

Maurice A. Deane School of Law at Hofstra University

## Scholarship @ Hofstra Law

---

Hofstra Law Faculty Scholarship

---

1994

### Retroactivity, Equal Protection and Standing

Leon Friedman

*Maurice A. Deane School of Law at Hofstra University*

Follow this and additional works at: [https://scholarlycommons.law.hofstra.edu/faculty\\_scholarship](https://scholarlycommons.law.hofstra.edu/faculty_scholarship)

---

#### Recommended Citation

Leon Friedman, *Retroactivity, Equal Protection and Standing*, 10 Touro L. Rev. 503 (1994)

Available at: [https://scholarlycommons.law.hofstra.edu/faculty\\_scholarship/222](https://scholarlycommons.law.hofstra.edu/faculty_scholarship/222)

This Article is brought to you for free and open access by Scholarship @ Hofstra Law. It has been accepted for inclusion in Hofstra Law Faculty Scholarship by an authorized administrator of Scholarship @ Hofstra Law. For more information, please contact [lawscholarlycommons@hofstra.edu](mailto:lawscholarlycommons@hofstra.edu).

# RETROACTIVITY, EQUAL PROTECTION AND STANDING

*Judge Leon D. Lazer:*

Thank you very much, Professor Gora. Our next speaker is Leon Friedman, who has been with us at all of our conferences. He is a Professor of Law at Hofstra University, has an extensive Civil Liberties Union background and is a lecturer at the Federal Judicial Center on civil rights. Professor Friedman is going to deal with a number of cases that do not fit easily within the various Bill of Rights niches, but which we believe, and he believes, are of significance and of interest. Professor Friedman.

*Professor Leon Friedman:*

I do not know whether to call myself a utility infielder or a garbage man, but I have a number of widely disparate cases to talk about, all of which affect state and local governments in a very significant way.

I want to start with *Harper v. Virginia Department of Taxation*,<sup>1</sup> the retroactivity case, because this one produced an interesting split between the so-called conservative judges.<sup>2</sup> I do not know if there are Federalists out there, but two basic propositions of Federalist doctrine were at issue here. One was the extent of state immunity from federal taxation, and the other was the whole question of retroactivity. To a Federalist, it is very important that state governments not be imposed upon by federal courts and federal tax problems. On the other hand, they like to think of courts as always discovering the law, not making the law. If you were a possible candidate for a federal judgeship and you went to the Justice Department in the Reagan and Bush Administration, the very first question they would ask you is, "are you in favor of judges making law or do you think judges

---

1. 113 S. Ct. 2510 (1993).

2. *Id.* at 2513, 2526. Justice Thomas delivered the opinion of the Court and was joined by Justice Scalia, while Justice O'Connor wrote a dissenting opinion in which Chief Justice Rehnquist joined.

simply discover law?" You had better get that question right or you are not going to go any further. And, of course, the doctrine is that judges never make law, they discover law.

Problems of retroactivity implicate that very key issue. Under what circumstances should a court, having made either a constitutional or a non-constitutional determination, say that a law applies in this case and in future cases, but it does not apply backwards. Any governmental body that says, "This is the law from now on," is making law. I do not know how else to describe it. Judges are not supposed to do that, they are supposed to say, "Oh, we were blind, but now we can see. We did not know what the law was. Now we know. It is the law and oh, by the way, it always was the law." If there is one strong Federalist doctrine, it is that judges should not make law and therefore a decision should always apply retroactively. The *Harper* case involved that issue in a very significant way for state and local governments.

The Supreme Court recently dealt with the issue of local and state taxation of governmental retirees.<sup>3</sup> Some states said that state employees who retired and got certain benefits, such as pension benefits or retirement pay, would not be taxed by the state or local government. However, that immunity from taxation did not apply to federal retirees. Four or five years ago, in a case called *Davis v. Michigan Department of Treasury*,<sup>4</sup> the Supreme Court held that the state immunity provision that protects state government retirees, but not federal government retirees, from state taxation violates a provision of federal law and the doctrine of intergovernmental tax immunity.<sup>5</sup> Title IV, section 111 says that it is permissible for local government bodies to tax federal governmental employees as long as it is not discriminatory,<sup>6</sup> and

---

3. See *infra* notes 4-7 and accompanying text.

4. 489 U.S. 803 (1989).

5. *Id.* at 817.

6. 4 U.S.C. § 111 (1966). In relevant part, the section provides:  
The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States . . . by a duly constituted taxing authority having jurisdiction, if the taxation does

as long as they are treated the same way as everybody else. The Supreme Court held that to allow pension or retirement benefits of federal employees to be taxed, but not those of state employees, violates that section.<sup>7</sup>

The question now arises, is that ruling retroactive? Twenty-three states had such a rule.<sup>8</sup> It was a fairly well established rule. Virginia,<sup>9</sup> Michigan,<sup>10</sup> and several other states had them. Now, what do you do? Needless to say, a group of federal retirees came into federal court claiming that they paid a discriminatory tax to the state government, and they wanted those taxes back. The burden on state and local governments would be very severe if the taxes had to be repaid. Indeed, Justice O'Connor, in her dissent in *Harper*, starts out by saying: "Today the Court applies a new rule of retroactivity to impose crushing and unnecessary liability on the states, precisely at a time when they can least afford it."<sup>11</sup> That is a dissent because in an opinion written by Justice Thomas, concurred in by Justice Scalia, the United States

---

not discriminate against the officer or employee because of the source of the pay or compensation.

*Id.*

7. *Davis*, 489 U.S. at 817.

8. See *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510, 2515 n.5 (1993) (noting that at the time *Davis* was decided 23 states had laws that gave "preferential tax treatment to benefits received by employees of state and local governments relative to the tax treatment of benefits received by federal employees").

9. See VA. CODE ANN. § 58.1-322(C)(3) (Michie 1991) (repealed 1989). The statute exempted from taxation the pensions or retirement income of officers or employees of the state, its subdivision or agencies, as well as income paid by the state, its subdivision or agencies, to surviving spouses of officers or employees. *Id.*

10. See MICH. COMP. LAWS ANN. § 206.30(1)(f)(i)-(ii) (West Supp. 1993). The Michigan statute exempts retirement benefits received from the state, or any of its subdivisions, from taxation, while taxing other forms of retirement benefits. *Id.*

11. *Harper*, 113 S. Ct. at 2526 (O'Connor, J., dissenting).

Supreme Court basically said it is fine to impose this unnecessary and crushing liability on the states.<sup>12</sup>

Why did they do that? By the way, Justice Rehnquist joined Justice O'Connor's dissent, so we have the four conservative justices absolutely split down the middle.<sup>13</sup> In addition, there was some very angry finger-pointing by Justice Scalia at Justice O'Connor,<sup>14</sup> and Justice O'Connor at Justice Scalia,<sup>15</sup> about the whole question of retroactivity. Justice Scalia said, as between crushing taxation on the states and conservative intellectual purity, intellectual purity will win in every instance.<sup>16</sup>

Well, it certainly wins in this instance. Justice Scalia, in a very strong opinion, said that every prior decision under which a court applied a rule prospective in nature was wrong, and goes against

---

12. *Id.* at 2519-20. If a state is found to have levied an "impermissibly discriminatory tax," the Constitution requires the state "to provide relief consistent with Federal Due Process principles." *Id.* at 2519 (quoting *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 181 (1990)). The Court, however, did hold that "federal law does not necessarily entitle [petitioners] to a refund." *Id.* Rather, the Court held that "a State may either award full refunds to those burdened by an unlawful tax or issue some other order that 'create[s] in hindsight a nondiscriminatory scheme.'" *Id.* at 2520 (quoting *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 40 (1990)).

13. *See supra* note 2.

14. *Harper*, 113 S. Ct. at 2523-24 (Scalia, J., concurring). Justice Scalia, in response to Justice O'Connor's assertion that "when the Court changes its mind, the law changes with it," stated that "[t]hat concept is quite foreign to the American legal and constitutional tradition. It would have struck John Marshall as an extraordinary assertion of raw power." *Id.* at 2523, 2527 (Scalia, J., concurring) (quoting *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439, 2451 (1991)). He thus concluded by saying "I join the opinion of the Court because the doctrine of prospective decision making is not in fact protected by our flexible rule of *stare decisis*; and because no friend of *stare decisis* would want it to be." *Id.* at 2524 (Scalia, J., concurring).

15. *Id.* at 2528 (O'Connor, J., dissenting). Justice O'Connor stated that "Justice Scalia would cast overboard our entire retroactivity doctrine . . . [and] [b]ehind the undisguised hostility to an era whose jurisprudence he finds distasteful, Justice Scalia raises but two substantive arguments . . . neither of which has been adopted by a majority of this Court." *Id.* (O'Connor, J., dissenting).

16. *Id.* at 2520-24 (Scalia, J., concurring).

the very nature of what the judicial process is all about.<sup>17</sup> The prior doctrine, at least in the civil field, was the *Chevron Oil* doctrine,<sup>18</sup> which implicated all kinds of equitable doctrines. The *Chevron Oil* doctrine stated that a court will not apply a new rule in the civil area, as far as civil law is concerned, if various equitable considerations are not met.<sup>19</sup> Those principles no longer apply.

There are a whole set of comparable principles in the criminal law area, and there is a certain amount of tension and inconsistency in this whole area because Justice Scalia was very much in favor of not applying new rules in the criminal law area,

---

17. *Id.* at 2522 (Scalia, J., concurring). Justice Scalia stated that “[t]he true *traditional* view is that prospective decision making is quite incompatible with the judicial power, and that courts have no authority to engage in the practice.” *Id.* (Scalia, J., concurring) (emphasis in original).

18. See *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). The respondent in *Chevron Oil* suffered a back injury while working on a drilling rig on the Outer Continental Shelf off the Gulf Coast of Louisiana that was owned and operated by the Chevron Oil Company. *Id.* at 98. The respondent did not discover the injury until many months later, at which time he brought suit for damages against Chevron Oil. *Id.* The issues before the Supreme Court were whether the action was time barred, whether state or federal law was appropriate in determining whether the action was time barred, and whether a determination in favor of federal law would be applied retroactively. *Id.*

19. *Id.* at 106-07. The Court in *Chevron Oil* set forth three factors to consider in dealing with a nonretroactivity question. *Id.* at 106. First, the decision in question must “establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed.” *Id.* Next, the court weighs the pro’s and con’s of each case by looking at the history, purpose, and effect of the possible retroactive law and deciding whether such an application will further or impede its application. *Id.* at 107. Finally, the court weighs the inequity that would result by a retroactive application. Where a great inequitable result would occur if the rule was applied retroactively, the court will hold for nonretroactivity. *Id.* Based on the factors it set forth, the Court decided not to retroactively apply the statute of limitations that was at issue. *Id.* In the time since the respondent had first instituted the suit, the Court felt that “[i]t cannot be assumed that he did or could foresee that this consistent interpretation of the [rule in question] would be overturned. The most [respondent] could do was to rely on the law as it then was.” *Id.*

as held in *Teague v. Lane*.<sup>20</sup> In *Teague*, the Court held that you do not apply a new law in a *habeas corpus* petition,<sup>21</sup> which, by the way, is a civil suit, as we all know, not criminal. But this doctrine of retroactivity and prospective application of law is not as simple as it sounds because the Supreme Court, in the criminal law area, said "Yes," as long as something is on direct appeal, any new rule should apply.<sup>22</sup> However, once it is over and we are in the post-conviction area, we will not apply any new rule.<sup>23</sup> By the way, that is a major issue in the pending crime bill. As many of you know, the *habeas corpus* provisions of the pending crime bill are an extremely contentious part of what is now before Congress.<sup>24</sup> The whole issue of retroactivity is not a dry or unimportant academic, philosophical question.

The *Harper* case involves hundreds of millions of dollars of tax payments which are going to have to be repaid,<sup>25</sup> subject only to the statute of limitations. The one cut back on it is at the very end of Justice Thomas' opinion, where he said it is not necessary that

---

20. 489 U.S. 288 (1989).

21. *Id.* at 310. The Court held that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Id.* The Court chose to adopt Justice Harlan's view of retroactivity for those cases which are on collateral review. It stated that "it is 'sounder, in adjudicating habeas petitions, generally to apply the law prevailing at the time a conviction became final than it is to seek to dispose of [habeas] cases on the basis of intervening changes in constitutional interpretation.'" *Id.* at 306 (quoting *Mackey v. United States*, 401 U.S. 667, 689 (1971)).

22. *Id.* at 322. The Court stated that a holding "cannot be applied retroactively to permit collateral review of convictions that became final before it was decided . . ." *Id.*

23. *See supra* note 21.

24. *See Mary Dixon, Court's 'Last Resort' Must Remain Intact Against Efficiency*, CHI. TRIB., Jan. 4, 1994, at 15 (stating that proponents of the crime bill blame congested court systems as a reason to curtail habeas corpus appeals while opponents feel that a "last-ditch" appeal should be allowed because a death sentence is "irreversible").

25. *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510, 2519 (1993) (stating that *Davis* applies retroactively to the tax years at issue in the refund action).

a judgment of a specific amount be laid down by the Court.<sup>26</sup> We will give the states a certain amount of leeway on how to make these payments.<sup>27</sup> The states are going to have to pay that money back, but we will give them a certain amount of time and flexibility in how they pay it back.<sup>28</sup> However, if the states do not, these plaintiffs can come right back to federal court and get a judgment for the amount required. So there is a certain amount of time and flexibility that they are going to give to the states. I do not know if they will give the tax payers tax credits, or what the suggestion would be, but it may very well be that they will not be able to obtain a judgment against the state for a specific amount, which, of course, involves some Eleventh Amendment problems.<sup>29</sup> At any rate, there is certainly a little bit of flexibility that they are willing to give the states in making that payment. As I said, the decision was quite interesting because the three liberal Justices just sat back and enjoyed the dog fight between the more conservative justices, who were fighting in favor of state federalism and immunity on the one hand, and retroactivity on the other hand.

The second important case that I wanted to mention is *Heller v. Doe by Doe*,<sup>30</sup> an involuntary commitment case dealing with the difference between the treatment in Kentucky of mentally retarded patients and mentally ill patients.<sup>31</sup> It turns out that

---

26. *Id.* at 2519-20 (stating that a state may give full refunds to those affected by an unlawful tax or they may issue another order to "create[] in hindsight a nondiscriminatory scheme").

27. *Id.* at 2520. ("Virginia 'is free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements we have outlined . . . ." (quoting *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 51-52 (1990))).

28. *Id.*

29. See U.S. CONST. amend. XI. The Eleventh Amendment states that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *Id.*

30. 113 S. Ct. 2637 (1993).

31. *Id.* at 2640.



Kentucky law would impose a lower standard for the involuntary commitment of a mentally retarded patient than it would for a mentally ill patient.<sup>32</sup> In order to involuntarily commit a mentally retarded patient, there were four standards that had to be met,<sup>33</sup> but they had to be met by clear and convincing evidence.<sup>34</sup> In order to involuntarily commit a mentally ill person, you had to show proof beyond a reasonable doubt.<sup>35</sup> Now, the state is sending people away and they are losing their freedom, but is there a basis for treating mentally retarded and mentally ill patients differently in terms of the standard of proof? Secondly, with the mentally retarded patients, the parents could intervene and be heard.<sup>36</sup> The Kentucky law allowed the parents to intervene as a party in the proceedings.<sup>37</sup>

---

32. See KY. REV. STAT. ANN. § 202B.160(2) and § 202A.076(2) (Michie/Bobbs-Merrill 1991). The burden of proof for involuntarily committing a mentally retarded person is clear and convincing evidence, while the standard for involuntarily committing a mentally ill person is beyond a reasonable doubt. *Id.*

33. *Heller*, 113 S. Ct. at 2641. The four requirements under § 202B.040 are:

(1) The person is a mentally retarded person; (2) The person presents a danger or a threat of danger to self, family, or others; (3) The least restrictive alternative mode of treatment presently available requires placement in [a residential treatment center]; and (4) Treatment that can reasonably benefit the person is available in [a residential treatment center].

*Id.*

34. See *supra* note 32. The reason asserted by Kentucky for the lower standard of proof in hearings for the mentally retarded was that mental retardation is "easier to diagnose than mental illness." *Heller*, 113 S. Ct. at 2644. The Court found that "Kentucky's basic premise that mental retardation is easier to diagnos[e] than mental illness has a sufficient basis in fact." *Id.* (citations omitted).

35. See *supra* note 32.

36. See KY. REV. STAT. ANN. § 202B.160(3) (Michie/Bobbs-Merrill 1991). The statute provides:

Guardians and immediate family members of the respondent shall be allowed to attend all hearings, conferences or similar proceedings; may be represented by private counsel, if desired; may participate in the hearings or conferences as if a party to the proceedings; may cross-examine witnesses if desired; and shall have standing to appeal any adverse decision.

The lower federal courts held that both provisions were unconstitutional.<sup>38</sup> They said that it is irrational to have a different standard for mentally retarded and mentally ill patients.<sup>39</sup> They are both in the same boat, so why have a different standard of proof? They also found that it was a violation of procedural due process to allow the parents to intervene as parties because their interest was to get rid of their child.<sup>40</sup> The implication was that if there was a proceeding to commit a mentally retarded patient, it was in the parents' interest to get rid of them and therefore, the whole case would be stacked against the patient. To have them present in the case would somehow implicate the rights of the mentally retarded person.<sup>41</sup>

In another very close case, the Supreme Court reversed in a five to four decision,<sup>42</sup> with Justice O'Connor concurring in part and dissenting in part, and with Justices Souter, Blackmun and Stevens dissenting.<sup>43</sup> I think the case is quite important because

---

*Id.*

37. *Heller*, 113 S. Ct. at 2641.

38. *See, e.g., Doe v. Cowherd*, 770 F. Supp. 354 (W.D. Ky. 1991) (recounting the long and complicated procedural history of the case), *aff'd in part, rev'd in part*, 965 F.2d 109 (6th Cir. 1992).

39. *Id.* at 358. The lower court, relying on *Doe v. Austin*, 848 F.2d 1386, 1394 (6th Cir. 1988), held that "mentally retarded persons be afforded the same protections as are mentally ill persons when facing involuntary commitment." *Id.* The court continued by stating that "mere identification of differences is not enough; equal protection 'require[s] that a distinction made have some relevance to the purpose for which the classification is made.'" *Id.* (quoting *Baxstrom v. Herold*, 383 U.S. 107, 111 (1966)).

40. *Id.* The court held those sections of the statute which permitted "parents or guardians . . . to participate in all aspects of the proceedings" unconstitutional under both the Equal Protection and Due Process Clauses because it would be unfair to allow third parties to participate when their interests may be adverse to the mentally retarded person's. *Id.*

41. *Id.*

42. *See Heller*, 113 S. Ct. at 2640 Justice Kennedy delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices White, Scalia, and Thomas joined.

43. *Id.* at 2650 (Souter, J., filed a dissenting opinion in which Blackmun, Stevens, J.J., joined, with O'Connor, J., joining in part. O'Connor, J. also concurred in part).

of the extraordinary deference that the Supreme Court gives to the rational relationship test.<sup>44</sup> Under the Equal Protection Clause, if you are not in the heightened scrutiny area, you apply the rational relationship test. The question is, is the rational relationship test a toothless one? Well, I always used to call it the "one tooth test." It is not toothless, but there is not a lot of bite in the whole thing. I think they have shaved off that tooth quite a bit, because Justice Kennedy basically stated that if you are applying the rational relationship test, the state or local government does not have to articulate any reason.<sup>45</sup> Furthermore, if there is any conceivable reason that could have occurred to a rational legislature, we will uphold the law.<sup>46</sup> So invent something after the fact, and if it is rational, we will uphold it.

I remember some years ago there was a case called *Maher v. Roe*,<sup>47</sup> dealing with the funding of abortions. And I remember that a friend of Professor Gora's and I got up there and said, "This law is irrational," and Justice Rehnquist looked at Professor Gora's friend and said, "Does that mean every

---

44. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.3 (4th ed. 1991). Under the rational relationship test, a court will only invalidate a law if the law has no rational relationship to any legitimate governmental interest. *Id.* at 580.

45. *Heller*, 113 S. Ct. at 2643 (stating that a state has no duty to explain or support the "rationality of a statutory classification" and that "'a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data'").

46. *Id.* at 2642. Justice Kennedy stated that "a legislature that creates these categories need not 'actually articulate at any time the purpose or rationale supporting its classification' . . . [i]nstead, a classification 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for classification.'" *Id.* (citations omitted).

47. 432 U.S. 464 (1977) (holding that the Equal Protection Clause does not require a state which is participating in Medicaid to pay expenses relating to nontherapeutic abortions of indigent women because it chose to pay expenses incident to childbirth); see also *Poelker v. Doe*, 432 U.S. 519 (1977) (holding that there was no equal protection violation by the city of St. Louis in electing to provide publicly financed hospital service for childbirth but not for nontherapeutic abortions).

legislator who voted for it was certifiably insane? Is that what the test means?" Well, that is about what it means now. You have to have a certifiably insane legislature in order for the law to be found irrational.

But, the deference to be given to the legislature is extraordinary. The state has no obligation to produce evidence to sustain the rationality of the statutory classification, and a statute is presumed constitutional.<sup>48</sup> It does not have to be based on any kind of scientific evidence. This case represents the most extraordinary deference I have ever seen under the rational relationship test. I have never seen a case which talked about the lean-over-backwards test, but that is what they did here. They leaned over backwards until they practically fell on their backs in order to sustain the law, and once again, the Court went out of its way to find some justification to support it. So I think *Heller* is important not so much for the specifics of the case, but because it indicates the extraordinary deference that the federal courts must now give under the rational relationship test to any kind of state and local legislation.

The third case I want to talk about is a standing case, *Northeastern Florida Chapter of the Associated General Contractors of America v. Jacksonville*.<sup>49</sup> It was an attack on a minority set-aside program instituted in Dade County, Jacksonville, Florida.<sup>50</sup> The City of Jacksonville had established a ten percent minority business enterprise requirement.<sup>51</sup> An

---

48. See *Heller*, 113 S. Ct. at 2643 (stating that there "is no obligation to produce evidence to sustain the rationality of a statutory classification" and that [a] statute is presumed constitutional and "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it" (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973))).

49. 113 S. Ct. 2297 (1993).

50. *Id.* at 2299.

51. *Id.* The City of Jacksonville enacted an ordinance which mandated "that 10% of the amount spent on city contracts be set aside each fiscal year for so-called 'Minority Business Enterprises.'" *Id.* A Minority Business Enterprise was "defined as a business whose ownership was at least 51% 'minority.'" *Id.* A minority was defined as "a person who is or considers

association of Florida contractors went into court to challenge the law, and when the case got to the Supreme Court, the question was, what kind of injury did this trade association have to show in order to have standing to challenge the law?<sup>52</sup> In addition, there was a whole sideshow going on, because while the lawsuit was pending, Jacksonville repealed the law, or at least amended it and omitted the ten percent set-aside. Instead, they said that they would now have "participation goals."<sup>53</sup>

Moreover, rather than protect any minority group, the new law was limited to only racial minorities and women. If you remember *City of Richmond v. J. A. Croson Co.*,<sup>54</sup> a part of the problem in that case was that the definition of a minority group included Aleuts and Eskimos<sup>55</sup> who had never been discriminated against as contractors in Richmond, Virginia. Justice O'Connor, I think, asked why we should give Aleuts and Eskimos this special position in Richmond, Virginia, when there was no showing that they had ever been discriminated against in the past.<sup>56</sup>

While the suit was pending, Jacksonville did two things. First, they redefined minority business enterprises to only include racial

---

himself to be black, Spanish-speaking, Oriental, Indian, Eskimo, Aleut, or handicapped." *Id.*

52. *Id.* at 2301-02.

53. *Id.* at 2300. Jacksonville repealed the original ordinance and replaced it with a new ordinance that applied only to blacks and females, which established 5 to 16% "participation goals" rather than a 10% "set aside," and provided five different methods to achieve the "participation goals." *Id.*

54. 488 U.S. 469 (1989).

55. *Id.* at 478. In *Croson*, the Minority Business Utilization Plan adopted by the Richmond City Council defined minorities as "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." *Id.* (citation omitted).

56. *Id.* at 506. In the Court's opinion, delivered by Justice O'Connor, the Court stated that "[t]here is *absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry . . . [I]t may well be that Richmond has never had an Aleut or Eskimo citizen." *Id.* (emphasis in original).

minorities and women,<sup>57</sup> forgetting about the Aleuts and the Eskimos, as well as anybody else. Second, they stated that it is no longer a ten percent set-aside, it is only a goal.<sup>58</sup> At that point, one would think that the Supreme Court would say, "Okay, the case is now moot, we are not attacking that law anymore." Indeed, the two dissenters in that case said, "We should just dismiss this case as moot, it is no longer an issue."<sup>59</sup>

I think the case is very important to governmental entities, who are asking, "If we fixed it all up, why should we still be dragged into court with respect to a law that is no longer on the books?" The Supreme Court has not been very clear about when you can fix a law by repealing that law. If you pass a bad law and suddenly find yourself in federal court being attacked on it, why can you not go back and say, "Okay, we want to fix it up. We are sorry. We will straighten it all out." The Supreme Court says, "Too late." The Court does not want local governments changing their minds, mootting a case out, and then changing the law back again. It is sort of a yo-yo effect. Every time you go into court, you change the law, the case gets dismissed, then you change it back and upwards and onwards. So to that extent, the Supreme Court set a barrier to the ability of local governments to fix up their laws. You may still be stuck, at least to some extent, in this law that you passed. You have a federal court case, attorneys' fees, and a lot of other things to worry about down the line, but the Court rejected the mootness argument, even though the particular law that had been in effect, and that started the lawsuit, was no longer in effect.

But on the merits of the standing issue, the Supreme Court said that the trade association can bring this action even though it

---

57. *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am.*, 113 S. Ct. at 2300.

58. *Id.*

59. *Id.* at 2305 (O'Connor, J., dissenting) (stating that since "this case more closely resembles those cases in which we have found mootness . . . I would not reach the standing question decided by the majority"). Justice Blackmun joined Justice O'Connor in her dissent. *Id.*

cannot show that any member would have lost business.<sup>60</sup> The general requirement for standing is that you first have to show an "injury in fact," which is an "invasion of a legally protected interest,"<sup>61</sup> second, "a causal relationship between the injury and the challenged conduct,"<sup>62</sup> and third, "a likelihood that the injury would be redressed by a favorable decision."<sup>63</sup> In this case, the trade association could not show, and did not show, that its members lost business and that they would get business if this law was not in effect.<sup>64</sup> But what the Supreme Court said was, "That is not the rule. The rule here is that you have standing if you cannot compete on an even basis."<sup>65</sup> That is the proposition, and the Court's exact words were:

When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of the other group, a member of the former group seeking to challenge the barrier need not allege that he or she would have obtained the benefit but for the barrier [in order to establish standing].<sup>66</sup>

It is the ability to compete on an even playing field that creates standing. So, the case is expansive as far as state and local governments are concerned. It undercuts the mootness argument that if the law gets changed, the case is not moot. Also, to the extent that if government gives a benefit to one group rather than another, a person does not have to show that but for this law, we would have obtained the benefit. All they have to show is that the government established an unequal playing field. That gives someone who is on the unequal playing field a chance to come in

---

60. *Id.* at 2303. See *infra* note 66 and accompanying text.

61. *Id.* at 2302.

62. *Id.*

63. *Id.*

64. *Id.* at 2299-2300.

65. *Id.* at 2303. The Court stated that all that was needed for a party to have standing to challenge a set-aside program is that "it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis." *Id.*

66. *Id.*

and sue in federal court. So, I think the case does have at least some procedural advantages and implications.

I want to say a word about the *Daubert*<sup>67</sup> case, which is quite far afield. *Daubert* is a case dealing with the standard for admitting scientific and expert testimony under the Federal Rules of Evidence. The extent to which expert testimony will be ruled admissible in federal court under Federal Rules of Evidence 702,<sup>68</sup> affects everybody, not just state and local governments. Basically, the Supreme Court stated that the *Frye*<sup>69</sup> case, a District of Columbia case dating from 1923, had held that scientific evidence is not admissible, even through an expert's testimony, unless, "the deduction [] made [is] sufficiently established to have gained general acceptance in the particular field in which it belongs."<sup>70</sup> If there is a debate in the scientific community about a particular scientific theory, under the *Frye* test, it had to be generally accepted in the scientific field in order to be admissible directly and through expert testimony.<sup>71</sup>

There is a clash between the *Frye* proposition and Rule 702 of the Federal Rules of Evidence, which says, "[i]f scientific, technical or other specialized knowledge will assist the trier of

---

67. *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993).

68. FED. R. EVID. 702. Rule 702 states that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." *Id.*

69. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

70. *Daubert*, 113 S. Ct. at 2793 (quoting *Frye*, 293 F. at 1014).

71. The court in *Frye* stated that:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

*Id.*



fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion."<sup>72</sup> The question is, which controls? Did Rule 702 overrule *Frye*? The answer is "Yes."<sup>73</sup>

Having gone up the mountain, they came right back down again, because Rule 702 requires that a federal court act as a gatekeeper to make sure that there is a predicate for a particular kind of evidence.<sup>74</sup> Among the gatekeeping criteria a federal judge can apply before he allows expert testimony to be introduced is the general acceptability of that scientific proposition in the community.<sup>75</sup> So, having torn *Frye* down as an absolute barrier to admissibility, they then give it some life through the back door by saying that the federal judge can take the extent of acceptability in the scientific community as a criteria for determining admissibility under other rules.

I do want to set aside some time to talk about land use. Although there were no significant land use cases decided in the Supreme Court this past year, there were some significant cases decided in the Second Circuit. I think the most significant case was *Southview Associates Limited v. Bongartz*,<sup>76</sup> a case decided a year ago. There are a number of different streams of doctrine under which a developer, or someone who asked for a permit, or someone who is requesting a zoning variance and does not get it,

---

72. FED. R. EVID. 702.

73. *Daubert*, 113 S. Ct. at 2793 ("[It is] contend[ed] that the *Frye* test was superseded by the adoption of the Federal Rules of Evidence. We agree.").

74. See *supra* note 68; see also *Daubert*, 113 S. Ct. at 2800 (Rehnquist, C.J., dissenting) ("I do not doubt that Rule 702 confides to the judge some gatekeeping responsibility in deciding questions of the admissibility of proffered expert testimony.").

75. *Daubert*, 113 S. Ct. at 2800. The Court stated that "reliability and relevancy are the touchstones of the admissibility of expert testimony." *Id.* Therefore, the general acceptability of the scientific proposition would aid in showing that the "evidentiary reliability will be based upon scientific validity." *Id.* (emphasis in original) (citation omitted).

76. 980 F.2d 84 (2d Cir. 1992), *cert. denied sub nom.*, *Southview Assocs., Ltd. v. Individual Members of Vt. Env't Bd.*, 113 S. Ct. 1586 (1993).

can now come into federal court. There are probably at least five separate legal doctrines which have been recognized in the Second Circuit, and elsewhere, for intervention in federal court.

The first one is a "taking." A governmental land use body will not let me do what I want with my land, and therefore has taken my land. Sure enough, the Fifth Amendment, which is applicable to the states through the Fourteenth Amendment, says that "private property [shall not] be taken for public use without just compensation."<sup>77</sup> There are two kinds of takings. There is a physical taking, where the government physically invades the land and takes it.<sup>78</sup> The second kind of taking is a regulatory taking, where government does not physically come and take the land, but makes it impossible for you to use the land for the economic use for which you bought it or tried to develop it.<sup>79</sup> So that is a taking, a taking with two subcategories.

The federal courts, and this is outlined in the *Southview* case, have also developed a substantive due process argument. There

77. U.S. CONST. amend. V, cl. 4.

78. See NOWAK & ROTUNDA, *supra* note 44, § 11.12, at 435-36.

79. See *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 197 (1985) ("[R]egulation that goes so far that it has the same effect as a taking by eminent domain is an invalid exercise of the police power, violative of the Due Process Clause."); see also *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 329 (1987) (Stevens, J., dissenting). Justice Stevens noted:

[A] regulatory program that adversely affects property values does not constitute a taking unless it destroys a major portion of the property's value. This diminution of value inquiry is unique to regulatory takings. Unlike physical invasions, which are relatively rare and easily identifiable without making any economic analysis, regulatory programs constantly affect property values in countless ways, and only the most extreme regulations can constitute takings.

*Id.* (citations omitted); see also *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-15 (1922) (holding that a state could not destroy a coal company's mining rights without providing just compensation because "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking"). But see *Penn Cent. Transp. Co. v. N.Y.*, 438 U.S. 104, 138 (1977) (holding that a taking had not occurred where the regulations imposed were "substantially related to the promotion of the general welfare").

are two kinds of substantive due process. There is substantive due process "gone too far."<sup>80</sup> By this we mean, government, you have gone too far in making this regulation, in prohibiting me from doing what I want with this land, or by denying me a permit or whatever.

The other possibility is a substantive due process claim based on "arbitrary and capricious" governmental conduct.<sup>81</sup> Now, what is the difference between a substantive due process "gone too far" claim, and one based on "arbitrary and capricious" conduct? Well, the Second Circuit really does not tell us, except to state that "gone too far" seems to be too broad. The language "gone too far" means that it is much broader than is necessary. "Arbitrary and capricious" means certifiably insane if you make this decision, or something like that. It is a much narrower decision, but it does not make a lot of sense.

---

80. *Southview Assocs.*, 980 F.2d at 96.

81. *Id.* at 101. In *Southview* the court stated that in determining whether a landowner's substantive due process rights were violated by arbitrary and capricious governmental conduct, the first inquiry must be whether:

'an entitlement exists in what has been applied for . . . instead of simply recognizing the owner's indisputable property interests in the land he owns and asking whether . . . government has exceeded the limits of substantive due process in regulating the plaintiff's use of his property by denying the application arbitrarily and capriciously.'

*Id.* at 101 (quoting *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 917 (2d Cir.), *cert. denied*, 493 U.S. 893 (1989)); *see also* *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 705 (1980) (Marshall, J., dissenting) ("[T]he arbitrary and capricious standard itself contemplates a searching 'inquiry into the facts' in order to determine 'whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971))); *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369 (11th Cir. 1993). In *Corn* the court stated that "the ultimate issue of whether a . . . decision is arbitrary and capricious is a question of law to be determined by the court. Although subsidiary facts are properly for the factfinder, the ultimate issue is for the court." *Id.* at 1373 (quoting *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1578 (11th Cir. 1989)); *Pearson v. Grand Blanc*, 961 F.2d 1211, 1217-19 (6th Cir. 1992) ("[T]he lack of uniformity among the circuits in dealing with the zoning cases of the 'arbitrary and capricious substantive due process' category is remarkable.").

Another possible land use claim rests on an equal protection irrationality, except that we know what a loose standard that is. I will alert you to the fact that some decisions by land use bodies are now being attacked as Bills of Attainder,<sup>82</sup> so that you can even invoke a Bill of Attainder requirement if it is a legislative decision which focuses in on a specific person. There was a very interesting Second Circuit decision this year, *In re McMullen*,<sup>83</sup> in which, all of a sudden, Bills of Attainder have now been given new light, not in the land use area, but in another area. So, developers have discovered that there is a great big Constitution out there and it has all kinds of provisions that have not been applied. Instead of taking an appeal to the Zoning Board of Appeals or an Article 78 proceeding,<sup>84</sup> they are going to go into federal courts and throw around these constitutional provisions.

Thus, the *Southview* case is quite important because even though the developer lost, Judge Oakes' decision lays out what you have to do before you can come into federal court on one of these claims,<sup>85</sup> and there are prerequisites. There is a ripeness requirement,<sup>86</sup> in that whatever the adverse decision, it has to be

---

82. See U.S. CONST. art. I, § 9. This section provides that "[n]o Bill of Attainder . . . shall be passed." *Id.*; see also NOWAK & ROTUNDA, *supra* note 44, § 11.9(C), at 420. A bill of attainder is a legislative act that imposes some sort of punishment on an individual without first conducting a trial. *Id.*

83. 989 F.2d 603 (2d Cir.), *cert. denied*, 114 S. Ct. 301 (1993).

84. N.Y. CIV. PRAC. L. & R. § 7801 (McKinney 1981). See DAVID D. SIEGEL, NEW YORK PRACTICE, § 557, at 580 (2d ed. 1991). An Article 78 proceeding provides a uniform device "for challenging the activities of an administrative agency in court." It replaces the common law writs of mandamus, prohibition, and certiorari to review. *Id.*

85. *Southview Assocs.*, 980 F.2d at 92.

86. *Id.* at 95-97. The circuit court in *Southview Assocs.*, referring back to the district court's opinion, discussed the two-prong test used to assess the ripeness of a takings claim as set forth in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). The first prong requires that a "final decision" be rendered by the governmental entity that is enforcing the regulation in question. *Southview Assocs.*, 980 F.2d at 95. The second prong requires that the plaintiff first seek compensation from the state if the state provides an "adequate provision for obtaining compensation." *Id.* (quoting *Williamson*, 473 U.S. at 194).

a final decision.<sup>87</sup> In addition, there cannot be a scheme for compensation under state law.<sup>88</sup> To the extent that you can get just compensation under state law, you have to pursue that avenue first. It is only after your land is taken, a final decision is rendered, and you cannot get compensation under state law, that you can come into federal court on a taking claim. Both of those prerequisites also apply to a substantive due process "gone too far" claim, but they do not apply to a substantive due process claim based on "arbitrary and capricious" conduct. While it would take me two hours to explain the differences between those, you really should be alert, as I say, that this river of development in the land use area now gets deltas and tributaries and all kinds of side requirements, and all I can do is alert you to that case as an indication of how complicated this whole area gets. Thank you very much.

---

87. *Id.* at 97. The court in *Southview* again relied on *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), in stating that a final decision is one that would "conclusively determine whether [the developer would] be denied all reasonable beneficial use of its property." *Southview Assocs.*, 980 F.2d at 97 (quoting *Williamson*, 473 U.S. at 194). It reasoned that "the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations . . . cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Id.* (quoting *Williamson*, 473 U.S. at 190-91). Thus, there would be no possibility that "some development w[ould] be permitted." *Southview Assocs.*, 980 F.2d at 98 (quoting *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 352 (1986)) (emphasis added).

88. *Id.* at 99. Prior to asserting a regulatory taking claim, the land owner must first seek compensation from the state if a "reasonable, certain and adequate provision for obtaining compensation" exists. *Id.* (quoting *Williamson*, 473 U.S. at 194). It is felt that there can be no violation of the Just Compensation Clause, which does not disallow the taking of property, but the taking of property without just compensation, until there has been an unsuccessful attempt to obtain compensation through the state provided procedures. *Id.*

*Professor Gary M. Shaw:*

You are right. You went far afield on a number of different areas and I have a number of different questions, but in the interest of keeping things short and brief, I am only going to ask one of them and that deals with *Heller v. Doe by Doe*.<sup>89</sup> I was struck as I read the case by just how deferential the Court was, which was something you pointed out. There has been a lot of talk in previous years about developing a more variable standard in order to get away from this two-part test, which is actually a three-part test if you are dealing with gender discrimination. The idea was to develop something which would be somewhat more variable, based on measuring governmental interests against the individual's interest at stake. Do you think that *Heller v. Doe by Doe* sounded like a wrongful death act?

*Professor Leon Friedman:*

I really think so. You can go through that case and see the absolute deference that the Court established. That there does not have to be any scientific basis for a legislative decision in this area is astonishing. I must say, I argued a case in the Second Circuit on Monday dealing with the State Legislature prohibiting trawlers from using a net to catch a lobster.<sup>90</sup> You cannot use a prone to catch a lobster, but you can use a trap, and I was arguing to Judge Oakes, "It doesn't make any sense, Your Honor." And he said, "We are not interested in that, absolutely, we are simply not going to permit that kind of distinction to come into federal court."

So, I really do think that the whole deferential standard, as I say, has reached the bottom. I do not see how you can win a case

---

89. 113 S. Ct. 2637 (1993).

90. See *New York State Trawlers Ass'n v. Jorling*, Nos. 569, 93-7571, 1994 WL 12677 (2d Cir. Jan. 18, 1994) (upholding as constitutional an amendment to the Environmental Conservation Law which prohibited fishing vessels equipped with trawling nets from taking lobsters from the Long Island Sound).

on irrationality grounds unless there is some implication of discrimination. The Supreme Court did have a case several years ago, *Cleburne v. Cleburne Living Center, Inc.*,<sup>91</sup> which they decided on an irrationality ground, but that really had to do with a very clear case of discrimination against a community based mental hospital.<sup>92</sup> So you can see, even though the group to be protected was not someone protected by the Equal Protection Clause, there was discrimination against a weak group in our society and they went off in that direction. Just reading those two pages of deferential language in the *Heller* case makes it highly unlikely that any state or local government is going to have to worry about the Equal Protection Clause, as long as you are not in the heightened scrutiny area.

*Professor Gary M. Shaw:*

I think that is true.

---

91. 473 U.S. 432 (1985).

92. The Supreme Court struck down a Texas city's denial of a special use permit for the operation of a group home for the mentally retarded. *Id.* at 435. Refusing to treat mental retardation as a "quasi-suspect" classification, the Court applied a rational basis standard of review and found that the refusal to grant the permit was not rationally related to any legitimate state purpose. *Id.* at 442, 448. Instead, the Court felt that the denial of the permit rested "on an irrational prejudice against the mentally retarded." *Id.* at 450.