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The New Equal Protection- Substantive Due Process Resurrected Under a New Name

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THE NEW EQUAL PROTECTION— SUBSTANTIVE DUE PROCESS RESURRECTED UNDER A NEW NAME?

A tenant, whose water supply was terminated without notice by the City of Atlanta Department of Water Works (Department), because of his landlord's failure to pay an outstanding bill, alleged, in *Davis v. Weir*,[1] that the Department's termination policy, authorized by city ordinances,[2] and the Department's refusal to contract with the plaintiff until the landlord's debts were paid, violated the equal protection and due process clauses of the United States Constitution.[3]

The District Court for the Northern District of Georgia held that the city ordinances violated the due process clause because they did

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1. 328 F. Supp. 317, (N.D. Ga. 1971), *aff'd*, 497 F.2d 139 (5th Cir. 1974). The plaintiff actually sued Paul Weir in his official capacity as General Manager of the Water Works. However, the action was primarily directed against the entire Department.

2. In particular, the plaintiff challenged sections 33-129 and 33-130 of the Code of Ordinances of the City of Atlanta as well as section 7.6.16 of the Charter and Related Laws of the City of Atlanta. Section 33-129 provides: " 'The manager is required to give three days' notice to the owner or tenant before cutting off the water supply for nonpayment of bills. This notice may be served upon the tenant or sent by mail to the last known address of the owner.' " 497 F.2d at 141 n.2. Section 33-130 provides: " 'Upon failure of any person to pay any water bill, assessment or charge against any premises within ten days from the date such bill is due, the manager is authorized to cut off and discontinue the water service until such bill or charge is paid, and a charge of three dollars ($3.00) will be made for each cut off. Such charge must be paid before water is again turned on, unless the manager in his discretion waives such charges.' " *Id.* at 142 n.3. In addition, section 7.6.16 provides: " 'The mayor and board of aldermen, or said committee, shall have full power and authority to require payment in advance for the use or rent of water furnished by them, in or upon any building, place or premises, and, in case prompt payment shall not be made, they may shut off the water from such building, place or premises, and shall not be compelled again to supply said building, place or premises with water until such arrears, with interest thereon, shall be fully paid.' " *Id.*

3. *Id.* at 142.

not affirmatively require pretermination notice to the actual consumer.[4] However, the Court of Appeals for the Fifth Circuit affirmed, finding a violation of the equal protection clause.[5] Plaintiff's complaint alleged that the Department divided those seeking service into two categories: applicants whose contemplated service address is burdened with a preexisting debt for which the applicant is not liable, and applicants whose residence is free from such debt.[6] The Department furnished water to the latter class only, arguing that this policy expedited the collection of unpaid bills.[7] Finding that the Department's acts constituted state action,[8] the court of appeals determined that the Department's discriminatory rejection of new applicants failed to pass equal protection standards under the "rational basis" test.[9] Because the court invalidated the Depart-

4. Davis v. Weir, 328 F. Supp. 317, 321-22 (N.D. Ga. 1971).

5. The circuit court in *Davis* was mainly concerned with the equal protection question; on appeal the Water Department conceded that due process demands pretermination notice to the actual user. 497 F.2d at 143.

6. *Id.* at 144.

7. *Id.*

8. *Id.* at 143. Supporting allegations of state action in cases involving public utility companies or other public services can be difficult. Some courts consider utilities to be completely private while at the same time possessing certain powers ordinarily designated to the states. Without finding literal state action, these courts have refused to apply the fourteenth amendment. For example, in Lucas v. Wisconsin Elec. Power Co., 466 F.2d 638 (7th Cir. 1972) (en banc), *cert. denied*, 409 U.S. 1114 (1973), the court did not invoke fourteenth amendment safeguards to strike down the utility's method of expediting collection of debts by terminating service. It argued instead that there was no direct aid on the part of the state which related to termination, and, therefore, no state action. In the recent case of Jackson v. Metropolitan Edison Co., 95 S.Ct. 449 (1974), the Court held that the mere filing of a general tariff by a heavily regulated private utility with a partial monopoly was not sufficient connection for a finding of state action. For a further discussion of this problem, see Note, *Constitutional Safeguards For Public Utility Customers: Power To The People*, 48 N.Y.U.L. REV. 493 (1973).

9. From 1889 to 1918 there were numerous challenges based on equal protection concerning state economic regulation. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886). The majority of these challenges resulted in the statutes being upheld. *See* Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294 (1913). In those cases, the

ment's application policy by this criterion, it did not consider the possibility that the right to water service is a fundamental right under either the due process or equal protection clauses.[10]

Traditionally, the United States Supreme Court has applied a "rational basis" test[11] to state statutes dealing with economic or

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Court applied what is now known as the traditional "rational basis" test. *See* Comment, *Equal Protection in Transition: An Analysis and A Proposal*, 41 FORDHAM L. REV. 605, 607 (1973) [hereinafter cited as *Transition*]. From approximately 1918 to 1937, the Court changed its direction, using this rational basis test to protect the interests of business and property against discriminatory state action. *Id.* During this period, though, the Court preferred to use the rubric of substantive due process, requiring that legislation be a "fair, reasonable and appropriate exercise of the police power of the state" in overturning legislation, instead of using the rational basis test of the equal protection clause. Lochner v. New York, 198 U.S. 45, 56 (1905). Thus, during this latter period, the rational basis test placed an increased burden on the state to justify its acts. In 1937 the Court rejected substantive due process as articulated in *Lochner, supra.* *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). It also reverted to the more burdensome requirements of the old rational basis test under equal protection. *See* text accompanying note 14 *infra*.

10. 497 F.2d at 144.

11. The rational basis test was first used by the Court in its due process analysis. In the first third of the twentieth century the Court invalidated many statutes under due process. Before this period, in cases such as Munn v. Illinois, 94 U.S. 113 (1876), the Court felt that many of the issues presented were legislative questions. Therefore, it applied the rational basis test to the statutes in question, and usually found the requisite relationship between the classifications and the purposes for them. These cases led critics to argue that the Court was subordinating the rights of private property once believed to be protected by constitutional guarantees against legislative interference. *See* Comment, *Judicial Review of Legislation in the United States and the Doctrine of Vested Rights and of Implied Limitations of Legislatures*, 3 TEXAS L. REV. 1, 6 (1924). In the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), the idea of liberty of contract was introduced as a check on state legislatures in regulating wage contracts and labor conditions. Comment, *supra* at 6. This was a major extension of the Court's reviewing power. From this idea emanated the eventual due process rule of reason or expediency as a test of the validity of legislation. According to decisions such as Lochner v. New York, 198 U.S. 45, 56 (1905), arbitrary legislative acts were void. Under this test, the state had to show more than a mere rational basis in order for the Court to uphold its legislation. Eventually the *Lochner* philosophy of strict judicial review

social matters.[12] Under this test, the Court identified the basis for the classification imposed by the legislation. It then examined the legislative purposes for enacting the statute. If the government could justify the statute by showing a rational relationship between the classification in question and the statute's purpose, then the legislation would be upheld.[13] Since a rational basis could be found in most instances, the potential for use of the equal protection clause became almost nil in such cases.[14]

Greater problems arose with legislation infringing on civil rights. For example, in *Skinner v. Oklahoma ex rel. Williamson*,[15] the Court was faced with a statute permitting sterilization of certain types of felons. Justice Douglas found procreation to be a basic civil right, demanding "strict scrutiny of the classification."[16] A mere showing of a rational relationship by the state was not enough.[17] Thereafter, this form of strict review was invoked when the Court found that the relevant statute affected a fundamental right[18] or

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in economic substantive due process cases was rejected by the Court in Nebbia v. New York, 291 U.S. 502 (1934) and West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). However, this rejection was more like an about-face by the Court because it went from strict judicial due process rational basis review to almost none at all. This milder use of the rational basis test became the same test that was applied to economic and social matters under the equal protection clause. *See* Goodpaster, *The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 479, 485-86 (1973) [hereinafter cited as Goodpaster, *Fundamental Rights*]. *See also* note 9 *supra*.

12. *See, e.g.*, James v. Valtierra, 402 U.S. 137 (1971) (upholding California constitutional provisions requiring local referendum before low rent housing could be built); Dandridge v. Williams, 397 U.S. 471 (1970) (upholding a Maryland statute placing a ceiling on funds payable to a single family under Aid to Families With Dependent Children).

13. *Transition* 607.

14. *See, e.g.*, Lindsey v. Normet, 405 U.S. 56 (1972); James v. Valtierra, 402 U.S. 137 (1971); Dandridge v. Williams, 397 U.S. 471 (1970); Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937).

15. 316 U.S. 535 (1942).

16. *Id.* at 541.

17. *Id.* One writer felt that this new strict scrutiny test was "conceived in the vacuum left by the Court's rejection of substantive due process . . . ." *Transition* 609.

18. Decisions subsequent to *Skinner* which have denominated individ-

suspect category.[19] Using this standard, statutes were invalidated unless found to promote a compelling state interest.[20]

These two standards, the strict scrutiny and rational basis tests, constituted the "two-tier" equal protection approach.[21] Under this analysis, the Court's resolution of the equal protection question depended upon the nature of the legislation involved.

After the creation and use of the "two-tier" test, it soon became clear that the Court was hesitant to increase its expanding list of fundamental rights.[22] This relegated important interests to the traditional rational basis standard and almost certain validation of the statute under attack.[23] Therefore, a new trend was established by recent decisions[24] such as *Reed v. Reed*.[25]

Reed involved an Idaho statute which gave preference to males in the appointment of a personal representative.[26] Without holding sex to be suspect, the Court found the statute unconstitutional.[27] The Court thus made it evident that it was willing to invalidate

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ual rights as fundamental include Dunn v. Blumstein, 405 U.S. 330 (1972) (the right to vote); Kramer v. Free School District, 395 U.S. 621 (1969) (the right to vote); Shapiro v. Thompson, 394 U.S. 618 (1969) (the right to travel).

19. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Loving v. Virginia, 388 U.S. 1 (1967) (race); McLaughlin v. Florida, 379 U.S. 184 (1964) (race); Hernandez v. Texas, 347 U.S. 475 (1954); Oyama v. California, 332 U.S. 633 (1948) (national origin).

20. *Transition* 610-11.

21. *Id.* at 611.

22. *See, e.g.*, Lindsey v. Normet, 405 U.S. 56 (1972) (housing not a fundamental right); James v. Valtierra, 402 U.S. 137 (1971) (wealth not a suspect classification); Dandridge v. Williams, 397 U.S. 471 (1970) (having large families not a fundmental right).

23. *Transition* 612.

24. *See, e.g.*, Department of Agriculture v. Moreno, 413 U.S. 528 (1973); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971).

25. 404 U.S. 71 (1971). The more recent use of the equal protection standard has been described as having a "new bite." *See* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18-19 (1972).

26. 404 U.S. at 71.

27. *Id.* at 75.

statutes without creating new fundatmental rights. Under this new use of the traditional rational basis test, an affirmative burden is placed upon the state to justify the particular classification included in the statute.[28]

In *Davis v. Weir*, the court of appeals attacked the equal protection problem in a *Reed*-like manner, stating:

> The City has no valid governmental interest in securing revenue from innocent applicants who are forced to honor the obligations of another or face constructive eviction from their homes for lack of an essential to existence—water.[29]

The court in *Davis* found a general obligation imposed upon the Department to supply water.[30] A departure from this obligation required the state to show something more than it would have been required to show under the traditional rational basis analysis.[31]

Basing its equal protection analysis on the existence of a duty by the Department to supply water as "an absolute necessity of life,"[32]

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28. *Id.* at 77.

29. 497 F.2d at 145.

30. This general obligation to supply water in *Davis* follows the *Reed* decision because in *Reed*, although sex was not held to be suspect, it was deemed important enough to invalidate the statute. Thus the Court in *Reed* found a general obligation by the states to treat the sexes alike. 404 U.S. at 75; *see* Struck v. Secretary of Defense, 460 F.2d 1372 (9th Cir. 1971), *vacated and remanded*, 409 U.S. 1071 (1972). The basis for the new equal protection test can be found in an older case, Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920), *cited in* Davis v. Weir, 497 F.2d at 144. "[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." 253 U.S. at 415. Having to show a *substantial* relationship between the classification and its purpose, rather than any relationship, is clearly more burdensome. *See generally* 2 FORDHAM URBAN L.J. 587 (1974).

31. *See* Gunther, *supra* note 25, at 18-19.

32. 328 F. Supp. at 321. Both the district court and court of appeals emphasized the importance of water service. Because of this importance the district court required the Department to notify the tenant: "There can be no serious doubt that water is an absolute necessity of life. The City of Atlanta, through the Department of Water Works, has undertaken to provide this important necessity to the people of Atlanta . . . . The crucial factor in the instant case is that the effect of the collection procedure is to terminate an important benefit provided by a governmental agency (albeit

the court may have influenced not only its equal protection analysis, but its due process argument as well.

Section 33-129 of Atlanta's 1965 Code of Ordinances requires that notice of termination be sent by the Department to either the landlord, the owner, or the tenant of the building.[33] While it was the tenant who was most immediately affected by termination of water service, the district court held that plaintiff tenant had received no such notification.[34] Therefore, an issue arose as to whether the Department's termination policy afforded the actual users due process of law.[35]

In applying the due process clause to government procedures, early courts distinguished between individual property rights and government-bestowed privileges.[36] Full procedural due process was afforded to the former but not to the latter.[37] Since this distinction was first used by the courts,[38] the list of rights has grown to encompass many interests which previously may have been considered to

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at cost to the customer) without notice to the person who is the actual recipient of that benefit and who is the person who will suffer a serious loss without that benefit." *Id.* at 321-22.

33. 497 F.2d at 142.

34. 328 F. Supp. at 320.

35. *Id.*

36. Examples of such interests are Social Security benefits, unemployment compensation, aid to dependant children, veterans benefits, and the whole scheme of state and local welfare. Reich, *The New Property*, 73 YALE L.J. 733, 734 (1964).

37. *See* Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691 (1938). Philbrick points out that "property" no longer implies something physical and tangible. Many other interests, such as the right to contract, are included in the definition of property. *Id.* at 694.

38. This distinction between constitutionally protected rights of private citizens and unprotected governmental privileges was first applied by Justice Holmes, while sitting on the Massachusetts high court, in McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892). There, a policeman violated a regulation by engaging in various political activities. Instead of reinstating his job through the due process protection of the first amendment's right to free speech and assembly, the court said that "the petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *Id.* at 220, 29 N.E. at 517.

be privileges.[39] Thus there has been a gradual wearing down of this right-privilege dichotomy.[40]

Goldberg v. Kelly[41] added welfare benefits to the growing list of procedurally protected rights. In *Goldberg*, welfare payments had been terminated before the recipient had an opportunity to prove that he still met all requirements necessary to receive the aid.[42] The Court rejected the argument that welfare benefits are a privilege rather than a right.[43] Thus, procedural due process was invoked. In determining the due process question, the Court balanced the importance of an individual's interest in obtaining welfare against the need for the state to avoid unnecessary payments.[44] In recognizing the overriding importance of welfare, the Court found that the recipient's interest had greater weight.[45]

Although utility services have never been deemed "fundamen-

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39. *See, e.g.*, Bell v. Burson, 402 U.S. 535 (1971) (driver's license); Goldberg v. Kelly, 397 U.S. 254 (1970) (termination of welfare benefits); Sherbert v. Verner, 374 U.S. 398 (1963) (disqualification for unemployment compensation); Speiser v. Randall, 357 U.S. 513 (1958) (denial of tax exemption); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956) (discharge from public employment).

40. In Lynch v. Household Fin. Corp., 405 U.S. 538 (1971), a Connecticut state procedure authorizing summary prejudgment garnishment was questioned. The Court stated: "Such difficulties indicate that the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account." *Id.* at 552.

41. 397 U.S. 254 (1970).

42. *Id.* at 259.

43. *Id.* at 262.

44. *Id.* at 261.

45. The Court in *Goldberg* stated: "For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. . . . Thus the crucial factor in this context—a factor not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental entitlements are ended—is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits." *Id.* at 264 (footnote and citation omitted) (emphasis in original).

tal," they are now recognized to be important rights which cannot be arbitrarily terminated.[46] When a person's service is threatened, full due process protection will protect him from arbitrary termination. There was no need to reach the fundamental right issue in *Davis*. A balancing test was particularly appropriate to fix plaintiff's due process rights and defendant's due process obligations.[47]

Several factors were involved in the court's analysis. First, it recognized the inherent injustice of requiring the tenant to pay all outstanding bills and of imposing on him the burden of seeking reimbursement from the landlord in another action.[48] As the court stated, this procedure amounted to nothing less than "condemning Davis to pay the past debt of another before he is allowed to contract for water service."[49] In addition, a due process right having been established,[50] the court held that notification to the tenant had to be given by the utility company.[51]

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46. *See, e.g.*, Bronson v. Consolidated Edison Co., 350 F. Supp. 443 (S.D.N.Y. 1972). There, the tenant was threatened by termination of both gas and electric services. The court recognized the importance of these services in stating: "It is beyond doubt that electric service can become as vital to the existence and livelihood of an individual as a driver's license or welfare check; indeed, it has been held on several occasions that when termination of such service is threatened the same constitutional safeguards apply." *Id.* at 447. *See also* Stanford v. Gas Serv. Co., 346 F. Supp. 717, 719-20 (D. Kan. 1972): "It is not open to question that food, clothing and shelter are considered necessary to sustain life. However, unheated shelter affects life itself."

47. 328 F. Supp. at 321-22.

48. This is a good illustration of the court's recognition that there are substantive due process elements in the case. As stated in note 11 *supra*, the Supreme Court abandoned most of its use of the substantive due process analysis. However, it would be unrealistic to think that procedural due process could exist without its substantive counterpart. If the "due process" clause requires only fair procedure, then it becomes illusory. Any arbitrary law would remain valid so long as procedural due process is afforded. *See* Poe v. Ullman, 367 U.S. 497, 509 (1961) (Douglas, J., dissenting).

49. 497 F.2d at 145.

50. The court in *Davis* felt that the debts involved represented a miniscule part of the Department's revenue. *Id.* Furthermore, in light of the availability of other collection methods, the Department did not establish sufficient need for maintaining its current procedures. *Id.*

51. In *Davis*, the court felt that a hearing on the merits concerning the

There are elements common to both due process and equal protection analysis.[52] Once it is determined that equal protection standards apply, the question that remains is what protection is equal?[53] Fundamental interests will merit the highest degree of equality among the various classifications contained in the statute, thus resulting in a greater possibility that the classification will be struck down. On the other hand, lesser social and economic interests require a lesser degree of equality. The various interests which fall somewhere between fundamental rights and economic and social matters will invoke different standards depending upon their importance.[54] The overlap between due process and equal protection can be seen in two recent Supreme Court cases: *Eisenstadt v. Baird*[55] and *Cleveland Board of Education v. LaFleur.*[56]

In *Eisenstadt*, a Massachusetts statute which prohibited the sale

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tenant's alleged debts was unnecessary because there was no question that the landlord was the guilty party. *Id.* Although there was no question of liability, there was a question surrounding the plaintiff's loss of water service, which was not dealt with either by the district court or the court of appeals. By the termination of his water service the tenant was facing constructive eviction without a hearing. This is the same as losing a right or status without due process of law. *See* Note, *The Emerging Constitutional Issues in Public Utility Consumer Law*, 24 U. FLA. L. REV. 744, 757 (1972). As stated in Fuentes v. Shevin, 407 U.S. 67 (1972), concerning the right to a hearing prior to any repossession of property: "If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented." *Id.* at 81.

52. *See* Goodpaster, *The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts*, 56 IOWA L. REV. 223, 248 (1970) [hereinafter cited as Goodpaster, *Integration*]. It has also been noted that recent decisions in the area of equal protection seem to overlap with notions of due process. *See Transition* 623. More specifically, once it is determined that an equal protection standard applies, the court then must determine the degree of equality to be applied according to the requirements of the fourteenth amendment.

53. Goodpaster, *Integration* 243.

54. *Transition* 626-27. An interest's importance is determined by its relationship to notions of valued civil and property rights—rights which are ultimately protected by procedural due process. *Id.*

55. 405 U.S. 438 (1972).

56. 414 U.S. 632 (1974).

of contraceptives to unmarried persons was challenged.[57] The Court placed a heavy burden on the state to justify its distinction between married and unmarried persons in the sale of birth control devices.[58] To determine the importance of the need to purchase contraceptives, the Court analyzed its relationship to the individual's fundamental right of privacy.[59] With a showing that the right of privacy was involved, the Court in *Eisenstadt* could have invalidated the Massachusetts statute under a due process balancing test, perhaps requiring the state to establish a compelling state interest. However, the Court resorted to the equal protection standard. It examined all possible purposes behind the statute to determine whether there was any rational relationship between these purposes and the classification.[60] With as important a right involved as the right of privacy, a high standard of equality was applied, and the statute was invalidated.[61]

In *LaFleur*,[62] the majority invoked a due process standard rather than equal protection. The case involved a public school policy requiring all pregnant teachers to take a leave of absence at the end of their fifth month of pregnancy. Teachers were not permitted to return to work until the next regular semester.[63]

The Court in *LaFleur* held that these requirements failed to meet due process standards, primarily because they arbitrarily impaired

57. 405 U.S. at 440-41.

58. *Id.* at 450-53.

59. *Id.* at 445-46. The fundamental right of privacy was first enunciated in Griswold v. Connecticut, 381 U.S. 479 (1965). The Court in *Eisenstadt* referred to *Griswold* in its decision: "If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." 405 U.S. at 453 (emphasis in original).

60. *Id.* at 454.

61. *Id.* at 454-55.

62. 414 U.S. 632 (1974).

63. *Id.* at 634-35.

the fundamental right to bear children.[64] Justice Powell wrote a concurring opinion where he, like the lower court, felt that an equal protection analysis was more appropriate.[65] In his opinion, Justice Powell used the new rational basis test.[66] Finding no relationship between the state's reasons for its policy and its mode of classification, the state could not sufficiently justify this particular policy.[67] Justice Powell applied a higher standard of equality in his analysis, implying that important rights were involved.[68] The importance of these rights was also the major factor in the majority's due process analysis.

If *LaFleur* is considered with other recent cases such as *Eisenstadt* and *Dandridge v. Williams*,[69] certain problems with due process and equal protection analyses become apparent. Courts must often deal with issues concerning interests which are not quite fundamental rights but at the same time are not economic or social interests either. Thus, an unpredictable standard is invoked which varies with the importance of the right involved.[70] It is the court which ultimately determines the importance of the right. In *Eisenstadt* important interests were at stake. The lower court[71] ruled that the statute violated fundamental rights protected by the due process

64. *Id.* at 639-43.

65. *Id.* at 651 (Powell, J., concurring).

66. Male teachers, as opposed to females, did not need to comply with these regulations imposed by the board of education. Therefore their jobs were not put in jeopardy. *Id.* at 652-53.

67. Justice Powell in *LaFleur* stated: "To be sure, the boards have a legitimate and important interest in fostering continuity of teaching. And, even a normal pregnancy may at some point jeopardize that interest. But the classifications chosen by these boards, so far as we have been shown, are either contraproductive or irrationally overinclusive even with regard to this significant, nonillusory goal." *Id.* at 653.

68. Note that the concurring opinion rejected the notion that the fundamental right to bear children was impaired by the school regulations. Justice Powell saw no need to invalidate these rules on such broad terms. Many types of statutes could interfere indirectly with child bearing and yet remain constitutional. *Id.* For example, limitations on welfare benefits a family may receive place a deterrence to large families. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970).

69. 397 U.S. 471 (1970).

70. Goodpaster, *Fundamental Rights* 517.

71. Baird v. Eisenstadt, 429 F.2d 1398 (1st Cir. 1970).

clause of the fourteenth amendment.[72] On appeal the Supreme Court applied an equal protection standard, perhaps purposely avoiding the fundamental right argument.

The Court in *Dandridge v. Williams*[73] was even less reluctant to find a fundamental right even though an essential one, welfare payments, was involved. *Dandridge* dealt with Maryland's program under Federal Aid to Families With Dependent Children.[74] This program placed a ceiling on funds payable to a single family. The appellees' argument that the program denied equal protection to children in large families[75] was rejected by the court.[76]

Holding a right to be fundamental has long-range consequences.[77] It would appear that the Court has, therefore, created a compromise by using the rational basis test in the new, *Reed*-like manner.[78] In some ways, this new equal protection test which overlaps with the due process notion of weighing and balancing interests against state objectives seems vaguely reminiscent of the days of substantive due

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72. *Id.* at 1402.

73. 397 U.S. 471 (1970).

74. *Id.* at 473. The State of Maryland participated in the AFDC program by statute. According to this statute (MD. ANN. CODE art. 88A, §44A (1969)), each family's need for welfare aid was determined by the number of children in the family and other extenuating circumstances. Usually the need increases with each additional member of the family. However, the Maryland regulation also placed a maximum limit on the amount a family could receive. 397 U.S. at 473-74.

75. *Id.* at 474-75.

76. *Id.* at 477-78.

77. "Holding a right to be a fundamental right has very serious consequences. Since the meaning of most rights is not unequivocal and 'right' is a general term encompassing a broad range of protected interests, there is a danger that holding a right to be fundamental will overvalue some interests. If this happens, legislatures may be proscribed from acting where they would ordinarily be found justified to act. To avoid this result, the Court may be forced to refine the 'fundamental' in a given fundamental right or to move from a compelling state interest to a balancing test. On the other hand, with respect to the rational basis test, when a sympathetic Court reviews legislation affecting an important right or interest not deemed fundamental, it may redefine its notions of rationality to fit the case. The meaning of 'rational basis' may then become fluid and unreliable." Goodpaster, *Fundamental Rights* 503.

78. *See* text accompanying notes 26-28 *supra.*

process, whereby any statutes deemed arbitrary by the Court were invalidated.[79] Like the new rational basis test, the end result in substantive due process analysis was unpredictable.[80] The Court applied its own particular prejudices to the case in deciding whether due process was violated or not. It has been noted that this type of analysis establishes the Court as a superlegislature.[81]

If substantive due process has really returned under a new name, "the new rational basis equal protection test," *Roe v. Wade*[82] becomes particularly relevant. *Roe* concerned the right of a woman to obtain an abortion without state interference.[83] The Court conceded the legitimacy of what it deemed to be the state's interest in the protection of the fetus' potential life.[84] It also conceded that there was a rational basis between the anti-abortion legislation and these state interests.[85] Nevertheless, the Court found that the right of privacy was involved and therefore a compelling state interest test was invoked.[86] It held, then, that a state cannot interfere with a woman's decision to abort in the first two trimesters of her pregnancy, invalidating the Texas statute in question.[87]

Besides disagreeing with the result, Justice Rehnquist, in his dissent,[88] argued that the Court was reverting to its former due process notions.[89] Even worse, he reasoned, these outdated notions were being used under an equal protection analysis, confusing the equal

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79. *See* note 11 *supra*.

80. *Id.*

81. *See* Ferguson v. Skrupa, 372 U.S. 726 (1963), where the Court expressly rejected substantive due process. Justice Black, writing for the Court, stated: "We refuse to sit as a 'superlegislature to weigh the wisdom of legislation,' and we emphatically refuse to go back to the time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.' " *Id.* at 731-32 (footnotes omitted).

82. 410 U.S. 113 (1973).

83. *Id.* at 116.

84. *Id.* at 148-50.

85. *Id.*

86. *Id.* at 154-56.

87. *Id.* at 164.

88. *Id.* at 171 (Rehnquist, J., dissenting).

89. *Id.* at 174.

protection and due process areas even more than before.[90]

Davis is a good illustration of a court's use of the new equal protection standard. If this new test is a sort of revived substantive due process test, then *Davis* is also a good illustration of late twentieth century due process analysis.

Whether substantive due process is actually back to haunt us is questionable. One commentator has stated that "the post-1937 Court has sought to limit the fourteenth amendment due process clause to a device for protecting against state infringement the political and religious liberties secured from federal abridgment by the first amendment."[91] He has concluded that the Court is really not moving back to the type of substantive due process voiced in cases like *Lochner*.[92] Rather, he sees the Court using equal protection and due process analysis as a means of allocating roles among

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90. "But the Court adds a new wrinkle to this [compelling state interest] test by transposing it from the legal considerations associated with the Equal Protection Clause of the Fourteenth Amendment . . . . Unless I misapprehend the consequences of this transplanting of the 'compelling state interest test,' the Court's opinion will accomplish the seemingly impossible feat of leaving this area of the law more confused than it found it." *Id.* at 173. In a more recent case, Jimenez v. Weinberger, 417 U.S. 628 (1974), Justice Rehnquist also dissented from the majority opinion, based on problems similar to those he found in *Roe*. In *Jimenez*, social security disability benefits were denied to the petitioner's two illegitimate children born after he became disabled. The state justified this policy, citing *Dandridge*, as a way to avoid spurious claims. *Id.* at 632-33. Instead of emphasizing the suspect nature of the classification based on illegitimacy, the Court was more concerned with the subclassifications of illegitimacy created by the statute. Illegitimates born prior to the disability were treated differently than those born after it. *Id.* at 634-36. In his dissent, Justice Rehnquist felt that the majority opinion had strong substantive due process overtones, *id.* at 638-39, and stated: "This Court should not invalidate such classifications simply out of a preference for different classifications or because an unworkable system of individualized consideration would theoretically be more perfect." *Id.* at 640.

91. Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 8 (1973); *see* Brandenburg v. Ohio, 395 U.S. 234 (1957); Cantwell v. Connecticut, 310 U.S. 296 (1940).

92. *See* Tribe, *supra* note 91, at 9-10.

the various elements of government and society in accord with the Constitution.[93]

Roe v. Wade is a good example of this role-allocation. The Court in *Roe* was not choosing between the two substantive ends: abortion or continued pregnancy for all women.[94] Rather the Court was determining who should make the decision of abortion or continued pregnancy from alternative possible decision-makers such as the state, doctors, or the individual.[95] Therefore, the Court avoided making a value judgment as to whether abortion is right or wrong.[96]

Once the Court gets away from analyzing cases according to the substantive interests involved and gets into the question of who is to choose among these interests, it is no longer advocating a *Lochner*-type doctrine.[97] If this is substantive due process revived in a different sense, then the Court may simply continue to call it equal protection in cases involving classes of persons and due process in cases involving individuals.[98]

The court of appeal's decision in *Davis* is consistent with this role-allocation theory. The right to water and the right to contract individually are not in and of themselves fundamental. However, fairness requires that the termination policy of the Department be used as a last resort, after first notifying the plaintiff and allowing him to remedy the situation.

The role of deciding the right of the plaintiff to contract with the Department should not rest solely with the Department. In light of the important interests at stake and the minor burden sustained by the Department, the plaintiff should be able to choose whether to contract individually.

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93. *Id.* at 52.
94. *Id.* at 11.
95. *Id.*
96. *Id.*
97. *Id.* at 12-13.
98. "With respect to fairness concerns underlying the principles of due process and equal protection, there is, I think, little difference between the guarantees of equal protection and due process except that the latter deals with individual fairness while the former deals with fairness as between groups." Goodpaster, *Fundamental Rights* 512.