Volume 27 | Issue 3 Article 8

1982

Constitutional Law

Various Editors

Constitutional Law

CONSTITUTIONAL LAW—EQUAL PROTECTION—DELAWARE RIVER BASIN COMMISSION RESOLUTION EXEMPTING ESTABLISHED USERS FROM WATER CHARGES FAILS TO SATISFY RATIONAL RELATIONSHIP TEST

Delaware River Basin Commission v. Bucks County Water & Sewer Authority (1981)

In 1961, four states [1] and the federal government entered into the Delaware River Basin Compact (Compact) [2] and established the Delaware River Basin Commission (Commission). The Commission was established to ensure adequate management and conservation of the Delaware River and its tributaries (Basin).[3] The Commission's powers

1. Delaware River Basin Comm'n v. Bucks County Water & Sewer Auth., 641 F.2d 1087 (3d Cir. 1981). The states through which the Delaware River flows or which border upon the River are New York, Pennsylvania, New Jersey and Delaware. *Id.* at 1089.

2. Delaware River Basin Compact of 1961, Pub. L. No. 87-328, 75 Stat. 688 (1961). The Compact was a response to the realization that coherent development of the Basin's resources was impossible when left to the uncoordinated decisions of the riparian states. 641 F.2d at 1089. In fact, the need for regional action was evidenced by legal controversies over use of Basin waters. *Id.* at 1089 n.2, *citing* New Jersey v. New York, 347 U.S. 995 (1954); New Jersey v. New York, 283 U.S. 336 (1931).

Delaware, New Jersey, New York, and Pennsylvania are the signatory states to the Compact, which was ratified by Congress pursuant to Article I, § 10 of the Constitution. *See* 641 F.2d at 1089; U.S. CONST. ART. I § 10. The Commission is unique among interstate agencies approved by Congress, in that Congress, in recognition of the federal interests in proper supervision of the river, affirmatively acted to make the United States a party to the Compact, rather than merely consenting to its formation. *Id., citing* Delaware River Basin Compact of 1961, Pub. L. No. 87-328, 75 Stat. 688 (1961). The Compact has been codified by each of the signatory states. *See* DEL. CODE ANN. tit. 7, §§ 6501-6512 (1975); N.J. STAT. ANN. §§ 32:11D-1 to -110 (West 1963); N.Y. ENVIR. CONSERV. LAW §§ 21-0701 to -0723 (McKinney 1973), and PA. STAT. ANN. tit. 32, §§ 815.101-.106 (Purdon 1967). The governor of each signatory state is a member of the Commission, and a fifth member is appointed by the President of the United States. 641 F.2d at 1089.

3. 641 F.2d at 1089. The express goals of the Compact are the "planning, conservation, utilization, development, management and control of the water resources" of the Basin. *Id., citing* Delaware River Basin Compact of 1961, Pub. L. No. 87-328, § 1.3, 75 Stat. 688 (1961). The Commission was granted broad powers to effectuate these goals, thereby ensuring "a realistic opportunity to effectuate a comprehensive plan that concerned itself with water quality as well as water supply, hydroelectric power, recreational areas, wildlife conservation and flood protection." 641 F.2d at 1089 n.3, *quoting* Ackerman & Sawyer, *The Uncertain Search for Environmental Policy,* 120 U. PA. L. REV. 419 (1972). For a general discussion of the Compact, *see* Ackerman & Sawyer, *supra;* Grad, *Federal-State Compact: A New Experiment in Cooperative Federalism,* 63 COLUM. L. REV. 825 (1963).

include the authority to impose charges for the use of water from the Basin.[4] However, this authority was expressly limited by Congress's addition of section 15.1(b) to the Compact prior to its enactment.[5] Section 15.1(b) prohibits charges for Basin water if the withdrawal "could lawfully have been made without charge on the effective date of the Compact."[6]

The Commission did not actually collect charges until 1974 when, with the adoption of Resolution 74-6,[7] it implemented a system of charges for the use of the Basin's surface waters.[8] Resolution 74-6 gave

4. 641 F.2d at 1089. This power is granted to the Commission by § 3.7 of the Compact. *Id.* Section 3.7 provides that:

> The Commission may from time to time after public notice and hearing fix, alter and revise rates, rentals, charges and tolls and classifications thereof, for the use of its facilities which it may own or operate and for products and services rendered thereby without regulation or control by any department, office or agency of any signatory party.

Delaware River Basin Compact of 1961, Pub. L. No. 87-328, § 3.7, 75 Stat. 688 (1961).

This power has been held to include the power to adopt water use charges. Borough of Morrisville v. Delaware River Basin Comm'n, 399 F. Supp. 469 (E.D. Pa. 1975), *aff'd per curiam,* 532 F.2d 745 (3d Cir. 1976). For a discussion of *Morrisville, see* note 8 *infra.*

5. 641 F.2d at 1089. Congress amended the Compact to include section 15.1(b) as an absolute precondition to federal participation. *Id.* at 1093.

6. *Id.* Section 15.1(b) of the Compact provides in pertinent part: "No provision of § 3.7 of the Compact shall be deemed to authorize the Commission to impose any charge for water withdrawals or diversions from the Basin if such withdrawals or diversions could lawfully have been made without charge on the effective date of the Compact . . . ." Delaware River Basin Compact of 1961, Pub. L. No. 87-328, § 15.1(b), 75 Stat. 688 (1961).

7. 641 F.2d at 1089. Section 5.1-2 of Resolution 74-6 provides that a charge for water shall be levied against "[a]ny person, firm, corporation or other entity . . . who shall use, withdraw or divert surface waters of the Delaware River Basin". Delaware River Basin Comm'n v. Bucks County Water & Sewer Auth., 474 F. Supp. 1249, 1251 (E.D. Pa. 1979), *vacated,* 641 F.2d 1087 (3d Cir. 1981). The Commission had previously authorized the implementation of such a system of charges when it passed Resolution 71-4 in 1971. 641 F.2d at 1089.

8. 641 F.2d at 1089. The purpose of levying water use charges was to finance the construction of water storage capabilities at the Blue Marsh and Beltzville Reservoirs. *Id.* at 1089 n.4, *citing* Borough of Morrisville v. Delaware River Basin Comm'n, 399 F. Supp. 469 (E.D. Pa. 1975), *aff'd per curiam,* 532 F.2d 745 (3d Cir. 1976). In *Morrisville,* seven municipal water users challenged the authority of the Commission to enact Resolution 74-6. 399 F. Supp. at 472. Conceding that the Compact did not explicitly authorize water charges, the *Morrisville* court nevertheless held that the charges were in fact for water storage services at Commission facilities and authorized under § 3.7. *Id.* at 474. The plaintiffs claimed that they derived no benefit from the increased storage capacity of the facilities as all but one of them were downstream of the reservoirs. *Id.* at 472. The court, however, accepted the Commission's argument that the Basin should be viewed as a single pool of water with each user benefiting from its enlargement, regardless of whether the water stored in the reservoir actually benefits the user. *Id.* at 471. For the *Delaware River Basin* court's discussion of the pooled water concept, *see* note 59 *infra.*

effect to the congressional limitation set forth in section 15.1(b) of the Compact by exempting from water charges those users who withdrew water "in quantities not exceeding the legal entitlement of the user" as of the effective date of the Compact.[9] "Legal entitlement" was defined as the lesser of the water quantity a user was authorized by state permit to withdraw, the user's pumping capacity, or the allocable flow of the River.[10]

In 1966, the City of Philadelphia contracted with the Bucks County Water & Sewer Authority (Authority) to supply the Authority with 35,000,000 gallons of water per day.[11] In 1976, the Commission requested, unsuccessfully, that the City bill the Authority for water charges under Resolution 74-6.[12] When the Commission subsequently sought to collect the charges directly, the Authority refused payment, claiming an exemption under 74-6.[13] As a result, the Commission brought an action against both the Authority and the City of Philadelphia in the United States District Court for the Eastern District of

---

9. 641 F.2d at 1089-90.

10. *Id.* at 1090, 1097. Section 5-1.3(b)(1) of Resolution 74-6 defines "legal entitlement" as follows:

> 1. "Legal entitlement" means the quantity or volume of water expressed in million gallons per month determined by the lesser of the following conditions:
>
> (i) a valid and subsisting permit, issued under the authority of one of the signatory parties, if such permit was required as of October 27, 1961, or thereafter;
>
> (ii) physical capability as required for such taking; or
>
> (iii) the total allocable flow without augmentation by the Commission, using a seven-day, ten-year, low-flow criterion measured at the point of withdrawal or diversion.

641 F.2d at 1090, *quoting* Resolution 74-6.

11. 641 F.2d at 1090. The Authority submitted the contract to the Commission for approval pursuant to § 3.8 of the Compact. *Id.* Section 3.8 of the Compact requires Commission endorsement of any project "having a substantial effect on the water resources of the [B]asin." *Id., quoting* Delaware River Basin Compact of 1961, Pub. L. No. 87-328, § 3.8, 75 Stat. 688 (1961). The Commission reported that § 3.8 did not require review of the contract. 641 F.2d at 1090. The City began delivering water to the Authority in 1970, and has done so continually since that time. *Id.*

12. 641 F.2d at 1090. The City refused on the grounds that it did not want to function as a "collection agency" for the Commission. *Id.*

13. *Id.* In a letter to the Authority, the Commission claimed the Authority was not entitled to Basin water free of charge and requested the Authority to remit money owed under Resolution 74-6. *Id.* The Authority refused payment on the grounds that the water it purchased could have been withdrawn by the City without charge on the effective date of the Compact and thus fell within the "legal entitlement" exemption of Resolution 74-6. *Id.*

Pennsylvania.[14] Granting the Commission's motion for summary judgment,[15] the court held that the Authority was not entitled to an exemption from water use charges and that section 15.1(b) of the Compact, as implemented by Resolution 74-6, did not violate the principle of equal protection.[16]

On appeal,[17] the United States Court of Appeals for the Third Circuit[18] vacated and remanded,[19] *holding* that Resolution 74-6 violated the constitutional right to equal protection of the laws because it had not been demonstrated to be rationally related to a legitimate government purpose. *Delaware River Basin Commission v. Bucks County Water & Sewer Authority*, 641 F.2d 1087 (3d Cir. 1981).

The fourteenth amendment to the United States Constitution guarantees that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[20] The United States

14. Delaware River Basin Comm'n v. Bucks County Water & Sewer Auth., 474 F. Supp. 1249 (E.D. Pa. 1979), *vacated*, 641 F.2d 1087 (3d Cir. 1981). The Commission sought payment of water charges under Resolution 74-6. 474 F. Supp. at 1251. The City crossclaimed against the Authority for indemnification in the event that the City was held liable to the Commission. *Id.* The Commission made a motion for summary judgment against the City and the Authority. *Id.* The defendants, in turn, moved for summary judgment against the Commission. *Id.*

15. 641 F.2d at 1090. The district court entered summary judgment against both the Authority and the City, and granted the City's request for indemnification. *Id.* at 1090 n.6.

16. *Id.* at 1090. The district court found that the Authority did not have a legal permit to withdraw water in 1961, and that the City's permit did not contemplate resale to outlying municipalities. *Id.* After conceding that the legislative intent behind the enactment of § 15.1(b) was unclear, the district court reasoned that the exemption of those uses previously authorized under state law was a reasonable legislative classification that did not violate the principles of equal protection. Delaware River Basin Comm'n v. Bucks County Water & Sewer Auth., 474 F. Supp. 1249, 1255 (E.D. Pa. 1979), *vacated*, 641 F.2d 1087 (3d Cir. 1981). The court concluded that it was reasonable for Congress to distinguish between pre-1961 users of the Basin and subsequent users since Congress "may well have supposed" that the Delaware River met the region's water use needs in 1961. 474 F. Supp. at 1255. Therefore, according to the district court, projects that the Commission undertook in order to enlarge the water supply after 1961 could be interpreted as a response to the needs of post-1961 users. *Id.* For a further discussion of the district court's rationale regarding the objectives of § 15.1(b) and Resolution 74-6, *see* note 66 and accompanying text *infra*.

17. 641 F.2d 1087. The Authority limited its challenge to the equal protection issue and argued that Resolution 74-6 implemented the "grandfather provision" of § 15.1(b) of the Compact in an unconstitutional manner. *Id.* For a discussion of the Authority's position, *see* note 55 and accompanying text *infra*.

18. The case was heard by Circuit Judges Adams and Sloviter, and by Judge Brotman of the United States District Court for the District of New Jersey, sitting by designation. Judge Adams wrote the majority opinion and Judge Brotman dissented. The opinions were filed on February 18, 1981.

19. 641 F.2d at 1100. The Third Circuit remanded to provide the Commission with an additional opportunity to demonstrate the rationality of Resolution 74-6. *Id.*

20. U.S. CONST. amend. XIV, § 1.

Supreme Court has held that the fifth amendment's due process clause imposes the same obligation upon the federal government.[21] When reviewing equal protection challenges to legislation, the Supreme Court has defined three different standards of review; their use depends upon the classification and the interest affected by the legislation.[22] When

21. Bolling v. Sharpe, 347 U.S. 497 (1954). The Supreme Court interpreted the due process clause of the fifth amendment to forbid unjustifiable discrimination by the federal government. *Id.* at 499. *See also* Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) (equal protection analysis under the fifth amendment is the same as under the fourteenth amendment); Johnson v. Robison, 415 U.S. 361, 364 n.4 (1974) (classification which is invalid under the fourteenth amendment is also inconsistent with fifth amendment due process). *See generally* Comment, *Federalism and a New Equal Protection,* 24 VILL. L. REV. 557, 557-76 (1979).

22. *See generally* Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory,* 67 CALIF. L. REV. 1049 (1979); Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972); Tussman & tenBroek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341 (1949); *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065 (1969) [hereinafter cited as *Developments*].

The Supreme Court has reviewed equal protection challenges under three different standards: the rational basis test; intermediate or "middle-tier" scrutiny; and strict scrutiny. *See, e.g.,* Craig v. Boren, 429 U.S. 190 (1976); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Brown v. Board of Educ., 347 U.S. 483 (1954). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 994-1133 (1978). Strict scrutiny has been applied, in general, to classifications based on a suspect class and those which infringe fundamental interests, and requires that a classification be necessary to the achievement of a compelling state interest. *See, e.g.,* Graham v. Richardson, 403 U.S. 365 (1971) (alienage is a suspect class, thus strict scrutiny applied); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel is a fundamental right, thus strict scrutiny applied); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (strict scrutiny applied in determining validity of state poll tax since right to vote is a fundamental right). Brown v. Board of Educ., 347 U.S. 483 (1954) (strict scrutiny applied to classifications based on race).

The intermediate standard of review has been applied when the court reviewed "important" but not "fundamental" interests or "sensitive" but not "suspect" classifications and requires that the classification be substantially related to the achievement of an important state purpose. *See, e.g.,* Trimble v. Gordon, 430 U.S. 762 (1977) (classification based on illegitimacy subject to intermediate scrutiny); Craig v. Boren, 429 U.S. 190 (1976) (gender-based classification subject to intermediate scrutiny). *See also* Fox, *Equal Protection Analysis: Laurence Tribe, the Middle Tier, and the Role of the Court.* 14 U.S.F.L. REV. 525 (1980).

Justice Marshall has suggested that in actuality the Supreme Court employs a "sliding scale," the standards of which vary with the nature of the classification and interest impinged on. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 97-110 (1973) (Marshall, J., dissenting). He contends that the Court's decisions reveal application of a variety of standards and suggests that a flexible approach should be explicitly adopted under which the degree of scrutiny would vary with the societal and constitutional importance of the adversely affected interest and recognized invidiousness of the discrimination. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 317-27 (1976) (Marshall, J., dissenting); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 97-110 (1973) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 508-30 (1970) (Marshall, J., dissenting).

the challenged regulation has affected only economic interests and has neither burdened fundamental rights [23] nor has been based upon suspect classifications,[24] the Court has applied the rational basis test.[25] To satisfy the rational basis test the legislation [26] must have a legitimate purpose [27] and the classification used in the statute must be rationally related to the achievement of that purpose.[28] Under the rational basis

23. For a discussion of the analysis applicable to fundamental rights, *see* note 22 *supra*.

24. For a discussion of the analysis applicable to suspect classifications, *see* note 22 *supra*.

25. *See* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980) (rational basis test applied to restructuring of retirement benefits); New Orleans v. Dukes, 427 U.S. 297 (1976) (rational basis test applied to ordinance prohibiting street vendors); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (rational basis test applied to state statute specifying a mandatory retirement age). *See also* Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms,* 91 HARV. L. REV. 1212, 1215-18 (1978). The "rational basis test" took recognizable form in Gulf Colo. & S.F. Ry. v. Ellis, 165 U.S. 150 (1897). In *Gulf,* the Court stated that in order for a legislative classification to be valid under the equal protection clause, the classification must be "based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection." *Id.* at 165-66. This idea developed into a classic, but now discarded formulation of the test employed in F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). The *Royster* Court stated that "[a] classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Id.* at 415. The standard currently employed by the Court is more relaxed, requiring only a rational relationship. *See* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980). *See also* notes 32-43 and accompanying text *infra*.

26. *See Developments, supra* note 22, at 1076-87. In order to identify the purpose of a statute, a court will ordinarily consider its language, the stated purpose, legislative history, related public pronouncements and public knowledge. *See* Bennett, *supra* note 22, at 1070-77. The author noted that this is a difficult task, particularly when the purpose is not articulated, when the statute itself is multipurposed, or when the statute is enacted by legislators who had numerous or conflicting purposes. *Id.* For a discussion of the Supreme Court's approach in the absence of an articulated purpose, *see* notes 33-36 and accompanying text *infra*.

27. *See* Bennett, *supra* note 22, at 1070, 1077-88. The purpose must not be explicitly or implicitly prohibited by the Constitution. *Id.* at 1077. A discriminatory purpose or the intent to confer unjustifiable benefits is not legitimate. *Id. See* United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 533 (1973). In *Moreno,* the challenged statute limited participation in the federal food stamp program to households of related persons. *Id.* at 528-33. The legislative history disclosed that the purpose of the classification was to prevent "hippies" from participating in the food stamp program. *Id.* at 534-35. The *Moreno* Court held that "a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* purpose." *Id.* at 534 (emphasis supplied by the Court). For a general discussion of discriminatory legislation, *see* Tussman & tenBroek, *supra* note 22, at 357-61.

28. *See, e.g.,* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980); McGowan v. Maryland, 366 U.S. 420 (1961). *See generally* Tussman & tenBroek, *supra* note 22, at 341-56. It should be noted that the Court has

test, enactments of Congress and other legislative bodies are presumed constitutional and the burden rests on those challenging the classification to demonstrate the absence of a rational relationship.[29] The Court has shown great deference to legislative classifications under this standard [30] by consistently refusing to invalidate, on equal protection grounds, legislation which it deemed merely unwise or inartfully drawn.[31]

In determining the purpose of a legislative classification, courts have traditionally examined the stated purpose and the legislative history of the enactment.[32] In the absence of an articulated purpose,

occasionally used the following words as alternative formulations of the rationality requirement: "arbitrary"; "capricious"; and "invidious". *See, e.g.,* Jefferson v. Hackney, 406 U.S. 535, 549 (1972) (provision of lower welfare benefits to AFDC recipients than to aged is not "invidious" violation of equal protection); Baxstrom v. Herold, 383 U.S. 107, 115 (1966) (civil commitment following prison sentence without jury review available to all others is "capricious" violation of equal protection); Phillips Chem. Co. v. Dumas Indep. School Dist., 361 U.S. 376, 385 (1960) (states' discretion to classify may not be palpably "arbitrary").

29. *See, e.g.,* Minnesota v. Clover Leaf Creamery, 101 S. Ct. 715, 724 (1981); Mathews v. Lucas, 427 U.S. 495, 510 (1976); McGowan v. Maryland, 366 U.S. 420, 426 (1961). *Clover Leaf Creamery* involved a challenge to Minnesota's statute banning the sale of milk in plastic, nonreturnable containers, but allowing its sale in nonplastic, nonreturnable containers. 101 S. Ct. at 721-22. The Court stressed that the essential question was whether a legislature could rationally have decided that the purposes of resource conservation would be furthered by this type of statute. *Id.* at 724. Thus, the Court could find the classification constitutional regardless of whether the purposes sought were, in fact, furthered by the classification. *Id.* Similarly, in *McGowan,* Chief Justice Warren declared, in now famous dictum, that: "a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." 366 U.S. at 426.

30. L. TRIBE, *supra* note 22, at 994-96. For a further discussion of the rational basis standard of review, *see* notes 37-54 and accompanying text *infra.* Notwithstanding the presumption of constitutionality under minimal scrutiny, Justice Brennan has noted that the "rational basis standard 'is not a toothless one' and will not be satisfied by flimsy or implausible justifications for the legislative classification." United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 184 (1980) (Brennan, J., dissenting), *citing* Mathews v. Lucas, 427 U.S. 495, 510 (1976).

31. *See, e.g.,* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 175 (1980); New Orleans v. Dukes, 427 U.S. 297 (1976). For a discussion of *Fritz, see* notes 51-54 and accompanying text *infra.* For a discussion of *Dukes, see* notes 46-50 and accompanying text *infra.* The *Dukes* Court stated that:

> The judiciary may not sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines. . . . [I]n the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.

427 U.S. at 303-04 (citations omitted).

32. *See* Bennett, *supra* note 22, at 1073. For a discussion of the various approaches for determining legislative purpose, *see* note 24 *supra. See also Developments, supra* note 20, at 1077.

courts have hypothesized purposes [33] or accepted purposes postulated by the parties.[34] In *Flemming v. Nestor*,[35] Justice Harlan approved of judicial speculation as to legislative purpose, indicating that it was "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision." [36]

Once a statutory purpose is identified, the court must determine whether the classification is a rational or reasonable means to accomplish it.[37] In *Dandridge v. Williams*,[38] the Court indicated that the creation of classifications in economic regulations is an unavoidable and peculiarly legislative task and stated that perfection in such a task is neither possible nor necessary.[39] Under the rational basis test, the Court has

33. *See, e.g.*, United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980); Jefferson v. Hackney, 406 U.S. 535, 549 (1972); Flemming v. Nestor, 363 U.S. 603, 612 (1960); *Developments, supra* note 22, at 1080.

The practice of postulating a purpose has not been without criticism. *See* United States R.R. Retirement Bd. v. Fritz, 449 U.S. at 186-93 (Brennan, J., dissenting). In *Fritz*, Justice Brennan suggested that when a legislative purpose is unarticulated, the resulting post hoc justifications should be viewed with skepticism. Justice Brennan further suggested that the actual, not the hypothetical purpose, should be examined. *Id.* at 186-88 (Brennan, J., dissenting). *See also* Schweiker v. Wilson, 101 S. Ct. 1074, 1085-89 (1981) (Powell, J., dissenting). In *Schweiker*, Justice Powell maintained that when there is no indication of legislative purpose in the legislative history, the court should require that the classification bear a "fair and substantial relation" to the asserted purpose. *Id.* at 1088 (Powell, J., dissenting). Three other members of the court—Justices Brennan, Marshall and Stevens—agreed with Justice Powell's analysis. *Id.* at 1085 (Powell, J., dissenting).

34. *See, e.g.*, United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980); Jefferson v. Hackney, 406 U.S. 535, 549 (1972); Flemming v. Nestor, 363 U.S. 603, 612 (1960). One commentator has observed: "How far a court will go in attributing a purpose . . . depends upon its imaginative powers and its devotion to a theory of judicial restraint." *Developments, supra* note 22, at 1080. Another commentator has suggested that it is almost always possible to uphold a classification by hypothesizing an appropriate purpose, or by defining the purpose so that the classification is rationally related to it. Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123, 128-35 (1972). The Supreme Court has, nonetheless, been criticized for invalidating legislation on rational basis grounds by ignoring purposes which were readily inferable from the statute or legislative history. *See* Bice, *Standards of Judicial Review Under the Equal Protection and Due Process Clauses*, 50 S. CAL. L. REV. 689, 698-700 (1977).

35. 363 U.S. 603 (1960).

36. *Id.* at 612. Justice Harlan hypothesized that Congressional legislation denying social security benefits to certain deportees could be supported by a justification that benefits sent abroad will not add to overall national purchasing power. *Id.*

37. For a discussion of the degree of relationship a classification must have to the legislative purpose under the rational basis test, *see* notes 39-54 and accompanying text *infra*.

38. 397 U.S. 471 (1970).

39. *Id.* at 485-86. *Dandridge* involved a claim that certain Maryland welfare legislation violated principles of equal protection. The *Dandridge* Court stated:

> In the area of economics and social welfare a State does not violate the Equal Protection Clause merely because classifications made by its

consistently upheld classifications which are overinclusive or underinclusive in relation to their purposes.[40] Similarly, the Court has held that the means is rationally related to the legislative purpose if it tends to accomplish it to the slightest degree.[41] In explaining the deference due the legislature under the rational basis test, the Court, in *Vance v. Bradley*,[42] stated: "The Constitution presumes that . . . even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." [43]

"Grandfather clauses" exempt those who have engaged in an activity as of a given date from the effect of a new regulation." [44] These clauses have often been challenged on equal protection grounds and the Supreme Court has reviewed grandfather clauses involving purely eco-

> laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the "classification is not made with mathematical nicety or in practice it results in some inequality."

Id. at 485, *citing* Lindsley v. Natural Carbonic Gas, 220 U.S. 61, 78 (1911).

40. *See, e.g.*, Vance v. Bradley, 440 U.S. 93 (1979); New Orleans v. Dukes, 427 U.S. 297 (1976); Dandridge v. Williams, 397 U.S. 471 (1970). *See also* Tussman & tenBroek, *supra* note 22, at 344-53, 368-80. Although equal protection generally requires that persons similarly situated be similarly treated, it does not require perfection in this goal. *See id. See also* Dandridge v. Williams, 397 U.S. at 485-86. An overinclusive classification includes not only persons at whom the law is aimed, but also persons not necessary to achievement of the legislative purpose. Tussman & tenBroek, *supra* note 22, at 351-52. An underinclusive classification includes only persons at whom the purpose of the law is aimed, but fails to include all such persons. *Id.* at 348-51. Administrative feasibility concerns, legislative convenience, and political considerations justify overinclusiveness as well as underinclusiveness, under the rational basis test. *Id.* A classification may be simultaneously underinclusive and overinclusive. *See* Vance v. Bradley, 440 U.S. 93 (1979); notes 42 & 43 and accompanying text *infra.*

41. *See, e.g.*, McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1961); Railway Express Agency Inc. v. New York, 336 U.S. 105, 109-10 (1949); Kotch v. Board of River Pilot Comm'rs, 330 U.S. 552, 556 (1947). One commentator has stated that, at a minimum, "rationality" is satisfied when a positive relationship exists between means and ends. Bice, *Rationality Analysis in Constitutional Law,* 65 MINN. L. REV. 1, 6 (1980).

42. 440 U.S. 93 (1979).

43. *Id.* at 97. In *Bradley,* it was argued that mandatory retirement at age sixty for foreign service employees, without a similar requirement for civil service employees, violated the equal protection clause. *Id.* at 95-96. The Court held that the classification furthered the congressional purpose of removing older, less dependable, employees from rigorous positions in the foreign service. *Id.* at 108-12. The Court acknowledged that the classification may have been simultaneously overinclusive and underinclusive, but indicated this was justified by convenience and political realities and that mathematical precision in drawing the classification was not required. *Id.* at 101-02 & 109.

44. A "grandfather provision" is a "provision in a new law or regulation exempting those already in or a part of the existing system which is being regulated." BLACK'S LAW DICTIONARY 629 (5th ed. 1979).

nomic regulations under the rational basis test.[45] In *New Orleans v. Dukes*,[46] the Court upheld an ordinance which banned all pushcart vendors in the French Quarter of New Orleans, except those vendors who had conducted business in the Quarter for the previous eight years or more.[47] The Court held that the classification was rationally related to the legislature's purpose of enhancing the charm and beauty of the historic French Quarter.[48] Recognizing that the older vendors had made business plans in reliance upon the law prior to the enactment of the ordinance, the Court indicated that the legislature, in adopting a gradual approach to the problem,[49] could rationally consider these reliance interests.[50]

Similarly, in *United States Railroad Retirement Board v. Fritz*,[51] the Court upheld a grandfather provision which allowed persons who were railroad employees as of 1974 to continue to receive both social security and railroad retirement benefits.[52] Applying the rational basis

45. *See, e.g.*, United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980); New Orleans v. Dukes, 427 U.S. 297 (1976); United States v. Maryland Savings-Share Ins. Corp., 400 U.S. 4 (1970).

The Supreme Court employed the rational basis test in reviewing a grandfather provision in *Maryland Savings-Share*. *See* 400 U.S. at 4. The Court upheld tax exemptions granted to nonprofit corporations which insured savings institutions and which had been in existence as of September 1, 1957. *Id.* The Court found a rational basis in the articulated purpose of protecting the stability of the Federal Savings and Loan Insurance Corporation by discouraging competitive corporations. *Id.* at 5-6.

46. 427 U.S. 297 (1976).

47. *Id.* at 304-05. The court in *Dukes* applied the rational basis test to the grandfather provision of the ordinance. *Id.* For a discussion of the rational basis test as employed in *Dukes*, see note 31 *supra*. The *Dukes* Court noted that only once in the past fifty years had the Supreme Court held that a purely economic regulation failed to satisfy the rational basis test. 427 U.S. at 306, *citing* Morey v. Doud, 354 U.S. 457 (1957). In *Morey*, an Illinois statute regulated businesses which sold money orders, but specifically exempted the American Express Company from the regulation. 354 U.S. at 458-63. The *Dukes* Court expressly overruled *Morey*, stating that "we are now satisfied the decision was erroneous." 427 U.S. at 306.

48. 427 U.S. at 303-06.

49. *Id.* The Court indicated that a legislature is not required to strike at all evils at the same time; a gradual approach to a problem is permissible. *Id.* The legislature may adopt regulations that only partially ameliorate a perceived evil and defer complete elimination of the evil to some future time. *Id.*

50. *Id.* at 305-06. The city could rationally choose to eliminate only vendors of recent vintage, rather than immediately prohibit all vendors. *Id.* at 305. The Court suggested that the two older vendors exempted from regulation might reasonably be considered "part of the distinctive character and charm" of the French Quarter. *Id.*

51. 449 U.S. 166 (1980).

52. *Id.* at 174. A person who, prior to 1974, had worked for both railroad and nonrailroad employers and qualified for both railroad retirement and social security benefits, would receive benefits under both systems. *Id.* at 168. In 1974, Congress eliminated these dual benefits, except for certain classes of employees who had a "current connection" with the railroad as of 1974. *Id.* at 169-73.

test,[53] the Court held that Congress, in pursuing its purpose of phasing out dual benefits, could properly consider the equitable claims of active employees to those benefits and tailor the legislation accordingly.[54]

It was against this background that the *Delaware River Basin* court considered the Authority's claim that the implementation of section 15.1(b) of the Compact through Resolution 74-6 violated constitutional principles of equal protection.[55] The Third Circuit began its analysis by deciding that the proper standard of review for the purely economic regulation at issue was the rational basis test.[56] After setting forth that test's requirements,[57] the court attempted to identify the purposes underlying section 15.1(b) of the Compact and Resolution 74-6. Upon examination of the Compact, its legislative history,[58] and the back-

53. *Id.* at 174-76. The Supreme Court in *Fritz* candidly admitted that it had not, in past decisions, applied a uniform or consistent test under the equal protection clause. *Id.* at 174, 176-77, n.10. For a discussion of earlier or alternate formulations of the rational basis test, *see* notes 22, 25 & 28 *supra*. The *Fritz* Court indicated that it felt obliged to apply the "equal protection components of the constitution" as it believed the Constitution required. 449 U.S. at 177, n.10. Moreover, it concluded that the proper application of the rational basis test for social or economic regulations was set forth in *Jefferson v. Hackney, Dandridge v. Williams,* and *Fritz. Id., citing* Jefferson v. Hackney, 406 U.S. 435 (1972); Dandridge v. Williams, 397 U.S. 471 (1970). For a discussion of *Dandridge,* see notes 38 & 39 and accompanying text *supra.*

54. 449 U.S. at 177-80. The *Fritz* Court hypothesized that Congress could have concluded that active employees had a greater equitable claim to such benefits and were more likely to be career railroad employees. *Id.* at 178.

55. 641 F.2d at 1091. The Authority's constitutional challenge was not framed directly against § 15.1(b) of the Compact, but rather against the implementation of § 15.1(b) through Resolution 74-6. *Id.* For the relevant text of § 15.1(b) and Resolution 74-6, *see* notes 6, 7 & 10 *supra*. Similarly, the Authority did not contend that the Commission exceeded its powers in enacting Resolution 74-6. 641 F.2d at 1091.

56. 641 F.2d at 1092. The court concluded that "[s]ince Resolution 74-6 neither apportions benefits and burdens on the basis of a 'suspect classification' nor impinges on 'fundamental interests,'" only minimal judicial scrutiny was required. *Id.* For a discussion of the scrutiny standards and their applicability to equal protection analysis, *see* note 22 *supra*. Although neither party suggested that a distinction between legislative and administrative action might be made, The *Delaware River Basin* court noted that, even when the challenged classification is devised by an administrative rather than a legislative body, the courts generally apply conventional equal protection analysis. 641 F.2d at 1093 n.11. The court suggested, however, that this might be inappropriate because of the absence of democratic safeguards in the administrative process. *Id.*

57. *See* 641 F.2d at 1092-98, *citing* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980); Vance v. Bradley, 440 U.S. 93 (1979); Mathews v. Lucas, 427 U.S. 495 (1976); New Orleans v. Dukes, 427 U.S. 297 (1976); United States v. Maryland Savings-Share Ins. Corp., 400 U.S. 4 (1970); Flemming v. Nestor, 363 U.S. 603 (1960). The Third Circuit stated that the equal protection analysis would be the same whether the challenge was viewed as against Congress or the signatory states because the same standard of review has been applied under the fifth and fourteenth amendments. 641 F.2d at 1092 n.8.

58. 641 F.2d at 1093. The legislative history disclosed only that Congress added § 15 as an absolute precondition to federal participation in the Com-

ground concerning the adoption of Resolution 74-6,[59] the court concluded that neither Congress nor the Commission had articulated a legitimate goal that was furthered by "exempting certain users of Basin waters from the charges shouldered by others." [60]

The Third Circuit acknowledged that in the absence of an articulated purpose courts have upheld challenged classifications on the basis of goals suggested by the parties involved or by the reviewing court itself.[61] The court, however, questioned the propriety of such speculation,[62] particularly in cases involving grandfather provisions, which the court stated may result from political favoritism.[63] Nevertheless, it declined to hold that an articulated purpose was an absolute precon-

---

pact "in order to provide minimum protection of federal interests". *Id., citing* S. REP. No. 985, 87th Cong., 1st Sess. 6 (1961) (reporting that the "purpose of the amendment is merely to clarify the intent of section 3.7 of the Compact"). For additional legislative history of the Compact, *see* H.R. REP. No. 310, 87th Cong., 1st Sess. 1 (1961); S. REP. No. 854, 87th Cong., 1st Sess. 1 (1961); S. REP. No. 1032, 87th Cong., 1st Sess. 1 (1961).

59. 641 F.2d at 1093-94. The Commission had indicated its reasons for adopting water charges in a public notice, but failed to indicate the purpose of the exemptions. *Id.* The underlying rationale for water use charges as set forth in the Commission's public notice was the "pooled water" concept, which conceives of all users, regardless of location, as receiving a benefit from an increase in the water supply. *Id.* For a discussion of the reasons for adopting water charges and the "pooled water" concept, *see* note 8 *supra.* The Third Circuit deemed the "pooled water" concept to be unrelated, and perhaps even contrary to exempting established users from charges. 641 F.2d at 1094.

60. 641 F.2d at 1094.

61. 641 F.2d at 1096-97. The court relied on Flemming v. Nestor, 363 U.S. 603 (1960), as the clearest expression of this viewpoint. *Id.* For a discussion of *Flemming, see* notes 35-36 and accompanying text *supra.*

62. 641 F.2d at 1095-97. The court suggested that the Supreme Court has emphasized actual or articulated purposes in recent years. *Id.* at 1094-96. *See, e.g.,* San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973) (classification must further a "legitimate, articulated purpose"); McGinnis v. Royster, 410 U.S. 263, 270 (1973) (purpose must be "legitimate and nonillusory").

63. 641 F.2d at 1095-97. In particular, the court viewed *United States v. Maryland Savings-Share Ins. Corp.,* a case involving a grandfather provision, as emphasizing the importance of articulating legislative purpose. *Id.* at 1095, *citing* United States v. Maryland Savings-Share Ins. Corp., 400 U.S. 4 (1970). For a discussion of *Maryland Savings-Share, see* note 44 *supra.* The *Delaware River Basin* court observed that the Supreme Court in *Maryland Savings-Share* distinguished *Mayflower Farms Inc. v. TenEyck,* 297 U.S. 266 (1936), a depression era case in which the Court had struck down a similar grandfather provision in a milk price control act, by noting that, in the latter case, there had been no affirmative showing of a valid purpose in the legislative history. 641 F.2d at 1095-96, *citing* Mayflower Farms Inc. v. TenEyck, 297 U.S. 266 (1936).

The Third Circuit suggested that a grandfather provision presents a strong probability of resulting from political favoritism rather than from reasoned judgments about social policy. 641 F.2d at 1095-96. The court felt the danger of political favoritism was especially great in the instant case, where the regulation was enacted for the benefit of the regulated group and not the general public. *Id.* The court also suggested that the interests of politically powerful users, such as the City of Philadelphia, had overborne the interests of more modest users in the formulation of the Resolution. *Id.* at 1096 n.19.

dition to validity[64] and proceeded to analyze the purpose that was postulated by the district court.[65]

The Third Circuit set forth the district court's hypothesis that Congress, in adding section 15.1(b) to the Compact, was motivated by the belief that the Basin met the water use needs of the region as of 1961 and that "most Commission projects aimed at enlarged and more equitable water allocation would be geared to meeting needs developing after the effective date of the Compact."[66] Assuming arguendo that the system of charges and exemptions was designed to allocate Commission costs to users whose demands arose after 1961,[67] the *Delaware River Basin* court examined whether Resolution 74-6 was rationally related to that goal.[68]

The court observed that under Resolution 74-6, an established user, possessing a valid permit, could increase his actual usage well beyond 1961 levels, thereby benefiting from the increased water supply, and yet remain exempt from charges so long as the increased diversions did not exceed his "legal entitlement."[69] For this reason, the court

64. 641 F.2d at 1096. The court felt that a recent statement of the Supreme Court which implicitly approved of hypothesizing of legislative purposes was controlling. *Id., citing* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980). Although *Fritz* did not address this issue, the Court in *Fritz* cited a case in which such hypothesizing was allowed, as an example of the proper rational basis scrutiny. 449 U.S. at 166, *citing* Jefferson v. Hackney, 406 U.S. 535 (1972). For a discussion of *Fritz, see* notes 51-54 and accompanying text *supra.*

65. 641 F.2d at 1097. The court indicated that consideration of various hypothetical goals would be permissible as long as the court did not "attribute to the legislature purposes which it [could not] reasonably be understood to have entertained." *Id.* The court noted that "when a legislature has decided *not* to pursue a certain goal, upholding the statute on the basis of that goal is not properly deference [sic] to a legislative decision at all; it is deference to a decision the legislature could have made but did not." *Id.* at 1097 n.21, *quoting* Schlesinger v. Ballard, 419 U.S. 498, 520 n.11 (1975) (Brennan, J., dissenting) (emphasis in original).

66. 641 F.2d at 1097, *quoting* Delaware River Basin Comm'n v. Bucks County Water & Sewer Auth., 474 F. Supp. 1249, 1255 (E.D. Pa. 1979) *vacated,* 641 F.2d 1087 (3d Cir. 1981). The Third Circuit did not strictly adhere to the district court's proposed justification and ascribed to the grandfather provision the following purposes, each being slightly different: 1) apportioning charges in relation to benefits; 2) distributing costs of Commission projects to users whose demands arose after 1961; 3) shielding established users from costs incurred in meeting needs of post 1961 users; 4) having those users who have increased water usage pay for projects undertaken to meet those demands; 5) fair allocation of costs; and 6) conservation and equitable resource management. 641 F.2d at 1097-98 & n.23.

67. 641 F.2d at 1097. The Third Circuit acknowledged that the district court's hypothesis might be an appropriate goal in theory, but doubted whether this purpose explained the resolution, suggesting that in its estimation, all users benefited from an increased water supply. *Id.*

68. *Id.*

69. *Id.* at 1097-98. According to the Third Circuit, the City of Philadelphia, an original party to the suit, provided a case in point. *Id.* Since the City's actual usage has never approached its legal entitlement, the City

concluded that the manner in which Resolution 74-6 exempted established users was arbitrary and not related to the suggested purpose of apportioning charges in relation to benefits.[70] Perceiving no reliance interest in the free enjoyment of amounts of water exceeding 1961 actual usage,[71] nor any indication that the exemption was a gradual approach to the problem,[72] the Third Circuit rejected the argument that these principles, as applied in *Dukes,* should yield a different result.[73]

The *Delaware River Basin* court next addressed the Commission's assertion that the purpose of the exemption was the preservation of existing rights to the free withdrawal of water.[74] The court held that such a purpose could not be reconciled with the Commission's authority to supersede state allocation systems and, therefore, could not have been an unarticulated motive for the exemptions of section 15.1(b).[75] Moreover, the court found that such a purpose was fundamentally objectionable in that it was no more than a tautological restatement of the classification itself.[76]

---

has been free to increase usage without charge under Resolution 74-6. *Id.* Thus, the court posited that if the City were to divert the water it sold the Authority to uses arising within the City, no charges would be imposed. *Id.* at 1098 n.23.

70. *Id.* at 1099. The court implied that if the grandfather provision had been based on actual usage as of 1961, rather than criteria such as pumping capacity and water permits, the provision would have been rationally related to the purpose suggested. *Id.* at 1097-99. For a discussion of Judge Brotman's criticism of this part of the majority opinion, *see* notes 82-84 and accompanying text *infra.*

71. 641 F.2d at 1099. The court stated that "[w]hile a user arguably has a reliance interest in continuing to withdraw, free of charge, the amount of Basin water diverted before the Compact became effective, we perceive no reliance interest in the free enjoyment of an amount exceeding actual usage". *Id.*

72. *Id.* at 1098-99. Although the court acknowledged that a gradual approach to solving a problem has been held to justify grandfather provisions, it indicated that it would involve sheer speculation to view Resolution 74-6 as anything other than a permanent exemption. *Id.*

73. *Id.* For a discussion of *Dukes, see* notes 42-46 and accompanying text *supra.*

74. 641 F.2d at 1099. The Commission suggested that the purpose of § 15.1(b) was to protect those political entities who had obtained permits to withdraw or divert Basin water from any charges which the passage of the Compact might entail. *Id.*

75. *Id.* The terms of the Compact granted the Commission the authority to override any previously developed state allocation systems through the regulation and control of withdrawals and diversions. *Id.* A user's pre-1961 rights to the enjoyment of water might, therefore, have to yield to the Commission's regulations. *Id.* Thus, the court held that the Compact itself belied any suggestion that the preservation of existing rights was an unarticulated motive for the grandfather provision. *Id.*

76. *Id.* at 1099-100. The court stated that a statute's classifications will invariably be related to a purpose, when the purpose is defined in terms which are, in effect, a restatement of the classification. *Id.* The *Delaware River*

The Third Circuit concluded that Resolution 74-6 could not survive equal protection challenge on the basis of the rationale presented to it.[77] Rather than grant final disposition, the court decided that remand would serve a useful function.[78] The court reasoned that the Commission should have an additional opportunity to offer a rational purpose for the Resolution, and that other affected Basin water users should be encouraged to intervene in the lawsuit.[79]

In a dissenting opinion,[80] Judge Brotman maintained that the grandfather provision was rationally related to the purpose suggested by the district court, that of exempting those pre-1961 users who did not benefit from increased water supply from the water use charges.[81] Judge Brotman indicated that the majority conceded the constitutionality of exempting established users up to their actual usage, but found

---

Basin court objected to the Commission's suggested purpose, stating that to engage in such hypothesizing would render the rational basis standard meaningless. *Id.* The court continued:

> [I]f the analysis of a legislative purpose requires only a reading of the statutory language in a disputed provision, and if any "conceivable basis" for a discriminatory classification will repel a constitutional attack on the statute, judicial review will constitute a mere tautological recognition of the fact that Congress did what it intended to do.

Id., quoting United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 180 (1980) (Stevens, J., concurring).

77. 641 F.2d at 1100. The court stated that it was unable to conceive of any additional satisfactory rationale for the grandfather provision, other than those already considered. *Id.* Since Resolution 74-6 had not been demonstrated to have been rationally related to the attainment of a legitimate state purpose, the court could not sustain the resolution against constitutional challenge. *Id.*

78. *Id.* Although the judgment was against the Commission, the Commission argued for final judgment, maintaining that no further evidence of the purposes underlying § 15.1(b), adopted nearly twenty years ago, could now be advanced. *Id.*

79. *Id.* The court realized that any modification of Resolution 74-6 would adversely affect other Basin water users and indicated that it would be helpful if these interested parties had an opportunity to advance their arguments for maintaining the Resolution's exemptions. *Id.*

80. *Id.* at 1101-02 (Brotman, J., dissenting). Judge Brotman concurred in the application of the rational basis test because he viewed Resolution 74-6 as a purely economic regulation which neither affected fundamental rights nor utilized suspect classifications. *Id.* According to Judge Brotman, the sole question before the court was who must pay the Commission for water withdrawn from the Basin. *Id.*

81. *Id.* at 1100-02 (Brotman, J., dissenting). Judge Brotman, who agreed with the district court's analysis, maintained that the exemption of established users from charges used to finance the construction of reservoirs was perfectly rational since these users received no benefit from the increased water supply. *Id.* Although agreeing that it would have been preferable for Congress to have articulated its purposes, Judge Brotman considered it impractical to insist that Congress provide a justification for every subsection of a statute. *Id.* at 1102 n.3 (Brotman, J., dissenting).

the slightly greater exemptions of Resolution 74-6 irrational.[82] According to Judge Brotman, the equal protection guarantee "does not draw such nice distinctions." [83] Conceding that the system adopted may not have been the best or most equitable means of financing increases in water storage capabilities, Judge Brotman stressed that the precise scope of the exemption from charges was a matter of legislative concern.[84] Accordingly, he cautioned the court "not to open the door towards a return to the era in which courts were all too willing to allow their economic opinions to color their judgments about matters of constitutional law." [85]

It is submitted that, while purporting to apply the minimum scrutiny of the rational basis test,[86] the *Delaware River Basin* court in fact required a stricter relationship between the classification and its asserted purpose than can be supported by current interpretations of the rationality test.[87] The court conceded that if the grandfather provision had been based upon 1961 actual usage, it would be rationally related to the suggested purpose of apportioning water charges in relation to benefits.[88] But since Resolution 74-6 might exempt established

---

82. *Id.* at 1102 (Brotman, J., dissenting). Judge Brotman observed that

> [t]he holding appears to be that the statute is constitutional insofar as it allows prior users, such as Philadelphia, to continue withdrawing water free of charge up to the amount of water they were actually withdrawing in 1961, when the Compact became effective. The majority merely finds the statute unconstitutional in that it exempts prior users from charges to a slightly greater extent—in an amount that is the lesser of (a) the quantity authorized by a valid State permit issued prior to 1961, (b) the physical capacity of the user's system to withdraw water at that time, or (c) the total allocable flow at the point of withdrawal.

Id.

Judge Brotman also disagreed with the majority's finding that the exempted users had no reliance interest in free withdrawal of amounts of water in excess of their 1961 usage. *Id.* He maintained that these users had obviously relied on continued access to the Delaware, to the extent then authorized by law, in building up their pumping capacity. *Id.* at 1102 n.4 (Brotman, J., dissenting).

83. *Id.* at 1102 (Brotman, J., dissenting).

84. *Id.*

85. *Id., citing* Hammer v. Dagenhart, 247 U.S. 251 (1918), *overruled,* United States v. Darby, 312 U.S. 100 (1941).

86. 641 F.2d at 1092. For a discussion of the court's assertion that it was applying the minimal scrutiny of the rational basis test, *see* notes 56-57 and accompanying text *supra.*

87. *See* notes 88-95 and accompanying text *infra.* For a discussion of the rational basis test as applied by the Supreme Court, *see* notes 22-54 and accompanying text *supra.*

88. *See* 641 F.2d at 1097-98. The Third Circuit stated that the Resolution was irrational in that it did not measure the exemption by actual usage but instead utilized other criteria such as permits, pumping capacity and allocable flow. *Id.*

The *Delaware River Basin* court defined the hypothetical purpose it was testing in no less than six distinct ways. For a summary of these purposes *see*

users to a slightly greater extent, for example, up to the 1961 pumping capacity, the court concluded that the Commission had acted irrationally.[89] It is submitted, however, that the *precise* amount of a benefit or exemption is not a proper question for judicial consideration under the rational basis test.[90] The Supreme Court, in addressing the constitutionality of "grandfather provisions" in *Fritz* and *Dukes,* has indicated that classifications need not be drawn with "mathematical perfection," and that a court should not substitute its views concerning the wisdom or desirability of the classification for that of the legislature.[91] Although it is conceded that the classification drawn by the grandfather provision of Resolution 74-6 may not be perfectly related to the asserted purpose,[92] recent Supreme Court opinions have reiterated the fact that a fair amount of overinclusiveness or underinclusiveness in the classification has been, and should be, tolerated under the rational basis test.[93]

---

note 66 *supra*. The court ultimately compared the classification against a purpose of requiring those who use more water after 1961 to pay for water supply projects. 641 F.2d at 1098. It is submitted that, by using this statement of the purpose, rather than a more liberal statement, the court rendered it impossible to conclude that the classification was rational. For example, if the effect of Resolution 74-6 is to impose most of the water use charges upon those post-1961 users whose demands brought about the need for increased Basin water capacity, then the resolution would seem rationally related to purposes described as "apportioning charges in relation to benefits" or "distributing costs of projects to users whose demands arose after 1961." The resolution, however, would seem arbitrary, when compared against a purpose described as "having those users who have increased water usage pay for Commission projects." For the proposition that it is always possible to define a purpose in such a way that the classification will not be rationally related to it, *see* note 34 *supra*.

89. 641 F.2d at 1097-99. It is suggested that the *Delaware River Basin* court, by rejecting an exemption based on pumping capacity or permit amount, and implicitly approving an exemption based on actual usage, has in essence required a perfect or exact relationship between the classification and its asserted purpose. *See id.*

90. *See* notes 39-42 and accompanying text *supra*. Typically a party alleges that placing him in a particular class denies him the equal protection of the laws. *See* Bennett, *supra* note 22, at 1060-62. The *Delaware River Basin* court did not find that a separate classification for established users was unconstitutional, but rather found that the Commission could not rationally exempt them to the *extent* provided by Resolution 74-6. *See* 641 F.2d at 1097-99. For a discussion of the court's reasoning, *see* notes 66-73 and accompanying text *supra*.

91. For a discussion of *Fritz, see* notes 51-54 and accompanying text *supra*. For a discussion of *Dukes, see* notes 46-50 and accompanying text *supra*.

92. *See* notes 66-70 & 87-90 and accompanying text *supra*. It is arguable that the classification at issue is overinclusive in that it exempts established users more than is necessary to achieve the purpose of shielding these users from costs incurred in meeting the needs of post-1961 users. However, the closest relationship between means and end is only required under higher levels of judicial scrutiny. For a discussion of these standards, *see* note 22 *supra*.

93. *See* notes 37-43 and accompanying text *supra*. It is submitted that Resolution 74-6 furthers the end sought to some degree and that any overin-

Moreover, it is submitted that the Commission, in establishing the precise exemptions of Resolution 74-6, could rationally consider that the pre-1961 users had relied on continued free access to the Delaware River in building their 1961 pumping capacity.[94] Thus, the Resolution's criteria of the lesser of permit amount, pumping capacity, or allocable flow are not arbitrary, but in fact have a rational basis.[95]

In its analysis, the Third Circuit suggested several factors which may explain its reluctance to defer to the grandfather provision.[96] First, neither Congress nor the Commisison had articulated its reasons for the exemption of established users.[97] Second, the resolution was promulgated by an administrative body whose decisions are less susceptible to review and correction by the democratic process than is a legislative enactment.[98] Third, there were suggestions that politically powerful users had influenced the decision making process.[99] It is submitted that although the Third Circuit purported to apply the minimal scrutiny of the rational basis test, its concern over these factors resulted in a more stringent level of review.[100] Although there may be theoretical justifications for heightened scrutiny under these cir-

clusiveness of the exemption might be justified on the basis of administrative convenience or political considerations. For example, there may be difficulties in calculating actual 1961 usage, or developing a method of computing this figure to take into account changes in water use in preceding years or increases in pumping capacity. For a discussion of overinclusiveness, *see* notes 40 & 43 *supra.*

94. *See* 641 F.2d at 1102 n.4 (Brotman, J., dissenting). For a discussion of Judge Brotman's view of the established users' reliance interests, *see* note 82 *supra.*

95. Under the Supreme Court's decision in *Dukes,* these reliance interests may be considered. For a discussion of *Dukes, see* notes 46-50 and accompanying text *supra.*

96. *See* notes 97-99 and accompanying text *infra.*

97. *See* notes 62-64 and accompanying text *supra.* Justices Brennan, Marshall, Powell and Stevens have suggested that when there is no articulated purpose, it might be appropriate to require a more substantial relationship between legislative means and end. *See, e.g.,* Schweiker v. Wilson, 101 S. Ct. 1074, 1085-89 (1981) (Powell, J., dissenting); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 188 (1980) (Brennan, J., dissenting). For a discussion of the dissenting views in *Schweiker* and *Fritz, see* note 33 *supra.* However, despite the theoretical justifications for such a requirement, the Supreme Court has implicitly rejected this suggestion made by the dissenting Justices. *See, e.g.,* Schweiker v. Wilson, 101 S. Ct. 1074 (1981); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980). For a discussion of the Supreme Court's willingness to utilize hypothetical purposes in rational basis analysis, *see* notes 32-36 and accompanying text *supra.*

98. *See* note 56 *supra.*

99. *See* note 63 *supra.*

100. *See* notes 86-93 and accompanying text *supra.* This is reminiscent of the "sliding scale" approach advocated by Justice Marshall, wherein the court will vary the degree of scrutiny according to the importance of the affected interest and the invidiousness of the discrimination. For a discussion of the "sliding scale" approach, *see* note 22 *supra.*

cumstances, the Supreme Court has not, at the present time, utilized these factors in determining the standard of review in equal protection challenges.[101] Furthermore, if the court was in fact reviewing the challenged provision under a more stringent standard for the above reasons, the court should not have done so *sub silentio* and without an adequate explanation of its standard of review.[102]

The immediate impact of *Delaware River Basin* upon the litigants will depend upon the disposition of the action on remand.[103] Should the ultimate result be against the constitutionality of Resolution 74-6 on equal protection grounds,[104] it is submitted that the Commission would be required to redraft the Resolution to limit the exemption of established users to their actual 1961 water usage.[105] This would presumably result in increased costs to previously exempted users of Basin water or their customers.[106] Furthermore, since the invalidation of the Resolution would apparently provide a defense to the imposition of water use charges previously imposed, other similarly situated users of Basin water may bring actions to recover unconstitutionally exacted charges.[107]

It is submitted that *Delaware River Basin* indicates that the Third Circuit, in future cases involving equal protection claims, may not automatically defer to legislative or administrative classifications.[108] Liti-

101. *See* note 97 *supra*. For a discussion of the factors determining the standard of review for equal protection challenges, *see* notes 22-25 and accompanying text *supra*.

102. The Supreme Court has not always articulated the standards which it has applied in the equal protection area. For instance, recent decisions which were decided under the guise of the rational basis test are now viewed as establishing an intermediate level of scrutiny. *See, e.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Reed v. Reed, 404 U.S. 71 (1971). For a discussion of the intermediate level of scrutiny, *see* note 22 *supra*. This failure to articulate the standard of review, or failure to adhere to an articulated standard is confusing to the nation's lawmakers and to the general political community. *See* Comment, *supra* note 21, at 559.

103. At the time of this writing, numerous parties have, in fact, intervened in the lawsuit, apparently in response to the Third Circuit's suggestion. The intervenors, who include other Basin water users, have entered the lawsuit on both the side of the Authority and the Commission. There has been no disposition of the case at this time.

104. *See* note 78 *supra*.

105. *See* 641 F.2d at 1100.

106. *See* notes 78-79 and accompanying text *supra*.

107. *See* 641 F.2d 1087. Other Basin water users have already intervened on the side of the Authority, and presumably will also seek to recover water charges already paid. The financial burden which would result from such recovery is not clear from the court's discussion, although one may suspect it would be substantial in light of the fact that charges imposed under the Resolution were used to build two reservoirs. *See* note 8 *supra*.

108. *See* notes 86-89 and accompanying text *supra*.

gants in cases involving grandfather provisions promulgated by administrative bodies, with a lack of articulated purpose or suggestions of political favoritism, should be sensitive to the possibility of heightened review of classifications affecting only economic interests.[109] If the Third Circuit continues to employ higher scrutiny of economic regulations, it is probable that future litigation concerning other legislation or administrative regulations will be encouraged. It is submitted, however, that future equal protection litigation should be governed by the Supreme Court's interpretation and application of the rational basis test, rather than the Third Circuit's application in *Delaware River Basin*.[110]

Richard L. Umbrecht

---

109. *See* notes 96-100 and accompanying text *supra*. These factors may have influenced the determination in the instant case on a cumulative basis; thus it is not clear what effect the presence of one or more of these factors will have in future litigation.

110. *See* text accompanying note 101 *supra*.

CONSTITUTIONAL LAW—STANDING—A PARTY WHO IS SUBJECT TO POTENTIAL CIVIL AND CRIMINAL LIABILITY UNDER AN ALLEGEDLY UNCONSTITUTIONAL STATUTE HAS STANDING TO ASSERT CONSTITUTIONAL RIGHTS OF THIRD PARTIES IN DEFENDING AGAINST LIABILITY UNDER THE STATUTE.

Hetherton v. Sears, Roebuck and Co. (1981)

Sears, Roebuck and Company (Sears) sold a rifle and ammunition to Lloyd Fullman, Jr.,[1] and failed to comply with a Delaware statute (section 904) which required each purchaser of a deadly weapon to be identified by two freeholders.[2] The weapon and ammunition were used by Fullman in an attempted robbery of a Wilmington restaurant where James Hetherton worked as a guard.[3] During the course of the robbery, Fullman shot Hetherton in the head, severely wounding him.[4] Hetherton brought a negligence action against Sears in the United States

1. 652 F.2d 1152, 1154 (3d Cir. 1981). Fullman purchased both the rifle and ammunition at a Sears, Roebuck department store in Wilmington, Delaware on February 25, 1976. Hetherton v. Sears, Roebuck & Co., 445 F. Supp. 294, 296 (D. Del. 1978), *rev'd and remanded,* 593 F.2d 526 (3d Cir. 1979), *on remand,* 493 F. Supp. 82 (D. Del. 1980).

2. 654 F.2d at 1154. *See* DEL. CODE ANN. tit. 24, § 904 (1974). Section 904 provided:

> Any person desiring to engage in the business described in this chapter shall keep and maintain in his place of business at all times a book which shall be furnished him by the State Tax Department. In such book he shall enter the date of the sale, the name and address of the person purchasing any deadly weapon, the number and kind of deadly weapon so purchased, the color of the person so purchasing the same, the apparent age of the purchaser, and the names and addresses of at least two freeholders resident in the county wherein the sale is made, who shall positively identify the purchaser before the sale can be made. No clerk, employee or other person associated with the seller shall act as one of the identifying freeholders. The book shall at all times be open for inspection by any judge, justice of the peace, police officer, constable or other peace officer of this state.

Id. Although the statute does not define freeholder, Delaware case law defines the term as one who is the owner of real property. 652 F.2d at 1154 n.1, *citing* Gebelein v. Nashold, 406 A.2d 279 (Del. Ch. 1979). At the time Fullman purchased the rifle and ammunition, he completed a Federal Firearms Transaction Record, Form 4473, and produced a Delaware driver's license with his picture on it, but failed to produce two Delaware freeholders for the purpose of identifying him. 652 F.2d at 1154 n.2. Delaware subsequently amended § 904 to require identification by at least two residents of the state. *Id.* at 1159 n.7 & 1154 n.2., *citing* DEL. CODE ANN. tit. 24, § 904 (Michie Supp. 1980).

3. 652 F.2d at 1154. Hetherton was a Wilmington Police Officer working at an extra job as a guard. Hetherton v. Sears, Roebuck & Co., 445 F. Supp. 294, 296 (D. Del. 1978).

4. Hetherton v. Sears, Roebuck & Co., 593 F.2d 526, 527 (3d Cir. 1979).

District Court for the District of Delaware, seeking damages for the injuries incurred in the shooting.[5] The district court granted Sears' motion for summary judgment,[6] holding that there was no causal connection between Sears' failure to obtain the requisite identification and Hetherton's injuries.[7] On appeal, the United States Court of Appeals

5. Hetherton v. Sears, Roebuck & Co., 445 F. Supp. 294, 296 (D. Del. 1978). The plaintiff's amended complaint stated three theories of liability: 1) Sears violated § 904 of the Delaware Code in failing to require at least two freeholders who were residents of New Castle County, Delaware, to positively identify Fullman before selling him a deadly weapon; 2) Sears sold a deadly weapon to a convicted felon without having reasonable cause to believe that the sale was not in violation of state law, as required under the Gun Control Act of 1968, 18 U.S.C. § 922(b)(2) (1976); and 3) Sears was negligent because it failed to exercise reasonable care in attempting to ascertain whether Fullman was prohibited from possessing a deadly weapon under the Delaware Code. 445 F. Supp. at 296.

For the text of the Delaware statute which requires identification by two freeholders, see note 2 *supra*. Section 922 of the Gun Control Act provides in pertinent part:

> (b) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver—
>
> . . . .
>
> (2) any firearm or ammunition to any person in any State where the purchases or possession by such person of such firearm or ammunition would be in violation of any State law.

18 U.S.C. § 922 (1976). The Delaware statute regulating the purchase and possession of deadly weapons by convicted felons and other classes of persons provides in pertinent part:

> Any person, having been convicted in this State . . . of a felony . . . or any person who has ever been committed for a mental disorder to any hospital, mental institution or sanatorium . . . or any person who has been convicted for the unlawful use, possession or sale of a narcotic, dangerous drug or central nervous system depressant or stimulant drug . . . or of a narcotic drug or controlled substance . . . who purchases, owns, possesses or controls any deadly weapon is guilty of a class E felony.

DEL. CODE ANN. tit. 11, § 1448 (1974).

6. Hetherton v. Sears, Roebuck & Co., 445 F. Supp. 294, 305 (D. Del. 1978). The district court granted summary judgment for the defendant on all theories of liability alleged by the plaintiffs. *Id.* at 305. As to the plaintiff's first theory, even though Sears had violated § 904 of the Delaware Code, the court found no causal connection between the statutory violation and the injuries sustained by the plaintiff. *Id.* With regard to the second theory of liability, the court concluded that compliance with specific Treasury Department regulations was sufficient to constitute compliance with the federal Gun Control Act. *Id.* at 301. Since Sears complied with the procedures set out in the regulations by obtaining identification and executing Form 4473 and was unaware of any negative information concerning Fullman, the court found no violation of the Gun Control Act. *Id.* at 299-301. As to the plaintiff's third theory of liability, the court concluded that it would be "unwise to extend the common law to recognize the possibility of a duty on the part of a firearms dealer to investigate the truthfulness of a purchaser's statements, absent some knowledge or reason to know that the purchaser is likely to misuse the firearm." *Id.* at 305.

7. *Id.* at 299. The court found that requiring the purchaser of a deadly weapon to produce two freeholders only served to verify the identity of the purchaser. *Id.* at 298. Because Fullman properly identified himself, the court

for the Third Circuit reversed and remanded for consideration of the issues of proximate cause and damages.[8] On remand, Sears defended on the grounds that the Delaware statutory requirement of identification by two freeholders violated the constitutional right to equal protection of nonfreeholders who sought to participate in gun control procedures.[9] Finding that Sears had met the third party standing requirements necessary to challenge the constitutionality of the Delaware statute,[10] the district court concluded that the two freeholder requirement was unconstitutional.[11]

---

found that compliance with the statute would not have affected the sale. *Id.* Thus, the court concluded that summary judgment was appropriate since there were no factual issues or inferences in dispute and, as a matter of law, no showing of proximate cause. *Id.* at 298-99.

8. Hetherton v. Sears, Roebuck & Co., 593 F.2d 526, 530-32 (3d Cir. 1979). The Third Circuit noted that requiring a purchaser to produce two freeholders was a burdensome procedure which reduced the ease and simplicity of obtaining a deadly weapon. *Id.* at 530. The court reasoned that it might have been difficult, if not impossible, for someone like Fullman, who could not legally purchase deadly weapons, to meet the additional identification requirement. *Id.* at 530-31. In view of the fact that Fullman was not accompanied by two freeholders, the court concluded that compliance with the statute would have prevented consummation of the sale at least at that time. *Id.* at 531. The court held that summary judgment was improperly granted since the issue of proximate cause could not be determined as a matter of law. *Id.*

9. 652 F.2d at 1154. Sears raised this constitutional argument in its original answer to Hetherton's complaint, but the district court, in deciding the summary judgment motion, did not reach this argument. *Id.* On remand, Sears contended that it had no duty to require Fullman to produce two freeholders because the Delaware statutory provision was unconstitutional. Hetherton v. Sears, Roebuck & Co., 493 F. Supp. 82, 85 (D. Del. 1980). Specifically, Sears contended that the statute violated the equal protection clause of the fourteenth amendment because it discriminated against Delaware citizens capable of participating in the regulatory functions of § 904 on the basis of wealth or property holding status. *Id.* In addition, Sears asserted the interests of potential vendees who knew no freeholders in purchasing deadly weapons. *Id.*

10. Hetherton v. Sears, Roebuck & Co., 493 F. Supp. 82, 86 (D. Del. 1980). The district court concluded that under the statute, Sears had a legal duty to require anyone purchasing a firearm to produce two freeholders who could identify the purchaser. *Id.* at 86. Since the failure to perform this duty exposed Sears to significant civil liability and could lead to criminal prosecution, the court found that the statute clearly caused Sears injury in fact and that Sears had a "weighty personal interest" in demonstrating that the law was unconstitutional. *Id.*

11. *Id.* at 87. The court found the requirement of § 904 to be "constitutionally infirm because it violates the Equal Protection Clause of the Fourteenth Amendment." *Id.* For the text of § 904, see note 2 *supra*. The fourteenth amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

The court found it unnecessary to decide whether it should review the statute's property-based classification under strict scrutiny, the minimum rationality standard, or some intermediate test, since it concluded that the freeholder identification requirement of § 904 was not rationally related to any conceivable legitimate state interest and, therefore, could not meet even the least demanding standard of review. Hetherton v. Sears, Roebuck & Co., 493 F. Supp. 82, 88 (D. Del. 1980). The court also concluded that, in light of the finding of unconstitutionality, Sears could not be held to a duty under the statute to require

On a second appeal, the United States Court of Appeals for the Third Circuit [12] affirmed,[13] *holding* that the existence of potential civil and criminal liability gave Sears standing to challenge the constitutionality of section 904 and that section 904 was unconstitutional under the fourteenth amendment. *Hetherton v. Sears, Roebuck and Co.*, 652 F.2d 1152 (3d Cir. 1981).

The concept of standing to sue derives from article III of the Constitution, which extends the jurisdiction of the federal courts to certain "cases or controversies." [14] In the 1975 case of *Warth v. Seldin*,[15]

---

the identification of two freeholders in addition to the positive identification provided by the driver's license. *Id.* at 89.

12. The case was heard by Circuit Judges Higginbotham and Weis, and Judge Barron P. McCune of the United States District Court for the Western District of Pennsylvania, sitting by designation. Judge Higginbotham delivered the opinion of the court. Judge Weis dissented.

13. 652 F.2d at 1155. The court reasoned that the requirement that the identification be performed exclusively by freeholders did not bear any rational relationship to the achievement of the statute's objectives and therefore violated the equal protection clause of the fourteenth amendment. *Id.*

14. U.S. CONST. art. III, § 2 cl. 1. Section 2, clause 1 provides in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Id.

Also derived from article III is the concept of mootness, which involves the extinction of a litigant's personal stake in the outcome of the case due to changes in law or in fact that occur after the initiation of a lawsuit. *See* North Carolina v. Rice, 404 U.S. 244, 246 (1971); Hall v. Beals, 396 U.S. 45, 48 (1969); Powell v. McCormack, 395 U.S. 486, 496 n.7 (1969). *See generally*, G. GUNTHER, CONSTITUTIONAL LAW 1653-55 (10th ed. 1980); Note, *The Mootness Doctrine in the Supreme Court*, 88 HARV. L. REV. 373 (1974). Although the Court has insisted that the mootness doctrine is an aspect of the article III case and controversy requirement, the modern Court has frequently relaxed the mootness barrier. *See* Defunis v. Odegaard, 416 U.S. 312, 316 (1974). In *Defunis*, the Court found that mootness barred an equal protection challenge to a law school minority admissions policy. *Id.* at 319-20. The petitioner, DeFunis, gained admission to the school while the case was in the courts. *Id.* at 314-15. By the time the case reached the Supreme Court, DeFunis was in his last semester of law school. *Id.* at 316. The Court found that the issue was not "capable of repetition, yet evading review" and held the claim nonjusticiable. *Id.* at 319. The Court reasoned that if the admissions procedures of the law school remained in force, there was "no reason to suppose that a subsequent case attacking those procedures [would] not come with relative speed to this Court." *Id.*

See also United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980); Roe v. Wade, 410 U.S. 113 (1973). In *Geraghty*, the Court held that an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim. 445 U.S. at 404. Since the class certification had been denied, the proposed representative of the class retained a "personal

the Supreme Court defined the contours of the doctrine of standing, which remain substantially intact today. The Court in *Warth* stated that in order to have standing to sue a party "must allege specific, concrete facts demonstrating that the challenged practices harm *him,* and that he would personally benefit in a tangible way from the court's intervention." [16]

---

stake" in obtaining class certification sufficient to assure that article III was not undermined. *Id.* Although the mootness doctrine requires that an actual controversy must exist at all stages of review, the *Roe* Court did not find that mootness barred the adjudication of the petitioner's constitutional challenge to criminal abortion statutes even though the petitioner was no longer pregnant. 410 U.S. at 124. Justice Blackmun explained the Court's decision:

> [W]hen, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied . . . . Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be "capable of repetition, yet evading review."

Id. at 125, *citing* Southern Pac. Terminal Co. v. ICC, 219 U.S. 498 (1911).

A related exception to the mootness doctrine is the principle of "a continuing harm to the plaintiff." *See* G. GUNTHER, *supra,* at 1653. A common example of this exception is the reluctance of the Court to find various challenges to criminal convictions moot even though the defendants have completed serving their sentence. *See, e.g.,* North Carolina v. Rice, 404 U.S. 244 (1971) (relying on "collateral consequences" to the conviction such as barriers to voting and to holding public office); Sibron v. New York, 392 U.S. 40 (1968) (overcoming the mootness question on the "mere 'possibility' " of collateral consequences stemming from a criminal conviction).

For a sampling of the Supreme Court's interpretations of the case or controversy requirement, *see* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970); Flast v. Cohen, 392 U.S. 83 (1968).

15. 422 U.S. 490 (1975). In *Warth,* several organizations and individuals brought an action against the town of Penfield, New York. *Id.* at 493. The petitioners claimed that the town's zoning ordinance excluded low and moderate income groups from living in Penfield in violation of their first, ninth, and fourteenth amendment rights. *Id.* The Court found that four distinct groups of plaintiffs failed to establish standing to sue. *Id.* at 502-18. The low and moderate income minority plaintiffs lacked standing because they had failed to allege that the zoning ordinance resulted in the denial of permits to builders and that without the ordinance, housing would have been available to them. *Id.* at 502-08. The Rochester taxpayers were denied standing on the basis of the prudential bar to the assertion of a third party's constitutional rights. *Id.* at 509-10. The housing associations lacked standing because they had failed to show that their groups had been economically injured or that a member of the groups had been injured. *Id.* at 511-14. And finally, the developer/builders were denied standing because they had not alleged that any one of their members had been denied a permit to build. *Id.* at 514-16.

16. *Id.* at 508 (footnote omitted). The Court stated that "[a]bsent the necessary allegations of demonstrable, particularized injury, there can be no confidence of 'a real need to exercise the power of judicial review' . . . ." *Id.* at 508, *quoting* Schlesinger v. Reservists to Stop the War, 418 U.S. 208, 221-22 (1974).

The constitutionally compelled standard for standing to sue of injury in fact and a causal connection between the injury and the challenged action was further refined by the Court the following year in *Simon v. Eastern Kentucky Welfare Rights Organization*[17] where the Court rejected a challenge by several indigents to a tax regulation which affected nonprofit hospitals.[18] A majority of the Court concluded that the plaintiffs' allegations failed to establish standing to sue since there was no showing of an injury to the plaintiffs "likely to be redressed by a favorable decision."[19] In *Duke Power Co. v. Carolina*

In addition to the injury in fact standard, the *Warth* Court set forth the requirement of a causal relationship between the defendant's actions and the plaintiff's injury. 422 U.S. at 504. The Court indicated that this additional requirement—a showing that the requested relief would redress the plaintiff's injury—was an article III limitation. *Id.* at 505. The Court reasoned that absent the two-pronged test of injury in fact and a sufficient causal connection, courts would be called upon to decide abstract questions of major public significance even though other governmental institutions may be more competent to address such questions and even though judicial intervention may be unnecessary to protect individual rights. *Id.* at 499-500, *citing* Schlesinger v. Reservists to Stop the War, 418 U.S. 208, 222 (1974). For a discussion of *Warth* and its ramifications, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW 92-97 (1978); Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.*, 91 HARV. L. REV. 1373 (1978).

17. 426 U.S. 26 (1976).

18. *Id.* at 45. In *Simon*, several indigents and their representative organizations challenged an Internal Revenue Service Ruling which reduced the amount of indigent services required to be provided by a hospital in order for the hospital to receive status as a "charitable institution." *Id.* at 30. Specifically, the Ruling granted favorable tax treatment to any hospital which provided indigents emergency room service, without the need for the hospital to provide a full range of services. *Id.* at 28. The plaintiffs alleged that the new Ruling encouraged hospitals to deny services to indigents. *Id.* at 33.

19. *Id.* at 38. The Court held that the respondents failed to carry their burden when they did not assert that the injury was a consequence of the defendant's actions or that the requested relief would remove the harm. *Id.*, *citing* Warth v. Seldin, 422 U.S. 490 (1975). Even though each indigent described a specific occasion when he or a member of his family had been denied hospital services due to indigency, the Court found that the plaintiffs lacked standing. 426 U.S. at 41. Justice Powell, writing for the majority, viewed article III as requiring a federal court to redress only "injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Id.* at 41-42. Justice Powell reasoned that it did not follow from the plaintiff's allegation that the denial of access to hospital services resulted from the Revenue Ruling or that a court-ordered return by the Internal Revenue Service to the previous policy would insure that the plaintiffs would receive the hospital service they desired. *Id.* at 42. The Court stated:

> It is purely speculative whether the denials of service specified in the complaint fairly can be traced to [IRS] "encouragement" or instead result from decisions made by the hospitals without regard to the tax implications. It is equally speculative whether the desired exercise of the court's remedial powers in this suit would result in the availability to [plaintiffs] of such services. So far as the complaint sheds light, it is just as plausible that the hospitals to which [plaintiffs] may apply for service would elect to forego favorable tax treatment to avoid the un-

Environmental Study Group,[20] the Court applied perhaps its most generous view, from a plaintiff's standpoint, of the two-pronged constitutional test[21] and found standing to sue despite a relatively tenuous causal connection between the alleged illegal action and the plaintiff's injury.[22]

Although a party may have the requisite personal stake in the outcome of the litigation to satisfy the requirements of article III, there may be "prudential" considerations which will nonetheless prevent a court

---

determined financial drain of an increase in the level of uncompensated services.

Id. at 42-43.

20. 438 U.S. 59 (1978). In *Duke*, forty individuals who lived near the sites for proposed nuclear power plants, an environmental group, and a labor organization claimed that the Price-Anderson Act violated due process by limiting aggregate liability for a single nuclear accident to $560 million. *Id.* at 72.

21. *See* L. TRIBE, *supra* note 16, at 9-13.

22. *See* 438 U.S. at 72-81. Writing for the majority, Chief Justice Burger noted that the personal stake requirement of article III had "come to mean not only a 'distinct and palpable injury' to the plaintiff but also a 'fairly traceable' causal connection between the claimed injury and the challenged conduct." *Id.* at 72, *quoting* Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977). With respect to the plaintiffs' injury, the Court found that several immediate adverse effects harmed the plaintiffs including the threatened reduction in property values and the increase in the temperature of a lake used for recreational purposes. 438 U.S. at 72-73. With respect to the more difficult causal issue, the Court, relying on the findings of the district court, found "a substantial likelihood that Duke would not be able to complete the construction and maintain the operation of [the nuclear] plants but for the protection provided by the Price-Anderson Act." *Id.* at 74-75, *citing* Duke Power Co. v. Carolina Envtl. Study Group, 431 F. Supp. 203, 219 (W.D.N.C. 1977). Based upon this analysis of the Article III requirements, the Court concluded that the plaintiffs had standing to challenge the Act. 438 U.S. at 81. For a discussion of the ramifications of *Duke Power*, see Varat, *Variable Justiciability and the Duke Power Case*, 58 TEX. L. REV. 273 (1980).

In its most recent exposition of the article III requirement of injury in fact, the Court denied standing to a nonprofit organization which sought to challenge the conveyance of federal property to a religious educational institution as a violation of the establishment clause of the first amendment. *See* Valley Forge Christian College v. Americans United For Separation of Church and State, Inc., 50 U.S.L.W. 4103 (U.S. Jan. 12, 1982), *reversing* 619 F.2d 252 (3d Cir. 1980). The Court stated that article III standing requirements include two elements: 1) the party seeking judicial resolution must "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant;" and 2) the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision." *Id.* at 4105, *citing* Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38, 41 (1976). Although the respondents were committed to the principle of separation of church and state, the Court held that they had failed to allege any personal injury sufficient to confer standing and that the invocation of the establishment clause did not justify any exception to the standing requirements of article III. 50 U.S.L.W. at 4108-10. The Court thus reversed the Third Circuit's ruling that respondents had established injury in fact through " 'their shared individual right to a government that shall make no law respecting the establishment of religion.' " *Id.* at 4108, *quoting* Americans United for Separation of Church and State v. Valley Forge Christian College, 619 F.2d at 261. For a discussion of the Third Circuit's attempt to expand the permissible bounds of standing, *see* Note,

from reaching the merits of the controversy.[23] One such consideration has taken shape as the rule that a party does not have standing to vindicate the constitutional rights of another.[24] The underlying rationale for this rule, as frequently stated by the Court, is to avoid unnecessary constitutional adjudication.[25] However, the Court has recognized exceptions to this rule [26] and will allow third party, or "jus tertii", standing when the following factors exist: [27] 1) the presence of some substantial relationship between the claimant and the third party; [28] 2) the impossibility of the

Citizen Interest in the Establishment Clause Held Sufficient to Challenge An Alleged Violation of That Clause, 26 VILL. L. REV. 609 (1981).

23. A. BICKEL, THE LEAST DANGEROUS BRANCH 120-23, 143, 146-54 (1962); L. TRIBE, *supra* note 16, at 52-80; Benzanson, *Abstention: The Supreme Court and Allocation of Judicial Power,* 27 VAND. L. REV. 1107; Scharpf, *Judicial Review and the Political Question Doctrine: A Functional Analysis,* 75 YALE L.J. 517 (1966). *Cf.* Field, *Abstention in Constitutional Cases: The Scope of the* Pullman *Abstention Doctrine,* 122 U. PA. L. REV. 1071 (1974).

24. *See* Note, *Standing to Assert Constitutional Jus Tertii,* 88 HARV. L. REV. 423 (1974). The Supreme Court has stated that this prudential standing rule "normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves." Warth v. Seldin, 422 U.S. at 509. The *Warth* Court applied this rule to one of the groups of plaintiffs who had challenged certain zoning practices and found that none of the exceptions to the rule was present. *Id.* For a discussion of *Warth,* see notes 15-16 and accompanying text *supra.* In an earlier formulation of the third party standing rule, the Court stated that it "ordinarily precludes a person from challenging the constitutionality of state action by invoking the rights of others." Barrows v. Jackson, 346 U.S. 249, 255 (1953). The Court has articulated the policy concerns which support the rule as "the avoidance of adjudication of rights which those not before the Court may not wish to assert, and the assurance that the most effective advocate of the rights at issue is present to champion them." Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. at 80.

See generally P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 184-91 (2d ed. 1973).

25. *See* Singleton v. Wulff, 428 U.S. 106, 113-14, 116 (1976); Griswold v. Connecticut, 381 U.S. 479, 481 (1965); NAACP v. Alabama, 357 U.S. 449, 459 (1958); Barrows v. Jackson, 346 U.S. 249, 255 (1953). Justice Brandeis, in a frequently cited passage, set forth the various instances in which the Court will refrain from deciding constitutional questions even though the cases may be within the Court's jurisdiction. *See* Ashwander v. TVA, 296 U.S. 288, 345-48 (1936) (Brandeis, J., concurring). For a comment on the rules set forth in *Ashwander,* see Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review,* 64 COLUM. L. REV. 1 (1964).

26. *See, e.g.,* Singleton v. Wulff, 428 U.S. 106, 123 (1976). For a discussion of *Singleton,* see notes 39-41 and accompanying text *infra. See generally* G. GUNTHER, *supra* note 14, at 1631-53; L. TRIBE, *supra* note 16, at 79-114 (1978); Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court,* 71 YALE L.J. 599 (1962); Note, *supra* note 24, at 423. *See* Warth v. Seldin, 422 U.S. at 500-01. The Court stated: "In some circumstances, countervailing considerations may outweigh the concerns underlying the usual reluctance to exert judicial power when the plaintiff's claim to relief rests on the legal rights of third parties." *Id.*

27. *See* notes 28-47 and accompanying text *infra.*

28. Note, *supra* note 24, at 425, *citing* Griswold v. Connecticut, 381 U.S. 479, 481 (1965). For a discussion of *Griswold,* see notes 36-37 and accompanying text *infra.*

rightholder's assertion of his own constitutional rights; [29] and 3) the need to avoid a dilution of third party constitutional rights that would result if the assertion of those rights was not permitted.[30] These factors are illustrated by several Supreme Court cases in which a litigant's standing to assert the constitutional rights of a third party was recognized.[31] In *Pierce v. Society of Sisters*,[32] a parochial school was permitted to assert the liberty interests of parents in its challenge to the constitutionality of a statute requiring parents to send their children to public schools.[33] Similarly, in *NAACP v. Alabama*,[34] the NAACP was permitted to assert the first amendment and privacy rights of its members in resisting a state order to disclose its membership lists.[35] In *Griswold v. Connecticut*,[36] the director of a Planned Parenthood Clinic and a licensed physician, who were convicted as accessories to the viola-

29. Note, *supra* note 24, at 425, *citing* NAACP v. Alabama, 357 U.S. 449, 459 (1958). For a discussion of *NAACP*, see notes 34 & 35 and accompanying text *infra*.

30. Note, *supra* note 24, at 425, *citing* Griswold v. Connecticut, 381 U.S. 479, 481 (1965); Barrows v. Jackson, 346 U.S. 249, 257 (1953). The commentator states that the *Barrows* Court "appeared to be motivated by both the difficulty of the rightholders' assertion of their rights, and the likelihood that forbidding the assertion of *jus tertii* and enforcing the covenant would deny blacks the equal protection of the laws." Note, *supra* note 24, at 426.

31. *See* notes 32-37 and accompanying text *infra*.

32. 268 U.S. 510 (1925).

33. *Id.* at 518. Although the *Pierce* Court failed to list specific criteria for the recognition of standing, its holding was based upon the close relationship between the parents and the school, the desire to protect business enterprises from interference with the freedom of their patrons, and the importance of the parents' constitutional right—the liberty interest in child rearing and education. *Id.*

34. 357 U.S. 449 (1958). In *NAACP v. Alabama*, the state had obtained a court order requiring the Association to produce membership lists. *Id.* at 453. Upon its refusal to comply with the court order, the NAACP was held in contempt. *Id.* at 451. The NAACP brought an action against the state, seeking review of the contempt judgment. *Id.* at 450.

35. *Id.* at 459. The Court noted that because litigation by individual members would require disclosure of their identity, and thus, destroy the freedom of association threatened by the court order, the NAACP was the appropriate party to vindicate that right. *Id.* The Court stated that the Association "argues more appropriately the rights of its members, and that its nexus with them is sufficient to permit that it act as their representative . . . . *Id.* at 458. The Court remarked that the constitutional rights of third parties could not be effectively guarded except by those before the Court. *Id.* at 459, *citing* Barrows v. Jackson, 346 U.S. 249, 255-59 (1953); Joint Anti-Fascist Refugee Comm. v. McGarth 341 U.S. 123, 183-87 (1951). The *NAACP* Court mentioned two factors which justified the assertion of third party rights in this case: 1) the rights of the parties were intertwined; and 2) the likelihood that the Association itself would be adversely affected by a decrease in membership and diminished financial support. *Id.*

36. 381 U.S. 479 (1965).

tion of a contraceptives use statute, were permitted to raise the privacy interests of married persons using contraceptives.[37]

The Burger Court has adhered to this view of standing to assert third party rights.[38] In *Singleton v. Wulff*,[39] the Court held that two physicians had standing to assert the privacy rights of their patients in challenging a statute which denied medicaid payments for abortions that were not medically necessary.[40] In a plurality opinion, the Court held that third party rights could be asserted when: 1) the plaintiff has a close relationship to the third party whose rights are sought to be asserted; and 2) the third party faces "some genuine obstacle" to asserting his or her own rights.[41] The Court reached a similar result in *Craig v. Boren*,[42] when it permitted vendors to assert the rights of their customers.[43] In *Craig*, a licensed vendor challenged an Oklahoma statute which prohibited the sale of 3.2% beer to males under the age of twenty-one and

37. *Id.* The Court, in reiterating its desire to avoid unnecessary constitutional adjudication, stated that any doubts regarding standing are "removed by reason of a criminal conviction for serving married couples in violation of an aiding-and-abetting statute." *Id.* at 481. The Court reasoned that an accessory should have standing to assert that the offense with which he is charged cannot constitutionally be a crime. *Id.*

38. *See* GUNTHER, *supra* note 14, at 1650; Rohr, *Fighting for the Rights of Others: The Troubled Law of Third-Party Standing and Mootness in the Federal Courts*, 35 U. MIAMI L. REV. 393 (1981).

39. 428 U.S. 106 (1976).

40. *Id.* at 118. The Court found that the statute unconstitutionally interfered with the decision to terminate pregnancy. *Id.* at 108.

41. *Id.* at 114-16. With respect to the first proposition, the Court reasoned that "[i]f the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue," the Court can be sure that adjudication of the right is "not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit." *Id.* at 115. With respect to the second proposition, the Court stated that if there is some genuine obstacle to the assertion of the right by the third party, that party's "absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by the default the right's best available proponent." *Id.* at 116, *citing* Eisenstadt v. Baird, 405 U.S. 438 (1972); NAACP v. Alabama, 357 U.S. 449 (1958); Barrows v. Jackson, 346 U.S. 249 (1953). In applying these two principles to the facts before it, the Court emphasized: 1) the closeness of the doctor-patient relationship, in both the situation where a patient could not secure an abortion without the aid of a physician, and the situation where a poor patient could not obtain an abortion unless the State paid the physician; and 2) the obstacles to the patient's assertion of her own rights, including the desire to protect the privacy of her decision to abort as well as the problem of mootness. 428 U.S. at 116-17.

Although the Court noted that constitutional rights should not be adjudicated unnecessarily because the holders of those rights "either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful . . . ," the Court concluded that this policy limitation should be overcome. *Id.* at 113-14, 116, *citing* Ashwander v. TVA, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring) (noting that the standing requirement is used to avoid unnecessary constitutional adjudication).

42. 429 U.S. 190 (1976).

43. *Id.* at 197.

to females under the age of eighteen.[44] The question before the Court was whether this gender-based distinction denied equal protection to males eighteen to twenty years of age.[45] The Court determined that the vendor had standing, finding that the Oklahoma statute plainly inflicted injury in fact upon the vendor[46] and that the third party rights would be "diluted or adversely affected" if the Court declined to hear the constitutional challenge.[47]

Against this background, the Third Circuit addressed the issues of whether Sears had standing to challenge the constitutionality of the Delaware statute[48] and, if so, whether the statute violated the equal

44. *Id.* at 191-92.

45. *Id.* at 192. Before reaching the equal protection issue, the Court discussed the vendor's standing to challenge the statute through the assertion of the fourteenth amendment rights of 18 to 20 year old males. *Id.* at 192-97.

46. *Id.* at 194. The Court noted that the legal duties created by the statutory scheme obliged the vendor either to obey the statute, thereby incurring a direct economic injury through the constriction of the vendor's market, or to disobey the statutory requirement and risk sanctions and a possible loss of license. *Id.* Thus, the Court concluded that the vendor's injury in fact was sufficient to guarantee "concrete adverseness." *Id.*

47. *Id.* at 195, *citing* Griswold v. Connecticut, 381 U.S. 479, 481 (1965). The Court reasoned that the threatened imposition of governmental sanctions might deter the appellant and other vendors from selling 3.2% beer to young men, and thus the "enforcement of the challenged restriction against the [vendor] would result indirectly in the violation of third parties' rights." 429 U.S. at 195, *citing* Warth v. Seldin, 422 U.S. 490, 510 (1975).

Although the Court has articulated at least three factors which justify the assertion of third party standing, there has been no uniform application of these factors, in that standing has been recognized when one or more of these factors are present in various factual contexts. *See* Craig v. Boren, 429 U.S. 190 (1976); Singleton v. Wulff, 428 U.S. 106 (1976); ROHR, *supra* note 38, at 404-26. As a result, many of the lower federal courts have adopted a liberal stance with regard to the assertion of third party standing. *See* ROHR, *supra* note 38, at 433-34. For example, some courts have granted standing solely on the basis of the "relationship" factor that was stated in *Singleton*. *Id.* at 434 (footnotes omitted). Other courts have permitted standing solely on the basis of a "genuine obstacle" to the third party's assertion of his own rights. *Id.* One court which strictly followed *Singleton* required the presence of both factors. *Id.* A few courts have only required an impact upon third party rights, with no pre-existing or established relationship. *Id.* In addition, other courts have recognized standing when adjudication did not contravene the policies underlying the general rule barring third party standing. *Id.* at 435 (footnotes omitted).

The Third Circuit has also adopted a generous view of the exceptions to the rule barring the assertion of third party rights. *See* United States v. Westinghouse Elec. Corp., 638 F.2d 570 (3d Cir. 1980). In *Westinghouse*, the United States had moved for an order under the Occupational Safety and Health Act directing the employer to produce certain documents. *Id.* at 572. The employer refused, relying on the privacy interests of its employees. *Id.* at 570, 574. The court recognized the employer's standing to challenge the subpoena by asserting the privacy interests of its employees since the employer was subject to the penalty of a contempt sanction. *Id.* at 574. The Court summarily concluded that prudential bars to standing were absent and recognized standing primarily on a finding of injury in fact. *Id.*

48. 652 F.2d at 1155-57.

protection clause of the fourteenth amendment.[49] As to the standing issue, the court initially noted that the jurisdiction of federal courts is limited by article III of the United States Constitution to "cases" or "controversies."[50] The court then indicated that recent Supreme Court decisions[51] direct the courts to determine whether the parties have suffered injury in fact to an interest arguably within the zone of interests protected or regulated by the statute in question.[52]

Finding that Sears had clearly suffered the requisite injury through its exposure to potential liability,[53] the court addressed the dissent's view that Sears should be denied standing due to the "prudential" concern against allowing the assertion of the constitutional rights of a third party not before the court.[54] In analyzing this issue, the court relied on the Supreme Court's decision in *Craig v. Boren*,[55] and its own decision in *United States v. Westinghouse*,[56] a jus tertii case.[57] The court noted that the principle factor present in both *Craig* and *Westinghouse* was

49. *Id.* at 1157-59.

50. *Id.* at 1155. For the relevant text of article III, see note 14 *supra*. The *Hetherton* court emphasized the Supreme Court's decisions which focused on whether the aggrieved party has such a personal stake in the outcome of the litigation as to assure that concrete adverseness which sharpens the issues presented to the court. *Id., citing* Flast v. Cohen, 393 U.S. 83, 99-100 (1968); Baker v. Carr, 369 U.S. 186, 204 (1962). For a discussion of the article III requirement of injury in fact see notes 14-24 and accompanying text *supra*.

51. 652 F.2d at 1155, *citing* Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970); Barlow v. Collins, 397 U.S. 159, 163 (1970).

52. 652 F.2d at 1155.

53. *Id.* at 1155-56. The court examined the district court's findings that under § 904 of the Delaware statute, Sears had a legal duty to require anyone purchasing a firearm from Sears to produce two freeholders for identification and that the failure to perform this duty was exposing Sears to " 'a very large potential liability and could lead to criminal prosecution.' " *Id., quoting* Hetherton v. Sears, Roebuck & Co., 493 F. Supp. 82, 86 (D. Del. 1980).

54. 652 F.2d at 1156-57. The court noted that Sears sought to assert the interests of nonfreeholders to participate in the enforcement of § 904 and the rights of persons who want to purchase deadly weapons but do not know any freeholders. *Id.* at 1156 (footnote omitted). *See* note 9 and accompanying text *supra*. The court distinguished Supreme Court cases involving prudential limitations on standing as presenting "situations totally separate from the present case." *Id.* at 1156, *citing* Schlesinger v. Reservists to Stop the War, 418 U.S. 208, 220-23 (1973); Flast v. Cohen, 392 U.S. 83, 100 (1968). The court noted that parties may lack standing because the alleged injury is too abstract or general in nature, as in *Schlesinger*, or because the case calls for the resolution of a political question, as in *Flast*. 652 F.2d at 1156. While acknowledging that Sears' challenge to the statute would not benefit any Delaware citizens in the future because that statute had already been amended, the court nevertheless found that the case was not moot. *Id.* The court reasoned that Sears' liability stemmed from events on the day of the sale and that, therefore, Sears "should have the same right on the basis of jus tertii to challenge § 904 as it would have had had there been no amendment." *Id.* at 1156-57.

55. 652 F.2d at 1156-57, *citing* Craig v. Boren, 429 U.S. 190 (1976).

56. 652 F.2d at 1156-57, *citing* United States v. Westinghouse, 638 F.2d 570 (3d Cir. 1980).

57. For a discussion of *Westinghouse*, see note 47 *supra*.

that the party seeking to assert the rights of a third party was subject to sanctions for the failure to obey either an unconstitutional statute or an impermissible subpoena.[58] The court found the policies underlying both cases apposite to *Hetherton*.[59] The *Hetherton* court determined that Sears was "in the best position to cogently present the constitutional arguments" [60] and that "any prudential considerations [were] outweighed by Sears' vital and immediate interests in challenging § 904." [61] After concluding that Sears was a proper party to champion the issue, the *Hetherton* court held that the Delaware statute was not rationally related to any legitimate state interest.[62]

In dissent, Judge Weis focused primarily on the question of whether Sears should be allowed to assert the constitutional rights of third parties.[63] Judge Weis agreed with the majority that Sears had suffered actual injury from the operation of the statute,[64] and thus, had satisfied the standing requirements of article III.[65] However, he maintained that prudential considerations should prevent a determination that Sears had standing.[66] After setting forth the factors which have led the

58. 652 F.2d at 1157.

59. *Id.* The court found that when the party seeking to assert third party rights is subject to sanctions, the policy consideration that the best advocate of the constitutional arguments should be before the court is satisfied. *Id.*

60. *Id.*

61. *Id.* at 1156.

62. *Id.* at 1157-59. Recognizing that a leaseholder is capable of feeling the same "attachment to the community" as a freeholder, the court concluded that "[f]or Delaware to assume that only citizens with the wealth and/or interest in owning real property are capable of participating in the regulatory functions of § 904 is simply not rational." *Id.* at 1158. The court also rejected the argument that the freeholder requirement is rationally related to a state objective of making the purchase of a deadly weapon more burdensome. *Id.* at 1159. Judge Higginbotham stated that

> [t]he state may have an interest in restricting the sale of firearms; however, it cannot do so by creating irrational and unconstitutional classifications. . . . If Delaware desired to burden the sale of firearms by restricting them to persons who are non-felons or otherwise stable members of the community, it should have done so by a more narrowly tailored statute.

Id.

63. *Id.* at 1160-65 (Weis, J., dissenting). Finding no standing on the part of the defendants to raise the constitutional rights of nonfreeholders, the dissent did not reach the equal protection issue. *Id.* at 1165 (Weis, J., dissenting).

64. *Id.* at 1160 (Weis, J., dissenting). Judge Weis noted that Sears was exposed to potential civil and criminal liability, and thus, actual injury had been shown. *Id.*

65. *Id.* Judge Weis relied on the Supreme Court's statement that a litigant who "asserts the rights of third parties defensively, as a bar to judgment against him" has satisfied article III standing requirements. *Id., quoting* Warth v. Seldin, 422 U.S. at 55 n.12. For a discussion of constitutional standing requirements, see notes 14-24 and accompanying text *supra*.

66. 652 F.2d at 1161-62 (Weis, J., dissenting). Judge Weis noted that the rule against the assertion of third party rights was a "self-imposed, nonconstitutional limitation, founded on prudential considerations," and that the rule has

Supreme Court to relax the rule against the assertion of jus tertii,[67] Judge Weis examined the facts of the *Hetherton* case to determine whether any of these factors was present.[68] First, Judge Weis noted that nonfreeholders were capable of asserting their own rights.[69] Second, Sears' interest and that of the class whose rights it purported to assert were not the same.[70] Finally, Judge Weis found that substantial

been invoked to avoid unwarranted intervention in cases involving nebulous and speculative constitutional issues. *Id.* at 1161 (Weis, J., dissenting), *citing* Craig v. Boren, 429 U.S. at 193. In addition, Judge Weis noted that the Supreme Court has favored the avoidance of adjudication of rights that third parties may not wish to assert and the postponement of judicial resolution until the most effective advocate of the right is before the court. 652 F.2d at 1161 (Weis, J., dissenting), *citing* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. at 80.

67. 652 F.2d at 1161-62 (Weis, J., dissenting). Judge Weis listed the following criteria:

> 1) the existence of countervailing considerations, such as the impossibility or difficulty attending third parties' efforts to assert their rights; 2) the lack of justification for enforcing the rule, as is true when there is such a congruence of interest between the third parties' rights and those of the proponent that they are tightly interwoven; and 3) the need to vindicate broad constitutional policy, for example, when fundamental rights are at stake.

Id. at 1161 (Weis, J., dissenting). In addition, Judge Weis noted that the Court has also permitted third party standing when denial of standing would have "diluted or adversely affected third-party rights." *Id.* But, as Judge Weis reasoned, there was no possibility that third party rights would be diluted in *Hetherton* because the challenged portion of the statute had already been amended. *Id.*

Although the majority addressed both the rights of nonfreeholders to participate in the regulatory procedures of § 904 and the rights of potential vendees who did not know two freeholders, the dissent limited its discussion to the participatory rights of nonfreeholders because the district court had so limited its decision. *Id.*

68. *Id.* at 1162-65 (Weis, J., dissenting).

69. *Id.* at 1163 (Weis, J., dissenting). Judge Weis noted that nothing would have prevented nonfreeholders, "had they been so inclined," from challenging the validity of the statute. *Id.* Since the remedy of declaratory judgment and a forum were available, Judge Weis concluded that the third party's absence from court when there was no genuine obstacle to that party's ability to bring an action tended to suggest that the third party's right was not truly at stake or important to him. *Id., citing* Singleton v. Wulff, 428 U.S. at 116.

70. 652 F.2d at 1164 (Weis, J., dissenting). Judge Weis reasoned that Sears sold the rifle and ammunition without any identification of the purchaser, and that the nonfreeholders' interest in gun control was thereby irrelevant. *Id.* Thus, as far as the particular sale to Fullman was concerned, Judge Weis found that Sears' economic interests would not have been furthered by the availability of two nonfreeholders to vouch for Fullman. *Id.* In addition, Judge Weis noted that the absence of a freeholder requirement in the future might increase Sears' sales of weapons. *Id.* Unlike *Craig*, where the third parties sought access to the market, the third parties in *Hetherton* did not seek access to the market but desired to prevent gun sales. *Id.* Therefore, Judge Weis concluded that no community of interest existed between Sears and the third parties whose rights it sought to assert. *Id.*

constitutional issues were not raised.[71] Consequently, Judge Weis concluded that there was no persuasive reason to justify dispensing with the rule against third party standing.[72]

It is submitted that the *Hetherton* court improperly recognized Sears' standing to raise the interests of third parties. In examining the jus tertii issue, Judge Higginbotham failed to properly deal with relevant Supreme Court precedent.[73] The Supreme Court has delineated three specific factors which may justify the assertion of third party rights.[74] The *Hetherton* court's failure to undertake an analysis of these factors not only pretermits Supreme Court precedent[75] but seriously undermines the significant policy considerations which support the general rule against third party standing.[76]

As the dissent correctly noted, none of the factors enunciated by the Supreme Court was present in *Hetherton*.[77] The *Hetherton* majority, relying on *Craig* and *Westinghouse,* implicitly determined that

71. *Id.* Judge Weis noted that standing is generally granted when the constitutional question implicates a fundamental right. *Id., citing* Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (standing granted to vendor when customer's privacy rights were asserted); Barrows v. Jackson, 346 U.S. 249 (1953) (recognizing standing when the issue involved allegations of racial discrimination in property ownership); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (permitting the proprietor of a private school to litigate the interest of parents in child rearing and education). Judge Weis stated that the constitutional issue raised in *Hetherton,* the rights of citizens to participate in the enforcement procedures of § 904, was of little import. 652 F.2d at 1164 (Weis, J., dissenting). Judge Weis distinguished this right to participate in the field of law enforcement from the more fundamental matters of "freedom from discrimination in voting, owning property, or availing oneself of first amendment rights of association, privacy, the exercise of religion, and rearing children," which do offer persuasive reasons for abandoning the prohibition against jus tertii. *Id.* at 1165 (Weis, J., dissenting).

72. 652 F.2d at 1165 (Weis, J., dissenting). Judge Weis found that in the absence of any of the three elements which would justify an exception to the general rule restricting third party standing, the court should exercise self-restraint even though article III standing was clearly established. *Id.* at 1162-65 (Weis, J., dissenting).

73. *See id.* at 1156-57; note 54 and accompanying text *supra.* For a discussion of Supreme Court authority dealing directly with third party standing, see notes 31-47 and accompanying text *supra.* The court distinguished *Hetherton* on the basis of two Supreme Court decisions which only peripherally addressed third party standing. *See* 652 F.2d at 1156, *citing* Schlesinger v. Reservists to Stop the War, 418 U.S. 208 (1973) (dealing primarily with the political question doctrine) Flast v. Cohen, 392 U.S. 83 (1968) (dealing primarily with taxpayer standing). *See also* note 85 and accompanying text *infra.* Although the *Hetherton* court did rely predominantly on one Supreme Court case which specifically analyzed the requirements for jus tertii—*Craig v. Boren*—this case is distinguishable from *Hetherton. See* notes 78-80 & 90 and accompanying text *infra.*

74. For a discussion of these criteria, see notes 28-30 and accompanying text *supra.*

75. *See* note 73 and accompanying text *supra.*

76. For a discussion of these policy considerations, see notes 25, 35 & 37 *supra.*

77. *See* notes 67-70 and accompanying text *supra.*

the relationship of vendor-vendee was sufficient to recognize third party standing.[78] However, unlike *Craig*, where the third parties sought access to the market, the third parties in *Hetherton* desired to *prevent* gun sales.[79] Thus, Sears lacked a congruence of interest with the parties whose rights Sears asserted.[80] Furthermore, *Hetherton* did not involve the assertion of fundamental constitutional interests.[81] The right to participate in the enforcement of gun control regulation is not among those fundamental rights which the Supreme Court has recognized in granting third party standing, such as the rights of parents to direct the education of their children,[82] the right to marital privacy [83] and the right to be free from racial discrimination.[84] Apparently Judge Higginbotham glossed over this type of an analysis [85] and based his decision predominantly on the article III consideration of injury in fact without adequately explaining why the prudential considerations articulated by the Supreme Court were outweighed in this case.[86]

Moreover, as the Supreme Court has consistently stated, these prudential considerations in questions of jus tertii standing are based on a desire to avoid unnecessary constitutional adjudication.[87] It is suggested that this policy concern further buttresses the conclusion that Sears did not have standing to raise the equal protection issue. First, as Justice Blackmun stated in *Singleton v. Wulff*, constitutional adjudication is unnecessary when "the right's enjoyment will be unaffected by the outcome of the suit." [88] This rationale is especially applicable to *Hetherton* in view of the redraft of the Delaware statute which allowed nonfreeholders to participate in the enforcement provisions.[89]

78. *See* 652 F.2d at 1156-57; notes 55-58 and accompanying text *supra*. For a discussion of *Craig*, see notes 42-47 and accompanying text *supra*. For a discussion of *Westinghouse*, see note 47 *supra*.

79. 652 F.2d at 1154 (Weis, J., dissenting). *See also* note 70 *supra*.

80. 652 F.2d at 1154 (Weis, J., dissenting).

81. *See* note 71 and accompanying text *supra*.

82. Pierce v. Society of Sisters, 268 U.S. 510 (1925). For a discussion of *Pierce*, see notes 32 & 33 and accompanying text *supra*.

83. Griswold v. Connecticut, 381 U.S. 479 (1965). For a discussion of *Griswold*, see notes 36 & 37 and accompanying text *supra*.

84. Barrows v. Jackson, 346 U.S. 249 (1953).

85. *See* 652 F.2d at 1156. The court reiterated the general rule that courts will not permit a party to assert the rights of others when those third parties are capable of representing their own interests. *Id.* The court then set forth the third party rights Sears sought to assert and concluded that any prudential considerations were outweighed by Sears' "vital and immediate" interest in challenging § 904. *Id.*

86. *See* note 73 *supra*.

87. Singleton v. Wulff, 428 U.S. 106 (1976); Griswold v. Connecticut, 381 U.S. 479 (1965); NAACP v. Alabama, 357 U.S. 449 (1958); Barrows v. Jackson, 346 U.S. 249 (1953).

88. 428 U.S. at 115. For a discussion of *Singleton*, see notes 39-41 and accompanying text *supra*.

89. 652 F.2d at 1159 n.7. *See* note 2 *supra*.

It is submitted that the concern in *Craig*, that the vendor would be required to continue the discrimination or risk some type of sanction, did not apply in *Hetherton* because the discriminatory aspects of the statute had been eliminated.[90] The second, related ground is that the revision of the statute rendered the equal protection issue moot,[91] and therefore, the court should not have considered the matter.

It is further suggested that the *Hetherton* court not only failed to apply valid Supreme Court precedent, but did so without clearly articulating a test to apply in future jus tertii cases. The court's justification for recognizing Sears' standing was a finding of Sears' "vital and immediate" interest in challenging section 904.[92] However, the third party interests involved were only "vital" to Sears as an integral part of its defense.[93] A party's interest in defending against liability cannot be considered a newly enunciated factor in determining whether to abandon the general rule against third party standing. Thus, the question remains whether only article III standards apply or whether some combination of article III plus the *Craig* and *Westinghouse* rationales constitute the test for the recognition of third party standing under the *Hetherton* approach.[94]

If the Third Circuit's decision implies the abrogation of the prudential rule against third party standing, standing will be more readily granted to defendants seeking to use the shield of third party rights. This possible impact must be tempered by questioning whether the Third Circuit can in fact abrogate specific prudential limitations delineated by the Supreme Court.[95] Finally, the absence of clearly de-

90. *See* 652 F.2d at 1154 n.2. *Craig* is also distinguishable from *Hetherton* on a procedural basis. In *Craig*, the plaintiff, who raised the interests of third parties argued that in order to comply with the challenged statute, she would have to participate in unconstitutional discrimination, while in *Hetherton* the defendant sought to raise third party interests as a shield to liability. For a discussion of *Craig*, see notes 42-47 and accompanying text *supra*. The Court has allowed the assertion of third party rights from a defensive posture when the nature of the right sought to be asserted is a fundamental one. *See* Barrows v. Jackson, 346 U. S. 249 (1953). The right asserted in *Hetherton*, to participate in the enforcement of § 904, cannot be characterized as a fundamental right. *See* note 71 and accompanying text *supra*.

91. The court conceded that the equal protection issue was moot to the extent that resolution of the case would not benefit any Delaware citizens in the future. 652 F.2d at 1156. For a discussion of mootness, see note 14 *supra*.

92. 652 F.2d at 1156. *See* text accompanying note 61 *supra*.

93. *See* 652 F.2d at 1156.

94. *See id.* at 1156-57.

95. In general, the Supreme Court has reversed lower federal courts for failure to apply prudential limitations on standing. *See* Benzanson, *supra*, note 23. A useful analogy can be drawn to the abstention doctrine. *See* Railroad Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941). In *Pullman*, the United States District Court for the Western District of Texas had jurisdiction to hear the plaintiffs' claim which involved two theories: 1) that the act complained of was unauthorized under state law; and 2) that the act complained of violated the equal protection clause. *Id.* at 498. The district court exercised juris-

fined standards in *Hetherton* leaves future litigants unable to evaluate what third party interests may be raised.[96]

Valerie Youmans Vilbert

---

diction and granted the plaintiffs' request for an injunction. *Id.* The United States Supreme Court reversed and remanded, holding that the district court should have abstained from deciding the case because the first issue involved an unsettled issue of state law and a determination of that issue by the state courts would have enabled the district court to avoid a decision on the constitutional question. *Id.* at 501-02. Thus, even when article III jurisdiction requirements are met, prudential concerns may mandate dismissal of an action. *See id.* Although the decision to abstain or not to abstain is regarded as "discretionary," it is reversible error to ignore prudential limitations. *See* Field, *supra* note 23.

96. *See* text accompanying note 94 *supra.*