Due Process, Equal Protection and the Right to Travel: Can Article 22 of the Warsaw Convention Stand up to These Constitutional Foes

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Comments

DUE PROCESS, EQUAL PROTECTION AND THE RIGHT TO TRAVEL: CAN ARTICLE 22 OF THE WARSAW CONVENTION STAND UP TO THESE CONSTITUTIONAL FOES?

BRITT MONTS

ARTICLE 22 OF the Warsaw Convention\(^1\) is a controversial treaty provision that limits air carrier liability for death, personal injury and loss of property resulting from in-

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ternational air disasters. The provision has come under increasing attack in the United States during the past two decades. The liability limitations, however, were vitally important to the first international airlines.

During the 1930s, business leaders around the world convinced many governments that newly formed international carriers would need protection from the potentially catastrophic recoveries available under tort law to the victims of air disasters. The technological and economic realities of air travel during this period threatened the viability of affordable international transportation by air. Additionally, fundamental cultural, legal and commercial distinctions among nations necessitated cooperation in the establishment of uniform industry practices. With these considerations in mind, President Roosevelt endorsed the Warsaw Convention and the Senate approved it, as a treaty, in 1934.

During fifty years of growth and maturity, the airline in-

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2 See generally Comment, supra note 1; Comment, Limitations on Air Carrier Liability: An Inadvertent Return to Common Law Principles, 48 J. AIR L. & COM. 111 (1982) [hereinafter cited as Comment, Limitations].

3 Lowenfeld & Mendelsohn, The United States and the Warsaw Convention, 80 HARV. L. REV. 497 (1967). Two international conferences were held: one in Paris in 1925 and another in Warsaw in 1929. Id. at 498. For an interesting discussion of air transportation from its beginnings to modern times, see generally C. SOLBERG, CONQUEST OF THE SKIES (1979). See also Wright, The Warsaw Conventions' Damage Limitation, 6 CLEV.-MAR. L. REV. 290 (1957).

4 See C. SOLBERG, supra note 3, at 125, 225. Generally, air travel was limited by the range of available aircraft (speed, size and distance between refueling). Technology in the area of radar and other navigational equipment was also limited. Id.

5 See Lowenfeld & Mendelsohn, supra note 3, at 498; Comment, supra note 1, at 809.

6 Haskell, supra note 1, at 485. The author states: "President Roosevelt submitted The Treaty to the . . . Senate. On June 15, 1934 the Senate gave its advice and consent . . . . Roosevelt proclaimed adherence to the Treaty in October 1934." Id., cited also in Comment, supra note 1, at 811. The Warsaw Convention today, with minor exceptions, remains substantially the same. Air carriers in the United States, pursuant to a private industry-wide agreement, now permit additional compensation to the liability limits under the Convention. See Lowenfeld & Mendelsohn, supra note 3, at 596-601. For a thorough discussion of the various amendments and protocols to the Warsaw Convention, see Lowenfeld & Mendelsohn, supra note 3, at 498-509, 552-75; Comment, supra note 1, at 809. See also Comment, Limitations, supra note 2, at 111. Since numerous articles containing excellent histories of the Warsaw Convention are widely available, this comment will not concern itself with a detailed account of the treaty's evolution. See S. SPEISER & C. KRAUSE, AVIATION TORT LAW § 11:4 (1978); Hildred, Air Carrier's Liability: Significance of the Warsaw Convention and Events Leading Up to the Montreal Agreement, 33 J. AIR L. & COM. 521 (1967); Comment, From Warsaw to Tenerife:
Industry benefited from the liability-limiting protection of the Warsaw Convention. Increases in passenger miles traveled spawned a demand for aircraft more advanced technologically. Optimism by lenders and investors led to an influx of much-needed capital. Consequently, today's airline industry boasts an impressive safety record which in turn has increased the availability of low cost liability insurance. Because the airline industry in the United States is now a large and financially secure industry, the accepted reason for adopting the Convention's liability limitations has been largely achieved. Moreover, the major concession made by

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9 Statistics for 1974 show a fatality rate of 13 per 100 million passenger miles flown on U.S. domestic flights. See R. KAN & A. VOS, AIR TRANSPORTATION 8-11 (6th ed. 1975). During the original Paris conferences in 1925 and 1929 the average fatality rate for domestic and international air carriers was 45 per 100 million passenger miles. See Lowenfeld & Mendelsohn, supra note 3, at 498.

10 For estimates of the cost of this type of insurance see Lowenfeld & Mendelsohn, supra note 3, at 556. See Burdell v. Canadian Pac. Airlines, 10 Av. Cas. (CCH) 18,151, 18,159-60 (1968) (citing Lowenfeld & Mendelsohn), in which the court states: Allowing for a reasonable margin of error in what were conceded to be only estimates, the incremental insurance costs at various limits, taken as a proportion of operating cost, were clearly somewhere between the cost of the olive and the cost of the gin in the martini, and nowhere near the cost of an inflight movie. Id. See also Brise, Some Thoughts on the Economic Significance of Limited Liability in Air Passenger Transport, in ESSAYS IN AIR LAW 19, 22-23 (A. Kean ed. II 1982).

11 Attached to the treaty when it was submitted to the Senate for ratification was a letter from then Secretary of State Cordell Hull, which stated: It is believed that the principle of limitation of liability will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation, but that it will prove to be an aid in the development of international air transportation, as such limitation will afford the carrier a more definite and equitable basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expenses for the carrier.
air carriers under the treaty, a presumption of airline fault, is arguably of little value in this country considering the widespread use of *res ipsa loquitur* by plaintiffs in aviation crash litigation. Thus, courts today are faced with the unsavory task of enforcing a treaty provision that severely restricts the rights of injured citizens to receive full compensation without giving anything meaningful in return.

The Senate recently expressed its disfavor towards the recovery limits under the treaty when it rejected the Montreal Protocol. The Protocol, which was negotiated by the State Department in 1975, was designed to increase recoveries available to accident victims, up to an absolute ceiling on re-

and advantages to travelers and shippers in the way of reduced transportation charges.

S. Exec. Doc. No. G., 73d Cong., 2d Sess. 3-4 (1934), cited in *In re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1307 (9th Cir. 1982). Though the Senate consented to the treaty without actual debate, 78 CONG. REC. 11,582 (1934), it seems that Secretary Hull's letter embodied the Senate's views on the need for the Warsaw Convention in 1934. It goes without saying that travelers and shippers today feel no gratitude in knowing that their rights to just compensation are severely restricted by the treaty. See Loggans, *Personal Injury Damages in International Aviation Litigation: The Plaintiff's Perspective*, 13 J. MAR. L. REV. 541, 560 (1980).

12 See *Warsaw Convention*, supra note 1, art. 17. Article 17 states:

The Carrier shall be liable for damages sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damages so sustained took place on board the aircraft or in the course of any of the operations or embarking or disembarking.

*Id.* The presumption may be rebutted if the carrier can show that every necessary precaution needed to prevent the accident was taken or that such precautions were impossible. *Warsaw Convention*, supra note 1, art. 20.

13 The accepted definition of *res ipsa loquitur* states:

There must be reasonable evidence of negligence; but where the thing is shown to be under the management of defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.


14 See infra text accompanying notes 19-22.

15 See generally Comment, supra note 1, at 809. Most recently the Senate defeated an amendment to the treaty that would have raised airline liability to at least $117,000 per victim and would also have created a supplemental compensation plan. 129 CONG. REC. S2279 (daily ed. March 8, 1983).
covery of $320,000 per passenger. Although the Senate Foreign Relations Committee recommended ratification, the Protocol failed to gain two-thirds support on the Senate floor.

The inadequacies and inequities of the Warsaw Convention have led courts in this country to scrutinize the treaty with a jaundiced eye whenever its limitation on liability is asserted. Judicial attacks on the Warsaw Convention can be divided into four distinct categories: (1) constitutional challenges to the treaty; (2) challenges asserting that the treaty violates statutory property rights; (3) challenges based on the inadequacy of notice to passengers that the Convention applies (ticketing requirements); and (4) questions surrounding the proper method of converting judgments based on a gold standard into dollars.

Considering the refusal of Congress to reject article 22 of the Warsaw Convention or to amend the limitation provisions to permit higher recoveries, it can be persuasively argued that the time is right for the courts to examine the constitutionality of the Warsaw liability limitations. This comment will focus on challenges to the Warsaw Convention under the due process and equal protection clauses of the Constitution, as well as under the implied constitutional right

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16 See Comment, supra note 1, at 813.
18 See supra note 15.
19 See infra notes 61-91. See also Comment, supra note 1, at 817; McGilchrist, Can The U.S. Courts Denounce the Warsaw Convention?, 6 L.M.C.L.A. 111 (1982).
21 See Comment, supra note 2, at 826.
22 See Franklin Mint Corp. v. Trans World Airlines, 690 F.2d 303 (2d Cir. 1982) (holding that the lack of an official conversion formula makes liability limitations in Warsaw Convention unenforceable), rev'd, 104 S. Ct. 1776 (1984); see also Comment, supra note 1, at 830.
23 See supra note 15.
to travel. Generally, the standards of judicial review used in due process and equal protection analysis are very deferential to legislative wisdom. In cases involving restrictions of travel rights, however, the courts will usually scrutinize such restrictions under the first amendment. International travel, on the other hand, has not been as strictly protected by the courts as domestic travel. In essence, this treatment seems to reveal that a court would likely use a low level of judicial scrutiny to determine whether article 22 of the treaty violates due process, equal protection and travel rights.

I. CONSTITUTIONAL FRAMEWORK OF THE WARSAW CONVENTION

From a United States constitutional perspective, the Warsaw Convention is a self-executing commercial treaty. Although the Constitution expressly gives the legislative branch the power to regulate international commerce, a self-executing treaty does not require any legislation to implement its provisions. The Constitution does require that the President submit all treaties to the Senate for two-thirds approval. Thus, the constitutional roles of the Senate and the President work in tandem in the ratification of a treaty.

The Warsaw Convention is an international agreement, and accordingly, it involves foreign relations. Traditionally,

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24 See infra notes 102-256 and accompanying text.
25 See infra text accompanying notes 95, 102.
26 See infra note 174.
27 See infra text accompanying notes 179-180.
28 See Lowenfeld & Mendelsohn, supra note 3, at 498. The treaty regulates U.S. carriers in ticketing procedures and also limits carriers' liability in international accidents. Id. at 498-99. A self-executing treaty is "immediately effective without the necessity of ancillary legislation" to effect its purposes. See Self-executing constitutional provision, BLACK'S LAW DICTIONARY 1220 (5th ed. 1979).
29 U.S. CONST. art. I, § 8, cl. 2 states: "Congress shall have power . . . to regulate Commerce with foreign nations, and among the several States, and with the Indian tribes." See infra note 40.
30 See supra note 28.
31 U.S. CONST. art. II, § 2, cl. 2 states: "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . ."
this area of responsibility has been vested in the President. The power of the President in the realm of foreign policy has been described by the Supreme Court as "delicate, plenary and exclusive." Once the Convention was approved by the Warsaw Conference participants, the President endorsed the treaty and submitted it to the Senate for approval. The Senate approved the treaty without debate in 1934.

Congress (through the Senate) exercised its enumerated power to regulate international commerce when it approved the Warsaw Convention. No court, federal or state, has challenged the authority of Congress to make the United States Government a party to the Convention. Legislative power over foreign trade is very broad. History suggests that the constitutional framers intended for the legislative branch to wield plenary power in the regulation of international commerce. The Warsaw Convention was devised and adopted to promote foreign commerce. Congress properly exercised its commerce power when it approved the treaty. It is equally undisputed that both the President and the Senate satisfied the treaty-making procedure prescribed in Article II, Section 2(2) of the U.S. Constitution.

34 See Haskell, supra note 1, at 485. President Roosevelt submitted the treaty to the Senate in 1934. Id.
35 Id. The treaty was ratified on June 15, 1934 and adhered to by the United States in October, 1934. Id.
36 Ratification of the Warsaw Convention by the Senate evidenced congressional approval. Ratification provides an important legislative check to executive treaty-making power. Only one House, however, is enabled to assert this power. See infra note 40.
37 In fact, Supreme Court cases addressing commerce clause issues have essentially focused on whether Congress' power to regulate interstate and intrastate commerce is as great as its power to regulate foreign commerce. See, e.g., Lottery Case, 188 U.S. 321 (1903) (Docket title — Champion v. Ames, No. 2, Francis v. United States, No. 80, argued simultaneously).
38 CONSTITUTIONAL LAW, supra note 32, at 139.
40 See In re Aircrash in Bali, Indonesia on April 22, 1974, 684 F.2d 1301 (9th Cir. 1982). The plaintiffs argued that the treaty was never ratified by the Senate, but the
II. JUDICIAL REVIEW OF TREATIES

It is a settled principle of judicial review that courts possess the power to test the constitutionality of treaties. Though the Constitution does not specifically confer this right on the judicial branch, scholars and judges agree that the broad concept of judicial review includes the substantive review of treaties. Treaties, being subject to constitutional scrutiny by courts, are theoretically afforded no greater weight as law than federal or state statutes. Consequently, a treaty may not abridge liberties guaranteed citizens under the Constitution. Justice Story once said: "A power given by the Constitution cannot be construed to authorize a destruction of other powers given in the same instrument." Even though the courts have declared themselves competent to determine the constitutionality of treaties, none has ever exercised that power when a purely economic treaty such as the Warsaw Convention is involved. The President can negotiate and sign an international commercial agreement, and with Senate "approval, such" an agreement is valid notwithstanding the House of Representatives' constitutional article I power to approve commercial regulations. See Indemnity Ins. Co. v. Pan Am. Airways, 58 F. Supp. 338, 339-40 (S.D.N.Y. 1944) (raising the issue of overlapping authority). During the constitutional convention a proposal was made that would have required both the House and Senate to approve all treaties. 2 M. Farrand, The Records of the Federal Convention of 1787 at 457-59, 461-66 (rev. ed. 1937), cited in 2 M. Glennon & T. Frank, United States Foreign Relations Law: Documents and Sources 342 (1980).

"In re Aircrash in Bali, Indonesia on April 22, 1974, 684 F.2d 1301, 1308-09 (9th Cir. 1982); Burdell v. Canadian Pac. Airlines, 10 Av. Cas. (CCH) 18,151 (Ill. Cir. Ct. 1968). See also W. Cowels, Treaties and Constitutional Law: Property and Due Process of Law (1941).

"See Constitutional Law, supra note 32, at 201-11. This view prevails notwithstanding the language in the Constitution which states that: "[A]ll treaties made . . . under the authority of the United States, shall be the supreme law of the Land; and the Judges in every state shall be bound thereby . . . ." U. S. Const. art. VI, § 2.

"There is no question that treaties are superior to and preempt state laws. In terms of judicial review, however, a treaty is not considered to be above constitutional restraint. See Reid v. Covert, 354 U.S. 1, 16-17 (1957).

"2 J. Story, Commentaries on the Constitution of the United States § 1508 (3d ed. 1958), cited in Burdell v. Canadian Pac. Airlines, 10 Av. Cas. (CCH) 18,151, 18,156 (Ill. Cir. Ct. 1968)."
Historically, the Supreme Court has declined to use its review power in matters touching foreign policy or national security. \textsuperscript{46} The courts have also been deferential to questions involving international commerce. \textsuperscript{47} This refusal to assert judicial power is known as the political question doctrine. \textsuperscript{48} The doctrine is rooted in the premise that the courts are the least suited of the three branches to decide issues affecting this nation's policies and relations with the rest of the world. \textsuperscript{49} Supreme Court opinions on the subject are few in number and do not provide a clear picture of the doctrine. \textsuperscript{50}

\textsuperscript{45} See Constitutional Law, supra note 32, at 202.


\textsuperscript{47} See Constitutional Law, supra note 32, at 139.

\textsuperscript{48} See id. at 109.

\textsuperscript{49} Id. at 109, 197-98. The political question doctrine is not limited to foreign affairs. Baker v. Carr, 369 U.S. 186, 208-11 (1962). The Constitution expressly grants to the Supreme Court jurisdiction over all (1) disputes involving treaties, ambassadors and other diplomats, (2) disputes between the United States and other countries, and (3) disputes between United States citizens and foreign citizens and governments. U.S. CONST. art. III, § 2. See also Scharpf, Judicial Review and the Political Question: A Functional Analysis, 75 YALE L.J. 517, 567 (1966).

\textsuperscript{50} Early Supreme Court decisions reflect the Court's uncertainty as to its role in the scheme of foreign affairs. See Geofoy v. Rigs, 133 U.S. 258 (1890) (Court refused to question a treaty that permitted foreign nationals to inherit in this country). The Court in Geofoy held that the treaty-making power was subject to constitutional restraint, but it refused to question the subject matter of any treaty that did not limit state power under the tenth amendment. Id. at 272-73. See also Missouri v. Holland, 252 U.S. 416 (1920) (holding that a treaty with Great Britain to protect migratory birds did not overstep states' rights under the tenth amendment); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) (upholding an executive proclamation banning sale of arms to certain countries). In Missouri v. Holland, Justice Holmes held that "Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States." 252 U.S. at 433. See L. Henkin, FOREIGN AFFAIRS AND THE CONSTITUTION 147 (1972); Nowak & Young, supra note 46, at 1140. The Court clarified its position in Reid v. Covert, 354 U.S. 1 (1957). The Court held that the U.S. Military had no court martial jurisdiction over civilian relatives of military personnel stationed abroad under a U.S./Great Britain treaty. 354 U.S. at 39-41. Writing for the plurality, Justice Black firmly declared the judiciary's power to determine whether a treaty violates the Bill of Rights. Id. at 16-17. The power of the judicial branch to second-guess executive and legislative acts was further established in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
In *Baker v. Carr,* a case involving court-ordered legislative reapportionment, the Supreme Court dismissed a longstanding notion that treaties were immune from judicial review.

The Supreme Court struck down President Truman's attempt to seize the nation's steel mills during a strike that occurred in the midst of the Korean conflict. *Id.* at 588. The Court acknowledged the importance of judicial deference in matters touching on foreign affairs where both the President and Congress act jointly, but the Court established its right to scrutinize actions taken by the President alone without congressional approval or delegation of authority. *Id.* Under the test laid out by the Court, where both Congress and the President have endorsed a particular action, the Court should review the action only to see if clear abuses of federal power are present. *Id.* at 585. Justice Jackson in his concurring opinion set forth three types of presidential action and the levels of judicial scrutiny applicable to each:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . . A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers. . . . In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. When the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb . . . [and] must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

*Id.* at 635-38 (Jackson, J., concurring). Since *Youngstown,* the Supreme Court has not confronted the President or Congress in a case involving foreign relations. Very recently, in *Dames & Moore v. Regan,* 453 U.S. 654 (1981), the Court upheld President Carter's agreement with Iran, under which the United States released Iranian assets in return for the release of U.S. citizens who were being held hostage. Since Congress had implicitly consented to the agreement, Justice Rehnquist followed the test set forth by Justice Jackson in *Youngstown* by giving the hostage-release agreement the "strongest presumption" of constitutionality. *Id.* at 661, 668, 686. The opinion evidences the Court's attitude of utmost deference in sensitive international negotiations. *Id.* at 682-83. The *Dames & Moore* opinion did leave open the possibility of judicial scrutiny if a treaty or other agreement were to restrict first amendment liberties. *Id.* at 688. However, some commentators claim that the Supreme Court refused to prevent even the infringement of first amendment rights in the 1982 case of *Haig v. Agee,* 453 U.S. 280 (1981). Phillip Agee, an ex-CIA employee, had his passport revoked when he attempted to travel overseas to expose CIA operatives. *Id.* at 283-86. Citing the sensitivity of the subject matter (foreign intelligence) and the danger to U.S. citizens abroad, the Supreme Court upheld the State Department's revocation of Agee's passport without considering whether Agee's rights of free speech and association were violated. *Id.* at 292, 306.


*Id.* at 211. The Court did recognize the need for a unified voice in matters of
The Court stated that "it is error to suppose that every case or controversy which touches foreign relations lies beyond the judicial cognizance."

Other portions of the Baker opinion, however, make it clear that judicial standards are frequently inapplicable to issues involving foreign policy, and that the judicial branch should defer to the President's broad foreign affairs power in most cases in order to preserve a unified federal voice abroad.

The President's endorsement of and adherence to the Warsaw Convention was within the international affairs power historically relegated to the executive branch. Additionally, the Senate's approval and ratification of the treaty was carried out in a constitutional manner. Though the Supreme Court has never used its review power to invalidate a treaty, it has carefully preserved the power to do so if deemed necessary. To date, the courts have used the utmost restraint in foreign policy matters. Even so, judicial review of article 22 cannot be ruled out. The constitutionality of the Warsaw limitations has been challenged by plaintiffs in several cases.

III. DECISIONS ADDRESSING THE CONSTITUTIONALITY OF THE WARSAW CONVENTION

Plaintiffs have confronted several courts with constitutional attacks leveled at the liability limitations of the Warsaw Convention. In the few cases in which lower courts

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53 Id.
54 Id.
55 Id.
56 See supra text accompanying notes 28-40.
57 See supra text accompanying notes 28-40.
58 See supra text accompanying notes 41-45.
59 See supra note 50 and accompanying text.
60 See infra notes 61, 62. See also In re Aircrash in Bali, Indonesia on April 22, 1974, 684 F.2d 1301, 1309 (9th Cir. 1982).
61 See Molitch v. Irish Int'l Airlines, 436 F.2d 42 (2d Cir. 1970) (holding that failure to raise constitutional challenge at trial waived plaintiff's right to raise same on appeal); In re Pago Pago Aircrash of January 30, 1974, 419 F. Supp. 1158 (C.D. Cal. 1976) (court denying motions raising constitutionality issue pending jury determina-
have considered the constitutionality of article 22, most have dismissed the plaintiffs' arguments in a cursory manner.\textsuperscript{62} Not until the late 1960s, over thirty years after the treaty was ratified, did a court thoroughly consider and analyze the legitimate question of whether the Warsaw limitations were constitutional.

Burdell v. Canadian Pacific Airlines\textsuperscript{63} arose out of an air crash that occurred during an airliner's final approach into Tokyo, Japan through heavy fog.\textsuperscript{64} The critical issue in Burdell was the applicability of the Warsaw Convention to the suit filed against Canadian Pacific Airlines by the families of the accident victims.\textsuperscript{65} Ultimately, the Illinois circuit court declared the treaty to be inapplicable to the suit.\textsuperscript{66} In dicta, however, the circuit court tackled head-on the constitutionality of article 22.\textsuperscript{67} The court, noting the vastly improved safety record of the airline industry, the financial strength of air carriers and the low cost of liability insurance, concluded that the liability limitations were "arbitrary, irresponsible, capricious and indefensible."\textsuperscript{68} Citing a number of authorities supporting judicial review of treaties, the court stated that article 22

\textsuperscript{62} See Pierre v. Eastern Air Lines, 152 F. Supp. 486 (D.N.J. 1957) (holding that the Warsaw Convention does not unfairly deprive a claimant of complete trial by jury because determination of damages is not solely a jury function); Indemnity Ins. Co. v. Pan Am. Airways, 58 F. Supp. 338 (S.D.N.Y. 1944) (holding that historical uniformity in commercial treaty-making requires judicial deference and furthermore, that the treaty does not violate due process because other laws also limit liability); Garcia v. Pan Am. Airways, 183 Misc. 258, 50 N.Y.S.2d 250 (1944), aff'd per curiam, 295 N.Y. 852, 67 N.E.2d 257 (1946) (constitutionality argument dismissed without discussion of either nature or merit of the challenge on grounds that a treaty of such importance as the Warsaw Convention is presumed to be constitutional unless an appellate court declares otherwise).
\textsuperscript{63} 10 Av. Cas. (CCH) 18,151 (Ill. Cir. Ct. 1968), revised, 11 Av. Cas. (CCH) 17,351 (Ill. Cir. Ct. 1969).
\textsuperscript{64} See Kennelly, Response to Comments on Burdell v. Canadian Pacific Airlines, 58 Ill. B.J. 454 (1970).
\textsuperscript{65} 10 Av. Cas. (CCH) 18,151.
\textsuperscript{66} Id. at 18,155. The court held that Singapore (where the flight to Tokyo originated) had not adopted the Warsaw Convention. \textit{Id}.
\textsuperscript{67} \textit{Id}.
\textsuperscript{68} \textit{Id}. at 18,157-61.
of the treaty was wholly irrational, served no reasonable purpose and, as a result, violated the plaintiffs’ rights to due process.\textsuperscript{69} Furthermore, because the court stated that the special treatment afforded the airline industry constituted a classification serving no legitimate state interest, the equal protection rights of other industries were also violated.\textsuperscript{70} The portion of the opinion addressing the constitutional issues was later excised at the request of the defendant.\textsuperscript{71} \textit{Burdell}, while praised by at least one commentator, remained largely unnoticed for another thirteen years.\textsuperscript{72}

The constitutional arguments set forth in \textit{Burdell} resurfaced in the 1982 case, \textit{In re Aircrash in Bali, Indonesia on April 11, 1974},\textsuperscript{73} in which the Ninth Circuit reopened the door to constitutional scrutiny of the Warsaw liability limitations. The case grew out of the crash of a Pan American Airways 707 into a mountainside which occurred after the plane’s crew lost visual contact with the airport’s runway lights. Survivors of three passengers brought an action at state law for damages against the defendant Pan American Airways.\textsuperscript{74} In turn, Pan American relied on article 22 of the Warsaw Convention to limit its liability.\textsuperscript{75} The district court found that the liability limitation was not applicable.\textsuperscript{76} Pan Am, therefore, appealed.\textsuperscript{77} The plaintiffs cross-appealed alleging, among other things, that the treaty violated their rights of substantive due process and equal protection.\textsuperscript{78} They also argued that the limitation provisions of the treaty amounted to an impermissible travel restriction.\textsuperscript{79}

The Ninth Circuit carefully side-stepped the plaintiffs’ con-
stitutional arguments by instead questioning, *sua sponte*, whether the Convention's liability limitation was a taking of the plaintiffs' property (their right of action at state law) under the fifth amendment. The court concluded that the plaintiffs' constitutional arguments would fail if full compensation for the taking could be recovered in the United States Claims Court. The court, however, carefully avoided holding that limitation of a right of action at state law under the treaty did amount to a taking under the fifth amendment, holding only that the claims court has jurisdiction to hear such a taking claim.

In dicta, the Ninth Circuit went on to address the merits of the plaintiffs' constitutional arguments. As in *Burdell*, the court had little difficulty determining that the Warsaw Convention, like any other treaty, is not shielded from review. The court then proceeded to summarize the growth of the airline industry and the availability of low-cost liability insurance. Using the lowest form of judicial scrutiny — whether a law is reasonable or arbitrary — the court indicated that article 22 of the Convention might be unconstitutional because it burdens due process and equal protection rights.

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80 Id. at 1310.
81 Id. The jurisdictional statute of the Claims Court provides in relevant part that:

The Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States.


82 684 F.2d at 1313. The court was able to avoid the constitutional issues by remanding the case to the district court for certain findings of fact. Id. After a determination of damages the plaintiffs would presumably be able to file suit in the Claims Court on a taking theory if the damages awarded exceeded the maximum recoverable damages under article 22 of the Warsaw Convention. *Id.*

83 Id. at 1308.
84 Id. at 1308-09.
85 Id. at 1310.
86 Id. at 1309. The court indicated that the appropriate standard of review in a challenge to the Convention under the Constitution would be the test laid out in *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59 (1978). Under this standard an economic regulation is constitutional unless it is arbitrary or unreasonable. 684 F.2d at 1309.
without serving any meaningful purpose.\textsuperscript{87}  

In addition, the court endorsed the plaintiffs' argument that the Warsaw limitation was essentially a penalty imposed on citizens who wish to travel outside the United States.\textsuperscript{88}  
The court stated that the right to travel freely outside the United States is a fundamental right that can be abridged only to serve a substantial governmental aim.\textsuperscript{89}  
The court also noted that a restriction of fundamental liberties must be "carefully tailored."\textsuperscript{90}  
A potential hurdle to a right to travel argument in wrongful death actions, recognized by the court, is whether relatives of air crash victims have standing to allege infringement of crash victims' personal liberties.\textsuperscript{91}  
While there exists only a skeletal framework of case law dealing with constitutionality of the treaty's limitation provisions, the courts agree that they possess the power to scrutinize the treaty should review become necessary.\textsuperscript{92}  
Judicial distaste for the Warsaw limitations has continued to grow.\textsuperscript{93}  
Time and changed circumstances have sharpened the harsh effects of article 22 on citizens. Hence, the justification for its continued survival should be questioned in a constitutional light.

IV. \textbf{DOES ARTICLE 22 OF THE CONVENTION VIOLATE DUE PROCESS AND EQUAL PROTECTION RIGHTS?}

Due process and equal protection challenges require essentially the same type of judicial analysis. The distinction lies in an additional element in the equal protection analysis:

\textsuperscript{87} 684 F.2d at 1309-10. The court stated: "We conclude that plaintiff's due process and right-to-travel arguments, while substantial, would fail if another remedy were available that would provide them with full compensation. We find that such a remedy is available [in the Claims Court]." \textit{Id.} at 1310. See \textit{supra} note 81.

\textsuperscript{88} 684 F.2d at 1309.

\textsuperscript{89} \textit{Id.}

\textsuperscript{90} \textit{Id. Compare infra} notes 202-205 and accompanying text.

\textsuperscript{91} 684 F.2d at 1310.

\textsuperscript{92} See \textit{supra} notes 61, 62.

\textsuperscript{93} See generally Comment, \textit{supra} note 1, at 809. Most recently the Senate defeated an amendment to the treaty that would have raised airline liability to at least $117,000 per victim and would also have created a supplemental compensation plan. 129 CONG. REC. S2279 (daily ed. March 8, 1983).
when a plaintiff alleges that his rights to equal protection have been violated, he must show that an identifiable group of persons, of which he is a member, has been singled out and treated unfairly by a law. Due process analysis does not require invidious discrimination against distinct groups, yet most due process challenges involve some type of classification as well. The merits of challenges to the limitation provisions of the Warsaw Convention under the due process and equal protection clauses of the Constitution will be discussed separately. It must be noted, however, that these two constitutional arguments overlap to a great extent.

A. *Substantive Due Process*

Judicial review of the substantive fairness of a federal, state or local law is a much broader exercise of judicial power than the determination of whether a law satisfies procedural due process requirements. Both types of due process are derived from the due process clauses of the fifth and fourteenth amendments. Procedural due process is concerned with the more limited requirement that the decision-making process behind a law be fair, not whether the effects of the law are fair. As stated earlier, the procedure followed by the President and the Senate in the adoption of the Warsaw Convention was constitutional. The due process arguments raised in *Bali* and *Burdell* were based on substantive due process. When a court reviews a law on substantive due process grounds, it dissects the law to see if individual liberties are

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94 *Id.* *CONSTITUTIONAL LAW*, supra note 32, at 585-90.
95 *Id.*
96 *Id.* at 416-17.
97 The fifth amendment provides in part that: "No person shall . . . be deprived of life, liberty or property, without due process of law." U.S. CONST. amend. V. The fourteenth amendment provides in part that: "[N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.
98 *CONSTITUTIONAL LAW*, supra note 32, at 416-17.
99 See supra text accompanying note 40.
100 684 F.2d at 1309; 10 Av. Cas. (CCH) at 18,157-61.
improperly burdened. 101

Under the current judicial standard of substantive due process review, a law must be rationally related to a legitimate state interest. 102 This test of substantive fairness gives utmost deference to legislative acts. 103 Supreme Court decisions, however, have created heightened levels of review where certain fundamental liberties such as speech, religion and travel rights are restricted by a law or regulation. 104 When one of

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101 See, e.g., 10 Av. Cas. (CCH) at 18,157-61. See also New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 439 U.S. 96 (1978) (court distinguished substantive from procedural due process).

102 For a thorough discussion of the development of substantive due process, see CONSTITUTIONAL LAW, supra note 32, at 425-51. Early Supreme Court decisions expressed a hesitancy to examine the substantive constitutionality of a Congressional act. See Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) (first Supreme Court decision to consider the concept of substantive review). In Calder Justice Iredell established the principle of judicial restraint, stating that the courts should not overturn legislation that violates natural law unless such judicial power can be derived from express constitutional language. Id. at 398-400. In 1877, the Court, in Mugler v. Kansas, 123 U.S. 623 (1887), decided that the judiciary had a duty to examine law substantively to determine if police power was being used to protect public health, safety and morals. Id. at 660-61. In the early Twentieth Century the Court entered a more liberal era during which many state and federal laws affecting economic affairs were scrutinized and overturned on the basis of underlying unfairness. The most famous of these cases was Lochner v. New York, 198 U.S. 45 (1905). The Court in Lochner struck down a New York Law which limited the hours per week that bakers could work. Though New York asserted a health and safety rationale for the statute, the Court held that the law restricted the rights of employees and employers to contract freely with one another. Id. at 64. For a detailed analysis of this case and its progeny, see CONSTITUTIONAL LAW, supra note 32, at 436-43. See also L. Tribe, AMERICAN CONSTITUTIONAL LAW 421-53 (1978). This period, referred to as the "Lochner" era, continued until the late 1930's. In the case of United States v. Carolene Prod. Co., 304 U.S. 144 (1938), the Court expressed disenchantment with the results of its broad use of the due process clause and adopted a more deferential test much like the Court's early public health, safety and morals standard. Id. at 154. Justice Stone, writing for the majority, held that "[i]nquiries where the legislative judgment is drawn in question, [the Court] must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it." Id. See also CONSTITUTIONAL LAW, supra note 32, at 444 (citing R. McCloskey, THE AMERICAN SUPREME COURT 182-85 (1960)); L. Tribe, supra, at 450. See Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) (upholding Kansas statute prohibiting practice of debt adjusting). See also CONSTITUTIONAL LAW, supra note 32, at 418. Under the standard of review used in Carolene Products a law must be rationally related to a legitimate state interest. For a judicial pronouncement of the means-end test see Nebbia v. New York, 291 U.S. 502, 536-37 (1934). Once the means-end test is satisfied, a court will not attempt to second guess legislative or executive wisdom. Ferguson, 372 U.S. at 731.


these rights is abridged, the Government must show that the relevant law is "substantially related" to a "compelling" state objective. 105

The Supreme Court recently addressed the constitutional fairness of a federal statute that limits tort recoveries in much the same manner as article 22 of the Warsaw Convention. 106 Duke Power Co. v. Carolina Envtl. Study Group, Inc. 107 involved an economic regulation similar in purpose to the limitation provisions of the treaty. In order to encourage capital investment in the nuclear power industry, Congress passed the Price-Anderson Act, a statute that limits liability resulting from a single nuclear accident to $560 million. 108 The plaintiffs resided near several proposed nuclear power plants. 109 They argued that the limitation on liability under the Act violated their due process rights. 110 The Supreme Court employed the traditional low-level standard of review, rejecting the plaintiffs' argument that a higher level of scrutiny is war-

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105 See infra note 143.
106 See infra text accompanying notes 107-113.
108 Price-Anderson Act, 71 Stat. 476, 42 U.S.C. § 1120 (1976). The Supreme Court also noted that the Act was passed to protect the public as well. 438 U.S. at 64 (citing 42 U.S.C. § 1120(j) (1976)).
110 438 U.S. at 83. The plaintiffs urged the Court to use a stricter standard of review because the Price-Anderson Act "jeopardized" interests that were "far more important than those in the economic due process and business-oriented cases." Id.
ranted in cases where a commercial law restricts the rights of injured citizens to receive full compensation. The Court weighed the potential burden on victims of a nuclear mishap against the important national interest in the development of nuclear energy. On this basis, the Court held that the Price-Anderson Act was a rational congressional exercise of the commerce power.

The situation in Duke closely paralleled that of the airline industry in the 1930s and 1940s. The Court in Duke pointed out that liability coverage for nuclear accidents was not available in amounts above the liability ceiling imposed by the Price-Anderson Act. The opinion stressed Congress' legitimate interest in making the United States less dependent on foreign crude oil through economic stimulation of a young and inexperienced nuclear power industry. The President and the Senate were likewise seeking to encourage a developing airline industry when they endorsed and ratified the liability limitations of the Warsaw Convention. Today, however, the facts relied on by the Supreme Court in Duke do not exist in regard to article 22 of the Convention.

The standard of review for a law regulating commerce is essentially the same under the due process clause as it is under the equal protection clause; a law must be a reasonable means of achieving a legitimate government goal. The test of legitimacy focuses upon the reason for the governmental restriction.

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111 Id. at 83-84.
112 Id. at 84. The Court held that the $560 million ceiling on recoveries was carefully arrived at by Congress in light of the uncertainty of damages that a nuclear disaster would cause, the unlikelihood that such an accident would occur, and the probability that Congress would enact emergency laws to supplement recoveries if necessary. Id. at 85-93.
113 Id. at 82.
114 See supra notes 4-7 and accompanying text.
115 438 U.S. at 84-85.
116 Id. at 83.
117 See supra notes 3-6 and accompanying text.
118 See supra notes 4-13 and accompanying text.
When the treaty was adopted in 1934, the President and the Senate were clearly acting for the benefit of a young and fragile industry subject to substantial risks. The embryonic technology and lack of experience in the design and operation of aircraft created safety and financial risks peculiar to the airline industry. The hazards of international air travel, however, were offset by the benefits to be derived from a fast and relatively inexpensive mode of transportation. Congress and the President knew that a strong network of international air routes would strengthen the United States both economically and politically. Thus, at the time of its ratification, the liability limitations under the Convention served a legitimate government interest.

Gradually, over the past fifty years, the economic status of the airline industry has improved. The need for governmental protection, initially of critical importance, is no longer as great. Arguably, however, the financial struggles troubling many United States based carriers today as a result of deregulation demonstrate a continuing need for special treatment of the airline industry. In either event, the most significant development in the airline industry is the willingness of insurance companies to insure flights at a nominal cost to carriers. The question that next arises is whether a previously legitimate treaty provision should continue to be upheld once its special protections are no longer needed.

The Supreme Court has held that in considering the effects of a law, whether harmful or beneficial, courts should consider current and actual circumstances rather than those that existed during another era. If the opposite were true, once

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121 See supra note 3.
123 Id.
124 See supra notes 3-6.
125 See supra notes 7-10.
126 Id.
127 See supra note 10.
128 Chastleton Corp. v. Sinclair, 264 U.S. 543, 547 (1924). The Court, in reviewing a rent control regulation enacted in the District of Columbia, held that "[a] law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when
a statute or regulation were found to be constitutional, no subsequent attempts could be made by a court to nullify latent, harmful effects. The courts in *Bali* and *Burdell* were not troubled by the undisputed fact that at one time article 22 of the treaty served a legitimate state function. Yet, economic policy may not be the only reason for continued United States adherence to the Warsaw liability limitations. A persuasive argument can be made that the Convention continues to serve a vital and useful function in United States foreign relations.

The Warsaw Convention is one of the most widely accepted international agreements in the world today. Over the years it has fostered commercial relations between the United States and many different countries. It would be difficult to say that United States foreign policy has not benefitted, at least indirectly, from the Convention. The policy of a particular nation cannot be defined by a finite set of guidelines and principles. In the overall scheme of United States foreign relations, the Warsaw limitations could, perhaps, represent a concession made by the Government in return for cooperation in other areas of commercial activity on the part of other member nations. Additionally, some commentators argue that neither the President nor Congress should repeal any portion of a longstanding international agreement because such an act would damage the credibility of the United States abroad.

Political interests could also be affected by judicial abrogation of article 22 of the treaty. United States foreign policy passed.  

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129 *Id.*

130 See *infra* text accompanying notes 167-173.

131 Id. at 1307-08; 10 Av. Cas. (CCH) at 18,157-58.

132 *Id.* at 1310. The United States has argued that in its negotiations concerning international air travel, concessions such as limitation of liability are necessary to foster cooperation by foreign countries. *Id.*
consists of a web of military, humanitarian and commercial interests, all of which are closely intertwined. For this reason, the courts may be ill-equipped to weigh the rights of United States citizens to full compensation against the global interests of this nation. In the past, the courts have chosen not to address political issues of this nature.

The President has not vigorously asserted any national concern for upholding the current liability limits under the Convention, although continued adherence to the treaty as a whole has been advocated by the State Department. The Senate, however, has expressed its unwillingness to adopt any form of liability limitation under the Convention. This apparent impasse between the executive and legislative branches over the proper solution to the problem of inadequate recoveries under the treaty could signal a need for judicial intervention on a constitutional basis.

B. Equal Protection

There are really two distinct equal protection clauses. The first is found in the fourteenth amendment, and it applies to state and local government. The second clause is implied from the due process clause of the fifth amendment and it applies to the federal government. The major difference between due process and equal protection review is that under the latter there must also exist distinct classifications of

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136 C. Fenwick, Foreign Policy and International Law 102 (1968).
137 See supra notes 46-50 and accompanying text.
138 An interesting justification for the executive branch's failure to respond to the burdensome effect of the treaty on citizens is a fear that such a move might cause negative foreign policy reverberations. Compare the State Department's letter of intent to denounce the Warsaw Convention of 1965. Haskell, supra note 1, at 486-87. The denunciation was to have taken effect six months after its release. Subsequent collateral agreements increasing maximum recoveries against U.S. carriers satisfied concern over U.S. citizens' rights to full compensation and, accordingly, the denunciation was withdrawn. Id.
139 See supra note 15 and accompanying text.
140 The fourteenth amendment provides in part: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.
141 See supra note 97 for the pertinent language of the fifth amendment.
two or more groups of individuals. The standard of review under the equal protection clause, however, tracks the same rational means-legitimate end analysis employed today by the courts under the due process clause where laws affecting commercial and social welfare are involved.

As stated by the courts in Bali, Burdell and Duke, an economic restriction of due process and equal protection requires that a classification not be arbitrary. Assuming for the purposes of this discussion that the Warsaw Convention serves a legitimate government interest, the next step of review is to determine whether the method chosen to achieve the desired result is rational.

From an equal protection standpoint the Warsaw Convention creates at least two classifications: (1) domestic versus international air travelers and (2) international air carriers versus all other industries. The Warsaw Convention applies only to "international flights" as defined in article 1(2) of the Convention. Generally, an international flight is a flight or series of flights originating in one member country and terminating in another. If a passenger is required to link several connecting flights in order to arrive at a foreign destination, the treaty is applicable even if a crash occurs

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142 Constitutional Law, supra note 32, at 583-601.
143 A type of classification, the "suspect class," will trigger the highest degree of scrutiny. Id. at 592. A suspect classification is one based on race or alienage. See Loving v. Virginia, 388 U.S. 1 (1967) (antimiscegenation statute held to violate equal protection rights); see also Graham v. Richardson, 403 U.S. 365 (1971) (state welfare benefits could not be conditioned on citizenship or residency requirements). Strict scrutiny ignores normal policies of judicial deference and instead requires the state to show that the classification is "substantially related" to a "compelling" state objective. See Constitutional Law, supra note 32, at 722-31. During the 1970's several Supreme Court decisions modified the language of the strict scrutiny standard. See id. Many scholars and commentators have interpreted these opinions to mean that an "intermediate" level of scrutiny will be used where "important" yet non-fundamental rights are infringed through classifications of citizens. For examples of intermediary scrutiny, see Parham v. Hughes, 441 U.S. 347 (1979) (classification based on illegitimacy); Craig v. Boren, 429 U.S. 190 (1976) (gender-based classification).
144 Bali, 684 F.2d at 1309; Burdell, 10 Av. Cas. (CCH) at 18,161; Duke Power, 438 U.S. at 83.
145 See Kennelly, supra note 64, at 458.
146 Warsaw Convention, supra note 1, art. 1(2).
147 Id.
during a domestic leg of the journey.\textsuperscript{148} In theory, the definition makes sense and in fact the courts have not criticized the foreign/domestic distinction. In reality, the definition can lead to seemingly bizarre results.\textsuperscript{149} As an example, take a flight from Boston to New York carrying two passengers; one whose final destination is New York and another who must change planes in New York to arrive at his destination in Paris. If the plane crashes and both are killed, the family of the New York resident will be entitled to full recovery while the family of the passenger booked on a subsequent flight to Paris will be limited in their recovery by article 22 of the Warsaw Convention. This result becomes harsher when domestic flights between the mainland United States and Hawaii or Alaska are considered in that these routes are as lengthy as most international routes.\textsuperscript{150} Still, the distinction cannot easily be labeled as unreasonable by design even though specific results may often seem irrational. Critics of the definition of international flights have not proposed any alternative method for determining what flights should be subject to the Convention.

The more difficult task is justifying the special economic treatment of international air carriers apart from all other industries.\textsuperscript{151} This analysis overlaps with the first prong of low level scrutiny — the existence of a legitimate state end.\textsuperscript{152} The original purpose of article 22 of the Warsaw Convention is no longer a persuasive argument. The court in \textit{Burdell} viewed the unnecessary protection of a financially solid industry as arbitrary and irrational.\textsuperscript{153} The fact that one industry is preferred over others by a law still does not, in and of itself, support a finding of unconstitutionality,\textsuperscript{154} but governmental preference of one industry over all others simply to further inarticulated foreign policy objectives hardly suggests

\begin{itemize}
  \item \textsuperscript{148} Id. See also S. SPEISER & C. KRAUSE, supra note 10, at § 11.8.
  \item \textsuperscript{149} Kennelly, supra note 64, at 458.
  \item \textsuperscript{150} Id.
  \item \textsuperscript{151} See \textit{Burdell}, 10 Av. Cas. (CCH) at 18,160-61.
  \item \textsuperscript{152} See supra note 119 and accompanying text.
  \item \textsuperscript{153} \textit{Burdell}, 10 Av. Cas. (CCH) at 18,160.
  \item \textsuperscript{154} See Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955).
\end{itemize}
a rational exercise of executive or legislative power. Still, it must not be forgotten that in reviewing the treaty a court would simply be looking for a conceivable rationale for the classification.

In *Duke*, the Supreme Court easily found that a statutory liability limitation for nuclear power companies was reasonable because of prohibitive financial risks that would have otherwise prevented development of nuclear power plants. In *Burdell*, the court was unable to find any reason for extending preferential treatment to a self-sufficient airline industry.

The rationality of the two classifications discussed previously under the second step in the equal protection analysis, the means-legitimate end relationship, is also questionable. If the only legitimate reason for limiting the recoveries of citizens harmed by negligent airline practices is founded in broad foreign policy objectives, it becomes difficult to understand why United States citizens who wish to travel abroad by air should be singled out to shoulder the burden of such a policy. There is a growing trend among the courts of this country towards full recovery for death and injury caused by negligent and strictly liable defendants. The liability limitations of the Warsaw Convention directly contravene this trend.

From an opposite perspective, the treaty also places a dis-

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155 This view was suggested by the court in *Burdell*, 10 Av. Cas. (CCH) 18,151, 18,160-61.
156 *See supra* note 143.
158 *Burdell*, 10 Av. Cas. (CCH) at 18,160.
159 *For a discussion and analysis of low-level scrutiny in the context of substantive due process, see supra* notes 96-139 and accompanying text.
161 *See Loggans, supra* note 11, at 541-42. *See also* *Bali*, 684 F.2d at 1310. The Ninth Circuit outlined several arguments against the treaty’s constitutionality and then based its holding on statutory grounds, i.e., the jurisdiction of the Claims Court. *Id.* In *Franklin Mint Corp. v. Trans World Airlines*, 690 F.2d 303 (2d Cir. 1982), *rev’d*, 104 S. Ct. 1776 (1984), the Second Circuit approached the liability limitation problem indirectly, holding that Congress had not specified the appropriate conversion formula for courts to use in translating “poincare” francs into dollars. 690 F.2d at 311.
proportionate amount of air disaster liability on aircraft manufacturers, aircraft component part manufacturers, and the United States Treasury.\footnote{162} One supporter of the Burdell dictum has pointed out that in virtually all aviation crash litigation the aircraft's manufacturer is named as a co-defendant with the carrier.\footnote{163} In some cases the United States is joined as co-defendant as well because of its role as the regulator of air safety.\footnote{164} The biased treatment of air carriers under the Warsaw Convention greatly burdens co-defendants in cases where a manufacturer is found to be strictly liable and an airline is found to have been negligent.\footnote{165} Though both parties are theoretically responsible for the accident, the manufacturer is forced to absorb most of the damages assessed.\footnote{166} Actions for contribution and indemnity are not available against airlines by virtue of the treaty.\footnote{167} There being no evidence today that air carriers are any less able to bear responsibility for their acts of wrongdoing than are manufacturers, the reasonableness of this effect is subject to question. It has also been pointed out that in cases where both the government and the carrier are adjudged liable, the Treasury is then forced to open its coffers to satisfy the vast portion of the damages awarded.\footnote{168} Again, contribution is not available against the carrier.\footnote{169}

The standard of judicial review applicable to the Warsaw Convention under the due process and equal protection clauses is very deferential, but nevertheless there are few, if

\footnote{162}{See Burdell, 10 Av. Cas. (CCH) at 18,160. See also Kennelly, supra note 64, at 457-58.}
\footnote{163}{Kennelly, supra note 64, at 457-58.}
\footnote{164}{See, e.g., Lloyd v. Cessna Aircraft Co., 429 F. Supp. 181 (E.D. Tenn. 1977) (plaintiff sued manufacturer; manufacturer filed third-party complaint against United States).}
\footnote{165}{Kennelly, supra note 64, at 457-58.}
\footnote{166}{Id. at 457.}
\footnote{167}{If this were not so, then a strictly liable manufacturer could sue a negligent airline for contribution and recover an amount in excess of the liability limitations under the Warsaw Convention.}
\footnote{168}{Kennelly, supra note 64, at 459.}
\footnote{169}{Kent v. Dulles, 347 U.S. 116, 125 (1958). If a taking is found, the government will be bearing the brunt of any damages. See supra notes 73-91 and accompanying text.}
any, pronounced reasons for upholding the treaty. Regardless, to increase the likelihood of a successful challenge it may be necessary for a plaintiff to invoke a higher level of judicial scrutiny.\textsuperscript{170} The plaintiffs in \textit{Bali} were aware of this need. In order to ignite more intense review by the court, the plaintiffs alleged the infringement of a fundamental right — the right to travel.\textsuperscript{171}

V. \textbf{DOES THE CONVENTION ABRIDGE THE CONSTITUTIONAL RIGHT TO TRAVEL?}

Unlike the individual liberties of speech, religion, press and assembly, the right to travel is not expressly mentioned in the United States Constitution.\textsuperscript{172} Yet free movement is universally recognized as one of the cornerstones of the American political system.\textsuperscript{173} Consequently, the courts were quick to recognize a fundamental right to travel freely from state to state and within each state.\textsuperscript{174} Whenever an exercise of police power restricts the rights of persons to travel domestically, the courts will usually employ a high level of scrutiny to determine if an important governmental purpose is served by the restriction.\textsuperscript{175} Additionally, the restriction imposed must be the narrowest means of achieving the purpose of the law.\textsuperscript{176}

The Supreme Court, however, has chosen to distinguish domestic travel from international travel.\textsuperscript{177} Interstate and

\begin{flushleft}
\textsuperscript{170} See supra note 143. \\
\textsuperscript{171} \textit{Bali}, 684 F.2d at 1309. \\
\textsuperscript{172} Comment, \textit{Constitutional Protection of Foreign Travel}, 81 COLUM. L. REV. 902, 913 (1981). \\
\textsuperscript{173} Grossman, \textit{The Right to Travel Takes a Wrong Turn}, 11 HUMAN RTS. 34, 35 (Winter, No. 1 1983). \\
\textsuperscript{174} The first Supreme Court decision to imply a constitutional right to travel was \textit{Crandell v. Nevada}, 73 U.S. (6 Wall.) 35 (1868) (travelers tax held too burdensome on right to travel). \\
\textsuperscript{175} \textit{CONSTITUTIONAL LAW, supra} note 32, at 806-16. The premier case on domestic travel is \textit{Shapiro v. Thompson}, 394 U.S. 618 (1969) (Court invalidated a residency requirement for welfare benefits). \\
\textsuperscript{176} \textit{Shapiro}, 394 U.S. at 634. \\
\textsuperscript{177} See infra notes 182-214 and accompanying text. As will be discussed later, the right to travel abroad must be carefully weighed against the broad powers of Congress and the President in international relations. \textit{CONSTITUTIONAL LAW, supra} note 32, at 802.
\end{flushleft}
intrastate travel rights are rooted in the first amendment as indistinguishable from the rights of free speech and association. On the other hand, the Court has been unwilling to recognize the right to travel abroad as a first amendment guarantee where the right conflicts with United States foreign policy or national security. Instead, international travel has been protected under the fifth and fourteenth amendments. Judicial review of international travel restrictions has, for the most part, focused on passport restrictions imposed by either Congress or the President. Four Supreme Court decisions establish the constitutional parameters in this area.

The first Supreme Court decision to address foreign travel was *Kent v. Dulles*. The case involved two American citizens who were members of the Communist Party. When the pair attempted to obtain passports in order to attend a conference in Europe, their requests were denied by the Secretary of State because they were active Communists. Under the existing federal regulations, Communists were required to submit affidavits stating their ideology before a valid passport could be issued. One of the pair, Kent, refused to file such an affidavit. The Supreme Court overruled the Secretary of State, holding that he had exceeded his power to deny passports under the powers delegated to him by Congress. The holding avoided a constitutional analysis, although the Court stated in dicta that freedom in foreign travel is a protected liberty under the fifth amendment.

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179 *See infra* text accompanying notes 193-213.
181 *See infra* text accompanying notes 182-214.
183 *Id.* at 117-18.
184 *Id.*
185 *Id.* at 118 & n.2.
186 *Id.* at 119.
187 *Id.* at 129. The Court refused to infer a delegation of Congressional authority to the President allowing the State Department to promulgate the passport regulations involved. *Id.*
188 *Id.* at 125.
Language in the opinion also hinted at a first amendment connection in certain unspecified instances.\textsuperscript{189}

In \textit{Aptheker v. Secretary of State}\textsuperscript{190} the Supreme Court struck down a federal statute that expressly denied passports to citizens belonging to Communist organizations.\textsuperscript{191} The Court based its holding on the overbreadth of the statute.\textsuperscript{192} The national security rationale asserted by Congress was not sufficient to warrant an across-the-board ban on foreign travel.\textsuperscript{193} The holding established that a travel restriction may constitute an abridgement of free speech and association rights.\textsuperscript{194} When first amendment rights are involved, a regulation will be upheld only if a less burdensome solution does not exist.\textsuperscript{195}

The Supreme Court was confronted with the same issue the following year in \textit{Zemel v. Rusk}.\textsuperscript{196} \textit{Zemel} arose from a denial by the Secretary of State of a passport application.\textsuperscript{197} Zemel was attempting to travel to Cuba during the Cuban missile crisis.\textsuperscript{198} Recognizing the danger to citizens traveling to Cuba during the crisis and the need to protect national security, the Court upheld the State Department's right to restrict travel in certain areas of the world.\textsuperscript{199} The Court held

\begin{itemize}
\item \textit{Id.} at 127. The Court stated: "Freedom to travel is, indeed, an important aspect of the citizen's 'liberty.' We need not decide the extent to which it can be curtailed. We are first concerned with the extent, if any, to which Congress has authorized its curtailment." \textit{Id.}
\item 378 U.S. 500 (1964).
\item \textit{Id.} at 514.
\item \textit{Id.} at 508-14. The Court utilized a due process/equal protection test of review. There was no dispute that the purposes of the Subversive Activities Control Act of 1950 were legitimate. However, the broad method of achieving the Act's goals was the basis for overturning the Act. \textit{Id.}
\item \textit{Id.}
\item \textit{Id.} at 511-12 & n.10. Since the ban on travel abroad imposed on the plaintiff stifled his right to communicate with persons overseas, the Court used traditional first amendment overbreadth analysis. \textit{Id.} Moreover, had he denounced his membership in the Communist Party, he would have been issued a passport. This also amounted to a violation of his associational rights under the first amendment. \textit{Id.}
\item \textit{Id.} at 512-13 & n.11.
\item 381 U.S. 1 (1965).
\item \textit{Id.} at 3. All U.S. citizens were denied passports to Cuba unless otherwise permitted by the Secretary of State. \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item The Supreme Court refused to hold that the area restriction against travel to Cuba was tantamount to an abridgement of the plaintiff's speech and association rights. \textit{Id.} at 16. On this basis the Court distinguished \textit{Kent} and \textit{Aptheker}. \textit{Id.} Addi-
that international travel bans do not always restrict first amendment rights, particularly when national security or foreign policy is the basis for the ban.\textsuperscript{200}

In a more recent case decided in 1981, \textit{Haig v. Agee},\textsuperscript{201} the Supreme Court again addressed the issue of international travel restrictions. Phillip Agee, an ex-CIA agent, became disillusioned with CIA policies.\textsuperscript{202} In an attempt to undermine clandestine activities, he traveled to several countries to expose CIA operatives.\textsuperscript{203} Shortly before he was to leave the United States on one such journey, the State Department revoked his passport.\textsuperscript{204} Agee challenged the regulation under which the Secretary acted claiming it was overbroad under the fifth amendment.\textsuperscript{205} He also likened the passport revocation to a denial of free speech under the first amendment.\textsuperscript{206} The Supreme Court held that important governmental interests were served by the revocation because of the sensitive and secret nature of statements being made by Agee.\textsuperscript{207} The Court concluded that in order to prevent harm to United States intelligence gathering operations and to protect intelligence personnel overseas the Government’s only option was to revoke Agee’s passport.\textsuperscript{208} On this basis the Secretary’s action was upheld.\textsuperscript{209} \textit{Aptheker} was distinguished by pointing

\textsuperscript{200} The decision indicates that the Court will exercise utmost restraint where national security or foreign policy is involved. \textit{Id.} at 10-12.

\textsuperscript{201} 453 U.S. 280 (1981).

\textsuperscript{202} \textit{Id.} at 283.

\textsuperscript{203} \textit{Id.} at 284.

\textsuperscript{204} \textit{Id.} at 286.

\textsuperscript{205} \textit{Id.} at 287.

\textsuperscript{206} \textit{Id.}

\textsuperscript{207} \textit{Id.} at 306. Revocation of passports in the interest of national security and foreign policy was held to be a reasonable, and thus constitutional regulation. \textit{Id.} See also Note, \textit{Constitutional Law}, 4 W. NEW ENG. L. REV. 449, 455 (1982).

\textsuperscript{208} 453 U.S. at 308.

\textsuperscript{209} \textit{Id.} The Court first concluded that the Passport Act did not give the Secretary of State the right to revoke passports. In order to find implied Congressional approval of the revocation the Court found it necessary to find an administrative practice sufficiently substantial and consistent to warrant a finding that Congress impliedly consented to the revocation. \textit{Id.} at 306. This stringent standard of review did not arise out of any infringement of Agee’s first amendment rights. \textit{Id.} at 308.
out that Agee’s action posed real danger to national security as well as to citizens abroad and thus, was not merely a disagreement over political philosophy. The Court, however, did not use a first amendment level of scrutiny to reach its decision even though the passport regulation was held to serve an important governmental purpose.

These cases suggest that the right to travel overseas is not as greatly protected by the Constitution as the right to travel domestically. It appears that courts mainly will look to see if a foreign travel restriction is supported by a reasonable state interest. This interest may include the welfare of the traveler himself, other citizens or national security. On the other hand, a foreign travel restriction may be struck down if it is so burdensome or arbitrary that it directly restricts the exercise of first amendment rights.

In Kent, Aptheker, Zemel and Agee the restriction on international travel was direct, i.e., the parties were not allowed to leave the United States. In Bab, the plaintiffs argued that the Warsaw limitations indirectly burdened the crash victims’ travel rights. The treaty does not prohibit international travel, but if a citizen chooses to travel abroad his right to do so is burdened since he or his survivors may not be able to receive full compensation in the event of an accident. Though the potential burden is great, the right to travel overseas is not directly restricted. Moreover, the liability limitations of the Convention imposes an economic burden on the property rights of citizen travelers. For this reason, low level due process and equal protection scrutiny is arguably appropriate because a distinct first amendment liberty is not directly infringed.

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210 Id. at 305.
211 Id. at 307.
212 Id. at 306-07.
213 See supra notes 182-211 and accompanying text.
214 See supra notes 180-195 and accompanying text.
215 684 F.2d at 1310.
216 Only where the economic burden is so arbitrary that it directly abridges first amendment rights of speech and association will the courts utilize a strict scrutiny/overbreadth standard. See supra notes 190-195 and accompanying text.
217 Since first amendment rights are not at stake, the treaty is subject to review
The dicta in *Bali* equated the right to travel outside the United States with the fundamental right to travel freely domestically.218 The court cited *Aptheker* in support of this view.219 The *Aptheker* opinion, however, does not expressly treat these distinct rights synonymously.220 The *Bali* court also pointed out that a travel restriction must be "carefully tailored to serve a substantial and legitimate government interest," based again on the holding in *Aptheker*.221 Yet in *Aptheker*, the Secretary of State had imposed a regulation that prohibited the issuance of passports to members of the Communist Party.222 The Supreme Court considered this restriction to be a direct violation of the first amendment right of free association.223 Based on this finding, the *Aptheker* Court proceeded to use a high level of scrutiny to review the delegated rulemaking authority.224 The facts in *Bali*,225 however, do not give rise to a similar challenge predicated on an infringement of first amendment rights because citizens traveling abroad by air are not restricted in their speech or in their association with others.226

In the absence of a recognized fundamental right, there is little precedential basis for a higher degree of scrutiny in cases such as *Bali*. Only a travel right protected under the fifth and fourteenth amendments remains.227 As discussed previously, the courts will employ a low level standard of review where fundamental rights or suspect classes are not adversely

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218 684 F.2d at 1309. The court stated that "[i]nternational travel, like interstate travel, is a fundamental right." *Id.* (citations omitted).
219 *Id.*
220 *See Aptheker*, 378 U.S. 500, discussed supra in text accompanying notes 190-195.
221 684 F.2d at 1309.
222 378 U.S. at 501-02.
223 *See supra* notes 192-195 and accompanying text.
225 684 F.2d at 1304-06.
226 *Compare Aptheker with Agee*, discussed supra in notes 190-197, 201-211 and accompanying text.
227 *See supra* text accompanying note 180.
Arguably, there is no reason for the domestic/international distinction in cases involving travel restrictions. In *Kent* the court stated: "Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values." In *Zemel* and *Agee* the Government justified its actions with legitimate concern over the safety of citizens abroad and national security. In *Agee* the Supreme Court recognized that the Government's only effective solution to the risk posed by Agee was the revocation of his passport. While it is not clear that the evidence presented by the Government in these two cases would have overcome first amendment scrutiny, it is clearly a possibility. The *Bali* dicta may represent a judicial willingness to view international travel on the same constitutional plane as domestic travel.

A. Standing Problems that Arise in Challenges Based on the Constitutional Right to Travel

Most cases involving the Warsaw Convention are wrongful death suits brought by families of victims which may create a conceptual problem with a party's assertion of a deceased family member's constitutional rights. The problem stems from the fact that foreign travel is not generally protected under the first amendment. In cases involving constitutional issues other than those associated with the first amendment, a party generally does not have standing to adjudicate

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228 See supra text accompanying notes 102-105, and note 143.
229 The Court's opinion in *Agee* strongly suggests that the same result could have been reached if strict scrutiny had been used. 684 F.2d at 1310. Arguably, treatment of international travel as equivalent to interstate travel would not affect cases such as *Agee* where important national security interests are threatened. See supra note 207.
230 357 U.S. at 126.
231 See supra notes 215-229 and accompanying text.
232 453 U.S. at 308.
233 684 F.2d at 1309. It does not appear that the court was pronouncing any new doctrine since the statement was merely dicta.
234 See supra notes 177-180 and accompanying text.
the constitutional rights of a third person.\textsuperscript{235} In \textit{Bali}, standing was not an issue with regard to the due process and equal protection arguments raised. The plaintiffs each had a personal stake in the outcome of the case, i.e., whether or not the Warsaw Convention would limit their recoveries.\textsuperscript{236} The issue of standing in cases such as \textit{Bali} arises solely in the context of the right to travel argument. The claimants in \textit{Bali} asserted, as third parties, the travel rights of the crash victims.\textsuperscript{237}

The Ninth Circuit in \textit{Bali} recognized this standing problem, but failed to provide a definite solution.\textsuperscript{238} The court did suggest that the right-to-travel challenge to the Warsaw limitation by a victim's family "may be one of the cases in which constitutional rights can be successfully protected only if interested third parties are permitted to raise them."\textsuperscript{239} Additionally, the court noted that unless families are permitted to assert the travel rights of their deceased relatives, the question of whether international air travelers are unduly burdened by the Warsaw limitations will continue to elude judicial review.\textsuperscript{240}

In \textit{Griswold v. Connecticut},\textsuperscript{241} the Supreme Court addressed a case in which third parties attempted to assert another person's fundamental rights. \textit{Griswold} arose out of a Connecticut statute that prohibited the use of contraceptives. Griswold, a birth control clinic official, was prosecuted for aiding in and abetting the use of contraceptives.\textsuperscript{242} He asserted the privacy rights of married couples as a defense.\textsuperscript{243} The Supreme Court

\textsuperscript{235} The rule against third-party standing stems from prudential concerns: the desire to avoid constitutional issues and to insure that when such an issue is before a court, it will be most effectively advocated. \textit{Constitutional Law, supra} note 32, at 87-88 & n.1. An exception to the third-party standing rule exists where a regulation, overbroad in its effect, threatens to limit first amendment liberties. \textit{NAACP v. Button}, 371 U.S. 415 (1963). \textit{See also Constitutional Law, supra} note 32, at 868.

\textsuperscript{236} \textit{See, e.g.}, 684 F.2d at 1310.

\textsuperscript{237} \textit{Id.}

\textsuperscript{238} \textit{Id. at} 1310.

\textsuperscript{239} \textit{Id.}

\textsuperscript{240} \textit{Id.}

\textsuperscript{241} 381 U.S. 479 (1965).

\textsuperscript{242} \textit{Id. at} 481.

\textsuperscript{243} \textit{Id.}
held that Griswold had standing to assert the rights of married couples because "[t]he rights of husband and wife . . . are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them." Moreover, the Court found it critical to their grant of standing that Griswold would be injured if he could not assert the rights of married couples.

A claimant in a wrongful death action must, by definition, have a close relationship with the deceased party. In essence, the plaintiff is legally stepping into the shoes of the person who has been killed. There is also injury in fact to the plaintiff in that the outcome of the claim will directly affect the plaintiff's right to full recovery. Plaintiffs in aviation crash litigation have a strong incentive to fully develop and litigate their claims since they are the beneficiaries of any damages awarded. As pointed out in Bâle, the only practical way to protect the constitutional rights of international travelers against possible infringement is to permit third-party standing. Otherwise, a potentially burdensome restriction of liberty will persist.

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244 Id. at 481. The Court thus focused on the nature of the relationship between the parties and found that the rights of all would be detrimentally affected if the third party had no standing to assess the married couples' rights. Id. at 481-86.

245 Id.

246 For example, Texas' wrongful death statute provides that: "Actions for damage arising from death shall be for the sole and exclusive benefit of and may be brought by the surviving husband, wife, children, and parents of the person whose death has been caused or by either of them for the benefit of all . . . ." TEX. REV. CIV. STAT. ANN. art. 4675 (Vernon 1952).

247 Id. Wrongful death statutes put specified survivors in privity with their deceased relatives for purposes of prosecuting all causes of action held by the decedent at his death.

248 The fundamental considerations in any standing issue are (1) whether the plaintiff has suffered "distinct and palpable" injury, and (2) whether there is a "traceable" causal link between the injury suffered and the party sued. CONSTITUTIONAL LAW, supra note 32, at 81.

249 See supra note 246.

250 This was the argument presented by the defendant in Griswold v. Connecticut, 381 U.S. 479, 481 (1965), discussed supra in notes 241-245 and accompanying text.

251 An international air traveler would not likely allege that the Warsaw Convention restricted his right to travel if he were not the victim of an air accident. On the other hand, if survivors of air crash victims are not allowed to assert the rights of their de-
Courts have endorsed third-party standing in cases where the nexus between the party asserting a right and the holder of the right was less direct than in a wrongful death suit. In *Griswold* an official was allowed to assert the rights of married couples. Other cases have allowed members of organizations to assert the constitutional rights of fellow members. Federal and state governments have successfully asserted the rights of citizens in certain cases. 

The test for third-party standing is not rigid. The courts will consider the connection between the party asserting the right and the holder of the right. If the relationship is substantial enough that the right will be adequately protected, and if failure to grant standing will likely preclude judicial review of a constitutional issue, a court will probably proceed to the merits of the challenge. If a court should decide to address the constitutionality of article 22 of the Warsaw Convention in a wrongful death action, there is an adequate basis to allow third parties to allege violations of their deceased relatives' travel rights.

VI. CONCLUSION

Air carriers in the United States are no longer in need of special liability limitation protection. The airline industry today boasts an impressive safety record. Liability insurance is now available at a nominal cost. Thus, the stated purpose ceased kin, the constitutional issue surrounding the treaty will continue to evade judicial review in the same way that abortion cases evaded scrutiny until Roe v. Wade, 410 U.S. 113 (1973).

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251 381 U.S. at 481.

252 See, e.g., *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977) (trade association allowed to challenge state law harmful to apple growers on behalf of its member growers); *Maryland v. Louisiana*, 451 U.S. 725 (1981) (Maryland granted standing to challenge Louisiana tax on natural gas on behalf of its citizens, who were consumers of such natural gas).

253 See *CONSTITUTIONAL LAW* supra note 32, at 90.

254 *Id.* The authors state “the Court should only forbid third party standing if it is persuaded that the party seeking standing will not be an adequate representative of the third parties whose interests he champions.” *Id.* (citing Rohr, * Fighting for the Rights of Others: The Troubled Law of Third Party Standing and Mootness in the Federal Courts*, 55 MIAMI L. REV. 393 (1981)).

255 See *supra* text accompanying notes 252-255.
for the United States’ adoption of the Warsaw Convention has been achieved. Moreover, plaintiffs whose recoveries are severely limited by the treaty do not receive anything meaningful in return because the presumption of airline fault created under the treaty has basically the same effect as the doctrine of res ipsa loquitur.257

From the defendants’ perspective, article 22 of the treaty is equally inequitable. Manufacturers are often exposed to most of the damages awarded in tort litigation since the right to contribution does not apply to air carriers beyond the liability limit of the treaty. The United States Treasury may also be required to satisfy a disproportionate amount of damages awarded in suits where both an airline and the United States are held liable for an international air disaster. Ultimately, someone must bear the cost of injuries and death sustained in air crashes. Arguably, air carriers should absorb this cost since their insurers are willing to insure the risk at modest rates.

Historically, treaties have been avoided as taboo by the judicial branch. Though the Constitution does not clearly delineate constitutional roles in international affairs, history and tradition have placed the vast portion of power over this realm of government in the executive branch. Congress as well has substantial authority over international policy since it must approve all treaties before they can become the “law of the land.”258 In addition, Congress has express constitutional power over international commerce. The Supreme Court has exercised restraint in cases involving treaties and foreign policy, but it has also firmly established its right to scrutinize treaties under the Constitution if it ever chooses to do so. Many argue that the time for constitutional review of the Warsaw Convention is ripe and that article 22 of the Convention cannot withstand judicial scrutiny.

If a court, state or federal, were to examine the liability limitations of the Convention under the Constitution it likely would apply a minimal level of scrutiny. Heightened scru-

257 See supra note 13 and accompanying text.
258 See supra text accompanying note 31.
tiny is probably not available since the liability limitations of the Convention do not directly infringe upon any first amendment or other judicially-recognized fundamental rights. This deferential type of review is susceptible to many arguments, any one of which would support continued adherence to article 22 of the treaty. It is widely agreed that the Warsaw Convention is a landmark international trade agreement and as such, it is intertwined with United States foreign policy. It is unlikely that the courts would upset a fragile balance of political policy if such a policy were vigorously pronounced by the President in support of the Warsaw Convention.

The political branches of the Government may choose to remain silent on whether the treaty should be upheld in the United States rather than risk criticism from the rest of the world for rejecting a critical provision of a long adhered-to international agreement. The Senate, however, has expressed its apparent disdain over the imposition of any form of liability limitation. The Montreal Protocol took over ten years to negotiate and draft. For this reason it is unlikely that a new Protocol with a higher recovery ceiling will arrive any time soon. Perhaps the Montreal Protocol will be resubmitted for Senate approval. If an unlimited supplemental recovery system rider were added to the Protocol’s recovery ceiling, such a package might gain ratification. At present, however, the President and Congress are at an impasse over the proper solution to the meager recoveries available under article 22 of the treaty.

When viewed in this light, the courts may be the only branch able to relieve the burden that article 22 of the treaty places on plaintiffs and co-defendants. Yet it is uncertain at best whether the limitations would collapse under the weight of low level judicial scrutiny. If heightened scrutiny were utilized by a court, it is doubtful that article 22 would be upheld. Thus, the type of judicial scrutiny used is the key to the treaty’s constitutionality. No available theory exists on which a court may employ heightened scrutiny in a due process or equal protection challenge to article 22. The most persuasive
argument supporting stringent review is that the treaty violates the fundamental right of citizens to travel. Though the freedom to travel abroad has not been as fiercely protected as the right to travel domestically, the rationale for the distinction is questionable. Perhaps the Ninth Circuit in Bali recognized the need to ignore the domestic/international distinction.259 Unfortunately these questions are likely to evade judicial consideration until another international air tragedy occurs.

259 See supra text accompanying note 218.