcome of the litigation in federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Guaranty Trust Co. of New York v. York,* 326 U.S. 99, 109, 65 S.Ct. 1464, 1470, 89 L.Ed. 2079 (1945).
>
> We believe the *Erie* rationale is instructive in interpreting Congress' command that "the substantive rules for decision in [any public liability action] shall be derived from the law of the State in which the nuclear incident occurs." 42 U.S.C. § 2014(hh); *see also* Price-Anderson Amendments Act of 1988, Pub.L. 100-408, § 11(b), 102 Stat. 1066, 1076. Although the legislative history is silent on the issue, we believe the clear language of this provision indicates an intent to ensure that the outcome of any public liability action arising from a single nuclear incident should be substantially the same as it would be if tried in the state where the incident occurred. The goal of achieving substantially the same outcome in all public liability actions, regardless of where filed, necessitates treatment of statutes of limitations as "substantive rules for decision." We do not believe Pennsylvania law can answer whether Congress intended the term "substantive rules for decision" to include statutes of limitations.
>
> Of course, because Pennsylvania courts do not sit in diversity, they will never have the occasion to decide whether to apply the Pennsylvania orthe Mississippi statute of limitations to an action filed in Mississippi. But Pennsylvania courts generally

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"apply[ ] Pennsylvania's statute of limitations not only to wholly domestic causes of action but also to causes of action arising in other jurisdictions (unless, pursuant to Pennsylvania's borrowing statute, a Pennsylvania court is directed to apply a *shorter* limitation statute of another jurisdiction.)" *AAMCO Transmissions, Inc. v. Harris,* 759 F.Supp. 1141, 1143-44 (E.D.Pa.1991) (footnotes omitted).

FN6. Section 20(b) provides that "the amendments made by Section 11" "shall apply to nuclear incidents occurring before, on, or after the date of the enactment of this Act." The dissent contends that the words "shall apply" may be interpreted in two ways: as requiring the application of Pennsylvania law from the date of filing of pending suits, or from August 20, 1988 forward. The dissent asserts the former interpretation necessitates imposition of a "historical fiction," while the latter merely "attaches new legal consequences to events completed before [ ] enactment [of the Amendments Act]." Dissent at 1118-19.

But we do not create a historical fiction that plaintiffs filed suit on any date other than that on which they actually filed. We simply attach new legal consequences to the fact that the filing date was not within two years of the Three Mile Island accident. In sum, we apply Pennsylvania's statute of limitations retroactively, as the clear language of § 20(b) and § 11(b) demands. The dissent, on the other hand, attaches no legal consequences to the application of Pennsylvania's statute of limitations. In fact, the dissent does not apply the Pennsylvania statute of limitations retroactively at all, but only prospectively to suits brought after the enactment of the Amendments Act. It refuses to apply the statute of limitations retroactively, despite the clear language that Pennsylvania law "shall apply," and even though it acknowledges that rulings made prior to the passage of the Amendments Act on the basis of substantive law which no longer applies should be modified to conform to the new governing law of the case. Dissent at 1119.

We believe the unambiguous language of § 20(b) and § 11(b) calls for the retroactive application of all of Pennsylvania law, including the statute of limitations. It is difficult to conceive of a clearer formulation than the "shall apply" language in § 20(b). In fact, in *Landgraf v. USI Film Products,* 511 U.S. 244, ----, 114 S.Ct. 1483, 1494, 128 L.Ed.2d 229 (1994), the Supreme Court considered virtually identical language to have "a determinate meaning" mandating retroactive application of legislation. *See id.* (language such as "the new provision 'shall apply to all proceedings pending on or commenced after the date of enactment' " mandates retroactive application). The dissent invokes the often stated presumption against retroactive legislation. Dissent at 1118-19. But if Congress has "expressly prescribed" a statute should apply retroactively, "there is no need to resort to judicial default rules." *Landgraf,* 511 U.S. at ----, 114 S.Ct. at 1505. The dissent also asserts that its interpretation accords with Congressional intent. Yet it has not offered any evidence that Congress intended to except statutes of limitations from retroactive application.

Finally, we note that plaintiffs have not argued that § 20(b) is ambiguous or that it exempts statutes of limitations from retroactive application.

*1113 III. Due Process

The district court held the choice of law provision of the Price-Anderson Amendments Act requires application of Pennsylvania law, including the Pennsylvania statute of limitations, to the Mississippi state and federal cases. Plaintiffs argue the retroactive application of Pennsylvania's statute of limitations to bar properly filed and already pending causes of action violates federal constitutional due process. Well-established precedent indicates that it does not.

A.

[8][9][10] Under the United States Constitution, legislation affecting a pending tort claim is not subject to "heightened scrutiny" due process review because a pending tort claim does not constitute a vested right. *See Hammond v. United States,* 786 F.2d 8, 12 (1st Cir.1986) (plaintiff does not have a vested right in a tort cause of action until there is a final, unreviewable judgement); *see also Arbour v. Jenkins,* 903 F.2d 416, 420 (6th Cir.1990) (retroactivity of a statute does not make it unconstitutional as a legal claim affords no enforceable property right until reduced to final judgement); *Sowell v. American Cyanamid Co.,* 888 F.2d 802, 805 (11th Cir.1989) (same). Other courts of appeals that have recently addressed the constitutionality of retroactive legislation that either abolishes or substantially affects a plaintiff's pending tort cause of action have reviewed such legislation on a "rational basis" standard. *See, e.g., In re Consolidated U.S. Atmospheric Testing Litig.,* 820 F.2d 982, 990-91 (9th Cir.1987) (plaintiff challenging retroactivity bears the burden of showing that the legislature acted in arbitrary,

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irrational way), *cert. denied sub nom. Konizeski v. Livermore Labs,* 485 U.S. 905, 108 S.Ct. 1076, 99 L.Ed.2d 235 (1988); *see also Hammond,* 786 F.2d at 13. In *In re TMI Litig. Cases Consol. II,* 940 F.2d 832 (3d Cir.1991), *cert. denied sub nom. Gumby v. General Pub. Utils. Corp.,* 503 U.S. 906, 112 S.Ct. 1262, 117 L.Ed.2d 491 (1992), we held that due process requires only that "the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means." *Id.* at 860 (quoting *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.,* 467 U.S. 717, 729, 104 S.Ct. 2709, 2717-18, 81 L.Ed.2d 601 (1984)). Accordingly, in order to show that retroactive application of the choice of law provision of the Amendments Act violates due process guarantees, plaintiffs bear the burden of showing that retroactive application was "irrational in purpose and effect." *Id.* at 861. This they cannot do.

B.

Congress adopted the Amendments Act "to effect uniformity, equity, and efficiency in the disposition of public liabilityclaims" arising from nuclear accidents. H.R.Rep. No. 104, 100th Cong., 1st Sess., pt. 3, at 18 (1987). We believe retroactive application of the Amendments Act's choice of law provision furthers each of these goals.

First, retroactive application of the Amendments Act's choice of law provision uniformly applies Pennsylvania law to all plaintiffs. Second, retroactive application advances equity by applying the same law to all similarly situated plaintiffs and eliminating inconsistent results. While retroactive application of the choice of law provision requires dismissal of these plaintiffs' claims which were filed in compliance with Mississippi's six year statute of limitations, this result is not inequitable. These actions were time-barred in Pennsylvania when they were brought, and plaintiffs resorted to a distant forum in order to avoid Pennsylvania's statute of limitations. Application of the law of the state in which the accident occurred, the ***1114** plaintiffs live, and where the plaintiffs were allegedly injured is not inequitable.

Finally, retroactive application of the choice of law provision promotes efficiency by allowing the constitutional exercise of federal jurisdiction over, and the consolidation of, these "public liability actions." Prior to the Amendments Act, the Price-Anderson Act provided for federal jurisdiction over only a limited class of cases--those arising from an "extraordinary nuclear occurrence." *Kiick v. Metropolitan Edison Co.,* 784 F.2d 490, 493 (3d Cir.1986); *Stibitz v. Gen. Pub. Utils. Corp.,* 746 F.2d 993, 997 (3d Cir.1984), *cert. denied,* 469 U.S. 1214, 105 S.Ct. 1187, 84 L.Ed.2d 334 (1985). Because the Nuclear Regulatory Commission did not designate the Three Mile Island accident an "extraordinary nuclear occurrence," the federal courts lacked subject matter jurisdiction to hear Three Mile Island cases filed in jurisdictions across the country. This situation resulted in "duplicative determinations of similar issues in multiple jurisdictions." S.Rep. No. 218, 100th Cong., 1st Sess. 13 (1987), *reprinted in* 1988 U.S.C.C.A.N. 1476, 1488.

[11] Congress sought to remedy the procedural problems plaguing the Three Mile Island cases by retroactively providing for federal jurisdiction over them and allowing their consolidation. But in creating federal jurisdiction, Congress was constrained by the constitutional principle that it cannot confer subject matter jurisdiction on federal courts where there is no underlying federal statute creating a federal question. *See Osborn v. Bank of United States,* 22 U.S. (9 Wheat) 738, 6 L.Ed. 204 (1824); *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983); *see also In re TMI Litig. Cases Consol. II,* 940 F.2d at 849 ("a case cannot be said to arise under a federal statute where there is nothing more than a jurisdictional grant."). Congress was clearly aware of this constitutional constraint. [FN7] It did not, therefore, simply grant federal courts subject matter jurisdiction over all cases arising from nuclear accidents. Instead it created substantive federal law governing nuclear accidents in the choice of law provision of the Amendments Act by providing "the substantive rules of decision in [any public liability action] shall be derived from the law of the State in which the nuclear incident involved occurs." 42 U.S.C. § 2014(hh). In the absence of the retroactive application of the choice of law provision to the Three Mile Island cases, Congress' retroactive creation of federal jurisdiction over them in the Amendments Act would be ***1115** nothing more than an unconstitutional grant of jurisdiction without any underlying substantive federal legislation creating a federal question. *In re TMI*

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Litig. Cases Consol. II, 940 F.2d at 854-55; *O'Conner v. Commonwealth Edison Co.,* 13 F.3d 1090, 1096-1101 (7th Cir.), *cert. denied,* 512 U.S. 1222, 114 S.Ct. 2711, 129 L.Ed.2d 838 (1994). [FN8] Accordingly, there is little doubt that the retroactive application of the choice of law provision has furthered the efficient and uniform processing of claims arising from the Three Mile Island accident by allowing those claims to be brought and to be consolidated in federal court.

FN7. In its report, the Senate Committee on Environment and Public Works stated the choice of law provision was essential to creating federal jurisdiction over public liability actions: [In order to] avoid the inefficiencies resulting from duplicative determinations of similar issues in multiple jurisdictions that may occur in the absence of consolidation ... the bill provides the federal district court in which the nuclear incident occurred with subject matter jurisdiction over claims arising from the nuclear incident. [The choice of law provision provides that] [a]ny suit asserting public liability shall be deemed to be an action arising under the Price-Anderson Act, and the substantive law of decision shall be derived from the law of the State in which the incident occurred, *in order to satisfy the Article III requirement that federal courts have jurisdiction over cases arising under the Constitution or the laws of the United States.*

S. Rep. No. 218, 100th Cong., 1st Sess. 13 (1987), *reprinted in* 1988 U.S.C.C.A.N. 1476, 1488 (emphasis added).

The House Committee on Interior and Insular Affairs came to the same conclusion. Reporting on H.R. 1414, the House version of the Amendments Act, it explained:

The Committee recognizes, of course, that Article III of the Constitution limits the type of cases that federal courts created under the Article may hear. For this reason, H.R. 1414 expressly states that any suit asserting public liability shall be deemed to be an action arising under the Price-Anderson Act, thereby making suits asserting public liability "Cases ... arising under ... the laws of the United States" within the meaning of Article III. Rather than designing a new body of substantive law to govern such cases, however, the bill provides [in the choice of law provision] that the substantive rules for decision in such actions shall be derived from the law of the state in which the nuclear incident involved occurs, unless such law is inconsistent with the Price- Anderson Act. The Committee believes that conferring on the Federal courts jurisdiction over claims arising out of all nuclear incidents in this manner is within the constitutional authority of Congress and notes that Congress has used this approach in the Outer Continental Shelf Lands Act.

H.R.Rep. No. 104, 100th Cong., 1st Sess., Pt. 1, at 18 (1987).

FN8. Congress explicitly stated that the jurisdiction and consolidation provision of the Amendments Act should apply retroactively to pending causes of action. *See* 42 U.S.C. § 2210(n)(2) (Amendment Act's consolidation and removal provision shall apply to all public liability actions, "including any such action pending on August 20, 1988"). Congress understood that the jurisdiction and consolidation provision could not pass constitutional muster without the choice of law provision. Accordingly, we believe Congress intended the choice of law provision also to apply retroactively. Moreover, even if retroactive application of the choice of law provision is not constitutionally essential, Congress at least had to create a federal cause of action for cases arising out of nuclear incidents before the district court could exercise jurisdiction. It did this in § 11(b) of the Amendments Act--the section in which the choice of law provision is contained--by defining a "public liability action." If § 11(b) does not apply retroactively, we do not have jurisdiction over the plaintiffs' claims because there was no federal cause of action under the Price- Anderson Act prior to its passage. *Stibitz v. General Pub. Utils. Corp.,* 746 F.2d at 996.

Because retroactive application of the choice of law provision to pending causes of action advances Congress' goals of uniformity, equity and efficiency in the disposition of claims arising from nuclear accidents, it is not arbitrary and irrational. Plaintiffs have not demonstrated retroactive application violates constitutional due process. *Cf. O'Conner v. Commonwealth Edison Co.,* 13 F.3d at 1102 (retroactive application of Amendments Act not arbitrary and irrational); *In re TMI Litig. Cases Consol. II,* 940 F.2d at 860-61 (same).

IV. Grace Period under Pennsylvania Law

[12] Plaintiffs also argue retroactive application of the Amendments Act's choice of law provision does not require dismissal of the Mississippi actions. They assert the choice of law provision incorporates all Pennsylvania law as federal law, including a century-old line of Pennsylvania cases that holds due process requires a grace period when the legislature retroactively curtails a statute of limitations. *See*

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Kay v. Pennsylvania Railroad Co., 65 Pa. 269 (1870); *Byers v. Pennsylvania Railroad Co.,* 18 Pa. Co. Ct. R. 187 (Allegheny Co. 1896); *Philadelphia B. & W.R. Co. v. Quaker City Flour Mills Co.,* 282 Pa. 362, 127 A. 845 (1925); *Ferki v. Frantz's Transfer Co.,* 152 Pa.Super. 267, 31 A.2d 586 (1943); *Wilson v. Central Penn Indus., Inc.,* 306 Pa.Super. 146, 452 A.2d 257 (1982). The district court declined to follow this line of cases, doubting its vitality in light of intervening developments in property law relating to vested rights, and refusing to read broad due process rights into the Pennsylvania Constitution on such a weak precedential basis. [FN9] *In re TMI Litig. Cases Consol. II,* No. 88-1452, slip. op. at 17-19 (M.D.Pa. Aug. 16, 1993). Even if the grace period doctrine retains force under the Pennsylvania Constitution, we do not believe the Pennsylvania Supreme Court would apply it under the facts of this case.

> FN9. Most of the cited cases base their imposition of a grace period on the due process clause of the Fourteenth Amendment of the United States Constitution or on cases construing the Fourteenth Amendment. *See, e.g., Quaker City Flour,* 127 A. at 846-47; *Ferki,* 31 A.2d at 587-88; *Wilson,* 452 A.2d at 260. These cases treat an accrued tort cause of action as a "vested right" under the United States Constitution, *see Jenkins v. Hospital of Med. College,* 535 Pa. 252, 634 A.2d 1099, 1104-05 (1993), and are contrary to current federal constitutional precedent that finds no vested right in a tort cause of action before final judgment, *see, e.g., Arbour,* 903 F.2d at 420; *Hammond,* 786 F.2d at 12. They also conflict with current case law that finds no Fourteenth or Fifth Amendment due process violation in rational, retroactive legislation not affecting vested rights. *See, e.g., In re TMI Litig. Cases Consol. II,* 940 F.2d at 860-61 ; *Sowell,* 888 F.2d at 805; *In re Consolidated U.S. Atmospheric Testing Litig.,* 820 F.2d at 990-91.

[13] None of the Pennsylvania grace period cases addresses a situation in which ***1116** Pennsylvania plaintiffs failed to sue within the time period allotted by the Pennsylvania statute of limitations and brought suit in another state's courts to avoid Pennsylvania's time bar. We believe the Pennsylvania borrowing statute, 42 Pa. Cons.Stat. Ann. § 5521 (1981), accurately reflects current state policy against "forum shopping" by applying to claims arising in another state either the other state's statute of limitations or the Pennsylvania statute of limitations, whichever is shorter. "Pennsylvania's borrowing statute unequivocally [evinces] the legislative intent to prevent a plaintiff who sues in Pennsylvania from obtaining greater rights than those available in the state where the cause of action arose." *Gwaltney v. Stone,* 387 Pa.Super. 492, 564 A.2d 498, 503 (1989). We believe Pennsylvania courts would not look favorably on plaintiffs here who missed Pennsylvania's statute of limitations, although Pennsylvania is the state where the accident occurred, and brought suit in Mississippi. Even if the Pennsylvania Supreme Court would require a grace period when the Pennsylvania legislature retroactively shortens a statute of limitations, we do not believe they would require a grace period in this case.

V. The Discovery Rule and Fraudulent Concealment

Plaintiffs in the Pennsylvania state cases appeal the district court's grant of summary judgment on their "initial injury" claims. [FN10] First, plaintiffs argue the statute of limitations was tolled under the "discovery rule" until they knew or should have known their injuries were caused by the Three Mile Island accident. Plaintiffs assert there are material issues of fact as to whether they knew or should have known the cause of their injuries. Second, plaintiffs argue the statute of limitations was tolled because defendants fraudulently concealed information about the Three Mile Island accident.

> FN10. The district court originally adopted in its entirety the prior judgment rendered by the Dauphin County Court of Common Pleas against plaintiffs in the Pennsylvania state cases. *In re TMI Litig. Cases Consol. II,* No. 88-1452, slip. op. at 23 (M.D.Pa. Aug. 16, 1993). Upon reconsideration, the court limited the state court's holding to "initial injury" claims. It then entered summary judgment against plaintiffs on the "initial injury" claims and dismissed them as time barred. *In re TMI Litig. Cases Consol. II,* No. 88-1452 (M.D.Pa. July 22, 1994).

A. The Discovery Rule

[14] The discovery rule tolls the running of a statute of limitations until "the plaintiff knows, or reasonably should know: (1) that he has been injured, and (2) that his injury has been caused by another party's conduct." *Cathcart v. Keene*

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Industrial Insulation, 324 Pa.Super. 123, 471 A.2d 493, 500 (1984) (in banc); *see also Hayward v. Medical Ctr. of Beaver County,* 530 Pa. 320, 608 A.2d 1040, 1043 (1992). Every plaintiff has a duty to exercise "reasonable diligence" in ascertaining the existence of an injury and its cause. *Stauffer v. Ebersole,* 385 Pa.Super. 306, 560 A.2d 816, 817, *app. denied,* 524 Pa. 622, 571 A.2d 384 (1989).

[15][16][17][18] In their brief, plaintiffs assert that several plaintiffs filed their actions within two years of diagnosis of a specific injury, and thereby complied with the discovery rule. Under Pennsylvania law, plaintiffs bear the burden of proving they filed their claims within the applicable statute of limitations. *See Osei-Afriyie v. Medical College of Pennsylvania,* 937 F.2d 876, 884 (3d Cir.) (citing cases), *cert. denied,* 502 U.S. 979, 112 S.Ct. 581, 116 L.Ed.2d 606 (1991). Where, as here, the non- moving party bears the burden of proof at trial, summary judgment is appropriate if non-movants fail to "make a showing sufficient to establish the existence of an element essential to [their] case." *Nebraska v. Wyoming,* 507 U.S. 584, 590, 113 S.Ct. 1689, 1694, 123 L.Ed.2d 317 (1993) . In responding to a motion for summary judgment, the non-moving party must "go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing there is a genuine issue for trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986) (internal quotations omitted). Beyond mere assertions, plaintiffs have not directed us to any evidence in the record that raises a material issue of fact as to whether any plaintiff filed suit within two years of discovery ***1117** of an "initial injury." Accordingly, we believe summary judgment was appropriate.

Plaintiffs also argue that "because the [discovery rule] involves questions of what a reasonable person should have known, a classic jury question is invariably presented, thereby precluding the use of the summary judgment procedure." Brief of the Appellants at 35-36. But the Court of Common Pleas held, and the record confirms, that the plaintiffs knew of the Three Mile Island accident, [FN11] and knew or should have known that exposure to radiation could cause adverse health affects. In such circumstances, the discovery rule does not toll the running of the statute of limitations.

FN11. Although plaintiffs did not file suit until almost six years after the Three Mile Island accident, they were able to answer in detail defendants' interrogatories on how they came to know of the accident, and where they were during the course of the accident. Some plaintiffs even left the geographic area in response to the accident.

Plaintiffs also assert summary judgment was improper because factual questions remain as to whether they used reasonable diligence to discover the cause of their injuries. The Court of Common Pleas held:

> The responses to interrogatories ... reveal plaintiffs knew of their specific injury more than two years prior to the time they filed their complaint. Thus, at that time they possessed the requisite knowledge to set the statutory clock running. Under the law of Pennsylvania they were under a duty to use all reasonable diligence to investigate the operative facts of their cause of action.... Given the notoriety of the accident and the plethora of investigative reports available to plaintiffs, it is clear that they had the "means of discovery" available to them.

In re TMI Litig. Cases Consolidated II, No. 426 S (1985), slip op. at 8-9 (Dauphin Co. February 20, 1987). Plaintiffs have not directed us to any evidence in the record that leads us to doubt these conclusions. Accordingly, we believe the district court properly granted summary judgment with respect to "initial injury" claims.

B. Fraudulent Concealment

[19][20] Plaintiffs also argue the statute of limitations was tolled because defendants fraudulently concealed information relating to the Three Mile Island accident. *See Molineux v. Reed,* 516 Pa. 398, 532 A.2d 792, 794 (1987) ("Where through fraud or concealment, the defendant causes the plaintiff to relax his vigilance or deviate from his right of inquiry, the defendant is estopped from invoking the bar of the statute of limitations.") (internal quotations omitted). In order to establish fraudulent concealment by a defendant, a plaintiff must prove "an affirmative or independent act of concealment that would divert or mislead the plaintiff from discovering the injury" or its cause. *Bohus v. Beloff,* 950 F.2d 919, 925 (3d Cir.1991). But plaintiffs have not directed us to any evidence

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that defendants sought to conceal the cause of their injuries. While plaintiffs have referred to statements by defendants' employees downplaying the seriousness of the accident immediately after it occurred, such statements do not create an issue of material fact with respect to fraudulent concealment.

In response to plaintiffs' fraudulent concealment argument, the Court of Common pleas found:

> The contention simply cannot prevail. Here, defendants did not "conceal" the fact that radiation escaped from the TMI facility. Defendants did nothing to induce plaintiffs not to file timely claims. In fact, the notice of the 1981 class action settlement, which was disseminated to all households within twenty-five miles of the reactor and widely publicized, put all persons on notice that if they believed they had a claim for personal injury, they should start their own lawsuit. This is not the type of conduct which could give rise to a claim of estoppel.
>
> Moreover, given the vast amount of information available to plaintiffs concerning the nature and extent of the accident, it is not rationally possible to ascertain any basis from which plaintiffs could claim that defendants are estopped from asserting the limitations defense. Defendants engaged in no affirmative action which could ***1118** have caused these plaintiffs to deviate from their right of inquiry.

In re TMI Litig. Cases Consolidated II, No. 426 S (1985), slip op. at 10 (Dauphin Co. February 20, 1987).

We agree that defendants' statements could not have caused plaintiffs to deviate from their right of inquiry into the source of their injuries. The record reflects that voluminous information about the Three Mile Island accident was in the public domain. [FN12] Moreover, many other plaintiffs obtained sufficient information to file suit within the statute of limitations. Under these circumstances, plaintiffs' have not raised a genuine issue of material fact with respect to fraudulent concealment. Summary judgment was proper.

> FN12. The Three Mile Island accident was the subject of extensive investigation and exhaustive reports long before plaintiffs were diagnosed with their illnesses or brought suit. *See Pennsylvania v. General Pub. Util. Corp.,* 710 F.2d 117, 118 n. 1 (3d Cir.1983).

VI. Conclusion

The choice of law provision of the Price Anderson Amendments Act, 42 U.S.C. § 2014(hh), mandates the retroactive application of Pennsylvania's two year statute of limitations to the plaintiffs claims filed in Mississippi state and federal court. Retroactive application comports with constitutional requirements of due process, and, in the circumstances of this case, Pennsylvania law does not provide for a grace period in which plaintiffs may file their claims. No issue of material fact precluded a grant of summary judgment based on the statute of limitations in the Pennsylvania state cases. For the foregoing reasons, we will affirm the judgment of the district court.

SAROKIN, Circuit Judge, dissenting.

I dissent primarily because I cannot conclude that Congress intended the Amendments Act to extinguish pending suits that were timely instituted in accordance with then-applicable statutes of limitations simply because they would not have satisfied the statute of limitations of the forum in which the underlying nuclear accident occurred. Nor can I conclude that Congress intended that certain pending claims survive while other identical ones cease to exist as a result of limitations periods that did not apply on the day those claims were filed. Certainly such a result is inconsistent with Congress's intent to promote " 'equitable and uniform treatment of victims.' " *TMI II,* 940 F.2d at 861 (quoting H.R.Rep. No. 104, 100th Cong., 1st Sess., pt. 1, at 18, 29 (1987)).

I agree with the majority that the jurisdictional provision, the choice- of-law provision, and the definition of "public liability action" contained in section 11 apply retroactively to lawsuits that were pending when the Amendments Act was passed. Because the majority's understanding of that retroactive application sweeps too broadly, however, I respectfully dissent.

It is well established that "[a] law is retrospective if it 'changes the legal consequences of acts completed before its effective date.' " *Miller v. Florida,* 482 U.S. 423, 430, 107 S.Ct. 2446, 2451, 96 L.Ed.2d 351 (1987)(quoting *Weaver v. Graham,* 450 U.S. 24, 31, 101 S.Ct. 960, 965, 67 L.Ed.2d 17 (1981)).

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Thus, retroactive legislation includes " 'all statutes, which, *though operating only from their passage,* affect vested rights and past transactions.' " *Id.* (quoting *Society for the Propagation of the Gospel v. Wheeler,* 22 F.Cas. 756, 767 (No. 13,156)(CCDNH 1814))(emphasis added). In the words of Justice Story,

> "every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective...."

Id. (citation omitted). Nevertheless, "deciding when a statute operates 'retroactively' is not always a simple or mechanical task." *Landgraf v. USI Film Products,* 511 U.S. 244, ----, 114 S.Ct. 1483, 1498, 128 L.Ed.2d 229 (1994). Ultimately, whether a particular application is retroactive "depends upon what one considers to be the determinative event by which retroactivity or prospectivity is to be calculated." *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 494 U.S. 827, 857 n. 3, ***1119** 110 S.Ct. 1570, 1588 n. 3, 108 L.Ed.2d 842 (1990)(Scalia, J., concurring).

In this case, Congress expressly stated that the Amendments Act "shall apply to nuclear incidents occurring *before,* on, or after the date of the enactment of this Act." 42 U.S.C. § 2014 (emphasis added). I agree with the majority that the term "nuclear incidents" includes pending actions arising from such incidents. What is unclear from the statute is how exactly the "shall apply" language should be interpreted in the context of pending actions.

The statute itself offers no guidance on this point. As a theoretical matter, however, retroactivity can be understood in one of two ways. First, it can be understood as the majority apparently construes it: as a rewriting of history. Under this theory, section 20 reaches into the past to transform pending lawsuits as of their inception, undoing and rewriting all subsequent proceedings and applying new law as though it had existed from the date of filing. This theory engenders a historical fiction pursuant to which plaintiffs' suits were public liability actions when they were filed in 1985, governed by Pennsylvania substantive law and subject to original federal jurisdiction, although the Amendments Act did not take effect until three years later.

Alternatively, the Amendments Act can be seen as retroactive in the more limited sense that it "attaches new legal consequences to events completed before its enactment." *Landgraf,* 511 U.S. at ----, 114 S.Ct. at 1499. This theory would mean simply that all pending actions asserting public liability were transformed on August 20, 1988 into public liability actions, and that the federal courts acquired original jurisdiction over those actions as of, but not prior to, that date.

Either interpretation of retroactivity is acceptable as a theoretical matter. It is our task to determine which is the correct one under the circumstances of this case.

I conclude that the latter interpretation of retroactivity under section 20 is the correct one, for several reasons. First and foremost, applying the Amendments Act to pending cases from August 20, 1988 forward accomplishes the goals that Congress intended the retroactivity provision to accomplish by defining the pending Three Mile Island cases as public liability actions and providing for their removal to federal court and litigation under federal substantive law.

Second, where, as here, the statute is ambiguous as to the appropriate scope of retroactivity, I believe that the well-established presumption against statutory retroactivity requires interpreting that scope narrowly. In this case, the statute neither states explicitly that the substantive law of the state in which the incident occurred applies "retroactively" to pending actions nor offers any guidance as to how the language "shall apply" should be interpreted in the context of a pending action. It is ambiguous as to whether section 11 applies to pending actions as of August 20, 1988, or whether, as the majority concludes, it applies to such actions as of their inception. In the absence of explicit Congressional instruction, I believe that the principles underlying the anti-retroactivity presumption make the former interpretation far more appropriate than the sweeping approach to retroactivity enunciated by the majority. [FN1]

> FN1. This is not to suggest that the presumption against retroactive legislation governs this case; on the contrary, I am in agreement with the majority that Congress intended the Amendments Act to

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> apply retroactively. *See* Majority Op. at 1112-13 n.6. The principles underlying the anti-retroactivity presumption are relevant, however, insofar as they evince a cautious and conservative approach to retroactivity that is fundamental to our legal system. Where, as here, there is a question as to the intended scope of retroactivity, I believe that the principles underlying the anti- retroactivity presumption urge us to interpret that scope narrowly.

Third, this interpretation eliminates the strained historical fiction on which the majority opinion, by necessity, must be based, thereby providing a more rational analytic framework for effectuating Congress's intent and leading to a more equitable result. For the most part, the practical effect of the retroactivity provision is the same under either interpretation; in either case, rulings made prior to the passage of the Amendments Act on the basis of substantive law which no longer applies can be modified to ***1120** conform to the new governing law of the case. Causes of action recognized in the filing state but not in the forum state can be dismissed. Rules of evidence, burdens of proof, and jury instructions all can be adjusted to accommodate the law of the forum. Under the majority's interpretation, these adjustments would be made by adopting a fiction that Pennsylvania law applied from the beginning and then relitigating the entire case accordingly. Under my interpretation, these adjustments can be made simply by applying Pennsylvania law after August 20, 1988 to motions, new or renewed, brought by the parties. In other words, after August 20, 1988, a party can move to dismiss a claim that no longer has any legal basis, renew a summary judgment motion that failed previously but might now succeed, or seek reconsideration of prior evidentiary rulings that do not stand up under the new governing law. Thus, while the two interpretations require different procedures for implementation, the ultimate effect on the parties is, for the most part, the same in both cases.

In the statute of limitations context, however, the difference in theory between the two interpretations translates into a crucial difference in outcome. The historical fiction on which the majority's theory is premised forces the majority to conclude that plaintiffs' action, although filed within the Mississippi statute of limitations, is now barred by the Pennsylvania statute of limitations--an inequity which I believe contravenes Congress's intent and which my theory avoids. Statutes of limitations are uniquely concerned with a specific point in time: the date on which the complaint was filed. While a defendant can raise the statute of limitations as a defense at any time during the course of a lawsuit, the relevant question for the court is always whether, *at the time the case was filed,* the applicable statute of limitations was satisfied. Because the majority reasons that section 20 requires extending Pennsylvania law back in time to the inception of plaintiffs' action, it concludes that Pennsylvania's statute of limitations applied--and was violated--at the time the suit was filed. However, *at the time it was filed,* plaintiffs' lawsuit was not a public liability action. As a result, I conclude that it was governed *at the time it was filed* by Mississippi, not Pennsylvania, law. Although the substantive law of Pennsylvania governs plaintiffs' case from August 20, 1988 forward, the statute of limitations was satisfied or violated back in 1985, when Mississippi law applied. At that time, under the applicable law, I conclude that it was satisfied.

Finally, the interpretation I endorse conforms with the "settled policy" of federal courts to "avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question," *Gomez v. United States,* 490 U.S. 858, 864, 109 S.Ct. 2237, 2241, 104 L.Ed.2d 923 (1989), by eliminating the constitutional questions of due process raised by the majority's interpretation. If the Amendments Act applies to pending actions from August 20, 1988 forward, then there is no issue as to whether the Act violates the due process rights of plaintiffs to pending lawsuits, because the Pennsylvania statute of limitations does not apply to deprive plaintiffs of their cause of action.

As a result, I conclude that the retroactivity provision of the Amendments Act does not rewrite history as applied to pending actions, but rather operates by changing the ground rules midway through the game, altering the legal status and governing law of pending actions from the time of its enactment forward.

The majority proffers that it agrees with this interpretation, and denies that its interpretation of section 20 engenders a rewriting of history. [FN2]

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Nevertheless, while conceding ***1121** that the definition of public liability action, the choice-of-law provision, and the original jurisdiction provision apply to pending cases from August 20, 1988 forward, the majority concludes that plaintiffs' lawsuit was filed in violation of Pennsylvania's two-year statute of limitations. Both positions cannot be correct. In effect, the Amendments Act drew a bright line down the middle of this lawsuit on August 20, 1988, dividing the case into two distinct parts. Prior to August 20, 1988, the suit was generic and Mississippi law governed; since that date, it has been a public liability action and Pennsylvania law governs. I think it logically inconsistent to hold, as the majority does, that plaintiffs' suit was not a public liability action when it was filed, and yet conclude that it was required at the time it was filed to satisfy the Pennsylvania statute of limitations--a statute that only applies to this action in its public liability incarnation. [FN3] Either plaintiffs' lawsuit was a public liability action when it was filed, subject to federal jurisdiction and Pennsylvania's statute of limitations, or it was not.

FN2. The majority's understanding of the term "historical fiction" is different from what I intend. In denying that its interpretation of the Amendments Act engenders a historical fiction, the majority states that it "do[es] not create a historical fiction that plaintiffs filed suit on any day other than that on which they actually filed." This rebuttal is wide of the mark. My point is simply this: (1) When plaintiffs filed their suit, it was not a public liability action--indeed, that cause of action did not yet exist; (2) When plaintiffs filed their suit, it was not governed by Pennsylvania law; (3) When plaintiffs' filed their suit, it satisfied the applicable statute of limitations; (4) On August 20, 1988, plaintiffs' suit was transformed into a public liability action, governed by Pennsylvania substantive law and subject to federal jurisdiction; (5) In order to conclude that plaintiffs' suit was filed in violation of the Pennsylvania statute of limitations, the majority must first conclude that the Pennsylvania statute of limitations applied to plaintiffs' suit at the relevant time: the day on which it was filed. Because Pennsylvania law applies only to public liability actions, however, the majority's holding in this case cannot be sustained without the historical fiction that plaintiffs' suit was a public liability action on the day it was filed.

FN3. As explained *infra,* I question whether Congress intended the phrase "substantive rules of decision" to include statutes of limitations in the first place. Because I think that the majority's argument fails even if the Amendments Act encompasses statutes of limitations, however, I will assume for now that the Pennsylvania statute of limitations is substantive law in this context.

Therefore, in my view it is the majority, and not I, who seeks to treat the statute of limitations differently from all other "substantive rules for decision" of Pennsylvania law. While concluding that Pennsylvania substantive law operates on plaintiffs' lawsuit from August 20, 1988 forward, the majority carves out an exception for the statute of limitations, allowing it to reach back in time--crossing the imaginary line drawn by the Amendments Act--to operate on the suit on the day it was filed. This treatment of the statute of limitations clashes directly with the majority's overarching theory of the case. Statutes of limitations, as discussed above, can only be violated (or satisfied) at one specific point in time--the day on which the suit was filed-- notwithstanding that such violations can be called to the attention of the court at any point during the pendency of a lawsuit. Under the majority's own interpretation of section 20, this case was not a public liability action when it was filed, and Pennsylvania law did not apply. As a result, the majority's treatment of the statute of limitations cannot be reconciled with its interpretation of the meaning and effect of the Amendments Act.

The majority seeks to justify this illogical result in terms of congressional intent. It is not at all clear, however, that Congress intended the choice- of-law provision of the Amendments Act to encompass statutes of limitations. While it is well established that statutes of limitations are characterized as substantive law for purposes of the doctrine of *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), *see Guaranty Trust Co. of New York v. York,* 326 U.S. 99, 109, 65 S.Ct. 1464, 1470, 89 L.Ed. 2079 (1945), this does not mean that they are considered substantive in other contexts. Indeed, in holding that statutes of limitations are substantive for purposes of the *Erie* doctrine, such that federal courts sitting in diversity must apply state statutes of limitations, the Supreme Court confined its analysis narrowly to the context of *Erie:*

It is therefore immaterial whether statutes of limitation are characterized either as 'substantive'

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> or 'procedural' in State court opinions *in any use of those terms unrelated to the specific issue before us. Erie R. Co. v. Tompkins* was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. In essence, the intent of that decision was to ensure that, *in all cases where a federal court is exercising jurisdiction solely because ***1122** of the diversity of citizenship of the parties,* the outcome of the litigation in federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.

Guaranty Trust Co. of New York, 326 U.S. at 109, 65 S.Ct. at 1470 (emphasis added).

In this case, the majority opinion's conclusion that "the statute of limitations is a substantive rule of decision," Majority Opinion, at 1112, is based entirely on cases holding that statutes of limitations are substantive rather than procedural for purposes of *Erie.* The characterization of statutes of limitations as substantive for *Erie* purposes, however, was not based on an assessment of their procedural or substantive nature in the abstract but rather on their impact on the federalism concerns that *Erie* 's rough procedural/substantive distinction was intended to address. *See Guaranty Trust Co.,* 326 U.S. at 109, 65 S.Ct. at 1470.

In this case, by contrast, there is no federalism concern at issue and no balance of power between federal and state courts to be maintained. The cause of action is federal, and the only question is whether Congress intended the term "substantive rules for decision" to include statutes of limitation. The legislative history of the Amendments Act is silent on this point; indeed, there is nothing to indicate that Congress even considered the status of statutes of limitations under that Act, much less intended to include them as substantive rules of decision. Moreover, a review of Pennsylvania case law makes clear that the courts of Pennsylvania "generally treat statutes of limitations as 'procedural.' " *AAMCO Transmissions, Inc. v. Harris,* 759 F.Supp. 1141, 1143-44 (E.D.Pa.1991) (footnotes omitted); *Boyle v. State Farm Mutual Automobile Ins. Co.,* 310 Pa.Super. 10, 456 A.2d 156, 162 (1983); *Altoona Area Sch. Dist. v. Campbell,* 152 Pa.Cmwlth. 131, 618 A.2d 1129, 1134 (1992). This strikes me as a strong indication that the courts of Pennsylvania would not consider the phrase "substantive rules for decision" to include Pennsylvania's statutes of limitations. [FN4] For these reasons, I do not think that congressional intent with respect to statutes of limitations is clear enough to sustain the majority's logically inconsistent conclusion that plaintiffs' suit is time-barred. [FN5] *See* Majority Op., at 1112 ("Congress could have exempted statutes of limitations from retroactive application, but it did not.").

FN4. The majority cites *AAMCO Transmissions, Inc. v. Harris,* 759 F.Supp. 1141, 1143-44 (E.D.Pa.1991), for the proposition that Pennsylvania courts generally apply Pennsylvania's statute of limitations to causes of action that arose in other jurisdictions as well as to causes of action that arose in Pennsylvania. Majority Op., at 1112 n.5. This may well be true, but it is irrelevant to the issue at hand, for two reasons. First, Pennsylvania law regarding the statute of limitations has no bearing on the question before us: whether section 20--a federal statute--requires us to apply Pennsylvania's statute of limitations retroactively to bar the underlying actions. This is purely a question of federal law, and neither the courts nor the statutes of Pennsylvania can provide the answer. Second, even if Pennsylvania law were relevant to the issue at hand, the language quoted by the majority is inapposite. The quoted language describes the way in which Pennsylvania courts treat cases which are filed in Pennsylvania in the first instance but which are based on events that took place ("arose") outside the jurisdiction--not cases such as this one which were filed in other jurisdictions and later transferred to Pennsylvania. It tells us nothing about the way Pennsylvania courts would treat a unique and highly unusual case such as this one, and provides no basis for inference.

FN5. Contrary to the majority's assertion, it is not true that "achieving substantially the same outcome in all public liability actions, regardless of where filed, necessitates treatment of statutes of limitations as 'substantive rules for decision.' " Majority Op., at 1112 n.5. Significantly, a finding that Congress did not intend the term "substantive rules for decision" to include statutes of limitations would not mean that there is no statute of limitations on public liability actions. Rather, in the absence of an express command from Congress, federal courts "ordinarily do not assume that Congress intended that there be no time limit

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> on such actions at all; rather, our task is to 'borrow' the most suitable statute or other rule of timeliness from some other source." *DelCostello v. Teamsters,* 462 U.S. 151, 158, 103 S.Ct. 2281, 2287, 76 L.Ed.2d 476 (1983). If there is no indication in the legislative history as to what statute of limitations Congress intended the courts to apply to a given type of action, the "fallback rule of thumb" is to "apply the most closely analogous statute of limitations under state law." *Id.* at 158 & n. 12, 103 S.Ct. at 2287 & n. 12. If the relevant state statute of limitations is an "unsatisfactory vehicle[ ] for the enforcement of federal law," however, courts may borrow timeliness rules from federal law--"either express limitations periods from related federal statutes, or such alternatives as laches." *Id.* at 161, 162, 103 S.Ct. at 2289. Thus, there are two possible outcomes if Congress did not intend for "substantive rules of decision" to include statutes of limitations and thus did not expressly provide for a statute of limitations for public liability actions: (1) the courts would apply state statutes of limitations anyway (although they would not fall under the rubric of section 20); or (2) the courts would apply a uniform statute of limitations to public liability actions drawn from federal law. In either event, all public liability actions arising from a single occurrence would be subject to the same statute of limitations, with the exception of cases already pending when the Amendments Act was passed.

***1123** Nor is there any evidence in the legislative history or elsewhere that Congress intended the sweeping retroactivity that the majority endorses. On the contrary, the legislative history indicates that the Amendments Act was based on the lessons of claims resulting from the TMI accident:

> The experience with claims following the TMI accident demonstrates the advantages of the ability to consolidate claims after the nuclear incident. Attorneys representing both plaintiffs and defendants in the TMI litigation testified ... that the ability to consolidate claims in federal court would greatly benefit the process for determining compensation for claimants.... The availability of the provisions for consolidation of claims in the event of any nuclear incident ... would avoid the inefficiencies resulting from duplicative determinations of similar issues in multiple jurisdictions that may occur in the absence of consolidation.

S.Rep. No. 218, 100th Cong., 2d Sess. 13, *reprinted in* 1988 U.S. Cong. & Admin. News 1476, 1488; *In re TMI Litig. Cases Consol. II,* 940 F.2d 832, 853 n. 18 (3d Cir.1991)(stating that Congress' decision to enact the Amendments Act was based on the lessons of litigation resulting from the TMI accident). This indicates to me that Congress contemplated providing a mechanism for consolidating TMI cases to facilitate their continued litigation. This forward-looking approach evidenced by the legislative history is wholly inconsistent with a congressional desire to extinguish those suits on technical grounds.

Because I conclude that retroactive application of the choice-of-law provision means simply that Pennsylvania substantive law applies to and governs the instant litigation from August 20, 1988 forward, I respectfully dissent from the majority's far-reaching and overly broad interpretation of section 20 and from its conclusion that Pennsylvania's two-year statute of limitations reaches back in time to bar plaintiffs' suit. Accordingly, I would reverse.

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Tab

19

United States Court of Appeals,
Eleventh Circuit.

Philip H. EDDINGS, as Personal Representative of the Estate of Scott Philip Eddings, Deceased, on Behalf of Philip H. EDDINGS, and Virginia Rae Randt, individually, Plaintiffs-Appellants,

v.

VOLKSWAGENWERK, A.G., a/k/a Volkswagen Aktiengesellschaft, a foreign corporation, et al., Defendants-Appellees.

Patricia Ann GRIFFIN, By and Through her next friend and natural father, Larry D. GRIFFIN, and Larry D. Griffin, individually, Plaintiffs-Appellants,

v.

FORD MOTOR COMPANY, Defendant-Appellee.

Albert V. VERHINE, Jr., a minor, By A. Brennis VERHINE, his legal Guardian; and A. Brennis Verhine, and Glenda L. Verhine, his natural parents, Individually, Plaintiffs-Appellants,

v.

VOLKSWAGENWERK, A.G., a foreign corporation and Volkswagen of America, Inc., a foreign corporation, Defendants-Appellees.

Dana C. LAMB, a minor, By and Through his mother and next friend, Jeanne F. DONALDSON, Jeanne F. Donaldson, individually, Plaintiffs-Appellants,

v.

VOLKSWAGENWERK AKTIENGESELLSCHAFT, a German Corporation, Volkswagen of America, Inc., a New Jersey corporation, Defendants-Appellees.

Nos. 86-3068, 86-3103, 86-3138 and 86-5258.

Jan. 22, 1988.

Actions were brought against automobile manufacturers for injuries suffered more than 12 years after date of delivery of automobiles to original purchasers, and defendants moved for summary judgment. The United States District Court for the Northern District of Florida, No. PCA 83-4127-WEA, 635 F.Supp. 45, Winston E. Arnow, J., entered summary judgment for defendants, as did the United States District Court for the Northern District of Florida, Nos. TCA 85-7244-09 and 84-7120-WS, William Stafford, Chief Judge, and the United States District Court for the Southern District of Florida, 631 F.Supp. 1144, Stanley Marcus, J., and plaintiffs appealed. On consolidated diversity actions, the Court of Appeals, Tjoflat, Circuit Judge, held that plaintiffs did not have vested property rights in causes of action that accrued based on Florida Supreme Court decision holding 12-year statute of repose unconstitutional, such that application of statute of repose after Florida Supreme Court receded from its position and held that statute of repose was constitutional would deprive plaintiffs of vested property right in violation of Fourteenth Amendment due process.

Affirmed.

West Headnotes

[1] Constitutional Law ⚿308
92k308 Most Cited Cases

[1] Limitation of Actions ⚿4(2)
241k4(2) Most Cited Cases

Florida's statute of repose which barred actions for products liability brought more than 12 years after date of delivery of completed product to original purchaser did not violate Fourteenth Amendment due process clause; recognizing overruling of *Battilla v. Allis Chalmers Mfg. Co.*, 392 So.2d 874 (Fla.). U.S.C.A. Const.Amend. 14; West's F.S.A. § 95.031(2).

[2] Constitutional Law ⚿308
92k308 Most Cited Cases

[2] Limitation of Actions ⚿31
241k31 Most Cited Cases

Plaintiffs who brought actions against automobile manufacturers for injuries suffered more than 12 years after date of initial purchase of automobiles did not have vested property rights in causes of action that accrued based on Florida Supreme Court decision holding Florida statute of repose which barred actions for products liability brought more

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than 12 years after date of delivery of completed product to its original purchaser unconstitutional, such that application of statute of repose after Florida Supreme Court receded from its position and held that statute of repose was constitutional would deprive plaintiffs of vested property right in violation of Fourteenth Amendment due process. U.S.C.A. Const.Amend. 14; West's F.S.A. § 95.031(2).

[3] Constitutional Law ⚖249(3)
92k249(3) Most Cited Cases

[3] Limitation of Actions ⚖4(2)
241k4(2) Most Cited Cases
(Formerly 241k412)

Florida statute of repose which barred actions for products liability brought more than 12 years after date of delivery of completed product to its original purchaser did not violate Fourteenth Amendment equal protection clause on theory that the statute of repose, combined with four-year statute of limitations, created two classes of injured persons with different legal rights--one class including persons who were injured less than eight years after delivery of product to original purchaser, who had full four years afforded by statute of limitations to bring actions, and another class including persons who were injured more than eight years, but less than 12 years, after product was delivered to original purchaser, who therefore had less than full four years afforded by statute of limitations to file suit--with no rational basis for the disparate treatment. U.S.C.A. Const.Amend. 14; West's F.S.A. § 95.031(2).

***1370** Karen E. Roselli, Kevin A. Malone, Fort Lauderdale, Fla., for plaintiffs-appellants in 86-3068.

Cathy Jackson Lerman, Fort Lauderdale, Fla., for amicus curiae Academy of Florida Trial Lawyers.

J. Richard Caldwell, Jr., Sharon Lee Stedman, Orlando, Fla., for defendants- appellees in 86-3068.

Edward T. O'Donnell, Mershon, Sawyer, Johnston, Dunwody & Cole, Miami, Fla., for amicus curiae Motor Vehicle & Product Liability.

***1371** Robert K. High, Jr., E.C. Deeno Kitchen, Brian S. Duffy, Robert M. Ervin, Jr., Tallahassee, Fla., Allen W. Lindsay, Jr., Milton, Fla., for plaintiffs-appellants in 86-3103.

Patrick J. Farrell, Jr., Patricia Guilday, Tallahassee, Fla., John M. Thomas, Office of the General Counsel,Ford Motor Co., Dearborn, Mich., for defendant- appellee in 86-3103.

John Stephen Derr, Field, Granger, Santry & Mitchell, Tallahassee, Fla., Michael Hoenig, Herzfeld & Rubin, New York City, for plaintiffs-appellants in 86-3138.

Sharon Lee Stedman, Rumberger, Kirk, Caldwell, Cabaniss & Burke, Orlando, Fla., for defendants-appellees in 86-3138.

Charles R. Stack, High, Stack, Lazenby & Palahach, Coral Gables, Fla., for plaintiffs-appellants.

Wendy F. Lumish, Rumberger, Wechsler & Kirk, Miami, Fla., Sharon Lee Stedman, Miami, Fla., for defendants-appellees in 86-5258.

Appeals from the United States District Court for the Northern District of Florida.

Appeal from the United States District Court for the Southern District of Florida.

Before TJOFLAT and HILL, Circuit Judges, and LYNNE [FN*], Senior District Judge.

FN* Honorable Seybourn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

TJOFLAT, Circuit Judge:

These four consolidated diversity actions present two issues involving Florida's products liability statute of repose. The first issue concerns the effect of a decision by the Florida Supreme Court in which the court reversed a prior decision holding that the statute of repose was invalid as applied. We must decide whether application of the supreme court's later decision in the cases before us deprives the appellants of a vested property right, in violation of the fourteenth amendment's due process clause. The second issue involves the question of whether Florida's statute of repose creates two classes of

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persons with different legal rights, in violation of the fourteenth amendment's equal protection clause. In each of the four cases, the district court granted the appellee's motion for summary judgment. 635 F.Supp. 45, 631 F.Supp. 1144. We affirm.

I.

A.

In 1974, the Florida legislature enacted a twelve-year products liability statute of repose. [FN1] That statute terminated manufacturer liability with respect to suits brought more than twelve years after delivery of the product to its first purchaser. In other words, the Florida legislature determined that independent of whether the applicable statute of limitations had run, an injury caused by a product that had been delivered to its original purchaser more than twelve years prior to the filing of the plaintiff's lawsuit would give rise to no cause of action against the manufacturer or designer. [FN2]

FN1. The statute of repose, Fla.Stat. § 95.031(2) (1982), provided as follows:

Actions for products liability ... must be begun within the period prescribed in this chapter ... but in any event within 12 years after the date of delivery of the completed product to its original purchaser ... regardless of the date the defect in the product ... was or should have been discovered.

In 1986, the Florida legislature amended section 95.031(2) so as to repeal the statute of repose in products liability actions. *See* Fla.Stat. § 95.031(2) (Supp.1987). The Florida Supreme Court has held that this repeal has no effect on cases arising prior to the date of the amendment. *See Melendez v. Dreis & Krump Mfg. Co.,* 515 So.2d 735, 737 (Fla.1987).

FN2. A statute of repose is to be distinguished from a statute of limitations. The district court in one of the cases before us thoughtfully explained the difference between a statute of repose and a statute of limitations:

While in the most general sense statutes of repose and statutes of time limitation are similar in that they prescribe the periods within which actions may be brought, we think there are critical analytical distinctions between the two and we do not use the terms interchangeably here. A statute of repose terminates the right to bring an action after the lapse of a specified period. The right to bring the action is foreclosed when the event giving rise to the cause of action does not transpire within this interval. A statute of limitations delineates the time a party has to initiate an action once the injury has occurred; it does not begin to run until the wrong has been or should have been discovered. Simply stated, a statute of repose is triggered once the product is delivered to its first purchaser. If an injury results from the product after the authorized period has elapsed the victim is without recourse to the manufacturer of the product. A statute of repose "... does not bar a cause of action; its effect, rather, is to prevent what might otherwise be a cause of action, from ever arising." *Rosenberg v. Tower of North Bergen,* 61 N.J. 190, 293 A.2d 662, 667 (1972). Thus under the Florida statute of repose an injury caused by a product which has reached its original purchaser more than twelve years prior forms no basis for recovery because the statute prevents the accrual of a right of action. "The injured party literally has *no* cause of action. The harm that has been done is *damnum absque injuria*--a wrong for which the law affords no redress." *Id.* The effect of the statute of repose may be to bar the cause of action before it has accrued.

These product liability statutes of repose are designed and intended to encourage diligence in the prosecution of claims, eliminate the potential of abuse from a state claim, and ultimately foster certainty and finality in liability.

Lamb v. Volkswagenwerk Aktiengesellschaft, 631 F.Supp. 1144, 1147 (S.D.Fla.1986).

***1372** In December 1980, in *Battilla v. Allis Chalmers Mfg. Co.,* 392 So.2d 874 (Fla.1980) (per curiam), the Florida Supreme Court held that the twelve-year statute of repose, as it applied to a plaintiff whose injury occurred more than twelve years after delivery of the product to its first purchaser, worked a denial of access to courts in violation of the Florida Constitution. [FN3] In August 1985, the Florida Supreme Court, in *Pullum v. Cincinnati, Inc.,* 476 So.2d 657, 659 (Fla.1985), overruled *Battilla* and held that the statute of repose is "not unconstitutionally violative of [the right of access] of the Florida Constitution." Although the supreme court did not state in *Pullum* whether the rule announced in that case would apply to cases involving injuries occurring after the *Battilla* decision but before the *Pullum* decision, it has since held that *Pullum* does apply to such cases. *See Pait v. Ford Motor Co.,* 515 So.2d 1278, 1279 (Fla.1987); *Melendez v. Dreis & Krump Mfg. Co.,* 515 So.2d 735, 737 (Fla.1987).

FN3. Article I, section 21 of the Florida Constitution provides as follows:

§ 21 Access to courts

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> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

B.

Each of the present lawsuits arose out of an accident occurring in Florida and involving an automobile that had been delivered to the original purchaser more than twelve years before the accident. [FN4] In three of the cases, the accident occurred after the supreme court's decision in *Battilla;* in the fourth case, the accident occurred before *Battilla* was decided. All of the accidents occurred before the supreme court reversed itself in *Pullum.* In each case, someone injured in the accident, or a representative of his estate, filed suit in the district court against the manufacturer of ***1373** the automobile, invoking jurisdiction under 28 U.S.C. § 1332 (1982). [FN5] In three of the cases, suit was filed after the supreme court decided *Battilla* but before it decided *Pullum.* In the fourth case, suit was filed eleven days after the supreme court decided *Pullum.*

> FN4. The chronology of relevant dates for each of the four cases is summarized below:
> *Eddings v. Volkswagenwerk, A.G.,* No. 86-3068
> 1967--Car delivered to original purchaser
> 1979--Statute of repose expires
> 1980--*Battilla* decided
> 1982--Accident occurs
> 1983--Suit filed
> 1985--*Pullum* decided
> *Lamb v. Volkswagenwerk Aktiengesellschaft,* No. 86-5258
> 1967 (Nov. 13)--Car delivered to original purchaser 1979 (Nov. 13)--Statute of repose expires
> 1979 (Nov. 21)--Accident occurs
> 1980--*Battilla* decided
> 1982--Suit Filed
> 1985--*Pullum* decided
> *Verhine v. Volkswagenwerk, A.G.,* No. 86-3138
> 1969 (July)--Car delivered to original purchaser
> 1980--*Battilla* decided
> 1981 (July)--Statute of repose expires
> 1981 (Aug.)--Accident occurs
> 1984--Suit filed
> 1985--*Pullum* decided
> *Griffin v. Ford Motor Co.,* No. 86-3103
> 1971--Car delivered to original purchaser
> 1980--*Battilla* decided
> 1983--Statute of repose expires
> 1985 (Jan.)--Accident occurs
> 1985 (Aug.)--*Pullum* decided
> 1985 (Sept.)--Suit filed
>
> FN5. Section 1332 provides as follows: (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs, and is between--
> (1) citizens of different states;
> ....

In each of the four cases, the defendant manufacturer moved the court for summary judgment, contending that because the twelve-year statute of repose had run its course, the plaintiff had no cause of action. In each case, the district court granted the defendant's motion for summary judgment. The plaintiffs have appealed to this court.

II.

The district court correctly interpreted Florida law in holding that the decision in *Pullum* controls these cases and leaves appellants with no cause of action rooted in products liability. [FN6] Appellants argue, however, that application of the statute of repose to their suits would, as a matter of federal law, deprive them of a vested property right in violation of the fourteenth amendment's due process clause.

> FN6. At the time the district court decided these cases, the Florida Supreme Court had not expressly decided whether *Pullum* would apply so as to bar a cause of action arising from an injury occurring after the *Battilla* decision but before the *Pullum* decision. The supreme court has, however, since ruled that *Pullum* is to have such application. *See Pait v. Ford Motor Co.,* 515 So.2d 1278, 1279 (Fla.1987); *Melendez v. Dreis & Krump Mfg. Co.,* 515 So.2d 735, 737 (Fla.1987).
> In their briefs, appellants have in various degrees relied on *Chevron Oil v. Huson,* 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). *Chevron* involved the retroactive application of a federal court decision regarding a matter of federal statutory law and is not applicable to our analysis in this case.

[1] We note preliminarily that appellants' facial attack on the constitutionality of the Florida statute

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of repose is without merit. The United States Supreme Court, in cases raising the constitutionality of similar statutes, has found no violation of the fourteenth amendment. *See, e.g., Woodward v. Burnham City Hosp.,* 449 U.S. 807, 101 S.Ct. 54, 66 L.Ed.2d 11 (1980), *dismissing appeal from Anderson v. Wagner,* 79 Ill.2d 295, 37 Ill.Dec. 558, 402 N.E.2d 560 (1979) (no due process violation from legislative action "establishing the four-year outer limit within which to file a complaint for medical malpractice") (appeal dismissed for want of a substantial federal question; see 49 U.S.L.W. 3065 for summary of questions presented on appeal); *Ellerbe v. Otis Elevator Co.,* 459 U.S. 802, 103 S.Ct. 24, 74 L.Ed.2d 39 (1982), *dismissing appeal from* 618 S.W.2d 870 (Tex.Civ.App.1981) (due process of law not denied plaintiff by virtue of statute prohibiting suits against licensed engineers or architects for damages arising out of unsafe condition of real property that was improved more than ten years earlier) (appeal dismissed for want of a substantial federal question; see 51 U.S.L.W. 3146 for summary of questions presented on appeal). [FN7]

> FN7. Summary disposition by the Supreme Court of an appeal for want of a substantial federal question is a disposition on the merits of the case:
> As Mr. Justice Brennan once observed, "[v]otes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case ...," *Ohio ex rel. Eaton v. Price,* 360 U.S. 246, 247, 79 S.Ct. 978, 979, 3 L.Ed.2d 1200 (1959); cf. R. Stern & E. Gressman, Supreme Court Practice, 197 (4th ed. 1969) ("The Court is, however, deciding a case on the merits, when it dismisses for want of a *substantial* question...."); C. Wright, Law of Federal Courts 495 (2d ed. 1970) ("Summary disposition of an appeal, however, either by affirmance or by dismissal for want of a substantial federal question, is a disposition on the merits.").
> *Hicks v. Miranda,* 422 U.S. 332, 344, 95 S.Ct. 2281, 2289, 45 L.Ed.2d 223 (1975).

[2] Appellants argue in the alternative that the statute of repose is unconstitutional as applied. Their argument, reduced to its essentials, is as follows. They begin with the premise that a products liability cause of action accrues at the time the injury occurs. Appellants' injuries occurred ***1374** after the Florida Supreme Court decided *Battilla* but before it decided *Pullum.* Since their injuries therefore occurred at a time when Florida decisional law held that application of the statute of repose to cases such as theirs would violate the Florida Constitution, appellants reason that nothing in Florida law prevented the accrual of their causes of action at that time. Appellants argue that an accrued cause of action is a vested property right, and that application of the statute of repose now would deprive them of that right in violation of the due process clause. [FN8]

> FN8. In one of the cases, *Lamb v. Volkswagenwerk, A.G.,* No. 86- 5258, the accident occurred before *Battilla* was decided. The appellant in *Lamb* therefore cannot make this particular argument.

We reject appellants' arguments that the *Pullum* decision should be analyzed as if it were a legislative reenactment of a repealed statute. *Battilla* did not invalidate the statute of repose; during the interim between the *Battilla* and the *Pullum* decisions, the statute continued to bar causes of action in cases factually distinguishable from *Battilla.* Appellants therefore cannot assert that the statute was repealed at the time their injuries occurred. Although at that time the supreme court had held that application of the statute to cases such as theirs violated the Florida Constitution, the supreme court was free to change its interpretation, and appellants had no vested right in the former interpretation. *See New York Cent. R.R. v. White,* 243 U.S. 188, 198, 37 S.Ct. 247, 250, 61 L.Ed. 667 (1917) ("No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit."); *see also Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. 59, 88 n. 32, 98 S.Ct. 2620, 2638 n. 32, 57 L.Ed.2d 595 (1978) ("Our cases have clearly established that '[a] person has no property, no vested interest, in any rule of the common law.' "); *Ducharme v. Merrill-Nat'l Laboratories,* 574 F.2d 1307, 1309 (5th Cir.) ("[A] plaintiff has no vested right in any tort claim for damages under state law."), *cert. denied,* 439 U.S. 1002, 99 S.Ct. 612, 58 L.Ed.2d 677 (1978). [FN9]

> FN9. Even if each appellant did possess an accrued cause of action, it would be questionable whether an accrued cause of action necessarily translates into a vested property right protected under the due process clause. *See Hammond v. United States,* 786 F.2d 8, 12 (1st Cir.1986) (reviewing Supreme Court precedent and concluding that "rights in tort

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do not vest until there is a final, unreviewable judgment").

We note that the Florida Supreme Court has decided that application of the statute of repose to persons in the appellants' position does not impair any vested rights cognizable under state law. *See Brackenridge v. Ametek, Inc.,* 517 So.2d 667, 12 Fla. Law Weekly 589, 590 (Fla.1987).

Appellants also apparently contend that their property rights are implicated because they relied on the *Battilla* decision when they filed their lawsuits. Underlying this argument is the notion that persons subject themselves to tortious conduct in reliance on a particular state of tort law. The timing of appellants' accidents, however, was of course purely fortuitous. We therefore conclude that appellants' due process challenge must fail.

III.

[3] Appellants in two of the cases before us argue that Florida's statute of repose violates the equal protection clause of the fourteenth amendment. [FN10] Appellants contend that the operation of the twelve-year statute of repose, Fla.Stat. § 95.031(2) (1982), together with the four-year statute of limitations, Fla.Stat. § 95.11(3)(e) (1982), creates two classes of injured persons with different legal rights. The first class includes those persons who are injured less than eight years after delivery of the product to its first purchaser and who therefore have the full four years afforded by the statute of limitations to bring their actions. The second class includes those persons who are injured more than eight years but less than twelve years after the product is delivered to its first purchaser. Owing to the operation of the twelve-year statute of repose, persons in the second class have ***1375** less than the full four years afforded those in the first class to file suit. Appellants argue that the statute of repose violates the equal protection clause of the fourteenth amendment because there is no rational basis for this disparate treatment.

FN10. Appellants in one of the two cases, *Verhine v. Volkswagenwerk, A.G.,* No. 86-3138, concede in their reply brief that their case does not present an equal protection challenge.

The Florida Supreme Court rejected this equal protection argument in *Pullum,* 476 So.2d at 660. The plaintiff in *Pullum* appealed that decision to the United States Supreme Court. The Supreme Court dismissed the appeal for want of a substantial federal question. *Pullum v. Cincinnati, Inc.,* 475 U.S. 1114, 106 S.Ct. 1626, 90 L.Ed.2d 174 (1986) (see 54 U.S.L.W. 3654 for summary of questions presented on appeal). The Court therefore disposed of *Pullum* on the merits, rejecting the equal protection arguments raised in that case. [FN11] We are bound by the Supreme Court's disposition of *Pullum* and accordingly reject appellants' contention that Florida's statute of repose violates the fourteenth amendment's equal protection clause.

FN11. *See supra* note 7.

IV.

For the foregoing reasons, the district court's grant of summary judgment in each of these four consolidated cases is

AFFIRMED.

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United States Court of Appeals,
Ninth Circuit.

In re CONSOLIDATED UNITED STATES ATMOSPHERIC TESTING LITIGATION, Christina KONIZESKI, et al., Plaintiffs-Appellants,
v.
LIVERMORE LABS, et al., Defendants-Appellees.
Alice P. BROUDY, et al., Plaintiffs-Appellants,
v.
UNITED STATES of America, Defendant-Appellee.

Nos. 85-2842, 86-5553.

Argued and Submitted Feb. 13, 1987.
Decided June 22, 1987.

Actions were brought against United States and federal contractors, asserting claims arising out of alleged exposure to nuclear radiation resulting from bombing of Hiroshima and atmospheric testing of nuclear weapons. Government moved to be substituted for contractors as sole defendant and for summary judgment. The United States District Court for the Northern District of California, William W Schwarzer, J., 616 F.Supp. 759, granted motions, and appeal was taken. In a similar action brought by widow of former serviceman, the United States District Court for the Central District of California, Laughlin E. Waters, J., granted summary judgment for Government, and appeal was taken. Upon consolidation of appeals, the Court of Appeals, J. Blaine Anderson, Circuit Judge, held that: (1) statute providing that actions against United States under Tort Claims Act is exclusive remedy for claims against contractors for radiation injuries resulting from atomic weapons testing programs was constitutional, and (2) claims were barred by discretionary function exception to Tort Claims Act.

Judgments affirmed.

West Headnotes

[1] Eminent Domain ⚿2(1)
148k2(1) Most Cited Cases

Two-step analysis is used to determine whether "taking" has occurred: first, is subject matter "property" within meaning of Fifth Amendment; second, if so, has there been taking of that property. U.S.C.A. Const.Amend. 5.

[2] Eminent Domain ⚿2(1.1)
148k2(1.1) Most Cited Cases

Statute providing that action against United States under Tort Claims Act is exclusive remedy for claims against contractor for radiation injuries resulting from atomic weapons testing program did not constitute taking under Fifth Amendment as applied to pending actions. Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1985, § 1631(b), 42 U.S.C.A. § 2212(b); U.S.C.A. Const.Amend. 5.

[3] Constitutional Law ⚿305(1)
92k305(1) Most Cited Cases

Congress must comply with due process when abolishing or substantially modifying common-law cause of action. U.S.C.A. Const.Amend. 5.

[4] Constitutional Law ⚿253(4)
92k253(4) Most Cited Cases

Rational basis, and not strict scrutiny standard of due process review, applied to constitutional challenge to retroactive application of federal statute substituting United States as defendant in all suits against private contractors to Government for radiation injuries arising out of any United States atomic weapons testing programs, and making Federal Tort Claims Act sole remedy for those injuries; Congress acted within its powers under war powers and commerce clauses of the Constitution, and there was no fundamental right or suspect classification involved. Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1985, § 1631(b), 42 U.S.C.A. § 2212(b); U.S.C.A. Const. Art. 1, § 8, cl. 3.

[5] Constitutional Law ⚿309(1)
92k309(1) Most Cited Cases

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Federal statute substituting United States as defendant in all suits against private contractors to Government for radiation injuries arising from any of the United States atomic weapons testing programs, and making Federal Tort Claims Act sole remedy for those injuries, was not wholly arbitrary and irrational in purpose, and thus did not violate due process; it was reasonably related to legitimate congressional purpose. Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1985, § 1631(b), 42 U.S.C.A. § 2212(b).

[6] Constitutional Law ⚷57
92k57 Most Cited Cases

Statute providing that action against United States under Tort Claims Act is exclusive remedy for claims against contractor for radiation injuries resulting from atomic weapons testing programs, as applied to pending actions, did not violate Article III under principle prohibiting congressional attempts to alter rule of decision in pending cases in favor of Government, where statute did not withdraw jurisdiction from federal courts, did not deprive party of benefit of judgment, and did not mandate outcome of particular case. Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1985, § 1631(b), 42 U.S.C.A. § 2212(b).

[7] Jury ⚷12(1.2)
230k12(1.2) Most Cited Cases

There is no right to jury trial against sovereign under Seventh Amendment. U.S.C.A. Const.Amend. 7.

[8] United States ⚷125(7)
393k125(7) Most Cited Cases

When United States abolishes cause of action and then sets up separate administrative remedy against itself, Seventh Amendment does not require that it must also provide jury trial. U.S.C.A. Const.Amend. 7.

[9] Jury ⚷31.2(1)
230k31.2(1) Most Cited Cases
(Formerly 230k31(3))

Statute providing that action against United States under Tort Claims Act is exclusive remedy for claims against contractors for radiation injuries resulting from atomic weapons testing programs did not constitute unconstitutional deprivation of right to jury trial. Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1985, § 1631, 42 U.S.C.A. § 2212(b); U.S.C.A. Const.Amend. 7.

[10] United States ⚷78(12)
393k78(12) Most Cited Cases

Discretionary function exception to Tort Claims Act barred claims for injuries caused by exposure to radiation from nuclear weapons based on allegations of negligent failure to take adequate safety precautions at test sites. 28 U.S.C.A. § 2680(a).

[11] United States ⚷78(12)
393k78(12) Most Cited Cases

Discretionary function exception to Tort Claims Act barred claims against Government for failing to warn participants in atomic weapons testing programs of dangers to which they would be exposed and for failing to monitor participants for health problems resulting from radiation exposure. 28 U.S.C.A. § 2680(a).

[12] United States ⚷127(2)
393k127(2) Most Cited Cases

Medical malpractice claim against Government by widow of former serviceman who had been ordered to participate in military exercises near two atmospheric nuclear test sites, was barred for failure to state sufficient claim to appropriate federal agency, where widow's administrative claim was filed with Department of Energy, but Department of Defense, which controlled medical facility where her husband received treatment, received no notice. 28 U.S.C.A. § 2675(a).

***983** Alan W. Sparer, San Francisco, Cal., and Ronald G. Bakal, Beverly Hills, Cal., for plaintiffs-appellants.

Marc Johnston, Washington, D.C., for defendants-appellees.

Appeal from the United States District Court for the Northern and Central Districts of California.

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Before ANDERSON, ALARCON and HALL, Circuit Judges.

J. BLAINE ANDERSON, Circuit Judge:

These consolidated appeals arise out of judgments entered by the United States District Court for the Northern District of ***984** California, [FN1] in actions for personal injury and wrongful death brought by or on behalf of military and civilian participants in the United States atmospheric nuclear weapons testing program. Appellees are the United States Government and private contractors who participated in the nuclear weapons testing program.

> FN1. Consolidated with these appeals is *Broudy v. United States,* No. 86-5553, a case from the Central District of California. The issues unique to *Broudy* will be dealt with in a separate section.

In the district court, the government moved pursuant to 42 U.S.C. § 2212, to be substituted for the contractors as defendants in these actions. The contractors joined in that motion. The government then moved to dismiss or for summary judgment in all actions based on various exceptions to its liability under the Federal Tort Claims Act (the "FTCA"), 28 U.S.C. § 2680.

The district court granted the motion to substitute the government as defendant in place of the contractors, specifically finding 42 U.S.C. § 2212 to be constitutional. It then granted the government's motion for summary judgment pursuant to the FTCA under the discretionary function exception, 28 U.S.C. § 2680(a), the foreign country exception, 28 U.S.C. § 2680(k), the combatant activities exception, 28 U.S.C. § 2680(j), and the *Feres* doctrine, *Feres v. United States,* 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950). We affirm.

The district court, The Honorable William W. Schwarzer presiding, in its Memorandum Opinion and Order, published as *In re Consolidated U.S. Atmospheric Testing Litigation,* 616 F.Supp. 759 (N.D.Cal.1985), accurately summarized the facts, analyzed the contentions of the parties, and properly applied the law to this case. The opinion is well reasoned, and we adopt, with appropriate deletions and additions, the following portions of it as the opinion of this court. [FN2]

> FN2. Brackets together, in this manner [ ], without enclosing material are used to indicate deletions from the opinion of the district court; brackets enclosing materials are, unless otherwise indicated, used to denote insertions or additions by this court. Footnotes in the district court opinion have been renumbered sequentially. Where appropriate, we have added and adopted portions of First Circuit's opinion in *Hammond v. United States,* 786 F.2d 8 (1st Cir.1986). *Hammond* examined 42 U.S.C. § 2212 and held that substituting the United States as defendant in all suits against private contractors for radiation injuries arising from any of the United States atomic weapons testing programs, was constitutional.

I. FACTS

"The atmospheric nuclear weapons tests giving rise to these actions took place between the closing days of World War II and the adoption of the Partial Nuclear Test Ban Treaty in 1963. Even before these tests, the United States Government had enlisted the scientific resources of industrial firms and universities in the program to develop an atomic bomb. The Manhattan Project, which ultimately produced the bomb detonated over Hiroshima, was an unprecedented joint effort by the government, universities and industry.

"Immediately following the end of World War II, the military services proposed a series of tests to determine the effects of atomic weapons. On orders of the President, a joint military task force was established to conduct the first of these tests, Operation Crossroads, at Bikini Atoll. The task force, commanded by an admiral, comprised 42,000 military and civilian personnel and numerous ships and aircraft.

"In 1946, Congress adopted the Atomic Energy Act, (the 'AEA'), establishing a national policy for the development and control of nuclear weapons. Under the AEA, authority was transferred from the military to the Atomic Energy Commission, (the 'AEC'), which was to operate a 'program of federally conducted research and development' with the 'paramount objective of assuring the common defense and security'. AEA, P.L. No. 585, ch. 724, 60 Stat. 755, §§ 1(a), (b)(3) (current version at 42 U.S.C. § 2011 *et seq.*). To this end the AEC was authorized to conduct experiments, undertake research, and develop the military applications of

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atomic energy either in its own facilities or pursuant to arrangements with public or private institutions. ***985** *Id.* at § 4(c)(2). All right, title and interest in fissionable material was vested in it. *Id.* at §§ 4(b), 5(a)(2). The production of atomic bombs and bomb parts was authorized, but 'only to the extent that the express consent and direction of the President of the United States has been obtained....' *Id.* at § 6(a)(2). In addition, Congressional oversight of the AEC's activities was established by creation of the Joint Committee on Atomic Energy. *Id.* at § 15(a). The AEA thus established a program of pervasive '[g]overnmental control of the production, ownership, and use of fissionable material', including the development and testing of nuclear weapons. *Id.* at § 1(b)(4).

"When the AEC took over the nuclear weapons program from the military, it acquired a complex of plants, laboratories and other facilities staffed by some 2,000 military personnel, 4,000 civilian government employees and 38,000 employees of contractors. The integral role of contractors, which started in the Manhattan Project, continued under the AEC. The University of California, Sandia Corporation and Reynolds Electrical and Engineering Co., Inc., were among those contractors.

"Escalating international tensions, marked by the Berlin blockade in 1948, the confrontation with the Soviet Union over Czechoslovakia, Greece and Iran, the detonation by the Soviet Union of an atomic device in 1949, and the Korean War led the government to assign the highest priority to the development and production of nuclear weapons. Weapons tests were an essential part of that effort.

"These tests were regarded as critical to national security. Presidents Eisenhower and Kennedy and the Chairman of the AEC made public statements stressing the vital importance of tests to the development of modern weapons needed to assure national security in the face of the threat posed by the Soviet Union. Indeed, atmospheric nuclear weapons testing was a major issue in United States-Soviet relations during this period. Beginning in 1955, testing was a topic in the disarmament negotiations. In 1958, a moratorium on tests was agreed on and was observed until the Soviet Union resumed atmospheric testing in 1961. The United States followed suit to counteract qualitative improvements in Soviet weapons. In 1963, atmospheric nuclear tests were finally banned by the Partial Nuclear Test Ban Treaty.

"From 1947 through 1963, the AEC in conjunction with the Department of Defense conducted 21 test series, some of which are the subject of these actions. These tests had a number of objectives, including developing weapons, planning their tactical and strategic use, determining how targets could be given protection, assessing the vulnerability of troops to the effects of detonations, and improving radiological safety. A particular objective of the tests was to determine the effects of nuclear explosions on the equipment, clothing, weapons and fighting capability of military personnel. The tests were coordinated with studies conducted at laboratories operated by contractors.

"Every phase of the preparation and implementation of each nuclear weapons test series was closely controlled and supervised by government officials. Initially, proposals for tests had to be approved at various levels by the responsible divisions of the AEC and the Department of Defense. Before any test took place, a detailed Operation Plan had to be reviewed and approved by the AEC, by the National Security Council, and finally by the President.

"Tests at the Pacific Proving Ground were under the control of a joint task force commander, appointed by the AEC and the Joint Chiefs of Staff. At the Nevada Test Site, tests were under the control of a Test Manager designated by the AEC. Tests were conducted in conformity with the approved Operation Plan, which incorporated radiation exposure limits established by the AEC applicable to both military and civilian personnel. Various military and civilian committees and medical and scientific experts took part in making the decisions which were incorporated into the Operation Plan. Designated units in each test organization ***986** were assigned responsibility for radiological safety.

"Nuclear weapons testing was known to be an inherently dangerous activity. Aside from the recognized radiation hazards, the risks included the dangers associated with any explosive devices, the effects of unpredictable meteorological conditions, and the risks of injury inherent in any large-scale military operation.

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"The need to balance risks against test objectives was particularly acute in tests involving troop maneuvers. These tests were intended to expose troops to battlefield conditions to test psychological reactions and protective measures. The location and movement of those troops was a subject of controversy between the AEC and military commanders. It was recognized that the desire of the military to expose troops to realistic combat conditions could interfere with the AEC's weapons testing objectives. The arrangements ultimately incorporated in the Operation Plans represented an accommodation of these divergent requirements by the AEC and military officials. In later tests, involving large scale military maneuvers under battlefield conditions, these considerations led to delegation of responsibility for radiological and physical safety of troops to the military commanders.

II. DISCUSSION

A. Motions to Substitute--42 U.S.C. § 2212

1. The Provisions and Effect of § 2212

"In October 1984, Congress adopted § 1631 of the Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1985, (the 'Act'), codified at 42 U.S.C. § 2212. It provides that an action against the United States shall be the exclusive remedy for injuries 'due to exposure to radiation based on acts or omissions by a contractor in carrying out an atomic weapons testing program under a contract with the United States', § 2212(a)(1), and requires any action against these contractors to be maintained solely against the United States pursuant to the FTCA. The Act applies to alleged acts or omissions of contractors 'without regard to when the act or omission occurred.' § 2212(a)(2).

> The Act provides, in pertinent part, that: A contractor against whom a civil action or proceeding described in subsection (a) ... is brought shall promptly deliver all processes served upon that contractor to the Attorney General of the United States. *Upon certification by the Attorney General* that the suit against the contractor is within the provisions of subsection (a) ..., a civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and *the proceedings shall be deemed a tort action brought against the United States*.... For purposes of removal, the certification by the Attorney General under this sub-section establishes contractor status conclusively.
> 42 U.S.C. § 2212(b) (emphasis added).

"A 'contractor' is defined as a 'contractor or cost reimbursement subcontractor of any tier participating in the conduct of the United States atomic weapons testing program....' § 2212(d). Authority to certify pursuant to § 2212(b) that the action against the contractor 'is based on acts or omissions by a contractor in carrying out an atomic weapons testing program under a contract with the United States' rests with the Attorney General. § 2212(a)(1).

"In its statement supporting the Act, the Department of Justice explained the unique situation at which it is aimed:

> [The Act] would clarify the status of certain contractors operating government-owned facilities relating to atomic energy national defense activities in litigation arising from those activities. Many actions recently have been brought against these contractors who have invaluably assisted the Government of the United States in carrying out its nuclear weapons testing program. The actions allege exposure to radiation and consequent***987** injury or death as a result of the United States atomic weapons testing.
> The provisions of the Federal Tort Claims Act determine the rights of individuals and corporate litigants to seek monetary recovery from the United States for alleged torts. Typically, the United States cannot be sued for and is not liable for the acts of independent contractors providing goods or services to the United States. However, contractors who operate nuclear weapons testing facilities for the Department of Energy or its predecessor agencies and who, as a result, have participated in the atomic weapons testing program are unique. They are not typical contract suppliers of commercially provided goods or services to the government. These contractors were and are utilized by the United States as instruments of national policy to assist in an entirely governmental task--nuclear weapons

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> research, development and testing. Further, the government reimburses these contractors for any liability arising out of their assistance in the weapons program, including the costs of litigation. The use of the contractors to implement national policy and perform a uniquely governmental function cannot be disputed. Therefore, it should be perfectly clear that, for the purposes of civil litigation arising from atomic weapons testing, the proper party defendant is the government. Only the government sets policy, makes decisions, and controls activities and circumstances regarding atomic weapons testing.
>
> H.R.Rep. No. 124, Part I, 98th Cong., 1st Sess. 34-35 (1983).

"The report of the Senate Committee on Armed Services elaborates the Act's underlying rationale:

> Each nuclear test that has been made since 1946 has been made under the statutory direction of Congress. Each nuclear test has been approved, before the fact, by the President of the United States. Each nuclear test has been under the direct supervision of government officials. Each nuclear test has been participated in by hundreds, and in some cases thousands, of government officials and military and civilian personnel.
>
> The committee recognizes, as has the Congress, that the military applications of atomic energy could not proceed either technically or economically without the participation of organizations that possess both scientific management skills and a high degree of scientific and technical expertise. Several such organizations were placed under contract almost at the inception of the nuclear weapons program in 1942 and have performed in an outstanding manner in the national interest for more than three decades. These organizations have provided scientific, engineering and technical support for nuclear tests carried out by the government and for the government in the exercise of a governmental function, i.e., providing for the national defense. These organizations did not order the tests to be performed; they did not set the times or places for the tests; nor did they direct military or civilian government personnel to participate in them.
>
> S.Rep. No. 500, 98th Cong., 2d Sess. 376 (1984).

"The Senate Report described the effect of the legislation as follows:

> [The Act] would cause all litigation involving the atomic weapons testing program, including suits now filed against contractors, to be maintained against the United States under the substantive and procedural requirements of the FTCA.

Id. at 375. By its terms, however, the Act is specifically limited to claims

> for injury, loss of property, personal injury, or death due to exposure to radiation based on acts or omissions by a contractor in carrying out an atomic weapons testing program under a contract with the United States.

42 U.S.C. § 2212(a)(1).

"The instant actions [ ] qualify under the Act. The Attorney General [ ] made the statutory certification. The [appellees'] motions to substitute the United States as the sole defendant in these actions must be ***988** granted unless § 2212 is found to be invalid."

[Appellants raise several issues concerning the constitutionality of 42 U.S.C. § 2212: (1) whether § 2212 constitutes a taking without just compensation in violation of the fifth amendment; (2) whether § 2212 violates the procedural and substantive due process requirements of the fifth and fourteenth amendments; (3) whether § 2212 violates the principle of separation of powers; and (4) whether § 2212 deprives appellants of their right to a jury trial as guaranteed by the seventh amendment.]

2. Constitutionality of § 2212

a. Fifth Amendment--Taking

"The effect of § 2212 is to substitute the remedy against the government under the FTCA for any cause of action against the contractors arising under state law. In adopting this legislation, Congress broke no new ground. In a number of other acts, Congress substituted the FTCA remedy against the government for remedies available against private parties, and these acts have been uniformly upheld. *See Ducharme v. Merill-National [sic] Laboratories,* 574 F.2d 1307 (5th Cir.), *cert. denied,* 439 U.S. 1002, 99 S.Ct. 612, 58 L.Ed.2d 677 (1978) (Swine Flu Act); *Carr v. United States,* 422 F.2d 1007 (4th Cir.1970) (Federal Drivers Act). *See also* 42 U.S.C. § 233 (Public Health Service medical personnel); 38 U.S.C. § 4116 (Veterans Administration medical personnel); 22 U.S.C. §

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817(a) (State Department medical personnel); 10 U.S.C. § 1089(a) (Armed Forces medical personnel).

"[Appellants] contend that the Act [ ] results in a compensable taking. In a classic example of understatement, the Supreme Court has said that '[t]he question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty.' *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 123, 98 S.Ct. 2646, 2658, 57 L.Ed.2d 631 (1978)."

[1] [A two-step analysis is used to determine whether a "taking" has occurred. First, is the subject matter (i.e., a pending cause of action) "property" within the meaning of the fifth amendment? Second, if so, has there been a taking of that property?]

"A cause of action has been described as a 'species of property protected by the Fourteenth Amendment's Due Process Clause.' *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 428, 102 S.Ct. 1148, 1154, 71 L.Ed.2d 265 (1982) (quoting *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950)). *See also In re Aircrash in Bali, Indonesia on April 22, 1974,* 684 F.2d 1301, 1312 (9th Cir.1982) (dictum). [FN3] [ ] It is helpful at the outset to recognize that ' "[a] claim of *deprivation* of property without due process of law cannot be blended as one and the same with the claim that property has been *taken* for public use without just compensation." ' *Kizas v. Webster,* 707 F.2d 524, 539 (D.C.Cir.1983), *cert. denied,* 464 U.S. 1042, 104 S.Ct. 709, 79 L.Ed.2d 173 (1984) (quoting J. Sackman, *Nichols' The Law of Eminent Domain* § 4.3 at 187 rev. 3d ed. cum. supp. 1982) (emphasis in original). [ ]"

> FN3. In *Bali,* the court of appeals in dictum postulated that wrongful death claims are property within the meaning of the just compensation clause. The court, however, reserved the question whether the Warsaw Convention, limiting the amount recoverable in a wrongful death action, constituted a compensable taking.

[In *Ducharme v. Merrill-National Laboratories,* 574 F.2d 1307 (5th Cir.), *cert. denied,* 439 U.S. 1002, 99 S.Ct. 612, 58 L.Ed.2d 677 (1978), the Fifth Circuit examined the constitutionality of the Swine Flu Act, 42 U.S.C. § 247. Like § 2212, this statute provides for the substitution of the United States as the sole defendant. That court found it well settled that "a plaintiff has no vested right in any tort claim for damages under state law." *Id.* at 1309 (citing *Keller v. Dravo Corporation,* 441 F.2d 1239 (5th Cir.1971), *cert. denied,* 404 U.S. 1017, 92 S.Ct. 679, 30 L.Ed.2d 665 (1972)). *See also Carr v. United States,* ***989** 422 F.2d 1007 (4th Cir.1970). Furthermore, in *Hammond,* the First Circuit found:

> "No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." *New York Central R.R. Co. v. White,* 243 U.S. 188, 198, 37 S.Ct. 247, 250, 61 L.Ed. 667 (1917); *Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. 59, 88 n. 32, 98 S.Ct. 2620, 2638 n. 32, 57 L.Ed.2d 595 (1978); *Second Employers' Liability Cases,* 223 U.S. 1, 50, 32 S.Ct. 169, 175, 56 L.Ed. 327 (1912); *Ducharme v. Merrill-National Laboratories,* 574 F.2d 1307, 1309 (5th Cir.), *cert. denied,* 439 U.S. 1002, 99 S.Ct. 612, 58 L.Ed.2d 677 (1978). This is true after suit has been filed and continues to be true until a final unreviewable judgment is obtained.
> *Hammond,* 786 F.2d at 12.]

"While a cause of action is considered to be a species of property, as heretofore discussed, those words do not translate into a cognizable taking claim. *See In re Aircrash in Bali, Indonesia on April 22, 1974,* 684 F.2d 1301, 1312 (9th Cir.1982) . Whether such a claim exists is subject to an 'essentially ad hoc, factual inquir[y].' *Penn Central,* 438 U.S. at 124, 98 S.Ct. at 2659. Both the nature of the property right and of the governmental invasion must be considered [to determine whether a taking has occurred.]

"Unlike contract claims, the tort claims asserted here lack 'investment-backed expectations.' " *Penn Central,* 438 at 124, 98 S.Ct. at 2659. *Cf. Lynch v. United States,* 292 U.S. 571, 579, 54 S.Ct. 840, 843, 78 L.Ed. 1434 (1934). Not only are they contingent by their nature, but they also arise in a field in which the law remains to be developed. *See, e.g., Molsbergen v. United States,* 757 F.2d 1016, 1020-25 (9th Cir.1985).

[2] "The governmental action, moreover, does not abrogate the claims but subjects them to the tort claims procedure which the plaintiffs could

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reasonably expect might be applied. This is true, notwithstanding the naming of contractors as defendants, because the claims arose out of activities conducted by the government and the contractors were named [by appellants] for the obvious purpose of escaping the well-known limits on the government's waiver of sovereign immunity. For these reasons, the Court concludes that [appellants] do not have a taking claim."

b. Fifth Amendment--Due Process

(i) Procedural Due Process

[As indicated above, a cause of action has been recognized as a species of property protected by the fifth amendment's due process clause.]

"To say that a cause of action is a species of protected property, however, is not to answer the question of what process is due. A cause of action is property of a substantially different nature than real or personal property or vested intangible rights. It is inchoate and affords no definite or enforceable property right until reduced to final judgment. *Cf. Armstrong v. United States,* 364 U.S. 40, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960) (state law materialman's lien entitling supplier to resort to specific property to satisfy claims is a property right compensable under fifth amendment); *Lynch v. United States,* 292 U.S. 571, 579, 54 S.Ct. 840, 843, 78 L.Ed. 1434 (1934) (contract rights are property rights compensable under fifth amendment).

"A cause of action does not afford the holder the traditional bundle of rights associated with the ownership of property. *Cf. United States v. Security Industrial Bank,* 459 U.S. 70, 75-76, 103 S.Ct. 407, 410-11, 74 L.Ed.2d 235 (1982). Instead, it represents a right to assert a claim for compensation or some other form of judicial relief. Its value is contingent on successful prosecution to judgment. Thus, to the extent it is entitled to due process protection, that protection focuses on assuring access to fair procedures for its prosecution. The notion of due process relevant to causes of action is that 'deprivation ... by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.' *Mullane v. Central Hanover Bank & Trust Co.,* ***990** 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950)." [On notice of hearing, appellants were given the opportunity to present their claims before the district court. The requirements of procedural due process were thereby satisfied. The plaintiffs' claims were simply unavailing under the procedure pursued by them. Procedural due process, however, does not guarantee that a party will prevail. *Logan,* 455 U.S. at 432, 102 S.Ct. at 1155-56. To the extent that § 2212 may have abrogated appellants' causes of action by substituting the parties and remedies, this court's analysis will focus on substantive due process.]

(ii) Substantive Due Process

[We adopt the *Hammond* court's cogent due process analysis of § 2212 with the following deletions and additions:

[3] "[ ] Congress must comply with due process when abolishing or substantially modifying a common law cause of action. In that sense the right to sue is a 'species of property.' *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 428, 102 S.Ct. 1148, 1154, 71 L.Ed.2d 265 (1982); *see Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. at 82-94, 98 S.Ct. at 2635-41. But, an act of Congress comes to us clothed with a presumption of constitutionality, and the burden is on the plaintiff to show that it violates due process. *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 15, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752 (1976); *McGowan v. Maryland,* 366 U.S. 420, 425- 26, 81 S.Ct. 1101, 1104-05, 6 L.Ed.2d 393 (1961).

[4] "Because Congress has acted within its powers under the war powers and commerce clauses of the Constitution and there is no fundamental right or suspect classification involved here, we find that the rational basis standard of due process review applies.

[5] "In applying the rational basis test to this case we follow the guidance of the Supreme Court in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.,* 467 U.S. 717, 728-34, 104 S.Ct. 2709, 2717-20, 81 L.Ed.2d 601 (1984); *Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. at 82-94, 98 S.Ct. at 2635-41; and *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. at 15-20, 96

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S.Ct. at 2892-94. We find that [appellants have] not met [their] burden of showing that § 2212 is wholly arbitrary and irrational in purpose and effect, *i.e.,* not reasonably related to a legitimate congressional purpose. *See United States R.R. Retirement Bd. v. Fritz,* 449 U.S. 166, 174-77, 101 S.Ct. 453, 459-60, 66 L.Ed.2d 368 (1980); *Vance v. Bradley,* 440 U.S. 93, 97-98, 99 S.Ct. 939, 942-43, 59 L.Ed.2d [sic] (1979).

"The reasons asserted by the United States for Congress' enactment of § 2212 are neither arbitrary nor irrational, and can be stated simply. The United States has operated a nuclear weapons testing program for over 40 years. It initiates, designs and authorizes all nuclear tests under the program but has found it necessary to obtain the assistance of various private entities including universities and private companies for many aspects of the testing. From the late 1940's to the early 1960's a series of above-ground tests of atomic weapons were conducted with military personnel, civilian government employees and private employees of government contractors taking part. [ ] There is no dispute that these tests were designed and supervised by government officials and were individually authorized by the President. A significant number of those present at the above-ground tests have instituted suits against the government contractors involved in them for injuries caused by radiation exposure. The contractors are generally not threatened with financial liability by these suits since most of their contracts with the government included a clause making the United States indemnitor for all tort liability, including costs of litigation, arising from their participation in the testing programs. S.Rep. No. 500, 98th Cong., 2d Sess. 374-76 (1984). Congress has nevertheless perceived these lawsuits to constitute a threat to the continued participation of the private contractors in the nuclear weapons program because the contractors fear the bad publicity generated by the suits. The contractors testified before ***991** Congress that the lawsuits have led the public to blame them for the formulation, implementation and execution of the atomic weapons testing policy of the United States. H.R.Rep. No. 124, Part 4, 98th Cong., 1st Sess. 2-3 (1983). They also testified that the lawsuits result in a diversion of human and financial resources away from research and testing activities and into litigation and, therefore, seriously disrupt their participation in the program. *See Litigation Relating to Atomic Testing, 1983: Hearings on H.R. 2797 before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary,* 98th Cong., 1st Sess. 46-49 (1983). [Appellants assert] that the mere public embarrassment of the private contractors is not a rational or legitimate reason for relieving them of liability. We disagree. Even if we question the extent and effect of this public embarrassment it is not for us to reevaluate it. It is a plausible reason for Congress' action. *United States R.R. Retirement Bd. v. Fritz,* 449 U.S. at 179, 101 S.Ct. at 461.

"Nor has Congress chosen a wholly arbitrary or irrational means to its legitimate end. [Appellants] claim[ ] that Congress created only an illusory substitute remedy in § 2212, that [ ] probably will not [ ] compensate [ ] [them] because under the terms of § 2212(a)(2) the 'limitations and exceptions' applicable to the remedies provided by § 2212 are preserved. [ ]"]

"[Appellants] argue, however, that the Act must be viewed not simply as a substitution of remedies, but rather as an abrogation of existing claims. By substituting the FTCA remedy, the claims become subject to dispositive defenses available to the government, including the *Feres* doctrine and the discretionary function exception."

["Nevertheless, although Congress could have relieved the independent contractors of their burden of defending suits for radiation injuries and still provided those injured by radiation a more generous substitute compensation scheme, we cannot say that Congress' choice of means was without any rational basis. The atomic weapons testing program has been an important, some say vital, government function from its inception. Independent contractors were used only to aid the government to carry out its program. When the program began Congress could have mandated that all tort claims arising from it be litigated through the FTCA. Under the statute as originally enacted, [appellants] had the right to sue contractors without restriction, but it was the government who paid the judgment under its indemnitor agreement with the contractor. [Appellants] had the best of both possible worlds, a right to sue free of any FTCA limitations with the government guaranteeing payment of the judgment. It was neither arbitrary nor irrational for Congress to change the law so as to place putative [appellants]

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in the same position as any other party suing the United States in tort. *See Hearings, supra,* at 46-48; S.Rep. No. 500, *supra,* at 377. Moreover, there may be government compensation available to many of those injured by radiation, including [appellants] here, under veterans benefits legislation, 38 U.S.C. §§ 301- 363, §§ 401-423, or the FECA." *Hammond,* 786 F.2d at 14.]

[Finally, appellants argue that § 2212 cannot be applied to them retroactively. However, "[t]he retroactive application of a federal statute ... is not forbidden under the constitution so long as due process requirements are met." *Matter of Reynolds,* 726 F.2d 1420, 1422 (9th Cir.1984) (citing C.D. Sands, *Statutes and Statutory Construction,* § 41-03 (4th ed. 1973)) (footnote omitted). As a general rule, a judge should apply the law in effect on the date of a decision. *Matter of Reynolds,* 726 F.2d at 1422; *United States v. The Schooner Peggy,* 5 U.S. (1 Cranch) 103, 110, 2 L.Ed. 49 (1801). To comport with the requirements of due process, the retroactive application of a statute must be supported by a legitimate legislative purpose furthered by a rational means. *Pension Benefit Guaranty Corp.,* 467 U.S. at 729, 104 S.Ct. at 2717-18. "[T]he burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Id.* (quoting *Turner Elkhorn Mining Co.,* 428 ***992**U.S. at 15, 96 S.Ct. at 2892). As we discussed above, appellants have not met this burden].

c. Separation of Powers Doctrine

[6] "Congressional attempts to alter the rule of decision in pending cases in favor of the government have been condemned as a violation of Article III. *See United States v. Klein,* 80 U.S. (13 Wall.) 128, 146-47, 20 L.Ed. 519 (1871); *United States v. Sioux Nation of Indians,* 448 U.S. 371, 404, 100 S.Ct. 2716, 2735, 65 L.Ed.2d 844 (1980). The instant cases, however, do not fall within that prohibition. Section 2212 does not withdraw jurisdiction from the federal courts, does not deprive a party of the benefit of a judgment, and does not mandate the outcome of particular cases. It substitutes remedies but it leaves the application of the rules of law, including any defenses, for judicial determination. *See Dames & Moore v. Regan,* 453 U.S. 654, 685, 101 S.Ct. 2972, 2989, 69 L.Ed.2d 918 (1981).

> [T]he better reading of *Klein* is quite narrow and construes the case as holding only that Congress violates the separation of powers when it presumes to dictate 'how the Court should decide an issue of fact (under threat of loss of jurisdiction)' and purports to 'bind the Court to decide a case in accordance with a rule of law independently unconstitutional on other grounds.'

United States v. Brainer, 691 F.2d 691, 695 (4th Cir.1982) (quoting P. Bator, D. Shapiro, P. Mishkin & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 316 n. 4 (2d ed. 1973)). Since the Act neither directs the court to make a certain finding of fact nor requires them to apply an unconstitutional law, the separation of powers doctrine is not offended. *See also Battaglia [v. General Motors Corporation],* 169 F.2d [254, 262 (2d Cir.1948)]."

d. Seventh Amendment--Right to Jury

[7][8][9] [Appellants argue that they were unconstitutionally deprived of their right to trial by jury because § 2212 makes an FTCA action against the United States the exclusive remedy for damages. [FN4] The court in *Hammond* held:

> FN4. The FTCA specifically provides that in tort actions against the United States, trials shall be to the court without a jury. 28 U.S.C. § 2402.

> There is no right to a jury trial against the sovereign under the seventh amendment, *Glidden Co. v. Zdanok,* 370 U.S. 530, 572, 82 S.Ct. 1459, 1484, 8 L.Ed.2d 671 (1962). If the United States can abolish the right to a cause of action altogether it can also abolish the right to a jury trial that is part of it. When the United States abolishes a cause of action and then sets up a separate administrative remedy against itself, as it has [with § 2212], the seventh amendment does not require that it must also provide a jury trial.

Hammond, 786 F.2d at 15. We agree and find that appellants were not unconstitutionally deprived of their right to a jury trial.]

"Section 2212 is therefore a valid exercise of Congressional power. The United States must be substituted as the defendant in place of the contractors, and the contractors dismissed from these actions."

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B. Motion for Summary Judgment

"Under § 2212, these actions must be treated as having been brought against the United States under the FTCA. The FTCA is a limited waiver of sovereign immunity subject to certain statutory and judicial exceptions. The government [ ] moved [and the district court granted, a motion] for summary judgment on the ground that each [appellant's] claims are barred by one or more of those exceptions.

[1]. The Discretionary Function Exception

"The FTCA excludes any claim 'based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal ***993** agency or an employee of the Government, whether or not the discretion involved be abused.' 28 U.S.C. § 2680(a). The government raises the discretionary function exception as a defense to all claims raised by all [appellants].

[a]. Claims arising out of acts or omissions in connection with the detonation of nuclear weapons.

[10] "[Appellants'] first category of claims is based on injuries caused by their exposure to radiation from nuclear weapons. They may be summed up as resting on alleged negligent failures to take adequate safety precautions at the test sites.

"[Appellants] acknowledge that the decision to conduct the tests is covered by the discretionary function. They contend, however, that the Court must examine each challenged act or omission to determine whether, in the light of the policies underlying the exception, it is of the type that Congress intended to protect. According to [appellants], many of those acts involved only the exercise of what they refer to as 'scientific or professional judgment' in implementing an overall decision to conduct the atomic weapons testing program and hence are not covered by § 2680(a). *See e.g., Driscoll v. United States,* 525 F.2d 136 (9th Cir.1975). In addition, they argue that the government can be held liable for failing to enforce its own safety requirements.

"The fountainhead of jurisprudence relating to the discretionary function exception is *Dalehite v. United States,* 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953). The continuing vitality of that decision was recently affirmed in *United States v. S.A. Empresa de Viacao Aerea Rio Grandense ('Varig'),* 467 U.S. 797, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984). *Dalehite* involved claims for damages against the United States arising out of a disastrous explosion of ammonium nitrate fertilizer, which had been produced and distributed under the direction of the United States for export to areas occupied by the Allied Armed Forces after World War II. Numerous acts of the government were charged as negligent: the cabinet-level decision to institute the fertilizer export program, the failure to experiment with the fertilizer to determine the possibility of explosion, the drafting of the basic plan of manufacture, and the failure properly to police the storage and loading of the fertilizer.

"The Supreme Court concluded that these allegedly negligent acts were governmental duties protected by the discretionary function exception and held the actions barred by § 2680(a). Describing the discretion protected by § 2680(a) as 'the discretion of the executive or the administrator to act according to one's judgment of the best course,' 346 U.S. at 34, 73 S.Ct. at 967, the Supreme Court stated:

> It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the 'discretionary function or duty' that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.

Id. at 35-36, 73 S.Ct. at 967-68 (footnotes omitted). In the course of its opinion, the Supreme Court analyzed the legislative history of the FTCA. It noted that 'congressional thought was centered on granting relief for the run-of-the-mine accidents, as distinguished from injury from performing discretionary governmental functions,' *id.* at 28, n. 19, 73 S.Ct. at 964, n. 19, and concluded that in § 2680 'Congress exercised care to protect the Government from claims, however negligently caused, that affected the governmental functions.'

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Id. at 32, 73 S.Ct. at 966. [footnote omitted].

"*Dalehite* is squarely on point. The argument made by plaintiffs in that case, and rejected by the Supreme Court, was essentially ***994** the same as that made here, i.e., that the charges were directed not at

> 'any Cabinet decision ... [but] only to the mistakes of judgment and the careless oversight of Government employees who were carrying out a program of manufacturing and shipping fertilizer and who failed to concern themselves as a reasonable man should with the safety of others.'

Id. at 35, 73 S.Ct. at 967 (quoting petitioners' arguments).

"The specific acts of negligence charged were the temperature at which the fertilizer was bagged, the coating and bagging materials used, and the labelling of the bags. *Id.* at 39, 46-57, 73 S.Ct. at 969, 973-79. The Supreme Court found all of these acts covered by the discretionary function exception because they were 'performed under the direction of a plan developed at a high level under a direct delegation of planmaking authority from the apex of the Executive Department.' *Id.* at 40, 73 S.Ct. at 970.

"The case presented by [Appellants] is congruent with *Dalehite.* [Appellants] chose to focus their arguments on the conduct of Operation Crossroads. [FN5] There, too, a detailed and extensive Operation Plan was adopted on orders from the highest levels of the Executive Department. [FN6] An integral part of that Plan was an extensive Safety Plan which, according to [appellants] at first lacked but later contained a plan for decontamination. [FN7] TheSafety Plan described anticipated radiation hazards, established exposure limits, and assigned responsibility for protecting personnel against exposure to unknown hazards. [FN8]

FN5. Plaintiffs' Op.Br. at 3. That operation, according to plaintiffs, epitomizes the nuclear weapons testing program at its worst: "In hindsight Operation Crossroads was an extraordinary fiasco, America's first nuclear disaster. The Joint Task Force took a radiation bath without adequate resources to deal with the decontamination problems that ensued." *Id.* at 76.

FN6. Government Exhibits E-7.10-7.15. Operation Plans for subsequent tests may be found at Government Exhibits E-8 (Operation Buster-Jangle), E-9 (Operation Castle), E-10 (Operation Redwing), E-11 (Operation Hardtack), E-12 (Operation Ivy), and E-13 (Operation Dominic I).

FN7. Government Exhibits E-7.3 to E-7.7. Extensive Safety Plans were a part of the Operation Plan for each test. *See, e.g.,* Operation Plan for Operation Castle, Government Exhibit E-9, at N-I to N-III-2.

FN8. Plaintiffs' Statement of Facts, at 11-16.

"[Appellants'] contention is that the government's scientists who prepared the plan 'failed to appreciate or prepare for the magnitude of the hazards that would result.' Plaintiffs' Statement of Facts at 16. They argue that 'AEC and military officials were responsible for developing safety plans to carry out Presidential and cabinet and agency-level directives to conduct the planned detonations without unduly jeopardizing the safety of the participants; for ensuring that all participants except those performing unusual or high priority missions such as cloud sampling were not subjected to radiation doses exceeding the exposure limits established by the plan; and for following other safety guidelines established in the plan, such as decontamination measures and use of protective clothing and gear..... There is substantial evidence that their negligent failure to carry out these operational tasks resulted in the overexposure of many hundreds or thousands of test participants, including the safety monitors themselves.' Plaintiffs' Op.Br. at 30.

"The nuclear weapons tests on which these actions are founded were carried out pursuant to specific legislative authority in the 1946 Atomic Energy Act, and its successor, the 1954 Atomic Energy Act, 42 U.S.C. § 2011 *et. seq.,* and presidential order. [FN9] They were conducted for the purpose of developing and testing weapons and discovering their effects, an inherently dangerous undertaking. The Safety Plan developed for each test series was designed to minimize exposure to radiation consistent with the purposes of the tests. The Plan provided that '[r]adiological safety of all military and civilian personnel is a command ***995** responsibility.' [FN10] While the Plan established radiation exposure limits, it was subject to the authority of the officer in charge of any particular test, who could permit exposure in excess of the established level if the exigencies of the situation

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required. Thus the Plans specified that compliance with exposure limits was conditioned upon operational requirements:

> FN9. *See* Government Exhibits E-14 to E-26.4.
>
> FN10. Government Exhibit I-4, at 1. *See also* Government Exhibits J- 5, at 3; I-1, at 3; E-11, at K-1; J-3 at 1.

> Due to the special nature of field tests it is considered that a policy of strict adherence to the radiological standards prescribed for routine work is not realistic. The regulations set forth herein have been designed as a reasonable and safe compromise considering conservation of personnel exposures, the international import of the test and the cost aspects of operational delays chargeable to excessive radiological precautions. In all cases other than emergencies or tactical situations, the ultimate criteria will be limited by the MPEs [maximum permissible exposure] for personnel. Special instances may arise ... in which operations will be carried out without regard to the MPEs and MPLs [maximum permissible level] prescribed herein. For such emergency or tactical operations the criteria prescribed below for tactical situations will be used as a guide. [FN11]

> FN11. Joint Task Force Seven, Command Task Group 7.3, *Operation Plan,* December 7, 1953, Government Exhibit J-21, at G-I-1. *See generally* references cited in Government Memo, in Support of Summary Judgment (Discretionary Function) [ ].

"The Safety Plan incorporated into the Operation Plan contemplated that judgments and decisions concerning exposure to radiological hazards and the degree of protection to be afforded would be made in the light of the objectives and the needs of the test program. Safety decisions, therefore, were a part of the policy decisions made in the conduct of the weapons tests, [ ] and they fall squarely within the articulation in *Dalehite* that

> [w]here there is room for policy judgment and decision there is discretion.

346 U.S. at 36, 73 S.Ct. at 968. That those judgments and decisions may have been made by scientists or other operational personnel does not affect the application of the discretionary function exception. As stated by the Court in *Varig,* 'it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies....' [467 U.S. at 813], 104 S.Ct. at 2765. [FN12]

> FN12. The pre-*Varig* criterion of looking at whether the decision was made at the planning level or operational level is no longer valid in view of the Supreme Court's statement in *Varig. See also Begay v. United States,* 768 F.2d 1059, 1062-63 n. 2 (9th Cir.1985).

"In these actions, the decisions concerning safety were in the first instance made by those charged with the preparation of the Operation Plan and its components. The responsibility for carrying out the Safety Plan was assigned to the officials in charge of the tests who had discretion to adopt and modify the Plan as necessary to achieve the objectives of the test. A court would be ill-equipped to evaluate the judgments concerning safety made by those officials based on the exigencies of the moment. Any attempt to do so would, moreover, require a comprehensive reexamination of the conduct of the tests and the decisions made during their course which would itself defeat the purpose of the exception. The consequences of such a reexamination would be to hamper the government in its future conduct of weapons tests and similar operations affecting the national security. [FN13]

> FN13. The appropriateness of deciding issues of governmental immunity on summary judgment to avoid unnecessary inquiries disruptive of effective government was stressed by the Supreme Court in *Harlow v. Fitzgerald,* 457 U.S. 800, 816-17, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

[Finally, the appellants argue that the discretionary function exception does not bar their challenge to the government's alleged negligent failure to supervise the contractor's compliance with the safety procedures and guidelines established by ***996** the Safety Plan. Appellants rely heavily on *Gardner v. United States,* 780 F.2d 835 (9th Cir.1986) for the proposition that, under California law, there is a "nondelegable duty to ensure adequate safety precautions were taken by an independent contractor" where the work to be performed involves special dangers. *Garnder,* 780 F.2d at 837 (citing *Rooney v. United States,* 634 F.2d 1238 (9th Cir.1980)). Furthermore, the United States can be liable under the FTCA for breaching this non-delegable duty. *Gardner,* 780 F.2d at 837. This

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case is clearly distinguishable. The discretionary function exception was not raised nor discussed. Furthermore,

> It is irrelevant to the discretion issue whether the AEC or its employees were negligent in failing to adequately protect the public. *See Cisco v. United States,* 768 F.2d 788, 789 (7th Cir.1985); *General Public Utilities Corp. v. United States,* 745 F.2d 239, 243, 245 (3d Cir.1984), *cert. denied,* 469 U.S. 1228, 105 S.Ct. 1227, 84 L.Ed.2d 365 (1985). [ ] When the conduct at issue involves the exercise of discretion by a government agency or employee, § 2680(a) preserves governmental immunity 'whether or not the discretion involved be abused.' "

Allen v. United States, 816 F.2d 1417 (10th Cir.1987) (footnotes omitted). *See also Cunningham v. United States,* 786 F.2d 1445 (9th Cir.1986) (negligent failure to inspect falls within discretionary function exception--"When an agency determines the extent to which it will supervise the safety procedures of private individuals, it is exercising discretionary regulatory authority of the most basic kind." (quoting *Varig,* 467 U.S. at 819-20, 104 S.Ct. at 2767)).

Furthermore, the Act is specifically limited to claims "for injury, loss of property, personal injury, or death due to exposure to radiation based on acts or omissions *by a contractor* in carrying out an atomic weapons testing program under a contract with the United States." 42 U.S.C. § 2212(a)(1) (emphasis added). Section 2212 is not designed to cover the negligence of the government itself.]

"Accordingly, [Appellants'] claims based on failures to take adequate safety precautions at tests must be dismissed. [footnote omitted].

[b]. Claims Based on the Government's Failure to Issue Warnings Prior to 1977.

[11] "[Appellants'] second category of claims is based on the breach of the government's alleged duty to warn [appellants] of the dangers to which they had been exposed or to monitor test participants for health problems resulting from radiation exposure. [This court] has postulated that California courts would impose a duty on the government to warn test participants of the dangers to which they have been exposed. *See Molsbergen v. United States,* 757 F.2d 1016, 1020-25 (9th Cir.1985). Such a duty would exist when a test participant could show that (1) the government has information relating to a serious risk to the life, safety or health of a participant; (2) the conduct of the government gave rise to the risk; (3) the burden resulting from imposition of a duty to warn is not onerous; and (4) there is reason to believe that a warning would have some practical effect. *Id.* For purposes of this ruling, it is assumed that the government failed to provide [appellants] with any warning of the health risks of exposure to radiation until 1977.

"The government's motion is not directed at whether it had a duty to warn. Rather, the government argues that in these cases the government's failure to warn involved the failure to perform a discretionary function and that the claims are therefore barred.

"Assuming the government had a duty to warn, the threshold question in determining whether the discretionary function applies is what, if any, warning measures it was obliged to undertake on behalf of test participants prior to 1977. This is not a case of failing to warn river users of a hidden obstruction beneath the surface, *Lindgren v. United States,* 665 F.2d 978 (9th Cir.1982); or park users of the risk of flash floods, *Ducey v. United States,* 713 ***997** F.2d 504 (9th Cir.1983); or a treating physician of his patient's dangerous propensities, *Jablonski v. United States,* 712 F.2d 391 (9th Cir.1983). The kind of 'warning' that these cases involve is best illustrated by the program the government did undertake beginning in 1977 on the strength of findings by the Centers for Disease Control of a leukemia cluster among test participants. At that time the Defense Nuclear Agency established the Nuclear Test Personnel Review ("NTPR") program. It began to assemble and publish voluminous materials concerning radiation exposure during tests and to calculate levels of exposure of personnel. Beginning in 1979, test participants whose records indicated significant radiation exposure were notified and provided with medical examinations. The notification and examination program was gradually expanded to include personnel who had received lower doses. It was also extended to the Department of Health, Education and Welfare which began to conduct studies and a public information program. [FN14]

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FN14. *See* the discussion and references cited at Government Memo, in Support of Summary Judgment (Discretionary Function) [ ]; Government Reply Memo [ ].

"The decision to embark on this program entailed a commitment of substantial resources, including the assignment of a large number of employees and the expenditure of large sums of money. The initial cost of the NTPR alone was $6,000,000 per year. The program required difficult judgments balancing the magnitude of the risk from radiation exposure--of which there was only fragmentary knowledge--against the risks and burdens of a public program. Those risks included the potential consequences of creating public anxiety and the health hazards inherent in the medical responses to the warning. [FN15]

FN15. *See* E. Robin, *Matters of Life & Death: Risks v. Benefits of Medical Care* (1984), which discusses the health hazards inhering in any widespread campaign to warn against and detect disease. Diagnostic tests, by reason of the intrusive procedures used, false positive indications, and sometimes unwarranted psychological effects, produce their own adverse consequences which must be taken into account.

The experience under the government's 1976 Swine Flu Program illustrates the hazards of a hasty reaction to a health program, the dimensions and seriousness of which are not yet known at the time. Although the probability of an epidemic was never established, the public was strongly urged to submit to immunization with little advice respecting its attendant hazards. R. Neustadt, *Swine Flu Affair: Decision-Making on a Slippery Disease* 86-97 (1978); Gray, "Complexities of Informed Consent," 437 *Annals Am. Academy Pol. & Soc. Sci,* 37, 44 (May, 1978); Centers for Disease Control, *Public Attitudes Toward the Swine Flu Immunization Program and Medical Coverage of Events 2-7* (1981). The government's experience with the swine flu program highlights the policy and cost/benefit tradeoffs involved in large-scale public responses to perceived health problems.

"Thus any decision whether to issue warnings to thousands of test participants of possibly life-threatening dangers and to provide them with appropriate examinations and counseling calls for the exercise of judgment and discretion at high levels of government. The difficulty of such decisions is illustrated simply by the problem of how to phrase such a warning where the degree of exposure of any particular participant and the consequent risk is not known. [FN16] A decision must also take into account sensitive questions concerning its impact on on-going and future tests and on the military and civilian participants. [FN17]

FN16. Not the least of the problems the government would face is that once having undertaken to issue a "warning", it may come under an obligation to exercise due care toward members of the public relying on it. *See Indian Towing Co. v. United States,* 350 U.S. 61, 69, 76 S.Ct. 122, 126, 100 L.Ed. 48 (1955) (not decided under the discretionary function exception).

FN17. Studying the psychological reactions of troops to nuclear weapons during field tests was a specific goal of many of the tests. *See, e.g.,* Characteristics of Troops with Varying Levels of Information about Atomic Effects, Government Exhibit D-67; Memorandum for the AEC Chairman, July 16, 1951, Government Exhibit K-14. To carry out such studies and achieve test objectives, the government needed complete control over information supplied to the troops. Troops were to be indoctrinated on how to conduct themselves on the nuclear battlefield. As one officer explained, the goal was to teach soldiers to respect radioactivity, not to fear it. Capt. Frank Winant, Command Problems of Atomic Defensive Warfare, Sept. 1947, Government Exhibit J-13.

***998** "In no sense can such a decision be equated with decisions to warn of submerged obstructions to navigation or flash floods. [FN18] Courts cannot be considered qualified to evaluate such a decision and any attempt to do so is likely to interfere with important governmental activities. Formulating and issuing warnings requires the government 'to establish priorities for the accomplishment of its policy objectives by balancing the objectives sought to be obtained against such practical considerations as staffing and funding.' *Varig,* [467 U.S. at 820], 104 S.Ct. at 2768. The conclusion is inescapable that every aspect of a warning program is a matter that falls within the discretionary function exception as defined in *Dalehite* and *Varig:*

FN18. *See, Begay v. United States,* 768 F.2d 1059 (9th Cir.1985); *First Nat'l Bank in Albuquerque v. United States,* 552 F.2d 370, 374-77 (10th Cir.), *cert. denied,* 434 U.S. 835, 98 S.Ct. 122, 54 L.Ed.2d 96 (1977) (decision by Department of Agriculture whether label on fungicide complied

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with statutory requirement that it contain a warning "necessary and if complied with adequate to prevent injury" fell within discretionary function exception).

Where there is policy judgment and decision there is discretion.

346 U.S. at 36, 73 S.Ct. at 968. The decisions of [this court], discussed in the immediately preceding section, compel the same result.

"[Appellants] argue that the discretionary function exception cannot apply in the absence of a 'conscious decision.' [FN19] The statute is not so limited; it exempts '[a]ny claim based upon ... the failure to exercise or perform a discretionary function ...' 28 U.S.C. § 2680(a). The language is directed at the nature of the conduct, and does not require an analysis of the decision-making process. *Cf. General Public Utilities Corp. v. United States,* 745 F.2d 239, 245 (3d Cir.1984), *cert. denied,* 469 U.S. 1228, 105 S.Ct. 1227, 84 L.Ed.2d 365 (1985) (the exemption is based on the nature of the conduct, 'not whether there is an option to choose'). When enacting § 2680, 'Congress exercised care to protect the Government from claims, *however negligently caused,* that affected the governmental functions.' *Dalehite,* 346 U.S. at 32, 73 S.Ct. at 966 (emphasis added).

FN19. *See Allen v. United States,* 588 F.Supp. 247, 337-40 (D.Utah 1984).

[The district court's decision in *Allen* was overturned by the Tenth Circuit in *Allen v. United States,* 816 F.2d 1417 (10th Cir.1987). In that opinion, the Tenth Circuit specifically rejected the District oof Utah District Court's "deliberate choice" or "conscious decision" analysis which was heavily relied upon by the appellants in this case. The Tenth Circuit held:

It is also irrelevant whether the alleged failure to warn was a matter of "deliberate choice," or a mere oversight. *See Allen,* 588 F.Supp. at 337-38. We agree with the treatment of this distinction in *Myslakowski v. United States,* 806 F.2d 94 (6th Cir.1986), *cert. denied,* --- U.S. ----, 107 S.Ct. 1608, 94 L.Ed.2d 793 (1987):

"The critical error in the trial court's analysis is in its conclusion that because the evidence does not show that the departmental policymakers evaluated the pros and cons of requiring that a warning be given concerning the rollover propensity of the jeep and then made a discretionary decision not to give such warnings, it therefore follows that no discretionary decision, of the kind contemplated by § 2680(a), was made....

Stated otherwise, even the negligent failure of a discretionary government policymaker to consider all relevant aspects of a subject matter under consideration does not vitiate the discretionary character of the decision that is made.

Indeed, it is, in part, to provide immunity against liability for the consequences of negligent failure to consider the relevant, even critical, matters in discretionary decisionmaking that the statutory exception exists. If it were otherwise, a judgment-based policy determination made at the highest levels, to which all would concede that the statutory exception applies (the decision to sell surplus jeeps), would result in no immunity if the decision could be shown to have been made without consideration of important, relevant factors, or was a decision negligently reached. If that reasoning were sound, the discretionary function exception would be inapplicable in every case in which a negligent 'failure to consider' a relevant risk could be proved."

Id. at 97-98. *Accord In re Consolidated United States Atmospheric Testing Litigation,* 616 F.Supp. 759, 776-77 (N.D.Cal.), *appeal docketed,* No. 85-2842 (9th Cir.1985).

Allen, 816 F.2d at 1422 n. 5.]

"If the decision to issue or not to issue a 'warning' is within the discretionary function exception, then logically the failure to consider whether to issue one necessarily ***999** falls within the exception as well. Any other interpretation of the statute would create insurmountable problems in its administration: What would constitute a 'decision'? Would a decision to defer decision be a 'decision'? Would the government be subject to liability for failing to act where operational employees conducting the relevant research consider the evidence as yet insufficient for making a decision? As the Supreme Court said in *Varig,* one must look to 'the nature of the conduct' to determine whether the exception applies. In this case, the relevant conduct is the issuance of 'warnings,' not the decision-making process or the failure to make a conscious, explicit decision.

"Accordingly, plaintiffs' claims based on the failure to issue warnings must also be dismissed." [FN20]

FN20. Because we dismiss all appellants' claims under the discretionary function exception, we do not reach the *Feres* doctrine, foreign country exception or the combatant activities exception.

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C. *Broudy* Appeal

Appellant Alice Broudy, decedent's wife, appeals from the United States District for the Central District of California's granting of the government's motion for summary judgment. In granting that motion, the Honorable Judge Laughlin E. Waters adopted the reasoning of the decision in *In re Consolidated United States Atmospheric Testing Litigation,* 616 F.Supp. 759 (D.C.Cal.1985) ("Konizeski appeal") and held, *inter alia,* that the discretionary function exception barred Broudy's post-discharge failure to warn and her medical malpractice claims. We affirm.

Major Broudy served as an officer in the U.S. Marine Corps from 1944 to 1960. In 1957, Major Broudy was ordered to participate in military exercises near two atmospheric tests conducted in Nevada.

Major Broudy was honorably discharged in 1960. He received medical care for various health problems at the Marine Corps medical facility at El Toro. He was never informed of nor warned about the dangers associated with his exposure to radiation. In 1976, he was diagnosed as having lymphosarcoma, a form of cancer that has been related to radiation exposure. He died from that disease in 1977.

Broudy, by stipulation, joined in all arguments and precedent advanced by the appellants in the Konizeski appeal on the issue of the government's post- discharge failure to warn and the applicability of the discretionary function. For the same reasons and policy considerations stated above in the Konizeski appeal, we find that the government's post-discharge failure to warn Major Broudy of any harm arising from his exposure to radiation is barred by the discretionary function exception to the FTCA.

[12] Broudy has attempted to distinguish her husband's case from the Konizeski appellants by asserting a medical malpractice claim. Specifically, she contends the medical personnel at the El Toro Medical Facility committed medical malpractice when they failed to warn Major Broudy of the dangers of radiation exposure when he went to the facility for post-discharge treatment. The district court held that this medical malpractice claim was barred for failure to state a sufficient claim to the appropriate federal agency. We agree.

28 U.S.C. § 2675(a) provides that as a prerequisite to maintaining a suit under the FTCA, a plaintiff must first present the claim to the appropriate federal agency. By enacting the notice requirement, Congress sought to ensure that plaintiffs "would promptly inform the relevant agency of the accident so that it may investigate the claim and respond either by settlement or by defense." *Broudy v. United States,* 722 F.2d 566, 568 (9th Cir.1983) (quoting *Adams v. United States,* 615 F.2d 284, 289 (5th Cir.1980)). The purpose of this notice requirement is to give the relevant agency an opportunity to commence an investigation into the claim. *See Broudy,* 722 F.2d at 568. Broudy's administrative claim was filed with the Department of Energy ("DOE"). The Department of Defense ("DOD") controls the medical facility at El Toro. The DOD received no notice of Broudy's claim. As a consequence, the ***1000** DOD was unable to initiate an investigation into her claims. We agree with the district court that Broudy's medical malpractice claim is barred because she failed to file the claim with the DOD which was the appropriate federal agency.

The judgments are AFFIRMED.

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Tab

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United States Court of Appeals,
First Circuit.

Mary E. HAMMOND, Individually and Mary E. Hammond as She Is the Executrix of the Estate of Charles E. Hammond, Plaintiff, Appellant,
v.
UNITED STATES of America, Defendant, Appellee.

No. 85-1339.

Argued Oct. 11, 1985.
Decided March 12, 1986.

Widow brought suit against private contractor for radiation death of her husband, a civilian employee of Department of Defense and observer at several atomic weapons tests. Private contractor moved to dismiss for failure to file an administrative claim under the Federal Tort Claims Act, which was granted by the United States District Court for the District of Massachusetts, A. David Mazzone, J. On appeal, the Court of Appeals, Bownes, Circuit Judge, held that federal statute substituting United States as defendant in all suits against private contractors to the Government for radiation injuries arising from any of the United States atomic weapons testing programs, and making the Federal Tort Claims Act the sole remedy for those injuries was rationally related to legitimate Congressional purpose, and thus did not violate due process.

Affirmed.

West Headnotes

[1] Constitutional Law ⚿105
92k105 Most Cited Cases

By enacting statute, 42 U.S.C.A. § 2212, substituting United States as defendant in all suits against private contractors to the Government for radiation injuries arising from any of the United States atomic weapons testing programs and making the Federal Tort Claims Act, 28 U.S.C.A. §§ 1346, 2671-2680, the sole remedies for those injuries, thereby retroactively abolishing widow's cause of action in tort for death of her husband from radiation, Congress abridged no vested rights of widow, as rights in tort do not vest until there is a final, unreviewable judgment. Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1985, § 1631, 42 U.S.C.A. § 2212.

[2] Constitutional Law ⚿305(1)
92k305(1) Most Cited Cases

Congress must comply with due process when abolishing or substantially modifying a common-law cause of action. U.S.C.A. Const.Amends. 5, 14.

[3] Constitutional Law ⚿305(1)
92k305(1) Most Cited Cases

Rational basis, and not strict scrutiny standard of due process review applied to constitutional challenge to retroactive application of federal statute, 42 U.S.C.A. § 2212, substituting United States as defendant in all suits against private contractors to the Government for radiation injuries arising from any of the United States atomic weapons testing programs, and making the Federal Tort Claims Act, 28 U.S.C.A. §§ 1346, 2671-2680, the sole remedy for those injuries, as Congress had thereby acted within its powers under the war powers and commerce clauses of the Constitution, and there was no fundamental right or suspect classification involved. Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1985, § 1631, 42 U.S.C.A. § 2212; U.S.C.A. Const. Art. 1, § 8, cl. 3.

[4] Constitutional Law ⚿305(1)
92k305(1) Most Cited Cases
(Formerly 94k305(1) Continuance)

Federal statute, 42 U.S.C.A. § 2212, substituting United States as defendant in all suits against private contractors to the Government for radiation injuries arising from any of the United States atomic weapons testing programs, and making the Federal Tort Claims Act, 28 U.S.C.A. §§ 1346, 2671- 2680 , the sole remedy for those injuries, was not wholly arbitrary and irrational in purpose, and thus did not violate due process, as it was reasonably related to a legitimate Congressional purpose. Department of

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Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1985, § 1631, 42 U.S.C.A. § 2212.

[5] Federal Courts ⚿1139
170Bk1139 Most Cited Cases

Where widow claimed several million dollars in compensation resulting from her husband's death by radiation, Court of Appeals lacked jurisdiction to consider widow's "taking" claim; rather, proper forum for such claim was the court of claims. U.S.C.A. Const.Amend. 5; 28 U.S.C.A. §§ 1346(a)(2), 1491.

[6] Jury ⚿12(1.2)
230k12(1.2) Most Cited Cases

There is no right to a jury trial against the sovereign under the Seventh Amendment. U.S.C.A. Const.Amend. 7.

[7] United States ⚿125(7)
393k125(7) Most Cited Cases

When United States abolishes cause of action and then sets up a separate administrative remedy against itself, Seventh Amendment does not require that it must also provide jury trial. U.S.C.A. Const.Amend. 7.

[8] Constitutional Law ⚿186
92k186 Most Cited Cases

Prohibition against ex post facto laws only applies to criminal or penal statutes. U.S.C.A. Const. Art. 1, § 9, cl. 3.

[9] Constitutional Law ⚿82.5
92k82.5 Most Cited Cases

[9] United States ⚿78(2)
393k78(2) Most Cited Cases

Federal statute, 42 U.S.C.A. § 2212, substituting United States as defendant in all suits against private contractors to the Government for radiation injuries arising from any of the United States atomic weapons testing programs, and making the Federal Tort Claims Act, 28 U.S.C.A. §§ 1346, 2671- 2680 , the sole remedy for those injuries was not punitive so as constitute a bill of attainder. Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1985, § 1631, 42 U.S.C.A. § 2212.

***9** Marc S. Alpert, P.C., Boston, Mass., for plaintiff, appellant.

Leon B. Taranto, Atty., Torts Branch, Civ. Div., U.S. Dept. of Justice, with whom Jeffrey Axelrad, Director, Torts Branch, Paul F. Figley, Asst. Director, Torts Branch, Richard K. Willard, Acting Asst. Atty. Gen., Washington, D.C., and William F. Weld, U.S. Atty., Boston, Mass., were on brief for defendant, appellee.

Before BOWNES and TORRUELLA, Circuit Judges, and HILL, [FN*] Senior District Judge.

FN* Of the Central District of California, sitting by designation.

BOWNES, Circuit Judge.

This is a constitutional challenge to the retroactive application of a federal statute, 42 U.S.C. § 2212, that substitutes the United States as defendant in all suits against private contractors to the government for radiation injuries arising from any of the United States atomic weapons testing programs, and makes the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80, the sole remedy for those injuries.

I. BACKGROUND

Plaintiff Mary Hammond, individually and as executrix of the estate of her deceased husband Charles Hammond, formerly a civilian employee of the Department of Defense and observer at several atomic weapons tests, originally filed suit in 1978 in Massachusetts Superior Court for Middlesex County against defendants to be named later. Plaintiff filed an amended complaint on June 2, 1984, naming E G & G Company as defendant. The amended complaint alleged wrongful death, pain and suffering of the decedent, and loss of consortium, all due to cancer caused by the ***10** negligent conduct of E G & G in failing to design the tests adequately to protect the deceased from radiation exposure. The complaint did not set out specific facts but generally alleged failure to warn, failure to provide proper protective clothing or equipment, general negligence, willful, wanton or reckless conduct, breach of warranty and fraud or deceit. There

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were three counts, the first and third in negligence, and the second under the Massachusetts wrongful death statute, Mass.Gen.Laws Ann. ch. 229. E G & G removed the case to federal court.

During the pendency of the action § 2212 was enacted. It provides, *inter alia:*

> **§ 2212. Contractor liability for injury or loss of property arising out of atomic weapons testing programs**
>
> **(a) Federal remedies applicable; exclusiveness of remedies; Federal employee status; procedure, limitations, and exceptions applicable**
>
> (1) The remedy against the United States provided by sections 1346(b) and 2672 of Title 28, or by the Act of March 9, 1920 (46 U.S.C. 741-752 and 781-790), as appropriate, for injury, loss of property, personal injury, or death shall apply to any civil action for injury, loss of property, personal injury, or death due to exposure to radiation based on acts or omissions by a contractor in carrying out an atomic weapons testing program under a contract with the United States.
>
> (2) The remedies referred to in paragraph (1) shall be exclusive of any other civil action or proceeding for the purpose of determining civil liability arising from any act or omission of the contractor without regard to when the act or omission occurred. The employees of a contractor referred to in paragraph (1) shall be considered to be employees of the Federal Government, as provided in section 2671 of Title 28, for the purposes of any such civil action or proceeding; and the civil action or proceeding shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of such Title and shall be subject to the limitations and exceptions applicable to those actions.

Pursuant to § 2212(b) [FN1] E G & G was first certified by the Attorney General as an atomic weapons testing contractor on January 10, 1985, and then on January 23 the motion of the United States to substitute itself as defendant was granted. Defendant's motion to dismiss for failure to file an administrative claim under the FTCA was granted without prejudice on March 11. The district court considered plaintiff's challenge to the constitutionality of § 2212 and rejected it. It denied plaintiff's motion to vacate its order of dismissal. Plaintiff then took this appeal.

> FN1. Section 2212(b) provides:
>
> **(b) Delivery of process to Attorney General; removal of cases from State courts; certification of contractor status**
>
> A contractor against whom a civil action or proceeding described in subsection (a) of this section is brought shall promptly deliver all processes served upon that contractor to the Attorney General of the United States. Upon certification by the Attorney General that the suit against the contractor is within the provisions of subsection (a) of this section, a civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings shall be deemed a tort action brought against the United States under the provisions of section 1346(b), 2401(b), or 2402, or sections 2671 through 2680 of Title 28. For purposes of removal, the certification by the Attorney General under this subsection establishes contractor status conclusively.

Plaintiff contends that § 2212 is unconstitutional on several alternative grounds: under the fifth amendment because the act destroyed vested rights in her pending state-law cause of action without due process of law, because it is an uncompensated "taking" of property, because it is the application of "unexpected" law without procedural due process of law, or because it violates equal protection; under the seventh amendment because the act denies plaintiff her right to a jury trial; under the ninth amendment because the act violates unenumerated rights reserved to the people; ***11** under the tenth amendment because the act is beyond the power of Congress and infringes on powers reserved to the states; under the general constitutional right of access to the courts; under the article 1 prohibitions against *ex post facto* laws, bills of attainder and laws impairing contracts. We find that § 2212 does not violate the Constitution, and affirm.

II. FIFTH AMENDMENT DUE PROCESS CHALLENGE

Plaintiff contends that § 2212 deprives her of a vested cause of action against E G & G without due process of law. She asserts that the filing of a suit

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on an accrued common-law or state statutory cause of action gives her a vested property right in that action, and that Congress cannot retroactively abolish that cause of action and legislate the dismissal of plaintiff's suit without violating due process. Plaintiff relies principally on *Coombes v. Getz,* 285 U.S. 434, 52 S.Ct. 435, 76 L.Ed. 866 (1932), and *Ettor v. Tacoma,* 228 U.S. 148, 33 S.Ct. 428, 57 L.Ed. 773 (1913). Plaintiff also contends that since Congress has denied plaintiff her right of access to the courts § 2212 must be subject to strict scrutiny review or an intermediate level of review to determine if Congress has justified its action. Finally, plaintiff claims that even under the least exacting standard of rational basis review the act cannot pass constitutional muster.

A. Abolition of Vested Rights

The Supreme Court has found in certain cases that vested rights created by statute cannot be abridged by a subsequent statute that effectively takes away accrued causes of action to enforce those rights. The principal cases striking down retroactive abridgment involved statutes that created rights "vesting" in: a corporate charter, *Coombes v. Getz,* 285 U.S. at 439-48, 52 S.Ct. at 435-38; real property, *Ettor v. Tacoma,* 228 U.S. at 155-58, 33 S.Ct. at 430-31; and a quasi-contract, *Steamship Co. v. Joliffe,* 69 U.S. (2 Wall.) 450, 456-58, 17 L.Ed. 805 (1864). *Cf. Richmond Screw Anchor Co. v. United States,* 275 U.S. 331, 48 S.Ct. 194, 72 L.Ed. 303 (1928) (rights in a patent); *Forbes Pioneer Boat Line v. Board of Comm'rs,* 258 U.S. 338, 339- 40, 42 S.Ct. 325, 325-26, 66 L.Ed. 647 (1922) (rights to a fixed sum of money); *Ochoa v. Hernandez,* 230 U.S. 139, 161-64, 33 S.Ct. 1033, 1041-42, 57 L.Ed. 1427 (1913) (rights in real property). In these cases, because the rights had "vested" in real property, a contract, or in a fixed sum, they were said to stand independent of the statute that created them and could not be abridged by the subsequent statute. *Coombes,* 285 U.S. at 442, 52 S.Ct. at 436; *Ettor,* 228 U.S. at 156, 33 S.Ct. at 430; *Joliffe,* 69 U.S. at 458. In none of these cases was any right to a tort cause of action, or a right deriving from a tort, held to be "vested." The Supreme Court in *Ettor,* 228 U.S. at 157-58, 33 S.Ct. at 431, heavily relied on by the plaintiffs, expressly distinguished the action for an injury to property involved in that case from one in tort. *Cf. Louisiana v. Mayor of New Orleans,* 109 U.S. 285, 3 S.Ct. 211, 27 L.Ed. 936 (1883) (a state that limits a city's tax collecting power to such an extent that the city cannot pay a tort judgment against it does not violate the judgment holder's fourteenth amendment rights).

The present case involves common-law and state statutory tort rights that are nothing like the vested rights of the *Coombes, Ettor,* and *Joliffe* cases relied on by the plaintiff. Moreover, these are old cases and their rationales are not easy to reconcile or apply. In fact, their vitality may now be in doubt because more recent cases have upheld retroactive application of statutes that abridge economic and real property rights created under a prior statute without always carefully distinguishing the older cases. *See, e.g., Welch v. Henry,* 305 U.S. 134, 144, 146-51, 59 S.Ct. 121, 125-27, 83 L.Ed. 87 (1938); *Graham & Foster v. Goodcell,* 282 U.S. 409, 426-32, 51 S.Ct. 186, 192-95, 75 L.Ed. 415 (1931); *United States v. Heinszen & Co.,* 206 U.S. 370, 386-91, 27 S.Ct. 742, 746-58, 51 L.Ed. 1098 (1907); *Moss v. Hawaiian Dredging Co.,* 187 F.2d 442, 444-47 (9th Cir.1951); ***12** *Battaglia v. General Motors Corp.,* 169 F.2d 254, 257-62 (2d Cir.), *cert. denied,* 335 U.S. 887, 69 S.Ct. 236, 93 L.Ed. 425 (1948); *Woods v. Schmid,* 164 F.2d 981, 982-83 (5th Cir.1947); *United States v. Atlantic Richfield Co.,* 435 F.Supp. 1009, 1029-31 (D.Alaska 1977), *aff'd,* 612 F.2d 1132 (9th Cir.1980); *Asselta v. 149 Madison Avenue Corp.,* 79 F.Supp. 413, 415-16 (S.D.N.Y.1948); *Hospital Data Center of S.C., Inc. v. United States,* 634 F.2d 541, 544-45, 225 Ct.Cl. 158 (1980); *but cf. United States Trust Co. of New York v. New Jersey,* 431 U.S. 1, 17-28, 97 S.Ct. 1505, 1515-20, 52 L.Ed.2d 92 (1977) (applying an intermediate standard of review to strike down under the contracts clause a repeal of a statutory covenant that provided security for bondholders).

[1] The question whether the rights asserted in plaintiff's state-law causes of action are "vested" cannot be answered by looking to see whether suit had already been filed and how far it had proceeded when Congress enacted § 2212. "No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." *New York Central R.R. Co. v. White,* 243 U.S. 188, 198, 37 S.Ct. 247, 250, 61 L.Ed. 667 (1917); *Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. 59, 88 n. 32, 98 S.Ct. 2620, 2638 n.

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32, 57 L.Ed.2d 595 (1978); *Second Employers' Liability Cases,* 223 U.S. 1, 50, 32 S.Ct. 169, 175, 56 L.Ed. 327 (1912); *Ducharme v. Merrill-National Laboratories,* 574 F.2d 1307, 1309 (5th Cir.), *cert. denied,* 439 U.S. 1002, 99 S.Ct. 612, 58 L.Ed.2d 677 (1978). This is true after suit has been filed and continues to be true until a final, unreviewable judgment is obtained. Chief Justice Marshall first announced the principle in *The Schooner Peggy,* 5 U.S. (1 Cranch) 103, 110, 2 L.Ed. 49 (1801). The Supreme Court held in that case that a court must apply the law in force at the time of its decision, even if it is hearing the case on appeal from a judgment entered pursuant to a prior law. For a more recent and stringent application of this rule, see *149 Madison Avenue Corp. v. Asselta,* 331 U.S. 795, 67 S.Ct. 1726, 91 L.Ed. 1822 (1947), *modifying* 331 U.S. 199, 67 S.Ct. 1178, 91 L.Ed. 1432 (1947). [FN2]

> FN2. In *149 Madison Avenue Corp. v. Asselta,* 331 U.S. 795, 67 S.Ct. 1726, 91 L.Ed. 1822 (1947), *modifying* 331 U.S. 199, 67 S.Ct. 1178, 91 L.Ed. 1432 (1947), the Supreme Court had affirmed a judgment for overtime pay due plaintiffs under the Fair Labor Standards Act. After their affirmance, but before the time for a motion for rehearing had run, Congress passed the Portal-to-Portal Act to give employers good-faith defenses against back overtime pay actions under the Fair Labor Standards Act. The defendants, on a timely motion for rehearing, asked the Court to reconsider its affirmance in light of the changed law. The Supreme Court remanded to the district court for reconsideration under the new law and judgment was vacated below. The defendants prevailed after a new trial. *Asselta v. 149 Madison Avenue Corp.,* 79 F.Supp. 413, 415-16 (S.D.N.Y.1948) (upholding constitutionality of the application of new law to this case), 90 F.Supp. 422 (S.D.N.Y.1950) (judgment for defendants).

Because rights in tort do not vest until there is a final, unreviewable judgment, Congress abridged no vested rights of the plaintiff by enacting § 2212 and retroactively abolishing her cause of action in tort.

B. Applicable Standard of Review

[2] Plaintiff is correct that Congress must comply with due process when abolishing or substantially modifying a common law cause of action. In that sense the right to sue is a "species of property." *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 428, 102 S.Ct. 1148, 1154, 71 L.Ed.2d 265 (1982); *see Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. at 82- 94, 98 S.Ct. at 2635-41. But, an act of Congress comes to us clothed with a presumption of constitutionality, and the burden is on the plaintiff to show that it violates due process. *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 15, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752 (1976); *McGowan v. Maryland,* 366 U.S. 420, 425-26, 81 S.Ct. 1101, 1104-05, 6 L.Ed.2d 393 (1961).

[3] This is not the first time Congress has substituted the government as defendant ***13** in a certain category of tort suits and relegated plaintiffs to an FTCA remedy. Statutory schemes similar to § 2212 have been enacted in the Federal Drivers Act, 28 U.S.C. §§ 2679(b)-(e) (substitution in any tort claim against a federal employee who was operating a motor vehicle within the scope of his employment at the time of an incident giving rise to personal injuries), and in the Swine Flu Act, 42 U.S.C. § 247b(k)- (1) (1976) (repealed 1978) (substitution in any tort claim against a private manufacturer of the swine flu vaccine for injuries arising from the vaccine). These two acts have withstood constitutional challenges, and the rational basis test has been the standard of due process analysis applied by the courts. *See, e.g., DiPippa v. United States,* 687 F.2d 14, 19 (3d Cir.1982) (Swine Flu Act); *Ducharme v. Merrill-National Laboratories,* 574 F.2d at 1310-11 (Swine Flu Act); *Carr v. United States,* 422 F.2d 1007, 1010-12 (4th Cir.1970) (Federal Drivers Act).

Plaintiff claims § 2212 must be specially scrutinized because she has been denied her fundamental right of access to the courts. But this case does not involve someone burdening or blocking plaintiff's right of access to the courts to seek enforcement of the law as in the cases plaintiff cites. *See, e.g., California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); *Boddie v. Connecticut,* 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971); *McKay v. Hammock,* 730 F.2d 1367 (10th Cir.1984); *Ryland v. Shapiro,* 708 F.2d 967 (5th Cir.1983); *Harris v. Pate,* 440 F.2d 315 (7th Cir.1971). This is a matter of Congress altering her prior rights and remedies. There is no fundamental right to particular state- law tort claims.

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Because Congress has acted within its powers under the war powers and commerce clauses of the Constitution and there is no fundamental right or suspect classification involved here, we find that the rational basis standard of due process review applies.

C. Rational Basis Review

[4] In applying the rational basis test to this case we follow the guidance of the Supreme Court in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.,* 467 U.S. 717, 728 - 34, 104 S.Ct. 2709, 2717-20, 81 L.Ed.2d 601 (1984); *Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. at 82- 94, 98 S.Ct. at 2635-41; and *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. at 15-20, 96 S.Ct. at 2892-94. We find that plaintiff has not met her burden of showing that § 2212 is wholly arbitrary and irrational in purpose and effect, *i.e.,* not reasonably related to a legitimate congressional purpose. *See United States R.R. Retirement Bd. v. Fritz,* 449 U.S. 166, 174-77, 101 S.Ct. 453, 459-60, 66 L.Ed.2d 368 (1980); *Vance v. Bradley,* 440 U.S. 93, 97-98, 99 S.Ct. 939, 942-43, 59 L.Ed.2d (1979).

The reasons asserted by the United States for Congress' enactment of § 2212 are neither arbitrary nor irrational, and can be stated simply. The United States has operated a nuclear weapons testing program for over 40 years. It initiates, designs and authorizes all nuclear tests under the program but has found it necessary to obtain the assistance of various private entities including universities and private companies for many aspects of the testing. From the late 1940's to the early 1960's a series of above-ground tests of atomic weapons were conducted with military personnel, civilian government employees and private employees of government contractors taking part. Plaintiff's deceased husband was an observer at several of the tests. There is no dispute that these tests were designed and supervised by government officials and were individually authorized by the President. A significant number of those present at the above-ground tests have instituted suits against the government contractors involved in them for injuries caused by radiation exposure. The contractors are generally not threatened with financial liability by these suits since most of their contracts with the government included a clause making the United States indemnitor for all tort liability, ***14** including costs of litigation, arising from their participation in the testing programs. S.Rep. No. 500, 98th Cong., 2d Sess. 374-76 (1984). Congress has nevertheless perceived these lawsuits to constitute a threat to the continued participation of the private contractors in the nuclear weapons program because the contractors fear the bad publicity generated by the suits. The contractors testified before Congress that the lawsuits have led the public to blame them for the formulation, implementation and execution of the atomic weapons testing policy of the United States. H.R.Rep. No. 124, Part 4, 98th Cong., 1st Sess. 2-3 (1983). They also testified that the lawsuits result in a diversion of human and financial resources away from research and testing activities and into litigation and, therefore, seriously disrupt their participation in the program. *See Litigation Relating to Atomic Testing, 1983: Hearings on H.R. 2797 before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary,* 98th Cong., 1st Sess. 46-49 (1983). Plaintiff asserts that the mere public embarrassment of the private contractors is not a rational or legitimate reason for relieving them of liability. We disagree. Even if we question the extent and effect of this publicembarrassment it is not for us to reevaluate it. It is a plausible reason for Congress' action. *United States R.R. Retirement Bd. v. Fritz,* 449 U.S. at 179, 101 S.Ct. at 461.

Nor has Congress chosen a wholly arbitrary or irrational means to its legitimate end. Plaintiff claims that Congress created only an illusory substitute remedy in § 2212, that she probably will not be compensated for her husband's death because under the terms of § 2212(a)(2) the "limitations and exceptions" applicable to the remedies provided by § 2212 are preserved. For purposes of this opinion we will assume, without deciding, that these "limitations and exceptions" include the "discretionary function" exception, 28 U.S.C. § 2680(a), the *Feres* doctrine, *Feres v. United States,* 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), and the exclusivity provisions of the Federal Employees Compensation Act, 5 U.S.C. § 8816(c), and that they will bar many putative plaintiffs from any relief under the FTCA for radiation injuries. *See DiPippa v. United States,* 687 F.2d at 16-19; *Noga v. United States,* 411 F.2d 943, 945 (9th Cir.) , *cert. denied,* 396 U.S. 841, 90 S.Ct. 104, 24 L.Ed.2d 92 (1969); *Thol v. United States,* 218 F.2d

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12, 13 (9th Cir.1954); *In re Consolidated United States Atmospheric Testing Litigation,* 616 F.Supp. 759, 771-80 (N.D.Cal.1985); *but see Wallace v. United States,* 669 F.2d 947, 950-54 (4th Cir.1982). Nevertheless, although Congress could have relieved the independent contractors of their burden of defending suits for radiation injuries and still provided those injured by radiation a more generous substitute compensation scheme, we cannot say that Congress' choice of means was without any rational basis. The atomic weapons testing program has been an important, some say vital, government function from its inception. Independent contractors were used only to aid the government to carry out its program. When the program began Congress could have mandated that all tort claims arising from it be litigated through the FTCA. Under the statute as originally enacted, plaintiffs had the right to sue contractors without restriction, but it was the government who paid the judgment under its indemnitor agreement with the contractor. Plaintiffs had the best of both possible worlds, a right to sue free of any FTCA limitations with the government guaranteeing payment of the judgment. It was neither arbitrary nor irrational for Congress to change the law so as to place putative plaintiffs in the same position as any other party suing the United States in tort. *See Hearings, supra,* at 46-48; S.Rep. No. 500, *supra,* at 377. Moreover, there may be government compensation available to many of those injured by radiation, including the plaintiff here, under veterans benefits legislation, 38 U.S.C. §§ 301-363, §§ 401-423, or the FECA.

***15** III. REMAINING CONSTITUTIONAL ISSUES

Plaintiff's other constitutional challenges can be dealt with summarily.

[5] (1) Fifth Amendment Taking. We have already found that plaintiff had no vested property right in her tort cause of action, so it is very unlikely there could be a "taking" here. But, in any event, we have no jurisdiction to consider a taking claim where the amount in controversy exceeds $10,000. Plaintiff claims several million dollars in compensation. The proper forum for such a claim is the Court of Claims. 28 U.S.C. §§ 1346(a)(2), 1491. *See, Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. at 71 n. 15, 101-02 & n. 4, 98 S.Ct. at 2629 n. 15, 2644-45 & n. 4 (Rehnquist, J., dissenting); *In re Aircrash in Bali, Indonesia, on April 22, 1974,* 684 F.2d 1301, 1312 (9th Cir.1982) .

(2) Unexpected Law. There is nothing "unexpected" about a validly enacted congressional statute even if the plaintiff was surprised by its enactment. Plaintiff alleges nothing unfair about the legislative procedure by which § 2212 was enacted.

(3) Equal Protection. Plaintiff claims that radiation victims of government atomic tests are a suspect class and that, therefore, strict scrutiny must be our standard of review under an equal protection analysis. Alternatively, she claims we must apply at least an intermediate test to this classification. We disagree. These radiation victims were injured because of the work they did. They do not fall within any of the suspect classifications based on race, gender, alienage or illegitimacy recognized by the Supreme Court as requiring a standard of review more exacting than the rational basis test. *See* J. Nowak, R. Rotunda & J. Young, *Constitutional Law* 524-25 (1978). We find no violation of equal protection for the same reasons we found no violation of due process.

[6][7] (4) Seventh Amendment. There is no right to a jury trial against the sovereign under the seventh amendment. *Glidden Co. v. Zdanok,* 370 U.S. 530, 572, 82 S.Ct. 1459, 1484, 8 L.Ed.2d 671 (1962). If the United States can abolish the right to a cause of action altogether it can also abolish the right to a jury trial that is part of it. When the United States abolishes a cause of action and then sets up a separate administrative remedy against itself, as it has here, the seventh amendment does not require that it must also provide a jury trial. This has been the holding of those courts that considered seventh amendment challenges to the Federal Drivers Act and Swine Flu Act. *See Jones v. Wyeth Laboratories, Inc.,* 583 F.2d 1070, 1070-71 (8th Cir.1978); *Ducharme v. Merrill-National Laboratories,* 574 F.2d at 1311; *Sparks v. Wyeth Laboratories, Inc.,* 433 F.Supp. 411, 418 (W.Okl.1977); *Nistendirk v. McGee,* 225 F.Supp. 881, 882 (W.D.Mo.1963).

(5) Ninth Amendment. Plaintiff asserts that certain rights are preserved in the ninth amendment for the people. She has not, however, specified which of those rights has been violated.

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(6) Tenth Amendment. Plaintiff relies on *National League of Cities v. Usery,* 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), to support her argument that Congress invaded rights reserved to the states when it abolished state-law causes of action by the enactment of § 2212. *Usery* was overruled in *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. ----, ----, 105 S.Ct. 1005, 1021, 83 L.Ed.2d 1016 (1985). Moreover, *Usery* was a case involving Congress' commerce clause powers. We do not think that the tenth amendment limits Congress' war powers under the facts of this case. *Cf. Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. at 84 n. 27, 98 S.Ct. at 2636 n. 27.

(7) Right of Access. As stated in our consideration of the standard of review applicable in plaintiff's due process challenge, plaintiff's right of access to the courts has not been abridged. Furthermore, since plaintiff has not alleged that she has been denied access to the administrative remedies contemplated under § 2212 she cannot ***16** claim her right to petition for redress of grievances has been eliminated.

[8][9] (8) *Ex Post Facto* Laws, Bills of Attainder, the Contracts Clause. The prohibition against *ex post facto* laws only applies to criminal or penal statutes. *Galvan v. Press,* 347 U.S. 522, 531 & n. 4, 74 S.Ct. 737, 742 & n. 4, 98 L.Ed. 911 (1954). Section 2212 is not punitive so it does not constitute a bill of attainder. *See Selective Service System v. Minnesota Public Interest Research Group,* 468 U.S. 841, ----, 104 S.Ct. 3348, 3351-56, 82 L.Ed.2d 632 (1984). We decline plaintiff's invitation to apply the contracts clause to the federal government.

Affirmed.

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22

United States Court of Appeals,
Third Circuit.

**Jacqueline and Salvadore A. DiPIPPA,
Appellants,
v.
UNITED STATES of America, Appellee.**

No. 82-3000.

Argued July 8, 1982.
Decided Aug. 24, 1982.

Federal employee and her husband appealed from order of the United States District Court for the Middle District of Pennsylvania, Richard P. Conaboy, J., dismissing their action against United States for injuries federal employee sustained from swine flu vaccination. The Court of Appeals, Seitz, Chief Judge, held that: (1) substantial question existed as to whether Federal Employees Compensation Act provided exclusive remedy for employee who contracted Guillain-Barre Syndrome after voluntarily receiving swine flu vaccination; (2) providing that federal employees pursue action under Federal Employees Compensation Act rather than Swine Flu Act was not denial of equal protection; and (3) to avoid statute of limitations problem district court should have stayed employee's swine flu claim until Secretary of Labor resolved question of Federal Employees Compensation Act coverage.

Vacated and remanded with directions.

West Headnotes

[1] Workers' Compensation ⚿2085
413k2085 Most Cited Cases

Where Federal Employees Compensation Act applies, its remedy is exclusive and bars all other claims for compensation against government. 5 U.S.C.A. § 8101 et seq.

[2] Workers' Compensation ⚿2085
413k2085 Most Cited Cases

Where three Federal Employees Compensation Act program memoranda indicated Labor Department's intent to provide Federal Employees Compensation Act coverage for adverse reactions to swine flu innoculations administered by federal employees on federal premises, substantial question of Federal Employees Compensation Act coverage existed, which would preclude any other remedy for injury sustained by federal employee who contracted Guillain-Barre Syndrome after voluntarily receiving swine flu vaccination given on federal premises during normal working hours. 5 U.S.C.A. § 8101 et seq.

[3] Workers' Compensation ⚿1095
413k1095 Most Cited Cases

Secretary of Labor's decisions regarding coverage under Federal Employees Compensation Act are absolutely immune from judicial review, whether particular determination is grounded in logic or precedent. 5 U.S.C.A §§ 8101 et seq., 8128(b).

[4] Workers' Compensation ⚿2085
413k2085 Most Cited Cases

In Swine Flu Act, Congress sought to substitute itself as defendant in all potential swine flu claims, made itself amenable to suit under Federal Tort Claims Act, and made Swine Flu Act exclusive remedy for all swine flu claims except where alternate and exclusive method of compensation existed under prior law; therefore, if employee who contracted Guillain-Barre Syndrome after voluntarily receiving swine flu vaccination on federal premises during normal working hours was covered under Federal Employees Compensation Act, Federal Employees Compensation Act would bar any swine flu claim against Government. Public Health Service Act, § 2(k)(1)(B),(k)(3),(k)(5)(C), 42 U.S.C.(1976 Ed.) § 247b(k)(1)(B),(k)(3),(k)(5)(C); 5 U.S.C.A. §§ 8116(c), 8131, 8131(a).

[5] Constitutional Law ⚿251.3
92k251.3 Most Cited Cases

Statutory classification in area of social and economic welfare will not violate due process if it is reasonable and bears some rational relationship to legitimate congressional goal. U.S.C.A.Const.Amend. 5.

[6] Constitutional Law ⚿299.2
92k299.2 Most Cited Cases

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(Formerly 92k299(2))

[6] Workers' Compensation ⚿19
413k19 Most Cited Cases

Congress could have reasonably concluded that federal employees asserting swine flu claim already had sufficient remedy under Federal Employees Compensation Act and needed no supplements; thus, denying federal worker's right to pursue claim under Swine Flu Act was not denial of equal protection. Public Health Service Act, § 2(j-*l*), 42 U.S.C.(1976 Ed.) § 247b(j-*l*); 5 U.S.C.A. § 8101 et seq.; U.S.C.A.Const.Amend. 5.

[7] Action ⚿69(7)
13k69(7) Most Cited Cases

Although there was substantial question of Federal Employees Compensation Act coverage for federal employee who contracted Guillain-Barre Syndrome after receiving swine flu vaccination, where language of Swine Flu Act required dismissal of action against United States only where "availability" of exclusive remedy precluded claim under Federal Tort Claims Act, to avoid statute of limitations problem, district court should have stayed federal employee's Swine Flu Act claim until Secretary of Labor resolved question of employee's coverage under Federal Employees Compensation Act. Public Health Services Act, § 2(k)(5)(C), 42 U.S.C.(1976 Ed.) § 247b(k)(5)(C); 5 U.S.C.A. § 8101 et seq.

***15** Anthony J. Ciotola, Hazleton, Pa., Clifford J. Shoemaker, (argued), Washington, D. C., for appellants.

David C. Shipman, Asst. U. S. Atty., Harrisburg, Pa., Leonard Schaitman, John F. Cordes (argued), U. S. Dept. of Justice, Civ. Div., Washington, D. C., for appellee.

Before SEITZ, Chief Judge, SLOVITER, Circuit Judge, and McCUNE, District Judge.[FN*]

FN* Honorable Barron P. McCune, United States District Judge for the Western District of Pennsylvania, sitting by designation.

OPINION OF THE COURT

SEITZ, Chief Judge.

The DiPippas appeal from the district court's order dismissing their action against the United States for injuries Jacqueline DiPippa sustained from a swine flu vaccination. This court has jurisdiction under 28 U.S.C. s 1291 (1976).

I.

In November 1976, while a federal employee, Jacqueline DiPippa voluntarily received a swine flu vaccination. The shot was given on federal premises during normal working hours. A month later, Jacqueline DiPippa developed symptoms diagnosed as Guillain-Barre Syndrome. In 1978, she and her husband filed a notice of administrative claim under the Swine Flu Act for injuries sustained from the vaccination. The Government denied the claim on the ground that the DiPippas' exclusive remedy was one for compensation pursuant to the Federal Employees Compensation Act (FECA), 5 U.S.C. s 8101 et seq. This action followed.

The DiPippas filed their complaint in the United States District Court for the District of Columbia under the Swine Flu Act of 1976, 42 U.S.C. s 247b(j)- (l) (amended 1978). The case was consolidated with other swine flu cases for pretrial proceedings in In re Swine Flu Immunization Products Liability Litigation, 446 F.Supp. 244 (J.P.M.D.L.1978), and then was transferred to the United States District Court for the Middle District of Pennsylvania. Because the district court found there was a substantial question that FECA might be the DiPippas' exclusive remedy,[FN1] it dismissed the action for want of jurisdiction.

FN1. Mr. DiPippa seeks damages for loss of consortium arising from his wife's injuries. Because it found there was a substantial likelihood that Mrs. DiPippa's injuries are compensable under FECA, and because FECA coverage bars a spouse's suit for loss of consortium, Underwood v. United States, 207 F.2d 862 (10th Cir. 1953); Levine v. United States, 478 F.Supp. 1389 (D.Mass.1979), the district court also dismissed Mr. DiPippa's claim against the Government. Mr. DiPippa's claim to relief is dependent on his wife's. Thus we need conduct no independent analysis of his claim.

***16** II.

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DiPippa argues that she may pursue her swine flu claim against the Government for two reasons: (1) there is no substantial question of FECA coverage and therefore she need not pursue a FECA remedy; and (2) even if there were FECA coverage, it would not bar her claim against the Government for the acts and omissions of the program participants. [FN2] DiPippa further argues that the district court's interpretation of the Swine Flu Act denies her equal protection under the law and, in light of our doctrine that statutes should be interpreted in a constitutionally valid manner, should be rejected.

> FN2. The Swine Flu Act defines program participants in s 247b(k)(2)(B): "the term 'program participants' ... means the manufacturer or distributor of the swine flu vaccine ..., the public or private agency or organization that provided an inoculation under the swine flu program ..., and the medical and other health personnel who provided or assisted in providing an inoculation under the swine flu program ...."

A.

(1) The Swine Flu Act provides that a claim for any injury sustained from the swine flu program shall bebrought directly against the United States under the procedures established by the Federal Tort Claims Act (FTCA), 28 U.S.C. s 2671 et seq. The Swine Flu Act makes this remedy exclusive, 42 U.S.C. s 247b(k)(3), except where a remedy under any other law provides claimant's exclusive remedy, 42 U.S.C. s 247b(k)(5)(C). Where FECA applies, its remedy is exclusive and bars all other claims for compensation against the Government. Thus, we must first determine whether FECA is DiPippa's exclusive remedy.

Only the Secretary of Labor or his designee may determine the scope of FECA coverage. 5 U.S.C. s 8128(b). In deference to such authority, this court has held that where a "substantial question" of FECA coverage exists, federal district courts will not entertain claims under the FTCA. Joyce v. United States, 474 F.2d 215, 219 (3rd Cir. 1973); Somma v. United States, 283 F.2d 149, 151 (3rd Cir. 1960).

A substantial question of FECA coverage exists unless it is "certain that (the Secretary of Labor) would find no coverage." Concordia v. United States Postal Service, 581 F.2d 439, 442-43 (5th Cir. 1978). Thus, we first consider whether DiPippa's claim presents a substantial question of FECA coverage under that standard.

(2) DiPippa voluntarily received the swine flu inoculation while she was a federal employee, on federal premises, during normal working hours. Three FECA Program Memoranda indicate the Labor Department's intent to provide FECA coverage for adverse reactions to inoculations administered by federal employers on federal premises. FECA Program Memorandum No. 42 (March 3, 1966) states that "(d) eleterious effects such as ... reaction to agency-sponsored innoculation (sic) ... will be compensable" under FECA. FECA Program Memorandum No. 186 (December 23, 1974) supplements the 1966 memorandum and states that FECA covers "any deleterious result of medical services furnished by the employing agency for non-work related illnesses or injuries." In 1976, the Labor Department published a third memorandum stating that adverse reactions to swine flu inoculations "given to Federal employees by Federal facilities are compensable under (FECA)." FECA Bulletin No. 26-76 (October 27, 1976). We believe that these bulletins raise a substantial question of FECA coverage.

(3) DiPippa correctly points out that the first two memoranda indicate only that agency-sponsored medical services provided ***17** under 5 U.S.C. s 7901 (1976) qualify for FECA coverage, and that she received her swine flu shot under a nationally sponsored program pursuant to 42 U.S.C. s 247b(j)-(l). She argues that the third memorandum conflicts with recent federal court decisions and prior policies of the Secretary. See Wallace v. United States, 669 F.2d 947, 954 (4th Cir. 1982). While this may be true, it does not mean that there is not a substantial question of FECA coverage. The Secretary of Labor's decisions regarding coverage are absolutely immune from judicial review, 5 U.S.C. s 8128(b), whether or not a particular determination is grounded in logic or precedent. Cf. Gill v. United States, 641 F.2d 195 (5th Cir. 1981) (employee may not seek review of Secretary's determination of coverage on the ground of bad motive). Should the Secretary rule that FECA covers DiPippa's injury, his determination would be conclusive. We think the presence of FECA Bulletin 26-76 raises a substantial possibility that he would so rule.

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We agree with the district court that DiPippa's claim presents a substantial question of FECA coverage. We are not persuaded to the contrary by the analysis in Wallace.

B.

The second issue we address is whether FECA coverage would bar DiPippa's swine flu claim against the United States for the acts and omissions of the program participants. To resolve this issue, we must look to the language of both statutes.

(4) In the Swine Flu Act, Congress sought to implement a national vaccination program in response to the perceived threat of a national flu epidemic. In doing so, it strove both to immunize manufacturers from any liability for injuries allegedly sustained from the vaccination program and to provide just compensation for any such injury. 122 Cong.Rec. 26,813 (remarks of Cong. Rogers). To achieve these two goals, the United States substituted itself as defendant in all potential swine flu claims, s 247b(k)(1)(B), made itself amenable to suit under the FTCA, id., and made this the exclusive remedy for all swine flu claims, s 247b(k)(3), except where an alternate and exclusive method of compensating the injury existed under prior law, s 247b(k)(5)(C). Thus, we must look to FECA to determine whether or not DiPippa can maintain an action against the Government for the acts and omissions of the program participants.

Where FECA applies, it unambiguously precludes "all other liability of the United States" either "under a workmen's compensation statute or under a Federal tort liability statute." 5 U.S.C. s 8116(c). On the other hand, FECA allows claims for compensable injuries only against "a person other than the United States." 5 U.S.C. s 8131(a). DiPippa's suit is not against a third party, but directly against the United States, as the plain language of the Swine Flu Act expressly requires. See 42 U.S.C. s 247b(k)(1)(B). FECA coverage therefore seems to bar DiPippa's swine flu claim against the Government.

DiPippa argues, however, that because section 8131 allows suits against third parties, section 8116(c) does not bar her claim against the Government for the acts and omissions of the program participants. Her theory is that section 8116(c) does not apply, because, although the Government is the named defendant, the action is against third parties. DiPippa's argument not only ignores the plain language of the statute, but it misinterprets the purpose behind section 8131. Sections 8131 and 8132 make it clear that the claimant should not be compensated twice for the same injury at the Government's expense. Congress intended those sections to provide a means of reimbursement to the Government where the claimant recovers twice for the same injury. The sections allow the claimant to pursue a third party, at the claimant's expense, so long as the successful claimant reimburses the Government for any FECA benefits the claimant receives. Congress designed these sections to limit the Government's costs under FECA, not to subject it to multiple claims for the same injury, as DiPippa's statutory interpretation would do.

> ***18** Plainly, by these two sections (8131 and 8132) Congress deals with the liability of persons "other than the United States " to employees entitled to compensation under the act, not for the purpose of increasing that compensation, but for the purpose of reimbursing the Government for payments made and of indemnifying it against other amounts payable in the future. The sections emphasize the disposition to treat the compensation provided for as adequate for the injuries received, and they negative any intention on the part of the Government to make further payments.

Dahn v. Davis, 258 U.S. 421, 430, 42 S.Ct. 320, 321, 66 L.Ed. 696 (1922) (emphasis in original).

Despite the clear statutory language, DiPippa argues that Congress did not intend for FECA to bar a tort claim based on the acts and omissions of the program participants. She relies on both Hunt v. United States, 636 F.2d 580 (D.C.Cir.1980), and Wallace v. United States, 669 F.2d 947 (4th Cir. 1982), to support her statutory interpretation. Hunt is distinguishable, and we find ourselves in disagreement with the statutory interpretation in Wallace.

In Hunt, plaintiffs received a swine flu vaccination while on active military duty and filed suit under the FTCA against the United States. The court held that the doctrine of Feres v. United States, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), which holds that remedies granted under the veterans' laws often bar relief under the FTCA, did not bar

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plaintiffs' swine flu claims. The fact that compensation under the relevant veterans' laws was not expressly exclusive was the determinative factor in Hunt. The court reasoned that the Swine Flu Act's subordination clause, section 247b(k)(5)(C), "does not itself bar an action under the Swine Flu Act; another remedy must preclude it." 636 F.2d at 595. In Hunt, the veterans' laws provided the other remedy, and, " '(u)nlike the usual workman's compensation statute, ... there is nothing in ... the veterans' laws which provides for exclusiveness of remedy.' " Id. at 585 (quoting Brooks v. United States, 337 U.S. 49, 53, 69 S.Ct. 918, 920, 93 L.Ed. 1200 (1949)). In this case, FECA provides the other remedy, and it is expressly exclusive.

In Wallace, the Fourth Circuit held that FECA "does not bar (plaintiff's) claim against the United States as the substitute defendant for other program participants." 669 F.2d at 954. The court reasoned that "FECA is an exclusive remedy only for potential claims against the United States as employer for work-related injury," and that the Act "cannot preclude claims against the United States as substitute defendant for acts or omissions of private third parties." Id. at 945-55. We disagree.

We find strong support for our analysis in cases holding that FECA bars claims based on the negligence of federal drivers under the Federal Drivers Act, 28 U.S.C. s 2679 (1976). The Federal Drivers Act provided the "pattern" after which Congress fashioned the "unusual, though not unique manner" by which the Government assumed liability for the acts of program participants in the swine flu program. See 122 Cong.Rec. 26,816 (remarks of Cong. Rogers). Application of that Act therefore provides a useful analogy. Congress intended the Federal Drivers Act to relieve federal drivers of the burden of expensive personal liability insurance. See S.Rep.No. 736, 87th Cong., 1st Sess. 1961, reprinted in 1961 U.S.Code Cong. & Ad.News 2784, 2785. To achieve that purpose, Congress, in language remarkably similar to that of the Swine Flu Act, substituted the United States as the exclusive defendant in all claims against federal employees operating motor vehicles in the performance of duty.

The compensation system set up under FECA bars an action under the Federal Drivers Act, even though federal employees would have had a common law action against the negligent driver prior to the Act. See, e.g., Van Houten v. Ralls, 411 F.2d 940, 943 (9th Cir.), cert. denied, 396 U.S. 962, 90 S.Ct. 436, 24 L.Ed.2d 426 (1969); Noga v. United States, 411 F.2d 943, 944 (9th Cir.), cert. denied, 396 U.S. 841, 90 S.Ct. 104, 24 L.Ed.2d 92 (1969). In ***19** Noga, plaintiff sought to avoid this result by "characteriz(ing) the United States as a technical defendant substituted in place of the negligent federal driver," and arguing that FECA's exclusivity clause therefore did not apply. 411 F.2d at 945. This is precisely DiPippa's argument. The United States Court of Appeals for the Ninth Circuit rejected Noga's argument.

> We do not believe plaintiff's proposed solution is permissible under the exclusivity provision of the FECA. The statutory language (of section 8116(c)) is not ambiguous. It states that the United States is not liable under the FECA and the Federal Tort Claims Act, but only under the FECA. This provision was not tampered with in the Federal Drivers Act.

Id. We find DiPippa's argument similarly unacceptable. The statutory language is clear: the Swine Flu Act did not negate the exclusivity language of FECA. On the contrary, it provided for it in section 247b(k)(5)(C). The legislative history explaining that clause makes this eminently clear.

> This provision gives priority to the handling of claims for which a remedy from the United States (as compared to some other source) is already available, using that remedy rather than the remedy provided by (this) legislation.

122 Cong.Rec. 26,815 (remarks of Cong. Rogers).

We agree with the district court that if there is FECA coverage, it would bar any swine flu claim DiPippa might assert against the Government.

C.

DiPippa argues that the district court's construction of the Swine Flu Act violates her right to equal protection. She argues that the district court's interpretation establishes two classes of swine flu plaintiffs: 1) injured persons eligible for compensation from the United States under another statute; and 2) those not so eligible. Only the latter group is permitted to pursue remedies based upon acts of both the Government and the program participants.

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(5) Although the equal protection clause of the Fourteenth Amendment has no application against the United States, the Supreme Court has held that "if a classification would be invalid under the Equal Protection clause of the Fourteenth Amendment, it is also inconsistent with the due process requirement of the Fifth Amendment." Johnson v. Robison, 415 U.S. 361, 364-65 n.4, 94 S.Ct. 1160, 1164 n.4, 39 L.Ed.2d 389 (1974). A statutory classification in the area of social and economic welfare will not violate due process if it is reasonable and bears some rational relationship to a legitimate congressional goal. Richardson v. Belcher, 404 U.S. 78, 81, 92 S.Ct. 254, 257, 30 L.Ed.2d 231 (1971).

(6) DiPippa argues that "(s)ingling out those who happen to receive federal workers' compensation benefits and denying them the right they would otherwise be entitled to ... is clearly anirrational classification." We disagree. We are unable to find that the disparity in treatment between persons compensated under FECA and those who are not is so unrelated to the objects of both FECA and the Swine Flu Act as to be arbitrary and irrational.

One congressional purpose behind the Swine Flu Act is to "assure an orderly procedure for the prompt and equitable handling of any claim for personal injury or death arising out of the administration of (the swine flu) vaccine." s 247b(k)(1)(B)(i). Courts have uniformly recognized that Congress intended FECA to guarantee federal employees "surer and more immediate relief in return for foregoing more expensive awards outside the system." Gill v. United States, 641 F.2d 195, 197 (5th Cir. 1981). In light of this guarantee, Congress could have reasonably concluded that federal employees asserting a swine flu claim already had a sufficient remedy under FECA that needed no supplement.

We hold that the procedure that Congress adopted under the Swine Flu Act is rationally related to achieving the legitimate goal of assuring "an orderly procedure for the prompt and equitable handling" of claims.

***20** III.

The district court dismissed DiPippa's claim for want of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1). While recognizing the general rule that "district courts ordinarily must withhold further action pending the outcome of proceedings under the FECA," the district court reasoned that the language of the Swine Flu Act required dismissal of DiPippa's claim.

> Where an action or proceeding under this subsection is precluded because of the availability of a remedy through proceedings for compensation or other benefits from the United States as provided by any other law, the action or proceeding shall be dismissed....

42 U.S.C. s 247b(k)(5)(C).

(7) We do not interpret the language of that section so harshly where, as here, there is a substantial question of FECA coverage. The district court would require dismissal where there is a mere possibility of an exclusive remedy under some other law. The language of the Act requires dismissal only where the "availability" of an exclusive remedy precludes a claim under the FTCA. If the Secretary of Labor should determine that no FECA remedy is available, DiPippa may pursue her claim under the FTCA. To avoid statute of limitations problems, the district court should stay proceedings in the action until the Secretary resolves the question of FECA coverage. Joyce v. United States, 474 F.2d 215 (3rd Cir. 1973); Somma v. United States, 283 F.2d 149 (3rd Cir. 1960). Indeed, the Government specifically stated that it would not object if this court remanded the case to the district court with instructions to reinstate the complaint and stay proceedings.

IV.

We will vacate the order of the district court and remand the case with directions to reinstate the complaint and to stay further action pending the outcome of any FECA proceeding.

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Tab

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United States Court of Appeals,
Fifth Circuit.

Marie and Donald DUCHARME, Plaintiffs-Appellants,
v.
MERRILL-NATIONAL LABORATORIES, and United States of America, Defendants-Appellees.

No. 77-3488
Summary Calendar.[FN*]

FN* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al., 5 Cir., 1970, 431 F.2d 409, Part I.

June 14, 1978.

Diversity action was brought against manufacturer of swine flu vaccine to recover for injuries resulting from adverse reaction to the vaccine. The United States District Court for the Western District of Louisiana, W. Eugene Davis, J., granted motion of United States to be substituted as sole defendant and to dismiss for failure to exhaust administrative remedies, and plaintiffs appealed. The Court of Appeals affirmed on basis of district court's memorandum opinion holding that: (1) the Act, which provides that cause of action against United States arising out of administration of the vaccination program is exclusive of any civil action against a manufacturer or distributor, does not violate Fifth Amendment due process as abrogating a state cause of action against the manufacturer for damages; (2) allowing a manufacturer a trial by jury on the government's indemnity claim while denying a jury trial in a claimant's action against the government does not violate equal protection; (3) procedures established under the Act are rationally related to achieving goal of assuring interstate distribution of vaccine, and (4) depriving claimants of jury trial in their action against the sovereign does not violate Seventh Amendment right to trial by jury.

Affirmed.

West Headnotes

[1] Constitutional Law ⚿105
92k105 Most Cited Cases

[1] Constitutional Law ⚿301(1)
92k301(1) Most Cited Cases
(Formerly 92k299)

[1] Drugs and Narcotics ⚿20.1
138k20.1 Most Cited Cases
(Formerly 138k20)

[1] United States ⚿127(1)
393k127(1) Most Cited Cases
(Formerly 393k127)

One has no vested right in a tort claim for damages under state law; hence, Swine Flu Act, which provides that a cause of action against United States arising out of administration of swine flu vaccine is exclusive of any civil action against a program participant, is not violative of Fifth Amendment due process as abrogating a state law right of action against the manufacturer for injuries resulting from the adverse reaction to the vaccine; also, cause of action against the manufacturer did not arise until after passage of the Act and, hence, there was no prior vested right in a cause of action under state law. LSA-C.C. art. 2315; U.S.C.A.Const. Amend. 5; Public Health Service Act, §§ 317, 317(k)(3) as amended 42 U.S.C.A. §§ 247b, 247b(k)(3).

[2] Constitutional Law ⚿253.2(2)
92k253.2(2) Most Cited Cases
(Formerly 92k253(2))

While equal protection clause of Fourteenth Amendment has no application against the United States, the Fifth Amendment does prohibit discrimination that is so unjustifiable as to be violative of due process. U.S.C.A.Const. Amends. 5, 14.

[3] Constitutional Law ⚿253.1
92k253.1 Most Cited Cases

In area of social and economic welfare, in order to meet due process standards the classification created under the statute must be reasonable, not arbitrary and bear some rational relationship to legitimate congressional goals. U.S.C.A.Const. Amends. 5, 14
.

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[4] Constitutional Law ⚷249(7)
92k249(7) Most Cited Cases
(Formerly 92k313)

[4] United States ⚷127(1)
393k127(1) Most Cited Cases
(Formerly 393k127)

Swine Flu Act does not violate equal protection by allowing a manufacturer or distributor a jury trial on an indemnity claim asserted against it by the United States while denying a jury trial in an action against the United States by one who has suffered an adverse reaction to the vaccine. Public Health Service Act, § 317(k)(1)(B) as amended 42 U.S.C.A. § 247b(k)(1)(B); 28 U.S.C.A. § 2402.

[5] Drugs and Narcotics ⚷20.1
138k20.1 Most Cited Cases
(Formerly 138k20)

[5] United States ⚷127(1)
393k127(1) Most Cited Cases
(Formerly 393k127)

Provisions of Swine Flu Act creating a cause of action against the United States for damages arising out of act of a program participant and making such cause of action exclusive of any civil action against a participant with the government having right to seek indemnity from a participant on basis of negligence or breach of contract, are rationally related to achieving goal of assuring interstate distribution of swine flu vaccine, in view of fact that commercial insurers refused to insure drug manufacturers for interstate distribution of the vaccine but would provide insurance for limited risk for which the government could seek indemnity. Public Health Service Act, § 317(k)(3, 7) as amended 42 U.S.C.A. § 247b(k)(3, 7); U.S.C.A.Const. Amend. 5.

[6] Jury ⚷31.1
230k31.1 Most Cited Cases
(Formerly 230k31(2))

[6] United States ⚷125(7)
393k125(7) Most Cited Cases

Swine Flu Act does not violate Seventh Amendment right to jury trial; in waiving its sovereign immunity by providing for a cause of action against it arising out of administration of the vaccine program the government was entitled to attach any conditions, including no right to jury trial, to its consent. Public Health Service Act, § 317(k)(1)(B), (3) as amended 42 U.S.C.A. § 247b(k)(1)(B), (3); 28 U.S.C.A. § 2402; U.S.C.A.Const. Amend. 7.

[7] Jury ⚷12(1.2)
230k12(1.2) Most Cited Cases
(Formerly 170Ak2081)

Suits against United States, requiring waiver of sovereign immunity, are not "suits at common law" within meaning of Seventh Amendment right to jury trial. U.S.C.A.Const. Amend. 7.

[8] United States ⚷125(7)
393k125(7) Most Cited Cases

When the sovereign waives immunity it may attach any conditions, including no right to trial by jury, to its consent. U.S.C.A.Const. Amend. 7.

[9] United States ⚷131
393k131 Most Cited Cases

Administrative procedure required under Federal Tort Claims Act is jurisdictional and cannot be waived. 28 U.S.C.A. § 2675.

[10] Federal Civil Procedure ⚷1838
170Ak1838 Most Cited Cases

Although no administrative claim was filed prior to institution of action for injuries resulting from adverse reaction to swine flu vaccine, dismissal of the government was without prejudice since under Swine Flu Act, if a suit is dismissed for failure to file an administrative claim, the plaintiff has 30 days from date of dismissal or two years from date claim arose in which to file an administrative claim. Public Health Service Act, § 317 as amended 42 U.S.C.A. § 247b.

***1308** J. Minos Simon, Lafayette, La., for plaintiffs-appellants.

***1309** Edward L. Shaheen, U. S. Atty., Shreveport, La., Jeffrey Axelrad, Leon B. Taranto, Civ. Div., Dept. of Justice, Washington, D. C., for United States of America.

Appeal from the United States District Court for the

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Western District of Louisiana.

Before RONEY, GEE and FAY, Circuit Judges.

PER CURIAM:

We affirm the judgment below on the basis of the district court's memorandum opinion appended.

AFFIRMED.

APPENDIX

(Title Omitted)No. 770,452

RULING ON MOTIONS

Plaintiffs filed this diversity action against Merrill-National Laboratories for injuries resulting from an adverse reaction to a swine flu vaccine. The basis of their cause of action is Louisiana Civil Code Article 2315.

The United States filed motions under the Swine Flu Act (42 U.S.C. s 247b) to dismiss for failure to exhaust administrative remedies, to substitute United States as sole defendant and an additional motion to stay discovery pending outcome of hearing on the motions.

Plaintiffs oppose the government motions alleging: (1) the Swine Flu Act is in violation of the due process clause of the 5th and 14th Amendments in that it abrogates plaintiffs' cause of action under Article 2315 for damages against the manufacturer; (2) the Swine Flu Act, which incorporates the Federal Tort Claims Act, violates plaintiffs' right to a jury trial.

Constitutional attacks on the Swine Flu Act, similar to the attack being made here, have been made in at least three district courts.[FN1]

> FN1. Wolfe v. Merrill National Laboratories, 433 F.Supp. 231 (M.D.Tenn.1977); Sparks v. Wyeth Laboratories, Inc., 431 F.Supp. 411 (W.D.Okl.1977); Stephens v. Wyeth Laboratories, Inc., No. 77-L-0274-S (W.D.Ala., June 3, 1977).

The courts, in all three of the above cases, upheld the constitutionality of the Swine Flu Act.

The Swine Flu Act basically:

1. Creates a cause of action against the United States based on negligence, strict liability or breach of warranty for damages arising out of the act of a program participant; [FN2]

> FN2. Program participant is defined as a manufacturer or distributor of swine flu vaccine. 42 U.S.C. s 247b(k)(2)(B).

2. provides that the cause of action against the United States arising out of the administration of the swine flu vaccine shall be exclusive of any civil action against the program participant, 42 U.S.C. s 247b(k)(3);

3. incorporates provisions of the Federal Tort Claims Act (42 U.S.C. s 247b(k) (1)(B) including (a) no right to jury trial (28 U.S.C. s 2402), (b) two year prescription (28 U.S.C. s 2401(b), and (c) requirement of first exhausting an administrative remedy (28 U.S.C. s 2675); and

4. affords the United States the right to seek indemnity from the program participant on the basis of negligence or breach of contract in connection with the swine flu program. 42 U.S.C. s 247b(k)(7) .

The cause of action provided by the Swine Flu Act to an injured person against the United States is substantially the same as that afforded against the manufacturer under Louisiana Civil Code Article 2315 except that under the Swine Flu Act no trial by jury is afforded and the plaintiff is required to seek first administrative review of his claim.

DUE PROCESS CLAIM

[1] It is well settled that a plaintiff has no vested right in any tort claim for damages under state law. Keller v. Dravo Corporation, 441 F.2d 1239 (5th Cir. 1971), upheld ***1310** the exclusive remedy provision of the Longshoremen's & Harbor Workers' Compensation Act against a due process challenge. The Court in Keller noted that the "abolition of non-vested rights is especially innocuous if . . . one remedy is substituted for another." (441 F.2d at 1242). Legislation has even been upheld where no remedy was substituted in place of the cause of action that was taken away. For example, in Carr v. United States, 422 F.2d 1007 (4th Cir. 1970), the Court upheld the

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constitutionality of the Federal Drivers Act (28 U.S.C. s 2679) which abrogated a federal employee's cause of action against a fellow employee. The Court in Silver v. Silver, 280 U.S. 117, 50 S.Ct. 57, 74 L.Ed. 221 (1929) upheld the abolition of a guest passenger's action against the host driver for negligence. In Brady v. Roosevelt Steamship Co., 317 U.S. 575, 63 S.Ct. 425, 87 L.Ed. 471 (1943), the Supreme Court recognized the congressional power to grant immunity from tort liability to private operators of government vessels, and in so doing paved the way for the enactment of the Suits in Admiralty Act, 46 U.S.C. s 745.

Plaintiffs rely on Richmond Screw Anchor Co. v. United States, 275 U.S. 331, 48 S.Ct. 194, 72 L.Ed. 303 (1928) for the proposition that congress may never validly divest a private litigant of a civil cause of action. The identical argument was made in Carr v. United States and disposed of in the following manner:

> "There the Supreme Court dealt with statutes whose combined effect deprived a patent owner of his right to sue for infringement. But the patent in that case had been issued prior to the enactment of the relevant legislation. There was, therefore, a vested right in being which was sought to be abrogated." (422 F.2d at 1010-11)

Plaintiffs' cause of action against the manufacturer did not arise until after passage of the Swine Flu Act. Plaintiffs had no prior vested right in a cause of action under Louisiana Civil Code Article 2315.

TRIAL BY JURY CLAIM

[2][3][4] Plaintiffs allege that the Swine Flu Act deprives them of equal protection of the law by allowing the manufacturer a trial by jury of the indemnity claim of the United States but denies trial by jury of their own claim. Plaintiffs contend that they and the manufacturer fall in the same general classification under the Act and they should be treated alike with respect to their right to trial by jury.

While the equal protection clause of the 14th Amendment has no application against the United States, the 5th Amendment does prohibit discrimination that is "so unjustifiable as to be violate of the due process." [FN3] In the area of social and economic welfare, in order to meet due process standards the classification created under the statute must be reasonable, not arbitrary and bear some rational relationship to legitimate congressional goals.[FN4]

> FN3. Bolling v. Sharpe, 347 U.S. 497, 499, 74 S.Ct. 693, 694, 98 L.Ed. 884 (1954).

> FN4. Richardson v. Belcher, 404 U.S. 78, 92 S.Ct. 254, 30 L.Ed.2d 231 (1971).

I am unable to find that the disparity in treatment between plaintiffs and manufacturer with respect to jury trial is so unrelated to the object of the statute as to be arbitrary.

Congressional purpose is set forth in the Act, 42 U.S.C. s 247b(k)(1)(A):

> "(i) . . . to achieve the participation in the program of the agencies, organizations, and individuals who will manufacture, distribute and administer the swine flu vaccine . . . and to assure the availability of such vaccine in interstate commerce . . .
> (ii) . . . to establish an orderly procedure for the prompt and equitable handling of claims . . .
> (iii) to be prepared to meet the potential emergency of a swine flu epidemic . . . "

[5] Congress found it necessary to insulate manufacturers from primary liability and provide an exclusive remedy against the United States due to the collapse of the ***1311** commercial liability insurance market. Legislative history reflects that insurance companies refused to insure drug manufacturers for interstate distribution of the vaccine due to the potential for a large number of meritless claims with attendant costs of investigation and defense and recent federal court decisions holding drug manufacturers strictly liable for failure to warn of possible adverse drug effects. While the Swine Flu Act is drafted to provide immunity to manufacturers from primary responsibility, the Act affords the United States the right to indemnity on the bases of negligence and breach of the contractural obligation. For this limited risk to drug manufacturers insurance was available.[FN5]

> FN5. See Cong.Rec. E 4695-4707, August 12, 1976. Debate in both chambers appears at Cong.Rec. H 8643-8655 and S 14108-14122, August 10, 1976.

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The United States also recognized some potential liability due to their "unique role in the initiation, planning, and administration of the swine flu (vaccine)." 42 U.S.C. s 247b(k)(1)(A)(ii). By making a claimant's remedy exclusive against the United States but allowing limited indemnity by United States against the manufacturer, Congress struck a balance between plaintiff's interest in preserving a tort remedy and the manufacturer's interest in obtaining insurance coverage.

Congress is not denied the power to "treat different classes of persons in different ways," but it is denied power to "legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." [FN6]

> FN6. Reed v. Reed, 404 U.S. 71, 75-76, 92 S.Ct. 251, 253, 30 L.Ed.2d 225 (1971); Johnson v. Robison, 415 U.S. 361, 374, 94 S.Ct. 1160, 1169, 39 L.Ed.2d 389 (1974).

I conclude that the procedure established under the Act is rationally related to achieving the goal of assuring interstate distribution of the swine flu vaccine.

[6][7][8] Plaintiffs make the additional argument that the Act violates their 7th Amendment right to trial by jury.

Although the 7th Amendment preserves the right to trial by jury of suits at common law, it is settled that suits against the United States, requiring waiver of sovereign immunity, are not "suits at common law" within the meaning of the 7th Amendment. When the sovereign waives immunity it may attach any conditions (including no right to trial by jury) to its consent.[FN7]

> FN7. Glidden Company v. Zdanok, 370 U.S. 530, 82 S.Ct. 1459, 8 L.Ed.2d 671 (1962); United States v. Sherwood, 312 U.S. 584, 61 S.Ct. 767, 85 L.Ed. 1058 (1941); Nistendirk v. McGee, 225 F.Supp. 881 (W.D.Mo.1963).

CONCLUSION

I conclude that the Swine Flu Act represents a valid exercise of Congressional power under the Constitution. Accordingly, the motion of the United States to be substituted as sole defendant under the terms of the Act is granted.

[9][10] The administrative procedure required under the Federal Tort Claims Act is jurisdictional and cannot be waived. Executive Jet Aviation, Inc. v. United States, 507 F.2d 508 (6th Cir. 1974). However, under the Swine Flu Act, if a suit is dismissed for failure to file an administrative claim, the plaintiff is given 30 days from the date of dismissal or two years from the date the claim arose in which to file an administrative claim. Therefore, the Government's motion to dismiss without prejudice to plaintiff is granted.

Lafayette, Louisiana, this 1st day of December, 1977.

/s/ W. Eugene Davis

Judge, United States District Court

Filed

Dec. 2, 1977.

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United States Court of Appeals,
Third Circuit.

Jimmie Dale THOMASON, Appellant in No. 75-2142 and 75-2143,
v.
John H. SANCHEZ et al.
Jimmie Dale THOMASON
v.
John H. SANCHEZ et al.
Jimmie Dale THOMASON
v.
John H. SANCHEZ and United States of America.
Jimmie Dale THOMASON
v.
John H. SANCHEZ and Dorothy E. Sanchez.

Nos. 75-2142 to 75-2143.

Argued May 3, 1976.
Decided July 22, 1976.

Following collision between automobile and motorcycle both operated by servicemen on military base, motorcyclist commenced common-law action in state court against motorist and his wife and filed federal complaints naming as defendants the motorist, his insurer and the United States. The state action was removed and the actions were consolidated. The United States District Court for the District of New Jersey, Clarkson S. Fisher, J., 398 F.Supp. 500, granted summary judgment in favor of defendants and plaintiffs appealed. The Court of Appeals, Aldisert, Circuit Judge, held that the government was not liable under the Federal Tort Claims Act for the injuries; that, under Federal Drivers Act provision that if district court determines that removed case is one in which remedy by suit within the Act is not available against United States, case shall be remanded to state court, the Tort Claims Act remedy is "not available" only where government driver was not acting within scope of his employment, so that case against motorist acting within scope of his employment would not be remanded to state court; and that, under the Federal Drivers Act, recovery would not be allowed against motorist's personal liability insurance carrier.

Affirmed.

West Headnotes

[1] United States ⚿125(30)
393k125(30) Most Cited Cases

Government was not liable under Federal Tort Claims Act for injuries sustained by serviceman who was operating his motorcycle on military base while in present for duty status. 28 U.S.C.A. §§ 1346(b), 2671 et seq.

[2] Removal of Cases ⚿102
334k102 Most Cited Cases

Under Federal Drivers Act provision that if district court determines that removed case is one in which remedy by suit is not available against United States, case shall be remanded to state court, the Federal Tort Claims Act remedy is "not available" only where government driver was not acting within scope of his employment; thus where the Tort Claims Act remedy was not available because injured serviceman was in present for duty status, the remand provision did not apply. 28 U.S.C.A. § 2679(b-e), (d).

[3] United States ⚿125(30)
393k125(30) Most Cited Cases

Inasmuch as defendant motorist was acting within scope of his employment as a serviceman when automobile struck motorcyclist, there could be no action, separate from an action under Federal Tort Claims Act, against defendant individually or against his insurer. 28 U.S.C.A. § 1346(b).

[4] Insurance ⚿2742
217k2742 Most Cited Cases
(Formerly 217k435.4)

Under Federal Driver's Act, serviceman motorcyclist injured in collision on military base with automobile driven by another serviceman in scope of his employment could not recover from motorist's personal liability insurer for coverage of his privately owned vehicle. 28 U.S.C.A. § 2679(b-e).

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[5] Armed Services 33
34k33 Most Cited Cases

[5] Constitutional Law 299.2
92k299.2 Most Cited Cases
(Formerly 92k299(2), 92k299)

Federal Drivers Act, as applied to deprive motorcyclist serviceman of all lawsuit remedies for injuries received in collision with car driven by another serviceman, did not constitute a denial of due process. 28 U.S.C.A. § 2679(a, d).

***956** Ira Rabkin, Molotsky, Rabkin & Gross, Haddonfield, N. J., for appellant.

C. Kennon Hendrix, Roy D. Cummins, Pennsauken, N. J., for appellees Sanchez and Government Employees Ins. Co.

Jonathan L. Goldstein, U. S. Atty., Maryanne T. Desmond, Asst. U. S. Atty., Newark, N. J., for appellee United States of America.

Before ALDISERT, GIBBONS and GARTH, Circuit Judges.

OPINION OF THE COURT

ALDISERT, Circuit Judge.

These appeals from summary judgments in favor of defendants emanate from a vehicular collision involving two servicemen on active duty and require us to interpret provisions of the Federal Tort Claims Act and the Federal Drivers Act. We affirm.

Appellant Thomason, a member of the United States Army, was operating his motorcycle on the grounds of Fort Dix, New Jersey on November 30, 1972, when he was struck by an automobile owned and operated by defendant Sanchez, himself a serviceman. Subsequently, Thomason commenced a number of lawsuits seeking compensation for injuries incurred in the collision. The district court has detailed these various actions now consolidated and their procedural nuances. 398 F.Supp. 500, 501 (D.N.J.1975). In the interest of simplicity, the following recitation suffices for our purposes. A common law action, commenced in state court against Sanchez and his wife, was removed to federal court pursuant to 28 U.S.C. s 2679(d).[FN1] Plaintiff filed federal complaints naming variously as defendants Sanchez, his insurer the Government Employees Insurance Company, and the United States. In these federal actions, Thomason sought money damages and other relief, essentially under the Federal Tort Claims Act. 28 U.S.C. ss 1346(b), 2671 et seq.

FN1. Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

Reluctantly, the district court granted summary judgment in favor of all three defendants. In its view, the doctrine of Feres v. United States, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), barred the action against the United States, while the exclusivity provision of the Federal Drivers ***957** Act, 28 U.S.C. s 2679(b),[FN2] defeated the claims against Sanchez and GEICO. Thomason now challenges, with varying ferocity, each of these conclusions.

FN2. See note 4 infra.

I.

Feres v. United States held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146, 71 S.Ct. at 159.[FN3] Injured servicemen were limited to seeking redress through "systems of simple, certain, and uniform compensation for injuries or death of those in armed services." Ibid. at 144, 71 S.Ct. at 158 (footnote omitted). In so ruling, the Court distinguished its then one-year-old precedent of Brooks v. United States, 337 U.S. 49, 69 S.Ct. 918, 93 L.Ed. 1200

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(1949): "The injury to Brooks did not arise out of or in the course of military duty. Brooks was on furlough, driving along the highway, under compulsion of no orders or duty and on no military mission." 340 U.S. at 146, 71 S.Ct. at 159. In the instant case, the district court found Feres, not Brooks, applicable:

> FN3. Feres was actually three cases, consolidated for disposition. Read together, the fact patterns disclose the sweep of the Feres doctrine. In Jefferson v. United States plaintiff had claimed damages for a negligent abdominal operation after which a towel 30 inches long was found still inside the plaintiff's stomach. United States v. Griggs was a wrongful death action alleging negligent and unskillful medical treatment by army surgeons. Feres also was a wrongful death action alleging negligence in the quartering of decedent in barracks known or which should have been known to be unsafe due to a defective heating plant.

> The fact that Thomason was in a "present for duty" status and not on any type of leave or pass, as sworn to in an affidavit by Captain James A. Kerchman, Commander of the Medical Company at Fort Dix, brings plaintiff within the ambit of Feres, thereby negating the applicability of the FTCA.

398 F.Supp. at 504.

[1] On appeal, Thomason does not urge that there is a genuine issue as to the material fact of his status at the time of the collision. See F.R.Civ.P. 56(c). Moreover, he concedes that "it seems that the Feres line of decisions is too firmly entrenched to be dislodged at this time." Appellant's Brief at 9. We previously expressed reservations about the continuing validity of the broad Feres doctrine. Peluso v. United States, 474 F.2d 605 (3d Cir.) (per curiam), cert. denied, 414 U.S. 879, 94 S.Ct. 50, 38 L.Ed.2d 124 (1973) (three Justices voting to grant certiorari). Upon reconsideration we reiterate that concern; as we noted there, however, we are powerless to jettison Feres or to dislodge it sufficiently to create an exception for vehicular collisions involving servicemen. See ibid. at 606.

II.

Appellant challenges the judgments as to Sanchez and GEICO on several grounds.

First, he asserts that the Federal Drivers Act, 28 U.S.C. s 2679(b)-(e), "operates only to deny plaintiff a choice of remedies where there is a remedy against the United States." Appellant's Brief at 11. Where, as here, there is no remedy against the United States, the actions against Sanchez and GEICO should be allowed to proceed. This argument has a first-blush appeal. Indeed, the second sentence of 28 U.S.C. s 2679(d), see note 1 supra, provides that, if a district court determines that a removed case such as this "is one in which a remedy by suit within the meaning of (28 U.S.C. s 2679(b) [FN4]) is not available against the United States, the case shall be remanded to the State court." (Emphasis added.)

> FN4. The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

***958** [2] The contention, however, is not of first impression. Rather, it has been presented to and rejected by at least three other circuits. Carr v. United States, 422 F.2d 1007, 1011 (4th Cir. 1970); Van Houten v. Ralls, 411 F.2d 940, 942 (9th Cir.), cert. denied, 396 U.S. 962, 90 S.Ct. 436, 24 L.Ed.2d 426 (1969); Vantrease v. United States, 400 F.2d 853, 855 (6th Cir. 1968). These courts are unanimous in holding "that within the meaning of the Drivers Act the Tort Claims Act remedy is 'not available' only where the government driver was not acting within the scope of his employment. When the Tort Claims Act remedy is not available for any other reason, the remand provision does not apply." [FN5] Carr v. United States, supra, 422 F.2d at 1011. The reason for this rule lies in the exclusivity provision of 28 U.S.C. s 2679(b), the basic purpose of which was to immunize individual government driversfrom the heavy financial burdens and personal liabilities associated with operating motor vehicles. A contrary interpretation of the "not available" language in the removal section "would revitalize the common law action. (T)his result would directly contradict the Act's immunizing purpose . . . ." Ibid. Moreover, Congress itself has indicated approval of this judicial construction of the exclusivity provision of the

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Federal Drivers Act.[FN6] Accordingly, we confidently join ranks with the Fourth, Sixth and Ninth Circuits.

> FN5. Conceivably, the Federal Tort Claims Act remedy might be barred by a statute of limitations shorter than that prevailing for the common law, state tort action. In such circumstances it would frustrate the immunizing congressional intent behind 28 U.S.C. s 2679(b) to construe 28 U.S.C. s 2679(d) as authorizing a remand to the state court for trial on the merits. Vantrease v. United States, supra, 400 F.2d at 855-86 n.2.

> FN6. See H.R.Rep. No. 715, 92d Cong., 1st Sess. 16 (1971); S.Rep. No. 776, 92d Cong., 1st Sess. 51 (1971) (proposed amendment to 38 U.S.C. s 4116). Using the Federal Drivers Act as a model, Congress passed legislation immunizing the medical personnel of the Veterans' Administration, 38 U.S.C. s 4116 (1970), as amended, (Supp. III, 1973), and the Public Health Service, 42 U.S.C. s 233 (1970). In these two immunity statutes, however, Congress explicitly stated that the remedy supplanting any common law right of action against the individual government employee was not only that provided by the Federal Tort Claims Act but also any compensation or other benefits provided by the United States where the availability of such compensation or benefits precludes a remedy under the Federal Tort Claims Act. See 38 U.S.C. s 4116(a); 42 U.S.C. s 233(a) . Rather than amend the statutory language of 28 U.S.C. ss 2679(b) and (d) in the same manner as it amended 38 U.S.C. ss 4116(a) and (c) in 1973, see Pub.L. 93-82, 87 Stat. 193 (1973), Congress apparently has been content to rely on this judicial construction of the Federal Drivers' Act.

[3] In this case, the district court was fully cognizant of its duty to make "an independent determination . . . as to whether Sanchez was acting within the scope of his employment." 398 F.Supp. at 504. The court concluded:

> The facts reveal that at the time of the collision Sanchez was operating his own vehicle, returning from procuring change for the use of Annex # 1 of the Non-Commissioned Officers' Club at Fort Dix, N.J., of which he was in charge. This finding is substantiated by affidavit of Sanchez of April 3, 1975 indicating that he was within the scope of his employment.
>
> A verified petition for removal has been executed by Maryanne T. Desmond, Assistant United States Attorney, which certifies that defendant John Sanchez was acting within the scope of his employment at the time of the incident out of which the within suit arose. The concomitant result of this petition is to provide an exclusive remedy against the United States for personal injuries "resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment." 28 U.S.C.A. s 2679(b).

Ibid. at 504-05. Defendant's status, therefore, had the effect of limiting anyone injured by Sanchez in his official capacity to a lawsuit under the Federal Tort Claims Act. ***959** There could be no separate action against Sanchez individually or against his insurer. Plaintiff's status as a serviceman which status eliminated the Tort Claims Act remedy is simply irrelevant to the foregoing.

Moreover, even were we to adopt a different construction of 28 U.S.C. s 2679(d) and order a remand to the state court, we doubt whether the New Jersey courts would be empowered to afford appellant a remedy. "Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law." Feres v. United States, supra, 340 U.S. at 146, 71 S.Ct. at 159. We gather, then, that under the Supremacy Clause New Jersey courts would be bound to apply federal law including both the Feres doctrine and 28 U.S.C. s 2679(b).

[4] Appellant's second challenge to the judgments in favor of Sanchez and GEICO asserts that "under the Federal Drivers Act, there should be allowed recovery which is actually against a federal employee's personal automobile liability insurance carrier for coverage of his privately-owned vehicle." Appellant's Brief at 11. We reject this contention. The reality is that any judgment against GEICO would affect Sanchez, if only in the form of an increased premium. Moreover, we question the desirability and the practicality of formulating a rule of law dependent upon a factual determination whether or not insurance is involved in the case which generally is improper for jury consideration.

[5] Appellant's final argument is that the Federal Drivers Act, as applied to him to deprive him of all lawsuit remedies,[FN7] constitutes a denial of due process. The Fourth Circuit discussed a kindred due process argument at length in Carr v. United States,

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supra:

> FN7. As a result of the injuries Thomason received in the collision with Sanchez, the government represented in its brief, the Veterans Administration determined that Thomason had a 60% service-connected disability for which he will receive $277 a month, subject to changes in his condition. Appellee's Brief of Government at 15.

Carr next contends that the Drivers Act violates the fifth amendment's due process clause by denying him equal protection. Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954). The deprivation, he argues, results from the fact that abrogation is restricted to accidents which involve motor vehicles. Government employees can sue their co-workers for injuries sustained in any other job-related activity.

The classification which the Drivers Act creates does not penalize the exercise of any constitutional right. As we have held, the right to sue a co-worker does not enjoy constitutional protection. Therefore, the classification need not be justified by "a compelling governmental interest." Shapiro v. Thompson, 394 U.S. 618, 634, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) (emphasis in the original). Nor does the Act create a "suspect" classification, see, e. g., Korematsu v. United States, 323 U.S. 214, 216, 65 S.Ct. 193, 89 L.Ed. 194 (1944), or involve a "fundamental" interest. See, e. g., Reynolds v. Sims, 377 U.S. 533, 561-562, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). Thus, a rigorous standard of review would be inappropriate here. Rather, the statutory classification comes here clothed with a presumption of constitutionality and it "will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961).

The legislative history to which we have already referred makes it clear that Congress was moved by the fact that automobile accident insurance placed such a heavy financial burden on government drivers that it was adversely affecting morale and making it difficult for the government to attract competent drivers into its employ. S.Rep. No. 736, 87th Cong., 1st Sess. (1961), reprinted in 2 U.S.Code Cong. & Admin.News 1961, at p. 2784 (1962). We think that the magnitude of the automobile insurance problem justified Congress's separate treatment ***960** of this specific problem. Furthermore, as the Supreme Court said in Silver v. Silver, 280 U.S. 117, 50 S.Ct. 57, 74 L.Ed. 221, in response to a substantially similar argument:

> (T)here is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied that the legislature must be held rigidly to the choice of regulating all or none. * * * It is enough that the present statute strikes at the evil where it is felt and reaches the class of cases where it most frequently occurs.
>
> 280 U.S. at 123-124, 50 S.Ct. at 59.

422 F.2d at 1011-12 (footnote omitted). We adopt this reasoning.

Appellant argues that his case differs materially from Carr's that he is in a distinct sub-class, that of injured servicemen, upon which the effect of the Federal Drivers Act is not reasonable. Appellant's Brief at 14. We are sympathetic with appellant's position, but not receptive to his argument. It is not the effect of the Federal Drivers Act which renders an unreasonable result. The effect of the Federal Drivers Act predicated upon defendant's status is to make the Federal Tort Claims Act the exclusive remedy. Rather, it is the effect of the Feres doctrine which turns on plaintiff's status which produces the hardship in this case. And, as we have stated previously, only the Supreme Court can overrule, or modify, Feres. Peluso v. United States, supra, 474 F.2d at 606.

The judgments of the district court will be affirmed.

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United States Court of Appeals, Fourth Circuit.

Richard Thomas CARR and Doreen Carr, Appellants,
v.
UNITED STATES of America, William Granville Reynolds, Sr., and Joseph B. Biggs, Appellees.

No. 13500.

Argued Jan. 5, 1970.
Decided Feb. 27, 1970.

Action for personal injuries resulting from automobile accident involving federal employees. The United States District Court for the District of Maryland, at Baltimore, Alexander Harvey, II, J., entered a judgment dismissing the action and the plaintiff employee appealed. The Court of Appeals, Winter, Circuit Judge, held that Federal Drivers Act provision abrogating federal employee's common-law right of action against government driver acting within the scope of his employment was not unconstitutional as contended by injured federal employee who asserted that the abrogation of his right of action without creation of some new benefit violation due process clause of Fifth Amendment.

Affirmed.

West Headnotes

[1] Federal Civil Procedure ⚿1951
170Ak1951 Most Cited Cases

District judge was well within his range of discretion in refusing to consider certain contentions advanced with respect of the alleged invalidity of Federal Drivers Act on ground that the same had not been timely asserted under the district court's local rules. 28 U.S.C.A. § 2679(b-e).

[2] Automobiles ⚿196
48Ak196 Most Cited Cases

Federal Drivers Act was enacted to relieve government employee of burden of personal liability for accidents occurring on job by excluding actions against employee for injuries resulting from employee's operation of motor vehicle while within the scope of employment. 28 U.S.C.A. § 2679(b).

[3] Automobiles ⚿196
48Ak196 Most Cited Cases

Federal Drivers Act abrogates federal employee's common-law right of action against government driver who is acting within the scope of his employment. 28 U.S.C.A. § 2679(b).

[4] Automobiles ⚿147
48Ak147 Most Cited Cases

[4] Constitutional Law ⚿307
92k307 Most Cited Cases

Federal Drivers Act provision abrogating federal employee's common-law right of action against government driver acting within the scope of his employment was not unconstitutional as contended by injured federal employee who asserted that the abrogation of his right of action without creation of some new benefit violated due process clause of Fifth Amendment. 28 U.S.C.A. § 2679(b-e); U.S.C.A.Const. Amend. 5.

[5] Removal of Cases ⚿21
334k21 Most Cited Cases

Under Federal Drivers Act provision for remand to state court of removed action for which a remedy under Tort Claims Act is not available against United States, Tort Claims Act remedy is "not available" only in those cases where government driver was not acting within the scope of his employment, and when remedy is not available for any other reason the remand provision does not apply. 28 U.S.C. A. §§ 2401(b), 2679(b-e).

[6] Automobiles ⚿147
48Ak147 Most Cited Cases

[6] Constitutional Law ⚿299.2
92k299.2 Most Cited Cases
(Formerly 92k299(2), 92k253(2), 92k253)

Federal Drivers Act abrogating federal employee's common-law right of action against fellow employee for injuries sustained from operation of automobile within scope of employment does not violate due process by denying equal protection merely because

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abrogation was restricted to accidents involving motor vehicles, and federal coworkers could be sued for injuries sustained in other job-related activities. 28 U.S.C.A. § 2679(b-e); U.S.C.A.Const. Amend. 5.

[7] Constitutional Law ⚿208(16)
92k208(16) Most Cited Cases

Right to sue federal coworker for injuries in action arising out of activity within the scope of employment does not enjoy a constitutional protection, and therefore, classification as to what types of accident give rise to cause of action against federal coworker need not be justified by compelling government interest. 28 U.S.C.A. § 2679(b-e).

[8] Constitutional Law ⚿208(16)
92k208(16) Most Cited Cases

Federal Drivers Act abrogating common-law right of action against coworker for injuries arising out of automobile accident within scope of employment did not create a suspect classification or involve a fundamental interest, and the statutory classification was clothed with presumption of constitutionality and would not be set aside if any state of facts could reasonably be conceived to justify it. 28 U.S.C.A. § 2679(b-e).

[9] Armed Services ⚿34.11(1)
34k34.11(1) Most Cited Cases

Soldiers' and Sailors' Civil Relief Act providing for tolling of statute of limitations with respect to action by or against person in military service only tolls a limitation provision if action is either against any person in military service or is against his heirs, executors, administrators, or assigns. Soldiers' and Sailors' Civil Relief Act of 1940, §§ 100, 205, 50 U.S.C.A. App. §§ 510, 525.

[10] Armed Services ⚿34.11(1)
34k34.11(1)Most Cited Cases

Since Federal Drivers Act abolished plaintiff federal employee's right to recover from coworker who was in Navy for a period of time after accident, plaintiff federal employee had no action against any person in military service, and provision of Soldiers' and Sailors' Civil Relief Act tolling statute of limitations was not applicable. Soldiers' and Sailors' Civil Relief Act of 1940, § 205, 50 U.S.C.A. App. § 525; 28 U.S.C.A. § 2679(b).

[11] Armed Services ⚿34.11(1)
34k34.11(1) Most Cited Cases

Provision extending benefits of Soldiers' and Sailors' Civil Relief Act to persons bringing actions against servicemen is intended to promote tranquility in military by permitting claimants to await termination of potential defendant's tour of duty without losing meritorious claim. Soldiers' and Sailors' Civil Relief Act of 1940, §§ 100, 205, 50 U.S.C.A. App. §§ 510, 525.

***1008** Bernard S. Cohen, Alexandria, Va. (Cohen, Hirschkop, Hall & Jackson, Alexandria, Va., on brief), for appellants.

***1009** Daniel Joseph, Atty., Dept. of Justice (William D. Ruckelshaus, Asst. Atty. Gen., and Morton Hollander, Atty., Dept. of Justice, and Stephen H. Sachs, U.S. Atty., on brief), for appellees.

Before BRYAN, WINTER and BUTZNER, Circuit Judges.

WINTER, Circuit Judge:

This action for personal injuries resulting from an automobile accident was first removed from a state court under the Federal Drivers Act, 28 U.S.C.A. § § 2679(b)-(e), and subsequently dismissed as untimely under the Federal Tort Claims Act, 28 U.S.C.A. § 2401(b). We affirm.

On December 8, 1965, Richard T. Carr was injured in a collision between an automobile operated by Robert D. Mitchell and another vehicle. At the time of the accident both Carr and Mitchell were federal employees acting within the scope of their employment. On March 6, 1968, over two years after the accident, Carr instituted suit for personal injuries in a Maryland Court against Mitchell. [FN1] Upon the certification that at the time of the accident Mitchell had been a federal employee acting within the scope of his employment, the action was removed to the district court pursuant to the Federal Drivers Act, 28 U.S.C.A. §§ 2679(b)-(e), and 28 U.S.C.A. §§ 1441(c), 1442(a)(1), 1446(d). Simultaneously, the United States was substituted

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for Mitchell as defendant on the ground that the Drivers Act, 28 U.S.C.A. § 2679(b), made the Federal Tort Claims Act, 28 U.S.C.A. § 1346(b), the exclusive remedy for injuries resulting from the operation of a motor vehicle by a government employee acting within the scope of his employment. At a later date, the district court granted the government's motion to dismiss on the ground that since the action had been commenced more than two years after the accident, it was barred by the limitations provision of the Federal Tort Claims Act, 28 U.S.C.A. § 2401(b).

FN1. Carr's wife also brought suit for loss of consortium. Our holding that Carr's claim was untimely makes it unnecessary to distinguish between the two actions.

[1] In this Court Carr argues (1) that the Drivers Act is an unconstitutional abrogation of a government employee's common law right of action against a fellow-employee for negligence; (2) that the Federal Employees' Compensation Act, 5 U.S.C.A. § 8116(c), requires a remand to the state courts under the Drivers Act, 28 U.S.C.A. § 2679(d); (3) that the Drivers Act violates the due process clause of the fifth amendment by restricting the abrogation of the common law right of action to cases which involve motor vehicles; and (4) that the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C.A. App. § 525, tolls the limitations provision of the Tort Claims Act. [FN2]

FN2. The district judge refused to consider the first three arguments on the ground that they had not been timely asserted under the district court's local rules. The district judge was well within the range of his discretion in this ruling. Ledwith v. Storkan, 2 F.R.D. 539, 542, 544- 545 (D.Neb.1942); 6 W. Moore, Federal Practice P55.10(4), at 1837-42 (2d ed. 1966); see Consolidated Masonry & Fireproofing, Inc. v. Wagman Construction Corp., 383 F.2d 249, 251 (4 Cir. 1967). However, we prefer to consider Carr's contentions on their merits.

[2] The Drivers Act was enacted to relieve government employees of the burden of personal liability for accidents which occurred on the job; for unlike many employers, the United States neither maintained liability insurance which protected its employees nor assisted them in paying for their own insurance against on-the-job accidents. Uptagrafft v. United States, 315 F.2d 200, 204 (4 Cir. 1963); H.R.Rep. No. 297, 87th Cong., 1st Sess. (1961); S.Rep. No. 736, 87th Cong., 1st Sess. (1961), reprinted in 2 U.S. Code Cong. & Admin. News 1961, at p. 2784 (1962); 107 Cong.Rec. 18,499-500 (1961). See generally Annot., 16 A.L.R.3d 1394, 1402 (1967). To accomplish this purpose 28 U.S.C.A. § 2679(b) excludes actions ***1010** against employees for injuries which result from the employee's operation of a motor vehicle while within the scope of his employment. H.R.Rep. No. 297, 87th Cong., 1st Sess. 4 (1961). It provides:

'The remedy against the United States provided by * * * (the Federal Tort Claims Act) * * * for personal injury * * * resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his * * * employment, shall hereafter be exclusive of any other civil action * * * by reason of the same matter against the employee or his estate whose act or omission gave rise to the claim.'

28 U.S.C.A. § 2679(b), as amended by the Act of July 18, 1966, Pub.L. No. 89-506, § 5(a), 80 Stat. 306, 28 U.S.C.A. § 2679(b). [FN3]

FN3. The changes instituted in section 2679(b) by the 1966 amendment have no significance in this case.

The Drivers Act had an apparently uncontemplated but not necessarily incongruous impact on federal employees injured by government drivers. Prior to the Act a government employee who sustained injuries as a result of the negligence of a fellow-employee acting within the scope of his employment was not restricted to the remedy against the United States provided by the Employees' Compensation Act, 5 U.S.C.A. §§ 751 et seq., 8101 et seq. He could also have brought a common law action against his co-worker for negligence. Allman v. Hanley, 302 F.2d 559 (5 Cir. 1962); Marion v. United States, 214 F.Supp. 320, 322-324 (D.Md.1963).

[3] Congress apparently did not specifically consider whether or not this cause of action against a fellow government employee should survive. Gilliam v. United States, 407 F.2d 818, 819 (6 Cir. 1969) (Combs, J., concurring). Nevertheless, abrogation is well within the ambit of the statutory

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language:

'the remedy against the United States * * * shall * * * be exclusive of any other civil action * * * against the employee * * *.'

28 U.S.C.A. § 2679(b), as amended by the Act of July 18, 1966, Pub.L. No. 89-506, § 5(a), 28 U.S.C.A. § 2679(b). Any other result would undermine the Act's purpose to protect government drivers from all liability. We, therefore, agree with the holdings of other circuits that the Drivers Act abrogates a federal employee's common law right of action against a government driver who is acting within the scope of his employment. Van Houten v. Ralls, 411 F.2d 940 (9 Cir. 1969); Gilliam v. United States, 407 F.2d 818 (6 Cir. 1969); Vantrease v. United States, 400 F.2d 853 (6 Cir. 1968).

[4] Carr does not seriously question this interpretation of the Act. But he does argue that abrogation without the creation of some new benefit as a quid pro quo constitutes a violation of the due process clause of the fifth amendment. We are not persuaded.

First, the argument's premise was rejected as unsound by the Supreme Court in Silver v. Silver, 280 U.S. 117, 50 S.Ct. 57, 74 L.Ed. 221, 65 A.L.R. 939 (1929). There, in sustaining the abolition of a gratuitous passenger's right to sue his host for negligence, the Court held that:

'The Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law * * *.'

Id., at 122, 50 S.Ct., at 58. There has been no indication that this is not the settled law on the question. E.g., Clarke v. Storchak, 322 U.S. 713, 64 S.Ct. 1270, 88 L.Ed. 1555 (1944), dismissing appeal for want of a substantial federal question from 384 Ill. 564, 52 N.E.2d 229 (1943).

Nothing in Richmond Screw Anchor Co. v. United States, 275 U.S. 331, 48 S.Ct. 194, 72 L.Ed. 303 (1928), constitutes contrary authority. There the Supreme Court dealt with statutes whose combined ***1011** effect deprived a patent owner of his right to sue for infringement. But the patent in that case had been issued prior to the enactment of the relevant legislation. There was, therefore, a vested right in being which was sought to be abrogated. By contrast, here the accident occurred over four years after the enactment of the Drivers Act. [FN4] Therefore, under Silver Carr had no interest entitled to constitutional protection.

> FN4. The Drivers Act does not apply to accidents which occurred up to six months after its enactment. Pub.L. No. 87-258, § 2, 75 Stat. 539.

Second, we think that in any event Congress provided an adequate quid pro quo for the common law cause of action which it abolished. True, a Tort Claims Act remedy may not be available to Carr because of the exclusivity provision of the Employees' Compensation Act, 5 U.S.C.A. § 8116(c). Van Houten v. Ralls, 411 F.2d 940 (9 Cir. 1969); Vantrease v. United States, 400 F.2d 853 (6 Cir. 1968). But we need not decide this question now. Even assuming that the Tort Claims Act is not available, the Drivers Act is itself an adequate quid pro quo, for it provided Carr with valuable protection against personal liability for on-the-job automobile accidents for which he might have been responsible.

[5] Carr also argues that if the Employees' Compensation Act's exclusivity provision does apply, the Drivers Act requires that his action against Mitchell be remanded to the state courts. In part the Drivers Act provides that if the action which has been removed

'is one in which a remedy (under the Tort Claims Act) is not available against the United States, the case shall be remanded to the State court.'

28 U.S.C.A. § 2679(d). Carr contends that if the Employees' Compensation Act's exclusivity provision bars his action under the Tort Claims Act, then necessarily his Tort Claims Act remedy against the United States 'is not available.' Therefore, he concludes, his case against Mitchell must be remanded to the state courts.

This argument has been rejected by the only other courts of appeals to consider it. Van Houten v. Ralls, 411 F.2d 940 (9 Cir. 1969); Gilliam v. United States, 407 F.2d 818 (6 Cir. 1969); Vantrease v. United States, 400 F.2d 853 (6 Cir. 1968). They have held that within the meaning of

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the Drivers Act the Tort Claims Act remedy is 'not available' only where the government driver was not acting within the scope of his employment. When the Tort Claims Act remedy is not available for any other reason, the remand provision does not apply.

We adopt this interpretation of the Act. While the statutory language does not by itself reject Carr's position, his theory would revitalize the common law action. Since this result would directly contradict the Act's immunizing purpose, we reject it.

[6] Carr next contends that the Drivers Act violates the fifth amendment's due process clause by denying him equal protection. Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954). The deprivation, he argues, results from the fact that abrogation is restricted to accidents which involve motor vehicles. Government employees can sue their co-workers for injuries sustained in any other job-related activity. [FN5]

> FN5. The Act of Oct. 31, 1965, Pub.L. No. 89-311, § 6(a), 79 Stat. 1156 (codified at 38 U.S.C.A. § 4116), extended like immunity to government medical personnel, but the Act was not effective at the time of the accident in this case. Id., § 6(c). In any event, numerous other employees remain personally liable for on-the-job accidents.

[7] The classification which the Drivers Act creates does not penalize the exercise of any constitutional right. As we have held, the right to sue a co-worker does not enjoy constitutional protection. Therefore, the classification need not be justified by 'a compelling governmental interest.' Shapiro v. Thompson, 394 U.S. 618, 634, 89 S.Ct. 1322, 22 ***1012** L.Ed.2d 600 (1969) (emphasis in the original). Nor does the Act create a 'suspect' classification, see, e.g., Korematsu v. United States, 323 U.S. 214, 216, 65 S.Ct. 193, 89 L.Ed. 194 (1944), or involve a 'fundamental' interest. See, e.g., Reynolds v. Sims,377 U.S. 533, 561-562, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). Thus, a rigorous standard of review would be inappropriate here. Rather, the statutory classification comes here clothed with a presumption of constitutionality and it 'will not be set aside if any state of facts reasonably may be conceived to justify it.' McGowan v. Maryland, 366 U.S. 420, 426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961).

[8] The legislative history to which we have already referred makes it clear that Congress was moved by the fact that automobile accident insurance placed such a heavy financial burden on government drivers that it was adversely affecting morale and making it difficult for the government to attract competent drivers into its employ. S.Rep. No. 736, 87th Cong., 1st Sess. (1961), reprinted in 2 U.S. Code Cong. & Admin. News 1961, at p. 2784 (1962). We think that the magnitude of the automobile insurance problem justified Congress's separate treatment of this specific problem. Furthermore, as the Supreme Court said in Silver in response to a substantially similar argument:

'There is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied-- that the legislature must be held rigidly to the choice of regulating all or none. * * * It is enough that the present statute strikes at the evil where it is felt and reaches the class of cases where it most frequently occurs.'

280 U.S. at 123-124, 50 S.Ct. at 59.

As we have indicated, we find it unnecessary to consider the government's position that the Employees' Compensation Act precludes relief under the Tort Claims Act in this case, because even if Carr is not limited to his rights under the Employees' Compensation Act his action is barred by the two-year limitations provision of the Tort Claims Act, 28 U.S.C.A. § 2401(b).

[9] Lastly, Carr contends that the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C.A. App. § 525, tolls this statute of limitations. This Act in part provides for tolling with respect to

'the bringing of any action * * * in any court * * * by or against any person in military service or by or against his heirs, executors, administrators, or assigns * * *.'

Since Mitchell was in the United States Navy for a period of time after the accident, Carr believes that his action under the Tort Claims Act is still viable.

We disagree. Section 525 only tolls a limitations provision if the action is either one 'against any

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person in military service' or one 'against his heirs, executors, administrators, or assigns.' Since the Drivers Act abolishes Carr's right to relief from Mitchell, Carr has no 'action * * * against any person in military service.' Nor do we think that in this case the United States is accurately described as one of Mitchell's 'heirs, executors, administrators, or assigns.' Therefore, we conclude that § 525 does not apply here.

[10][11] We arrive at this conclusion after a consideration of the relevant statutory purposes. The Soldiers' and Sailors' Civil Relief Act was intended to enable persons serving in the armed forces 'to devote their entire energy to the defense needs of the Nation' without the worries and distractions which are involved in the conduct of litigation. 50 U.S.C.A. App. § 510; e.g., Van Heest v. Veech, 58 N.J.Super. 427, 432, 156 A.2d 301, 304 (1959). We have found nothing to suggest that Congress was protecting a contrary purpose when it extended the benefits of § 525 to persons who bring actions 'against' servicemen. Consistent with the statute's broad purpose, therefore, we think that ***1013** § 525 was intended to promote tranquility in the military by permitting claimants to await the termination of the potential defendant's tour of duty without losing a meritorious claim. Blazejowski v. Stadnicki, 317 Mass. 352, 356-357, 58 N.E.2d 164, 166 (1944); Annot., 26 A.L.R.2d 284, 287-88 (1952). See also Reed, Soldiers' and Sailors' Civil Relief Act of 1940, 28 Iowa L.Rev. 14, 27 (1942).

This purpose, however, has no applicability here. A serviceman in Mitchell's situation is, by virtue of the Drivers Act, completely immune from 'any * * * action.' 28 U.S.C.A. § 2679(b). He has no need for the partial and temporary relief from worry and distraction which § 525 would provide.

The judgment of the district court is Affirmed.

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