Equal protection, workers compensation and offset of benefits – Merrill v Utah Labor Commission and Satterlee v Lumberman's Mutual Casualty Company

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Introduction

One issue which has received considerable attention in terms of equal protection challenges in US courts is that concerning the offset of one type of social security benefits with another, with an occupational benefit, or the overlapping of various benefits with worker’s compensation payments. The Supreme Court in Richardson v Belcher upheld the reduction in social security disability insurance because of receipt of a state worker’s compensation payment as rationally based and free from invidious discrimination.1 The Court and various Federal courts of appeals have subsequently shown little interest in subjecting such offset provisions to more than a minimal level of scrutiny.2 State courts have also generally upheld provisions offsetting workers compensation and different forms of disability benefits;3 and rules offsetting unemployment and disability benefits or pensions.4 However, some State courts have continued to show considerable concern about attempts to offset old age and retirement benefits with worker’s compensation schemes and have, in a number of cases, struck down such provisions as unconstitutional under either the Federal or State constitutions (although a majority of courts in cases raising the issue have upheld such provisions).

The main cases are summarized in Table 1 [now updated to 2015].5 As can be seen, successful challenges have been to offset legislation in Arkansas (Golden), Colorado (Romero), Louisiana (Pierce and Wal-Mart), Montana (Reesor) and West Virginia (Beirne) (and to a limited extent in Kentucky (Brooks)).6

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1 Richardson v Belcher, 404 U.S. 78 (1971)
2 See, for example, Das v Department of Health and Human Services, 17 F.3d 1250 (9th. Circuit 1994) (windfall elimination provision which reduces social security benefits where a person is also entitled to a public sector pension not unconstitutional).
5 In North Dakota, a challenge to an offset between state disability benefits and retirement benefits was successful but on the basis that the claimant had a ‘significant reliance interest in, and expectation of’ continued benefits rather than on equal protection grounds: Gregory v North Dakota Workers Compensation Bureau, 1998 ND 94 (N.D. 1998). See also Ash v Traynor 1998 ND 112 (N.D. 1998) following Gregory.
6 Golden v Westark Community College, 333 Ark. 41, 969 S.W.2d 154. (Ark. 1998); Industrial Claims Appeals Office v Romero, 912 P.2d 62 (Colo. 1996); Pierce v Lafourche Parish Council, 762 So.2d 608 (La. 2000); Wal-
The recent decision of the Utah Supreme Court in *Merrill v Utah Labor Commission*\(^7\) is another case in which a successful challenge has been made to such a provision. In contrast, the Montana Supreme Court – distinguishing *Reesor* - upheld such an offset in *Satterlee*.\(^8\) The cases will be discussed and compared in this note.

**Merrill**

Mr. Merrill was injured in the course of his employment and the Utah Labor Commission decreed that he had become permanently and totally disabled and was unable to find other employment. The Commission ordered that Merrill receive workers’ compensation payments but it was subsequently intended that this be reduced as Utah law required that the award be offset by 50% of the social security retirement benefits which he would receive on reaching age 65 (after a additional transitional period of 6 years).

Subsection (5) of Utah Code section 34A-2-413 provides:

> Notwithstanding the minimum rate established in Subsection (2), the compensation payable by the employer, its insurance carrier, or the Employers’ Reinsurance Fund, after an employee has received compensation from the employer or the employer’s insurance carrier for any combination of disabilities amounting to 312 weeks of compensation at the applicable total disability compensation rate, shall be reduced, to the extent allowable by law, by the dollar amount of 50% of the Social Security retirement benefits received by the employee during the same period.

Mr. Merrill argued that this provision violated both the uniform operation of laws provision of article I, section 24 of the Utah Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

**The Court of Appeal**

The Court of Appeal ruled that as no fundamental right or suspect class was involved, the Court should apply a ‘deferential standard of review’ required only that (1) the classification...
at issue be reasonable, (2) the legislative objectives be legitimate, and (3) there be a reasonable relationship between the two.\(^9\)

Merrill argued that the law discriminated based on age as it distinguished between workers who did and did not receive retirement benefits (for which age was an essential qualifying condition). Perhaps surprisingly the court did not challenge this categorization of the legislative classification. However, it pointed out that there was ‘nothing inherently unreasonable in distinguishing between individuals based on age and that age distinctions have often been upheld as constitutional in other contexts’.\(^10\) It held that Merrill had not shown that the challenged classification was inherently unreasonable and turned to the legitimacy of the legislation’s objectives.

Here it ruled that a court will sustain legislative action if it could reasonably conceive of facts which would justify the classifications made by the legislation.\(^11\) It pointed out that in *Richardson v Belcher*\(^12\) the United States Supreme Court held that governmental efforts to avoid duplication of disability benefits constituted a legitimate legislative purpose. It also noted that a number of State courts had come to similar rejected similar challenges to that advanced by Merrill.\(^13\) On the basis of these decisions, the Court found that

the Utah Legislature may have legitimately concluded that the statute would assure employees adequate recovery for wages lost due to disability but also avoid duplication in benefits by reducing workers’ compensation awards once workers also begin receiving social security retirement payments. Additionally, the legislature may have intended to reduce the cost of workers’ compensation insurance premiums for employers.

Finally, the Court examined whether the legislature chose a reasonable means to achieve its objective. The Court held that it was

reasonable for the legislature to target sixty-five-year-old recipients of workers’ compensation disability benefits who also receive social security retirement benefits


\(^10\) Ibid at 12.


\(^12\) Richardson v Belcher 404 US 78.

because those individuals receive overlapping wage replacement awards for one lost wage ... 14

As benefits were funded (in whole or in part) by the employer, the Court concluded that the provision ‘sav[ed] money for the employer and maintain[ed] the integrity of Utah’s workers' compensation system’. 15 Accordingly it rejected the challenge under both constitutional provisions on the basis that the age discrimination involved was rationally related to legitimate legislative objectives.

The Utah Supreme Court

Mr. Merrill appealed to the Utah Supreme Court which approached the case from a somewhat different perspective. The Utah Constitution art I, § 24 provides that ‘All laws of a general nature shall have uniform operation’. The court pointed out that this provision and the equal protection clause of the US Constitution addressed similar concerns. However, it evaluated the constitutionality of the provision under Utah law as – on the basis of its own previous case law – such review was ‘at least as exacting and, in some circumstances, more rigorous than the standard applied under the [Fourteenth Amendment of the] federal constitution’. 16

Classification

Applying the three-part inquiry set out above by the court of appeal, the supreme court first examined whether the classification made in the legislation was reasonable. Under Utah law, this required the court to consider (1) if there is a greater burden on one class as opposed to another without a reason; (2) if the statute results in unfair discrimination; (3) if the statute creates a classification that is arbitrary or unreasonable; or (4) if the statute singles out similarly situated people or groups without justification 17. Here the court focused on the last of these issues.

The court took the view that the provision created creates two classifications, one implicitly based on age (because persons in receipt of retirement benefits were necessarily aged 65 or over) and a second based on the receipt of social security retirement benefits. It accepted that the US Supreme Court had held that age was not a suspect classification and that the

14 Merrill (CA) at 19. The Court has earlier referred to Larson’s view that workers compensation benefits and old age benefits were both essentially intended to replace wage loss: Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 157.01 (2007).

15 At 19.

16 Merrill (SC) at 7 citing Mountain Fuel Supply Co. v. Salt Lake City Corp., 752 P.2d 884, 889 (Utah 1988)

17 At 10.
Utah courts had taken a similar approach and ruled that it was reasonable to classify based on age.\(^{18}\)

However, the court held that it was ‘not reasonable for a state legislature to classify individuals based on the receipt of federal social security retirement benefits because this classification singles out certain people without a rational basis.’\(^{19}\) The court speculated that the legislature was attempting to take into account the additional income received by claimants of retirement benefit. However, it ruled that there was no rational basis to rely on income from this source alone.\(^{20}\)

**Legitimate objective**

The court rejected the ‘hypothetical’ approach of the court of appeal and recalled that under Utah law, the objectives of legislation must be judged ‘on the basis of reasonable or actual legislative purposes’.\(^{21}\) In addition to the two possible objectives identified by the court of appeal (preventing duplication and reducing costs for employers), the supreme court’s review of the legislative history found a third objective: the restoration of the solvency of the workers’ compensation fund. The supreme court found that preventing duplication of benefits and restoring solvency were legitimate objectives. However, it rejected the view that reducing the costs of the scheme for employers was a legitimate objective pointing out that the scheme already limited the liability of employers and that it would not be a legitimate objective to reduce employer liability further regardless of eligibility for workers compensation.

**Reasonable relationship**

Finally the court examined whether there was a reasonable relationship between the classification and the legislative objectives. Given that it had already found the classification to be unreasonable, unsurprisingly it found that there was not and here the court indicated the critical reason it differed from the court of appeal, i.e. its interpretation of the purpose of workers compensation benefits and retirement pension. Critically the supreme court held that

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\(^{18}\) At 8 citing Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313–14 (1976) and Purdie v. Univ. of Utah, 584 P.2d 831, 832 (Utah 1978). This approach has generally been applied by State courts although in *Pierce* the Louisiana supreme court applied a higher standard under the State constitution requiring the defendant to show that ‘the classification is not arbitrary, capricious, or unreasonable because it substantially furthers an appropriate governmental objective’: *Pierce v Lafourche Parish Council*, 762 So.2d 608 (La. 2000).

\(^{19}\) At 16.

\(^{20}\) At 16.

\(^{21}\) At 18 citing Blue Cross & Blue Shield, 779 P.2d 634, 637.
The purposes of workers’ compensation and social security retirement benefits are not the same, and neither can legitimately serve as a substitute for the other.\(^{22}\)

Therefore, the court held that offsetting workers’ compensation benefits against retirement benefits was not a rational means to prevent the duplication of benefits nor to achieve a solvent workers’ compensation fund.

The court held that the purpose of workers compensation was to provide an exclusive remedy for injuries and pointed out that in exchange for the right to such benefits workers forgo their normal right of access to the courts for compensation. It cited Arkansas and West Virginia decisions to the effect that such benefits were not (or not solely) a wage loss compensation.\(^{23}\) It also held that the purpose of retirement benefits was to serve as a pension for persons reaching retirement age and not as a wage replacement.

The court advanced five arguments as to why workers compensation and retirement benefits were neither duplicative nor wage loss benefits. First, the two benefits provided compensation for different eventualities.\(^{24}\) Second (although arguably this is the same point) retirement benefits are not paid on injury or disability but on the basis of contributions paid by the insured person.\(^{25}\) Third, the Senior Citizen’s Freedom to Work Act, 42 U.S.C. § 402 (2000) allows persons over sixty-five to receive social security benefits and continue to work, thus – the court argued – ‘invalidating the rationale that social security retirement benefits are a wage replacement’.\(^{26}\) Fourth, the Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(1) (2006) prohibits an employer from discriminating against any employee with respect to compensation on the grounds of age.\(^{27}\) Although not deciding that the benefits at issue in this case were covered by the ADEA, the court suggested – following *Romero* – that the public policy it set out supporting the argument that the Utah law was constitutionally arbitrary. Finally, the court agreed with the West Virginia supreme court that the denial of benefits based on an assumption that workers compensation benefits (reduced by the level of retirement benefits received) provide full compensation for work injury would raise an issue as to whether the workers compensation scheme provided an adequate substitute for that available under the tort system.\(^{28}\)

\(^{22}\) Ibid at 23.

\(^{23}\) Golden v. Westark Cmty. Coll., 969 S.W.2d 154, 158 (Ark. 1998); West Virginia v. Richardson, 482 S.E.2d 162, 166 (W. Va. 1996).

\(^{24}\) At 30 citing West Virginia v. Richardson, 482 S.E.2d 162, 168.

\(^{25}\) At 31.

\(^{26}\) At 32.

\(^{27}\) At 33 citing Industrial Claim Appeals Office v. Romero, 912 P.2d 62 (Colo. 1996).

\(^{28}\) At 34 citing West Virginia v. Richardson, 482 S.E.2d at 168.
court, therefore, concluded that the provision violated Utah’s ‘uniform operation of laws’ provision.

Satterlee

Three individuals, Catherine Satterlee, James Zenahlik and Joseph Foster all suffered work-related injuries, which resulted in permanent total disability (PTD). Because of the injuries, they began to receive PTD benefits. However, when they became eligible for social security retirement benefits, the PTD benefits terminated in accordance with Montana law which provides:

If a claimant is receiving disability or rehabilitation compensation benefits and the claimant receives social security retirement benefits or is eligible to receive or is receiving full social security retirement benefits or retirement benefits from a system that is an alternative to social security retirement, the claimant is considered to be retired. When the claimant is retired, the liability of the insurer is ended for payment of permanent partial disability benefits other than the impairment award, payment of permanent total disability benefits, and payment of rehabilitation compensation benefits. However, the insurer remains liable for temporary total disability benefits, any impairment award, and medical benefits.29

The Montana Supreme Court

The case followed a rather tortuous procedure which need not concern us here.30 The appellants challenged the offset rule under the equal protection and substantive due process clauses of the Montana constitution.

Article II, Section 4 of the Montana constitution provides that

[t]he dignity of the human being is inviolable. No person shall be denied the equal protection of the laws.

In addressing an equal protection challenge, the Montana courts follow a three-step process.31 First, the classes involved must be identified and the court must determine whether they are similarly situated.

29 Section 39-71-710, MCA.


Identifying the classes for comparison

The workers' compensation court (WCC) had adopted the Reesor court's classification, which identified the two classes in Reesor as (1) WC eligible claimants who receive or are eligible to receive social security retirement benefits; and (2) WC claimants who do not receive and are not eligible to receive social security retirement benefits. The parties did not dispute this approach to classification on appeal and the Supreme Court agreed with the WCC's approach.

The WCC followed Reesor in deciding that the two classes were similarly situated because both classes suffered work-related injuries, were unable to return to their time-of-injury jobs, had permanent physical impairment ratings, and had to rely on the workers compensation legislation as their exclusive remedy under Montana law. 32

The Montana State Fund argued that age was not the only differentiating factor because many claimants over age 65 continued to receive PTD benefits. However, the supreme court took the view that the fact that some individuals continued to receive PTD benefits after reaching age 65, did not mean that both classes were not similarly situated. Persons allowed to retain their benefits did so because they did not qualify for retirement benefits. Here, as in Reesor, both classes had suffered work-related injuries, were unable to return to their time-of-injury jobs, had permanent physical impairment ratings, and had to rely on workers’ compensation law as their exclusive remedy. Although the Montana workers compensation law did not specify a particular age, it was triggered by operation of social security regulations that did so. It applied only to claimants who were ‘retired,’ i.e. a claimant who receives social security retirement benefits or is eligible to receive or is receiving full social security retirement benefits or retirement benefits from a system that is an alternative to social security retirement . . . . 33

The court took the view that the claimant's age was the only identifiable differentiating factor between the two classes and agreed with the WCC's determination that the classes are similar.

Standard of review

The second step in analyzing an equal protection challenge under Montana law is to determine the appropriate level of scrutiny to apply to the challenged legislation. In order to do so, the court must determine whether a suspect classification is involved or whether the nature of the individual interest involves a fundamental right, either of which would trigger a strict scrutiny . However, the Montana supreme court had already ruled that the right to receive workers' compensation benefits was not a fundamental right which would trigger a

32 Satrelee 2005 MTWCC 55 at 11.
33 Section 39-71-710, MCA.
strict scrutiny analysis. Nor did it infringe upon the rights of a suspect class. Therefore, rational basis review would apply. The appellants argued that a middle-tier analysis should be developed given the combination of age discrimination and the total loss of workers' compensation benefits. The Montana courts apply middle-tier scrutiny when the legislation at issue infringes upon a right that has its origin in the Montana Constitution, but is not found in the Declaration of Rights. This was not the case here and while the court was sympathetic to any worker who suffers a loss of income, it ruled it would be inappropriate to disregard the well established principle that rational basis review applies to workers' compensation claims.

**Objective of WC benefits**

The third and final step is to apply the appropriate level of scrutiny to evaluating the constitutional challenge. The rational basis test requires that (1) the statute's objective was legitimate, and (2) that the statute's objective bears a rational relationship to the classification used by the legislature. The appellants understandably argued that the Court should follow *Reesor* and hold that there was no rational basis to distinguish between the two classes. However, the employers argued that PPD benefits (at issue in *Reesor*) and the PTD benefits in this instant case were relevantly different.

The court pointed out that PPD and PTD benefits differ in several relevant ways. First, the definition of each classification is markedly different. The WCA defines PPD as

- a physical condition in which a worker, after reaching maximum medical healing: (a) has a permanent impairment established by objective medical findings; (b) *is able to return to work in some capacity* but the permanent impairment impairs the worker's ability to work; and (c) has an actual wage loss as a result of the injury. \(^\text{35}\)

PTD on the other hand, is defined as

- a physical condition resulting from injury as defined in this chapter, after a worker reaches maximum medical healing, in which a worker *does not have a reasonable prospect of physically performing regular employment*. \(^\text{36}\)

The court ruled that a claimant defined as PPD is in ‘a very different situation’ from a claimant defined as PTD. \(^\text{37}\) While a PPD claimant would presumably be able to return to work and earn an income, a PTD claimant will not. This distinction, the court believed, was

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\(^{34}\) Stratemeyer v. Lincoln Co., 259 Mont. 147, 151, 855 P.2d 506, 509 (1993).

\(^{35}\) Section 39-71-116(24), MCA. Emphasis added.

\(^{36}\) Section 39-71-116(25), MCA. Emphasis added.

\(^{37}\) Satterlee [SC] at 22.
important because it underlies the second relevant difference between PPD and PTD benefits—namely, the purpose of the statute itself.

Following its decision in *Rausch II*, the Court held that the purposes of PPD and PTD differ greatly. PPD benefits are intended to restore the claimant to a pre-accident wage level for a limited amount of time while PTD benefits are meant to assist the claimant for his or her work life. As the Court had ruled in *Rausch II*

[T]he PPD claimant, who is able to return to work, is entitled to wage supplement benefits, which serve to restore the claimant to a pre-accident wage level if the claimant has suffered a decrease in wages upon return to work. Additionally, the PPD claimant is entitled to an impairment award, which compensates the claimant for the permanent loss of physical function. This benefit is smaller than the total disability benefit, and is paid over a shorter period of time, but is designed to compensate a claimant who is able to return to work and re-commence earning a wage. The payment of an award to a claimant who returns to work is consistent with the Act's stated purpose of returning injured workers to the work force.

The court ruled that PTD benefits were not meant to supplement a claimant's wages rather they are intended to assist the worker who will never be able to return to work. The supreme court, therefore, agreed with the WCC that the distinctions between PPD and PTD benefits were significant and required a different analysis. It declined to follow *Reesor* as that decision had dealt with PPD rather than PTD benefits. The court ruled that the two benefit classes were ‘simply too different and serve such divergent purposes that equating the two would be inappropriate’.  

**Legitimate objective**

The court therefore turned to consider the statute's constitutionality by examining the governmental interests relevant to PTD benefits. The employers argued that the government has a legitimate interest (i) in assisting the worker at a reasonable cost to the employer and in providing wage-loss benefits that bear a reasonable relationship to actual wages lost; and (ii) in protecting the financial viability of the workers' compensation system.

The appellants had argued that PTD benefits were not wage replacements but the court had already rejected this argument. It therefore rejected the appellants' argument that the offset was arbitrary. It pointed out that while PPD benefits were temporary and intended to terminate after a limited number of weeks, PTD benefits were intended to assist the worker.

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39 *Satterlee* at 23 citing Rausch II at 25.
40 *Satterlee* at 24.
over the course of his or her working life. It was, therefore, rational to terminate PTD benefits at retirement (i.e. when working life ends).\textsuperscript{41}

The appellants also argued that the WCC had been incorrect to rely on cost containment as a legitimate objective. The supreme court ‘readily concede[d] that cost alone is insufficient to justify the disparate treatment of similar classes’.\textsuperscript{42} However, it ruled that

control of workers’ compensation costs is a legitimate government interest that may constitutionally be pursued by the legislature. As long as cost containment is not the sole reason for disparate treatment and it is achieved by a rational means the legislature may attempt to improve the viability of the workers’ compensation system without offending the Equal Protection Clause.\textsuperscript{43}

As the WCC ‘appropriately relied on additional factors in reaching its conclusion’ that the law was constitutional (i.e. the argument that the government’s interest in assisting the worker at a reasonable cost to the employer as well as to the interest in providing benefits that bear a reasonable relationship to actual wages lost), the supreme court upheld its analysis.

Therefore the court rejected the appellants’ arguments as regards the equal protection clause holding that the statute is rationally related to the legitimate government interest in assisting the worker at a reasonable cost to the employer so that the wage-loss benefit bear a reasonable relationship to actual wages lost.\textsuperscript{44}

\textit{Due process}

The court also rejected the due process arguments. Some were, in effect, a repetition of the equal protection issues. The appellants advanced additional arguments that the legislation was unreasonable as it allowed claimants who had worked less, and therefore do not qualify for social security retirement benefits, to continue to collect PTD benefits while terminating those claimants who have worked more, and are therefore eligible for retirement benefits. However, the court did not think this distinction rose ‘to the level of an absurdity so that we would be required to hold [the law] unconstitutional’.\textsuperscript{45} The court took the view that the legislature might have decided to allow the most vulnerable claimants who did not qualify for social security retirement benefits to continue to receive PTD benefits. The fact that the legislature did not enunciate this specific purpose did not mean

\begin{footnotes}
\footnote{At 27. The evidence to the court was that ‘nearly two-thirds’ of people who reach the age of 66 are no longer working.}
\footnote{At 29.}
\footnote{At 29 (citations omitted).}
\footnote{At 31.}
\footnote{At 34.}
\end{footnotes}
that it should not be considered, as the Montana court took the view that the legislative objective ‘may be any possible purpose of which the court can conceive’.\(^{46}\)

Finally, the appellants argued that the law was in breach of their due process rights as there was no *quid pro quo* for the PTD rights lost. The court pointed out that the WCA was a legislative compromise and, as such, not infallible.\(^ {47}\) On balance, the court was satisfied that while a claimant who suffers a work related injury after becoming eligible for social security retirement benefits (a factual situation not applicable to the appellants) may not be able to qualify for PTD benefits, he or she is still eligible for benefits of sufficient significance to satisfy the *quid pro quo* principle. More broadly the court ruled that the appellants’ argument ‘ignored the fundamental compromise’ involved in the enactment of the WCA, i.e. that in exchange for no fault recovery, employers gained the predictability of consistent workers compensation payments.

**Dissent**

Justices Morris and Nelson dissented from the judgment, citing *Merrill* (unlike the majority who made no reference at all to the Utah case). The minority would have followed the *Merrill* approach pointing out that the offset struck down there was less onerous than the Montana provisions.\(^ {48}\) They called for the application of ‘rational scrutiny with bite’ rather than the ‘toothless analysis’ employed by the majority. They also questioned whether the Montana WCA still provided an ‘adequate substitute remedy’ for the tort system.\(^ {49}\) Unlike the majority, the minority took the view that the offset ‘eviscerates the *quid* without returning the *quo*’.\(^ {50}\)

**Comment**

As has been seen most of the cases in which this issue was considered turned largely on the manner in which the court characterized the workers compensation scheme and social security retirement benefits. The Utah supreme court saw workers compensation as an exclusive remedy for work injuries which did not duplicate the purpose of retirement benefits. In contrast, the Montana supreme court classified the PTD benefits as a replacement for income lost during the working life and classified what was clearly an ‘offset’ provision as a rule ended to end payment of those benefits at the end of the working

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\(^{46}\) At 34 citing Stratemeyer v. Lincoln Co., 259 Mont. 147, 151, 855 P.2d 506, 509 (1993) (*Stratemeyer I*).

\(^{47}\) At 37.

\(^{48}\) At 42.

\(^{49}\) At 55.

\(^{50}\) At 56.
life. In this section we review a number of the key aspects of the courts’ approaches in a comparative context.

**Standard of review**

First, as to the standard of review, the Utah court applied the state standard which, in this case, clearly is more rigorous than the ‘rational basis’ requirement whereby under the equal protection clause of the US constitution (and the Montana constitution) the courts must ask whether the law is rationally related to a legitimate government interest (or, at least, more rigorous than the manner in which this is normally applied). Therefore, the Merrill case may have limited broader implications. However, it is worth noting that a number of successful challenges to such offset provisions have been made under the Federal equal protection clause itself or under State constitutions applying rational review on the basis that workers compensation and retirement benefits are not duplicative. The Utah standard of review required that the court determine whether the classification is reasonable, whether the objectives of the legislative action are legitimate, and whether there is a reasonable relationship between the classification and the legislative purposes.

**Classification**

As to the approach to classification, we have seen that the Utah court accepted that it was rationale to categorize on the basis of age. This is rather surprising. While the Utah court is correct that age ‘is a permissible method of classifying individuals where a rational basis exists’ it is strongly arguable that classifying on the basis of age alone in this case would not be rationale as age does not automatically equate to receipt of retirement benefits. Conversely, the Utah court’s ruling that classification on the basis of receipt of benefits is not rationale is premised on the argument – discussed later in the judgment – that retirement benefits and workers compensation are not duplicative. In fact other courts have struck down offset provisions precisely on the basis that they were not narrowly tailored to receipt of retirement benefits but rather used a proxy such as age or eligibility or have upheld them but reading the statutory language as only applying to receipt of benefits.

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52 Golden v Westark Community College, 333 Ark. 41, 969 S.W.2d 154. (Ark. 1998).
53 See Reesor v Montana State Fund, 2004 Mt. 370 (Mont. 2004) and West Virginia v. Richardson, 198 W.Va. 545, 482 S.E.2d 162, (W. Va. 1996) where challenges under the Montana and West Virginia constitutions respectively were successful applying rational basis review.
54 Although as Romero points out there is also ‘no presumption that age discrimination in disability benefits is rational under the equal protection clause’: Industrial Claim Appeals Office v. Romero, 912 P.2d 62.
55 Industrial Claim Appeals Office v. Romero, 912 P.2d 62. Although the West Virginia supreme court was prepared to accept a general age cut-off rather than a distinction on the basis of receipt of benefits: State of West Virginia ex rel Beirne v Smith, 214 W. Va. 771, 591 S.E.2d 329 (W. Va. 2003).
Insofar as the Utah court rejected classification on the basis of receipt of benefits as there was ‘no rational basis to rely [sic.] only on income from a single source’,\textsuperscript{57} legislative underinclusiveness clearly would not be a basis for finding a law to be constitutionally unsound under the Federal equal protection clause.\textsuperscript{58}

The Montana supreme court accepted that the ‘only identifiable differentiating factor’ between those affected and not affected by the offset was age\textsuperscript{59} - again a rather strange decision given that it was obvious receipt of (or eligibility for) retirement benefits which triggered the offset and not age per se. In effect, however, the Montana court accepted age (viz. eligibility for benefits) as a proxy for retirement\textsuperscript{60}.

\textit{Legislative objectives}

Although nothing much turned on the point in the \textit{Merrill} case, the Utah supreme court also took a more rigorous approach to the establishment of legislative objectives. While not going so far as to require that the objectives be confined to the \textit{actual} objectives of the legislature at the time, it did state that they should be ‘reasonable or actual legislative purposes’. Again this is in contrast to many equal protection clause cases where the courts now routinely accept any conceivable objective, as did the Montana courts in \textit{Satterlee}.\textsuperscript{61}

The Utah court also rejected the argument that reducing costs for employers was a legitimate objective. However, it is less than clear why a legislature could not come to the conclusion (on the basis of a given set of facts) that the cost burden on employers has become excessive and should be reduced. Other State courts have, without giving the matter close examination, been prepared to accept similar objectives as legitimate.\textsuperscript{62} The Montana court chose a middle ground accepting that cost containment on its own is not sufficient to justify different treatment but that it may be taken into account as long as it not the sole reason for disparate treatment. However, the logic of this approach is also not immediately apparent. Either cost containment is a legitimate objective (and the Montana

\begin{enumerate}
\item \textit{Merrill (SC)} at 16.
\item Richardson v Belcher 404 US at 84; Harris v Labor Industries, 120 Wn.2d 461, P.2d 1056 (Wash. 1993).
\item At 16.
\item At 28.
\item See, for example, Industrial Claim Appeals Office v. Romero, 912 P.2d 62; Rayhall v. Akim Co., 263 Conn. 328 (Conn. 2003). \textit{Satterlee (SC)} at 34.
\item See Berry v HR Beal 649 A.2d 1101(Me. 1994); McDowell v Jackson Energy, 84 S.W.3d 71 (Ky. 2002); Rayhall v. Akim Co., 263 Conn. 328 (Conn. 2003). \textit{In Pierce} the Louisiana supreme court was prepared to accept that maintaining the fiscal integrity of the scheme was a legitimate objective but (on the higher standard required in that case) held that the State had not shown that the measure was either necessary or would achieve that objective: Pierce v Lafourche Parish Council, 762 So.2d 608 (La. 2000). See also Wal-Mart Stores v Keel, 817 So.2d 1 (La. 2002). Unlike the Utah supreme court, other courts have not always distinguished clearly between the objectives of maintaining fiscal stability and reducing employer costs.
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courts have said it is) in which case it should be sufficient to justify differential treatment (depending obviously on the strength of the justification) or it is not.

Reasonable relationship

Finally, the Utah supreme court took a rigorous approach to whether there was a reasonable relationship between the classification and the objectives. Obviously, if two sets of benefits have entirely different objectives than it may well be unreasonable to offset one against the other. However, in this case the Utah supreme court was prepared to take a different view to the legislature (and several other State courts) on this point. While arguments can be made either way, whether or not workers compensation and retirement benefits are duplicative is a matter on which different opinions are possible (as shown by the fact that Larson takes the view that they are). Clearly the Utah court did not take a particularly deferential approach to the legislature on this issue.

If we examine the arguments of the Utah court as to why workers compensation was not analogous to retirement benefits, one can readily dispose of the ADEA argument. If the ADEA does not apply to the benefits in question,63 this is simply an argument by analogy and the lack of legislation prohibiting such offsets might rather be argued to support the legislative provision.

Similarly the West Virginia supreme court’s speculation in Richardson as to whether a workers’ compensation scheme which allowed offsets would be seen as an adequate substitute for a tort remedy is just that: speculation. Neither the West Virginia nor the Utah court seriously considered the issue as to whether upholding the offsetting provisions would threaten the constitutionality of the scheme as a whole (on the basis of the right of access to the courts). Given the countless modifications which are made in workers compensation schemes, it would surely be an adventurous court which found that one (rather minor) provision of the workers compensation scheme altered it so much as to make it an inadequate substitute for access to the courts.64

The other arguments advanced as to the different objectives of the two schemes and, in particular, the fact that Senior Citizen’s Freedom to Work Act allows cumulation of

63 Neither the Utah nor the Colorado court in Romero considered the issue but a number of State courts have held that workers’ compensation statutes do not fall within the definition of the ‘compensation, terms, conditions, or privileges of employment’ and thus are not affected by the Age Discrimination in Employment Act. See Peck v. General Motors Corp., 417 N.W.2d 547 (Mich. App. 1987); O’Neill v Department of Transportation, 442 So.2d 961 (Fla. Ap. 1983). Also without coming to a decision on the scope of the ADEA, the Tennessee supreme court pointed out that if ‘differentiation is based on reasonable factors other than age, the classification is authorized, even if it involves age discrimination’ and found no breach of the ADEA: Vogel v Wells Fargo, 937 S.W.2d 856 (Tenn. 1996).

64 The Florida supreme court rejected a similar argument holding that a ‘partial remedy does not constitute an abolition of rights without reasonable alternative’: Sasso v Ram Property Management, 452 So.2d 932 (Fla. 1984). See also Injured Workers of Kansas v Franklin, 262 Kan. 840 (Kan. 1997). And, as we have seen, the Montana court dismissed a similar argument in relation to due process in Satterlee.
retirement benefits and work income are legitimate arguments in support of the view that workers compensation and retirement benefits are not duplicative. But, ultimately, this is both a matter of degree and a matter of opinion on which more judicial deference to the legislature might perhaps have been appropriate.

In Reesor the Montana supreme court (by a narrow majority) had ruled that the offset of PPD benefits and retirement income was unconstitutional as it was not rationally related to a legitimate objective as the purpose of both types of benefit was different. The Montana court had held that workers compensation benefits were wage replacement benefits but that social security retirement benefits were not.

In Satterlee, the Montana supreme court was faced by its previous decision in Reesor. The court relied on its decision in Rausch II to argue that PPD and PTD benefits were different and, therefore, Reesor was not controlling. But its logic is spurious at best. Rausch II correctly decided that, in the context of the workers compensation scheme, PPD and PTD benefits have different objectives. But that case involved a comparison between the treatment of PPD and PTD claimants as regards entitlement to WCA benefits and had nothing to do with the broader issues raised in Satterlee. Having (incorrectly) relied on Rausch II to distinguish Reesor, the Satterlee court then entirely ignored the issue as to whether the rationale behind that decision was still persuasive. In fact, the Satterlee court chose to interpret the objective of the provision in a different way. Ignoring the fact that that the provision is clearly one to prevent the overlap of workers compensation and retirement benefits, the court now read the objective as being to terminate PTD benefits at the end of the claimant’s working life with receipt of (or eligibility for) retirement benefit being simply a proxy for retirement. But if the legislature had intended to do this then surely it could have said so (or simply used an age such as 65 as a proxy for retirement). In fact the rationale of the Reesor court refers to the objective of the workers compensation scheme overall and hardly mentions the fact that the case relates specifically to PPD benefits. Looking at the overall objective of the scheme, it is difficult to see any reason why wage supplement benefits (PPD) should continue after retirement age but wage replacement benefits (PTD) should not.

In contrast to the Utah’s court’s perhaps over-interventionist approach, the Montana court veered to the opposite extreme in terms of deference, unconvincingly distinguishing its previous judgment in Reesor and, having done so, simply ignoring the rationale underlying that judgment to provide, as the dissent argued, a ‘toothless’ rational review. Whatever one

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65 Reesor v Montana State Fund, 2004 Mt. 370.
66 Reesor at 18 and 24 respectively.
67 The issue as to the different length of benefit payment, relied on in part in Satterlee, is not mentioned at all in Reesor.
may think of the outcome(s), neither decision constitutes a major contribution to the jurisprudence on this issue.
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<td><em>Culver v Ace Electric</em>, 971 P.2d 641 (Colo. 1999)</td>
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<td><em>Rayhall v. Akim Co.</em>, 263 Conn. 328 (2003)(^{69})</td>
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<td><strong>Florida</strong></td>
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<tr>
<td><em>Sasso v Ram Property Management</em>, 452 So.2d 932 (Fla. 1984)</td>
<td>Statute which terminated WC wage-loss benefits terminated at age 65 upheld as there were legitimate purposes for termination of benefits, such as reducing fringe benefits to reflect a productivity decline with age, inducing older</td>
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\(^{69}\) Followed in Pasquariello v. Stop & Shop Cos., 281 Conn. 656, 673, 916 A.2d 803 (Conn. 2007).
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<td>workers to retire, and reducing the cost of WC premiums.</td>
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<td>reduction of WC premiums.</td>
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<td><em>Reduction of WC death benefits where social security death benefits also payable not unconstitutional</em></td>
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70 Interestingly, however, the court affirmed the trial court’s conclusion that the exclusion of those over 65 was not rationally related to the prevention of ‘double dipping’ because Social Security retirement benefits do not serve the same purpose as wage-loss benefits. Sasso, 452 So. 2d at 934 n.3.


72 In Dickens v Pizza Co., 266 Kan. 865 (SC Kan. 1999) the Court had applied a purposive interpretation to find that the offset provision did not apply to social security retirees injured while working to supplement their income thereby not reaching the constitutional issue on this point (i.e. the offset applied only where the injury predated the retirement).
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<td><strong>McDowell v Jackson Energy</strong>, 84 S.W.3d 71 (Ky. 2002)</td>
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<td>Reducing WC by offset by 50% of the social security retirement benefits on reaching age 65 (after an additional transitional period of 6 years) in breach of</td>
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<sup>73</sup> The court held that the differential application of the cap to totally (as opposed to partially) disabled persons, which was ‘imperfect’ and led to ‘odd’ results (such as a person with less disability receiving more benefits), was irrational and constitutional. However, rather than striking down the total disability cap, the court extended its application to partial disability leaving it to the legislature to take further action if it saw fit.
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74 Also cited as State ex rel. Boan v. Richardson.