THE ENTITLEMENT TO MUNICIPAL WATER SERVICE: CONSTITUTIONAL PROBLEMS IN THE TERMINATION OF A PUBLIC UTILITY SERVICE

The federal judiciary has developed the concept of "entitlement" as a new form of property interest to be protected in conformity with the due process clause of the fourteenth amendment.[1] The United States Supreme Court and several lower federal courts have employed the entitlement concept to protect against termination of a myriad of governmental benefits by administrative discretion — *e.g.*, governmental contracts,[2] unemployment compensation,[3] welfare benefits,[4] motorists' licenses,[5] occupational licenses,[6] and continued residency in public and subsidized housing.[7] The Court, however, has not

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1. For the academic origin of the concept of "entitlement" see Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965); Reich, *The New Property*, 73 YALE L.J. 733 (1964). For an historical discussion of the former right-privilege bifurcation in government benefit analysis see Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

2. Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964).

3. Sherbert v. Verner, 374 U.S. 398 (1963).

4. Goldberg v. Kelly, 397 U.S. 254 (1970).

5. Bell v. Burson, 402 U.S. 535 (1971).

6. Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963).

7. The entitlement to continued residency in public and subsidized housing has elicited procedural due process requirements in administrative decisions on tenant evictions and rent increases. Lower federal courts have applied different due process hearing requirements in the two situations. The Goldberg v. Kelly, 397 U.S. 254 (1970), procedural due process hearing and notice requirements have been applied to evictions. For a discussion of these requirements see the text at notes 20-25 *infra*. For the leading cases applying *Goldberg* requirements see Caulder v. Durham Housing Authority, 433 F.2d 998 (4th Cir. 1970), *cert. denied*, 401 U.S. 1003 (1971), and Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir.), *cert. denied*, 400 U.S. 853 (1970). In rent increase decisions tenants of low-rent public housing and of low- and moderate-income housing, constructed under the section 221(d)(3) program of the National Housing Act, 12 U.S.C. § 1715*l*(d)(3) (1970), have been accorded the right to receive notice of proposed rent increases and to participate in the administrative determination of rent increases by making written presentations. *Compare* Marshall v. Lynn, 497 F.2d 643 (D.C. Cir. 1973), Thompson v. Washington, 497 F.2d 626 (D.C. Cir. 1973), *and* Burr v. New Rochelle Municipal Housing Authority, 479 F.2d 1165 (2d Cir. 1973), *with* Langevin v. Chenango Court,

developed the related concept of "fundamental interest" as a technique to protect entitlements under the equal protection clause of the fourteenth amendment.[8] In *Davis v. Weir*[9] a consumer's property interest in municipal water service was recognized as an entitlement under the due process clause, yet not as a fundamental interest under the equal protection clause.[10]

Davis involved a tenant whose water service was terminated by the Atlanta Department of Water Works because his landlord failed to pay the bill.[11] The water department notified the landlord, but not the consumer-tenant, of the impending termination of service. Plaintiff-tenant filed a section 1983 class action[12] seeking to enjoin defend-

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Inc., 447 F.2d 296 (2d Cir. 1971), *and* Hahn v. Gottlieb, 430 F.2d 1243 (1st Cir. 1970).

In examining the due process hearing requirement the *Thompson* court distinguished eviction and rent increase situations by reference to the adjudicative and legislative nature, respectively, of the administrative decisions involved:

> Most of the cases which established a due process right to hearing were concerned with *individualized* determinations—suspension or revocation of licenses, termination of statutory benefits to individuals, dispossession of property. In those cases individual hearings, with some oral presentation, were well nigh indispensable to the airing of the critical questions. Where, as here, the issues involved affect a class of citizens, there is a need to impose some limits to keep the proceeding manageable. While it is impossible to anticipate all the issues which could be raised in a rent-increase dispute, tenants are most likely to be concerned with the landlord's costs, level of services, alternative sources of revenue, and tenants' ability to pay increased rent. On these matters, we believe, tenants will have adequate opportunity to express their views, if they are afforded a hearing of the type prescribed by the Administrative Procedure Act for rule-making proceedings: an opportunity to make written presentations.

Thompson v. Washington, 497 F.2d 626, 640-41 (D.C. Cir. 1973). *See also* K. DAVIS, ADMINISTRATIVE LAW TEXT §§ 7.01-.06 (3d ed. 1972).

8. *Cf.* 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, 38-40 (1972); 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, 46-48 (1973).

9. 497 F.2d 139 (5th Cir. 1974).

10. *Id.* at 144.

11. In the six-month period from April 14 to October 14, 1970, the single water meter at the multi-dwelling unit, in which plaintiff and his family were the only residents, registered use of over 1.98 million gallons of water, for which a $1,433 bill was received. By December 1970 the landlord's debt was approximately $1,800. Appendix in The United States Court of Appeals for the Fifth Circuit at 27-28, Davis v. Weir, 497 F.2d 139 (5th Cir. 1974).

12. In 1973 the district court held that injunctive relief would be granted to a class constituting "all present and future non-commercial users of water service provided by the City of Atlanta, Department of Water Works." Davis v. Weir,

ant-water department from terminating service to his premises and from refusing to contract directly with him for continued water service.[13] Plaintiff contended that due process notice and an administrative hearing were required prior to the termination of an "essential" public service and that defendant's refusal to contract with him solely because of the financial obligation of a third party, the landlord, violated the equal protection clause. A federal district court held that the termination of a tenant's water service because of his landlord's debt was a deprivation of a property interest entitled to protection under the due process clause.[14] The court also held the Atlanta ordinance authorizing the termination procedure[15] invalid under the equal protection clause. The ordinance unreasonably classified applicants for water service by refusing service to persons whose premises were burdened with a lien for pre-existing debts.[16] The Fifth Circuit affirmed, reasoning that a lien against the defaulting debtor's service address should not deprive an unindebted tenant

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359 F. Supp. 1023, 1028 (N.D. Ga. 1973). The Fifth Circuit held that, as a class action pursuant to Rules 23(a) and (b)(2) of the Federal Rules of Civil Procedure, the class should include only "residential consumers of water furnished by the City of Atlanta, Department of Water Works, who have not contracted with the City for water service in their own names." 497 F.2d at 147; *cf.* Ihrke v. Northern States Power Co., 459 F.2d 566 (8th Cir.), *vacated and dismissed as moot*, 409 U.S. 815 (1972). *See also* 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1775 (1972).

13. *See* 497 F.2d at 141-42. Suit was brought to contest the validity of sections 33-129 and 33-130 of the 1965 Code of Ordinances of the City of Atlanta and section 7.6.16 of the Charter and Related Laws of the City of Atlanta. *Id.* at 141 n.2, 142 n.3.

14. Davis v. Weir, 328 F. Supp. 317, 320-22 (N.D. Ga. 1971), *clarified*, 359 F. Supp. 1023 (N.D. Ga. 1973). The 1973 decision was issued to clarify a class action controversy arising from Davis' representing the class of "users of water services furnished by the City of Atlanta who do not have a contract for water service in their own names." 359 F. Supp. at 1024-25.

15. Section 7.6.16 of the Charter and Related Laws of the City of Atlanta states:

> 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.

497 F.2d at 142 n.3.

16. 359 F. Supp. at 1026-27; 328 F. Supp. at 322-23.

from contracting for service with the municipal water department.[17]

The theoretical foundation for procedural due process requirements in terminating a public utility service is grounded upon two United States Supreme Court decisions.[18] *Goldberg v. Kelly*[19] held that welfare benefits could not be terminated without adequate

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17. 497 F.2d 139; *see* Annot., 19 A.L.R.3d 1227 (1968):

> Municipalities and public utility companies have frequently sought reimbursement of unpaid charges for utilities from the property served itself, or someone connected with the property, such as an occupant or owner, other than the one who incurred the charges. The conventional rule has been that liability for the debt of another cannot be imposed in the absence of special agreement or statutory authorization for a lien on the property, and ordinances or regulations seeking to impose such liability have usually been held unreasonable in the absence of an authorized lien.

Id. at 1232; *cf.* 2 C. ANTIEAU, LOCAL GOVERNMENT LAW §§ 19.10-.12 (1970); 12 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 34.92 (3d ed. rev. 1970).

The Georgia judiciary has developed a minority doctrine that municipal water services are legally deemed to be received by the premises rather than by its residents and that a quasi-lien could be imposed on the real property and collected from the present resident prior to the continuance of service. Under this doctrine, Georgia courts have validated ordinances that permitted local officials to terminate or to condition continued water service to dwellings upon the payment of the debts incurred at the building. No distinction was made as to the contractual status of the applicant for further service. *See* Harrison v. Jones, 226 Ga. 344, 175 S.E.2d 26 (1970); City of Atlanta v. Burton, 90 Ga. 486, 16 S.E. 214 (1892). *But see* Dodd v. City of Atlanta, 154 Ga. 33, 113 S.E. 166 (1922). In *Davis* this judicial development was criticized:

> Although the defendants assert that the power to discontinue service for nonpayment, which is authorized by Section 7.6.16 of the City Charter, . . . is a "specie of a lien," neither that language nor any other state law or local ordinance cited by the defendants *expressly* creates a lien for unpaid water bills. The Water Works concedes that it has never foreclosed on such a lien and that no recordation devices exist to place such an encumbrance on record.

497 F.2d at 145 n.9; *accord*, Oliver v. Hyle, 513 P.2d 806 (Ore. App. 1973).

18. Fuentes v. Shevin, 407 U.S. 67 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970). For an application of *Fuentes* and *Goldberg* to the removal for cause of a nonprobationary federal employee see Arnett v. Kennedy, 416 U.S. 134 (1974). In *Arnett* the Court held that provisions of the Lloyd-LaFollette Act and implementing regulations did not violate procedural due process by failing to afford an adjudicative hearing prior to the removal of a nonprobationary federal employee. The Court distinguished the nature of the property interests protected in *Fuentes* and *Goldberg* from that of the interest in *Arnett*: "Since the purpose of such a hearing in such a case [the removal of a nonprobationary federal employee] is to provide the person 'an opportunity to clear his name,' a hearing afforded by administrative appeal procedures after the actual dismissal is a sufficient compliance with the requirements of the Due Process Clause." *Id.* at 157.

19. 397 U.S. 254 (1970).

notice and a pre-termination evidentiary hearing.[20] The Court constructed a balancing test to guide the judiciary in determining the constitutionally required elements for notice and an evidentiary hearing. Two factors must be considered: the necessity of the service to human subsistence and the countervailing governmental interest in conserving fiscal and administrative resources.[21] The Court defined the requisites for a pre-termination procedure as: (1) timely and adequate notice detailing the reasons for a proposed termination,[22] (2) an effective opportunity to defend, including confrontation of any adverse witnesses and the oral presentation of arguments and evidence,[23] (3) an oral statement of position, (4) representation by retained counsel if desired, (5) an impartial decision-maker,[24] and (6) a decision that sets forth evidence relied upon and reasons for the result.[25]

After numerous federal court decisions applying the *Goldberg* rationale to protect governmental benefits under procedural due process,[26] the Court turned its attention to the protection of a "sig-

20. For a discussion of the historical development of procedural due process guarantees in the welfare area see O'Neil, *Of Justice Delayed and Justice Denied: The Welfare Prior Hearing Cases*, 1970 SUP. CT. REV. 161, 165-202. An empirical study from one jurisdiction revealed that administrative decisions to terminate welfare benefits to specific recipients have been reversed with significant frequency. *See* Handler, *Justice for the Welfare Recipient: Fair Hearings in AFDC—The Wisconsin Experience*, 43 SOC. SERVICE REV. 12, 22 (1969).

21. Unfortunately, the countervailing governmental interest category was left vague. For a description of the *Fuentes* model's articulation of the government interest in the balancing test see note 35 *infra*.

22. *See* Armstrong v. Manzo, 380 U.S. 545 (1965); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

23. Essential to this protection is that the burden of proof fall upon the governmental unit. *See* Speiser v. Randall, 357 U.S. 513, 524 (1958). *Goldberg* presents a model of the pre-termination hearing as a probable cause determination to lessen the risk of erroneous termination of welfare benefits. *See* Arnett v. Kennedy, 416 U.S. 134, 201 (1974) (White, J., concurring in part and dissenting in part).

24. *See* Arnett v. Kennedy, 416 U.S. 134, 198 (1974) (White, J., concurring in part and dissenting in part); Dailey, *Due Process Requirements for Residential Utility Service Termination*, 6 CLEARINGHOUSE REV. 540 (1973).

25. These essentials for reasoned administrative decision-making are in accord with Professor Kenneth Davis' ideal for curtailing arbitrary discretion by agencies. *See* K. DAVIS, *supra* note 7, §§ 4.04, 6.05.

26. *See* Bell v. Burson, 402 U.S. 535 (1971); Hall v. Garson, 430 F.2d 430 (5th Cir. 1970); Java v. California Dep't of Human Resources Dev., 317 F. Supp. 875 (N.D. Cal. 1970), *aff'd*, 402 U.S. 121 (1971); Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970).

nificant property interest," *i.e.* the consumer's equitable interest under conditional sales contracts in the continued possession and use of chattels before transfer of title. In *Fuentes v. Shevin*[27] the Court invalidated Florida and Pennsylvania statutes authorizing seizure under a writ of replevin of chattels in the consumer's possession. These statutes authorized state agents to seize secured consumer goods upon the ex parte application of a creditor who claimed a right to them and posted a security bond.[28] The statutes differed as to the procedural requirements for the creditor's procurement of a writ of replevin.[29] Neither, however, gave the debtor, prior to the seizure of the specified chattel,[30] the right to adequate notice or a due process hearing on the merits of conflicting claims. The *Fuentes* Court held that notice and an opportunity for an administrative hearing must *precede* state-authorized seizures of property in the debtor's possession.[31]

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27. 407 U.S. 67 (1972).

28. *Id.* at 73-78. In Mitchell v. W.T. Grant Co., 416 U.S. 600, 615-16 (1974), the Court held that the issuance of a sequestration writ under the Louisiana Code of Civil Procedure did not violate procedural due process under *Fuentes*. In reaching its holding the Court distinguished the sequestration statute from the Florida and Pennsylvania replevin statutes invalidated under the *Fuentes* doctrine:

> The Louisiana sequestration statute followed in this case mandates a considerably different procedure. A writ of sequestration is available to a mortgage or lien holder to forestall waste or alienation of the property, but different from the Florida and Pennsylvania systems, bare conclusionary claims of ownership or lien will not suffice under the Louisiana statute. Article 3501 authorizes the writ "only when the nature of the claim and the amount thereof, if any, and the grounds relied upon for the issuance of the writ clearly appear from specific facts" shown by verified petition or affidavit. Moreover, in the parish where this case arose, the requisite showing must be made to a judge and judicial authorization obtained. . . .
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> [T]he facts relevant to obtaining a writ of sequestration are narrowly confined. . . . [D]ocumentary proof is particularly suited for questions of the existence of a vendor's lien and the issue of default. . . .
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> Louisiana law expressly provides for an immediate hearing and dissolution of the writ "unless the plaintiff proves the grounds upon which the writ was issued."

Id. at 616-18. For a critique of *Mitchell* see Hobbs, *Mitchell v. W.T. Grant Co.: The 1974 Revised Edition of Consumer Due Process*, 8 CLEARINGHOUSE REV. 182 (1974). A careful reading of footnote 14 in *Mitchell* should assuage fears that the decision will have precedential value for overruling *Fuentes* when judicial supervision over the seizure or foreclosure proceeding is lacking. 416 U.S. at 620 n.14. For a confirmation of the theory that *Mitchell* represents a narrow exception to the *Fuentes* doctrine see North Georgia Finishing, Inc. v. Di-Chem, Inc., 43 U.S.L.W. 4192 (U.S. Jan. 22, 1975).

29. 407 U.S. at 73-78.

30. *Id.* at 75-78.

31. *Id.* at 80-83; *accord*, Boddie v. Connecticut, 401 U.S. 371, 378-79 (1971).

In reaching its holding, the Court altered the *Goldberg* methodology for procedural due process analysis. Under the *Fuentes* approach, gradations in the significance of property interests in consumer goods are relevant primarily to the form of both the notice and hearing required by due process.[32] The notice and hearing requirement will apply to protect "significant property interests" regardless of their relative importance to the respective consumer.[33] Utilitarian considerations of cost efficiency in judicial administration cannot outweigh the requirement of notice and a hearing.[34] Postponement of the procedural safeguard will be justified only by the existence of circumstances satisfying the "extraordinary situation" test.[35]

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32. 407 U.S. at 87 n.18, 89 n.20, 90 n.21, 97 n.33; *see* Boddie v. Connecticut, 401 U.S. 371, 378 (1971); Sniadach v. Family Finance Corp., 395 U.S. 337, 342 (1969) (Harlan, J., concurring).

33. 407 U.S. at 88-90. The Court attempted to rationalize its alteration of the *Goldberg* entitlement theory:

> [The district courts] reasoned that Sniadach and Goldberg . . . established no more than that a prior hearing is required with respect to the deprivation of such basically "necessary" items as wages and welfare benefits.
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> This reading of Sniadach and Goldberg reflects the premise that those cases marked a radical departure from established principles of procedural due process. They did not. Both decisions were in the mainstream of past cases, having little or nothing to do with the absolute "necessities" of life but establishing that due process requires an opportunity for a hearing before a deprivation of property takes effect.

Id. at 88 (footnotes omitted).

34. *Id.* at 90 n.22, 92 n.29. The Court states:

> A prior hearing always imposes some costs in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right. . . . Procedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken.

Id. at 90 n.22. *But see* Mitchell v. W.T. Grant Co., 416 U.S. 600, 608-09 (1974). In *Mitchell* the creditor's risk of property devaluation from the debtor's use of the property was calculated into the cost analysis. *See also* J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 974-75 (1972).

35. 407 U.S. at 90-93. The "extraordinary situation" test may be applied to justify the lack of pre-seizure notice and hearing, but the existence of three conditions must first be established:

> First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. Thus, the Court has allowed summary seizure of property to collect the internal revenue of the United States, to meet the needs of a

Several lower federal courts have held that regulated utility corporations, in terminating residential utility service, act "under color of state action" given the degree of state utility regulation, the utility's monopolistic character, the essential nature of the utility service to human existence, and the special state-authorized privileges of entry to private property and eminent domain.[36] Certain

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national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated food.

Id. at 91-92; *see* Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950); Fahey v. Mallonee, 332 U.S. 245 (1947); Phillips v. Commissioner, 283 U.S. 589 (1931); Central Union Trust Co. v. Garvan, 254 U.S. 554 (1921); North Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908). For an application of the "extraordinary situation" test in a critique of the *Mitchell* holding see Mitchell v. W.T. Grant Co., 416 U.S. 600, 629-30 n.1 (1974) (Stewart, J., dissenting).

In *Davis* defendants tried to justify the municipal water department's termination procedure under the "extraordinary situation" analysis. They argued: (1) that the present termination procedure was necessary as the only cost effective device for the collection of debts without the institution of a unilateral rate increase; (2) that a special need existed for prompt action in the termination of a utility service that can not be "repossessed;" and (3) that municipal ordinances carefully narrow the administrative decision to terminate. Appendix, *supra* note 11, at 261-62. Plaintiffs disputed the appropriateness of applying the "extraordinary situation" test to this particular utility termination:

> Defendants contend that summary termination is necessary because water is consumed and cannot be repossessed. . . . The Defendants cannot legitimately claim that speedy action is necessary when they operate on a two month billing cycle and in the Willie Davis case allowed an extraordinary bill to accumulate over a six month period. The Defendants further contend they fit within the extraordinary circumstances of *Fuentes* because the power to terminate is vested in a governmental official who may act only within the narrow confines of the City Charter. But the Charter hardly contains a detailed set of regulations controlling termination in due process terms as does the Internal Revenue Code. In fact, the Charter and Ordinances permit the Water Department to terminate service upon three days notice to the tenant *or* owner, if the account is delinquent. . . .

Id. at 289-90.

36. *See* Palmer v. Columbia Gas, Inc., 479 F.2d 153 (6th Cir. 1973); Bronson v. Consolidated Edison Co., 350 F. Supp. 443 (S.D.N.Y. 1972); Stanford v. Gas Serv. Co., 346 F. Supp. 717 (D. Kan. 1972). *See also* Adams v. Southern California First Nat'l Bank, 492 F.2d 324, 334-36 (9th Cir. 1973).

In a recent decision the United States Supreme Court has held that, for the purposes of the fourteenth amendment, a regulated utility corporation does not act "under color of state action" given that the utility "was a heavily regulated private utility, enjoying at least a partial monopoly in the providing of electrical service within its territory, and that it elected to terminate service to petitioner in a manner which the Pennsylvania Public Utilities Commission found permissible under state law." Jackson v. Metropolitan Edison Co., 95 S. Ct. 449, 457 (1974). As a precedent for the determination of "state action" in administrative decisions of regulated utilities, *Jackson* must be limited to factual situa-

regulated utilities have thus been held subject to due process challenges under section 1983 of the Civil Rights Act.[37] In applying *Fuentes* and *Goldberg*, lower federal courts have considered the following factors significant in determining what form the pre-termination notice and hearing procedure must take: (1) the adequacy of the notice to inform the consumer of a proposed service termination[38] in that the notice be sufficiently in advance of a hearing to permit him to formulate a defense[39] and to provide suggestions for the resolution of the debt through internal administrative procedure,[40] (2) the degree of administrative reliance upon computers for billing,[41] (3) the efficiency of the billing service in providing a uniform billing schedule,[42] (4) the existence of empirical evidence indicating

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tions in which there is no delegation of some state power "which is traditionally associated with sovereignty," *i.e.* eminent domain. *Id.* at 454. Under *Jackson* such factors as the monopoly status of a regulated utility, the degree of state regulation, and the essential nature of the utility service should be applied to the test of "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Id.* at 453; *accord*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176 (1972).

37. 42 U.S.C. § 1983 (1970). For a discussion of sovereign and municipal immunity from suit under section 1983 class actions see A. LAFRANCE, M. SCHROEDER, R. BENNETT & W. BOYD, LAW OF THE POOR 459-65 (1973). *See also* Haydock, *State Action: Public Utilities and the Public Interest*, 6 CLEARINGHOUSE REV. 69 (1972).

38. Palmer v. Columbia Gas, Inc., 479 F.2d 153, 157-58 (6th Cir. 1973). *See also* Bronson v. Consolidated Edison Co., 350 F. Supp. 443, 444 (S.D.N.Y. 1972). In *Palmer* an employee of the company called a "collector" to terminate service at plaintiff's residence. The employee was vested with the discretion to terminate the service without notice to the residents. In *Bronson* only the following warning was sent to plaintiff's address prior to termination: "YOUR SERVICE WILL BE DISCONTINUED UNLESS THE TOTAL AMOUNT SHOWN BELOW IS PAID BY MAR 02 1970." *Id.* at 450. Hence, plaintiff-consumer was not notified that she could register a complaint with Consolidated Edison or the New York Public Service Commission prior to the termination.

39. Palmer v. Columbia Gas, Inc., 479 F.2d 153, 166-67 (6th Cir. 1973).

40. *Id.* at 167-68.

41. *See* Lucas v. Wisconsin Elec. Power Co., 466 F.2d 638, 672 n.28 (7th Cir. 1972) (Sprecher, J., dissenting): "The defendant utility disavowed any 'computer error' among its 646 annual errors 'due to human agency.' Of course from one viewpoint, a computer is incapable of error; only the computer operator makes errors. Nor can anyone know how many errors go undetected in the course of the year." *Id.*

42. *See* Palmer v. Columbia Gas, Inc., 479 F.2d 153, 157 (6th Cir. 1973). In *Palmer* the Columbia Gas Company instituted a system of meter calculation whereby an actual reading would follow a series of several computer estimates.

whether a large number of the complaints actually investigated by the utility or the state regulatory commission resulted in adjustments favorable to the consumer,[43] (5) the impartiality of the decision-maker,[44] and (6) the adequacy of litigation as an alternative to a pre-termination hearing.[45] In determining the form of the due process hearing, federal court decisions have placed particular emphasis upon the requirements that the utility company bear the burden of proof[46] and that the decision-maker be sufficiently free from the internal pressures of the state regulatory apparatus to protect the utility's autonomy in its collection procedure.[47]

Two recent decisions[48] have held that, under *Fuentes,* the utility must be allowed broad discretion in establishing notice and termination hearing requirements.[49] Essential to the reliance upon adminis-

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The actual reading would often be considerably higher than the previous estimates. For instance, one plaintiff received a $200 bill following a series of bills between $10 and $15. *Id.* at 157 & n.2.

43. Bronson v. Consolidated Edison Co., 350 F. Supp. 443, 448 n.11 (S.D.N.Y. 1972): "[Sixteen percent] of those complaints actually investigated by the Public Service Commission result in adjustments in favor of the customer." *Id. See also* Comment, *The Shutoff of Utility Services for Nonpayment: A Plight of the Poor,* 46 WASH. L. REV. 745 (1971).

44. *See* Bronson v. Consolidated Edison Co., 350 F. Supp. 443, 449-50 (S.D.N.Y. 1972). In *Bronson* the court found that the New York Public Service Commission's investigation procedure relied upon the utility to assemble the necessary data. During a six month period in 1972, 9,385 billing inquiries had been received by the Public Service Commission, with 8,886 being "processed." *Id.* at 450.

45. *See* Lamb v. Hamblin, 57 F.R.D. 58, 62-64 (D. Minn. 1972). For analysis of these judicial alternatives see notes 50-54 and accompanying text *infra.*

46. *See* note 23 *supra.* Such shifting of the burden of proof is consistent with the common law rule of Wood v. City of Auburn, 87 Me. 287, 293, 32 A. 906, 908 (1895):

> It is said, however, that the consumer can apply to the courts to recover back any sum he is thus compelled to pay, if it was not justly due from him, or, if he can show affirmatively that it is not a just claim against him, he can, by judicial process, restrain the company or municipality from shutting off the water. To oblige a person to follow such a course would be a violation of the fundamental juristic principle of procedure. That principle is that the claimant, not the defendant, shall resort to judicial process; that he who asserts something to be due him, not he who denies a debt, shall have the burden of judicial action and proof.

47. In *Palmer, Bronson, Stanford* and *Lamb* the factor of the public service commission's undue reliance upon the public utility was essential to the determination of state action and the application of *Goldberg* due process requirements.

48. Jackson v. Metropolitan Edison Co., 95 S. Ct. 449 (1974); Lucas v. Wisconsin Elec. Power Co., 466 F.2d 638 (7th Cir. 1972).

49. Lucas v. Wisconsin Elec. Power Co., 466 F.2d 638, 653 (7th Cir. 1972). The *Lucas* court distinguished electric service from statutory entitlements such

trative discretion is the courts' faith in three alternative judicial remedies—the equitable remedy of injunction, payment under protest followed by a suit for a refund, and a remedy at law for damages.[50] The majority of federal decisions question the efficacy of these alternative remedies. For the low-income consumer, the cost of obtaining an injunction is prohibitive.[51] By pursuing legal remedies, the consumer may be deprived of an essential service without due process[52] pending judgment. The disputed amounts are often insufficient to justify the expense of litigation.[53] Finally, the consumer-plaintiff must satisfy an imposing burden of proof for injunctive relief—"identification of a right to be protected; a showing of irreparable injury; a showing of an inadequate remedy at law; and a showing that there is a likelihood of prevailing on the merits."[54]

The *Davis* court specified a form that would satisfy the procedural due process notice requirement. Notice must be mailed to the occupants of the serviced premises. It must state that the user may contract with the water department in the user's own name and must assure the user that water service will not be contingent upon the payment of the delinquent bill of a third party.[55]

Davis does not impose an evidentiary hearing upon the public utility and the consumer to resolve the dispute over the landlord's

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as welfare benefits. Thus the *Goldberg* due process requirements were held to be inapplicable to the termination of electric services by a utility corporation. In his dissent Circuit Judge Sprecher stated:

> The defendant utility is not infallible. It admitted to 646 errors during a recent calendar year. There is no reason why the present preliminary informal negotiations between utility and customer which unearthed these errors would not continue if notice and hearing were required prior to threatened disconnection. Despite the 10,000 service disconnections by defendant utility each year, in a recent calendar year only 71 persons went so far with their disputes as to contact the Public Service Commission, the Better Business Bureau, a newspaper or a public utility officer.

Id. at 671-72.

50. *Id.* at 648-50.

51. Lamb v. Hamblin, 57 F.R.D. 58, 63 (D. Minn. 1972): "The injunctive remedy, in particular, is burdensome and expensive. M.S.A. § 585.04 requires posting of a minimum $250.00 bond as a prerequisite to issuance of a temporary injunction." *Id.*

52. *See* Note, *The Emerging Constitutional Issues in Public Utility Consumer Law*, 24 U. FLA. L. REV. 744, 757-58 (1972).

53. Bronson v. Consolidated Edison Co., 350 F. Supp. 443, 449 (S.D.N.Y. 1972).

54. Lamb v. Hamblin, 57 F.R.D. 58, 63 (D. Minn. 1972).

55. Davis v. Weir, 359 F. Supp. 1023, 1025-26, 1028 (N.D. Ga. 1973).

bill. The court reasoned that the consumer would be an inappropriate participant in the utility-landlord conflict.[56] Thus the court avoided the problem of explicating the nature of the due process evidentiary hearing—a task made particularly difficult given the *Fuentes* rule that no specific guidelines shall govern the creditor's standard of proof and the minimal procedural safeguards necessary for the protection of the debtor's defense.[57]

The *Davis* holding that the Atlanta ordinance unreasonably classified applicants for residential utility service presents a common dichotomy in constitutional jurisprudence, *i.e.* between the "strict scrutiny" and "rational relationship" tests for equal protection analy-

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56. *See* NATIONAL CONSUMER LAW CENTER, INC., MODEL RESIDENTIAL UTILITY SERVICE REGULATIONS (1974). The Model Regulations have been developed to comply with *Davis*' procedural due process requirements. Articles five, six and seven present a structured administrative process for collection policy and termination consistent with the requirements and spirit of the *Goldberg* and *Davis* decisions. The pre-termination evidentiary hearing is designed as a final safeguard; both negotiations between the utility and consumer and informal review are encouraged prior to the commencement of the *Goldberg* due process hearing. The informal review process of article six features an impartial complaint officer selected by the state or municipal regulatory agency. The officer's order will include an offer for a deferred payment agreement or an extension agreement.

In both article four, part two (extension agreements), and article five (termination procedure), the notice and hearing requirements of *Davis* are specifically related to the plight of the apartment building resident. The Model Regulations supersede the protections of *Davis* by its extension agreement procedure within the provision for the informal review or hearing:

> As part of the informal review or hearing, the model provides that multiple dwelling residents shall have the right to negotiate an extension agreement for continued service without liability for any outstanding debt or delinquent account of the landlord. §§ 4.201, 5.105(g), 6.102(4), 7.104(5). This agreement may take any workable form by which payment for current service can be arranged. § 4.203. However, where single meter-single account service can be installed simply by installation of metering equipment, each resident shall have the right to an extension agreement for that service, subject to the deposits and eligibility requirements of Article 2. § 4.202.

National Consumer Law Center, Inc., *supra* at 14-15. It is the goal of the Model Regulations that single meter-single account service for multi-unit dwellings will replace master metering and thereby facilitate contractual independence between the tenant and the utility.

57. In *Fuentes* the burden of proof of the creditor before the hearing is satisfied by "establishing the validity, or at least the probable validity . . . of the underlying claim against the alleged debtor. . . ." Fuentes v. Shevin, 407 U.S. 67, 97 (1972). *But see* Fuentes v. Shevin, 407 U.S. 67, 102 (1972) (White, J., dissenting). *See also* Sniadach v. Family Finance Corp., 395 U.S. 337, 343 (1969) (Harlan, J., concurring).

For a presentation of the minimum due process hearing requirements of *Goldberg* see notes 22-25 and accompanying text *supra.*

sis. Under the former test, the Supreme Court has analyzed whether state legislation adversely affects "fundamental interests"[58] or is based upon a "suspect classification."[59] Given a suspect classification or an affected fundamental interest, the legislation must be shown necessary to the promotion of a "compelling state interest" in order to establish constitutional validity.[60] Under the rational relationship test, the state need only prove that the legislation was rationally related to some legitimate state policy.[61]

The bifurcation of equal protection analysis into two distinct theories has been questioned in several of Mr. Justice Marshall's dissents.[62] The Marshall paradigm for equal protection analysis establishes a single inquiry based on the following factors: "the character of the classification in question, the relative importance to the individuals in the class discriminated against of the governmental benefits they do not receive, and the asserted state interests in support of the classification."[63] Several recent Court decisions have been interpreted by both academic and judicial authorities as employing the Marshall paradigm under the language of the traditional "rational relationship" test.[64] Functionally, the *Davis* analysis

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58. *See* Shapiro v. Thompson, 394 U.S. 618 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 533 (1964); Griffin v. Illinois, 351 U.S. 12 (1956); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942). *See also Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1127-31 (1969).

59. *See* Graham v. Richardson, 403 U.S. 365, 371-72 (1971) (alienage); McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964) (race); Korematsu v. United States, 323 U.S. 214, 216 (1944) (nationality).

60. *See Developments in the Law, supra* note 58, at 1101-04, 1121-23.

61. *See* McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911). *See also Developments in the Law, supra* note 58, at 1076-87.

62. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 70-133 (1973) (Marshall, J., dissenting); Richardson v. Belcher, 404 U.S. 78, 90 (1971) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 517-21 (1970) (Marshall, J., dissenting).

63. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting). For an application of the Marshall paradigm to the examination of the validity of a state financing system for public education see *id.* at 110-33.

64. *See* Gunther, *supra* note 8, at 18-19:

> In seven of the fifteen basic equal protection decisions, the Court upheld the constitutional claim or remanded it for consideration without mentioning the "strict scrutiny" formula. . . . After the years in which the strict scrutiny-

is in accord with this interpretation. Without the semantics of either the "fundamental rights" or the "suspect classification" tests for strict scrutiny, the *Davis* decision represents the first application of traditional "rational relationship" doctrine to protect consumer-tenant interests from the administrative discretion of public utilities.[65]

The *Davis* court implicitly applied the Marshall paradigm to invalidate the provisions of the Atlanta ordinance authorizing the termination of water service. First, the court questioned the classification of applicants based upon residence at a service address encumbered by the pre-existing debt of a third party. Secondly, the court stated that water service was basic to the habitability of multi-unit dwellings.[66] Finally, the court analyzed the state's in-

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invalidation and minimal scrutiny-nonintervention correlations were virtually perfect, the pattern has suddenly become unsettled. After an era during which the "mere rationality" requirement symbolized virtual judicial abdication, the Court—following personnel changes in a noninterventionist direction—has suddenly found repeated occasions to intervene on the basis of the deferential standard. . . .

Id. The seven cases cited by Gunther for the 1971 term of the Supreme Court are: James v. Strange, 407 U.S. 128 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Humphrey v. Cady, 405 U.S. 504 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971). Note that *Weber* and *Stanley* did not formally adopt the traditional "rational relationship" test. Essential to Gunther's model of judicial intervention (upholding constitutional claims through the application of the deferential standard of "rational relationship") is its utility as an avoidance strategy. Gunther, *supra* note 8, at 25-30. For example, in *Jackson* and *Eisenstadt* the Court avoided constitutional issues relating to the cruel and unusual punishment clause and to the right of privacy, respectively. *Id.* at 29.

In its 1972 term the Court, in United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973), applied the Gunther model to the protection of welfare rights. The Court held that section 3(e) of the Food Stamp Act, 7 U.S.C. § 2012(e) (Supp. II, 1972), *amending* 7 U.S.C. § 2012(e) (1970), created an irrational classification by excluding from participation in the food stamp program any "household" containing an individual who was not related to any other member. The Court found that section 3(e) had no rational relationship to the governmental interest of minimizing fraud in the administration of the program. 413 U.S. at 538. For a further discussion of the *Moreno* decision's relation to the Gunther Model see 8 URBAN L. ANN. 289 (1974).

65. 497 F.2d at 143-46.

66. *See* AMERICAN BAR FOUNDATION, MODEL RESIDENTIAL LANDLORD-TENANT CODE §§ 2-203(1)(d), (f) (Tent. Draft 1969) (landlord's duty to supply and maintain the dwelling adequately). For a decision applying an implied warranty of habitability concept in all urban rental leases see Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1075-80 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970). *See also* Green v. Superior Court, 10 Cal. 3d 616, 627, 517 P.2d 1168, 1175, 111 Cal. Rptr. 704, 711 (1974); Jack Spring, Inc. v. Little, 50 Ill. 2d 351,

terest in collecting water charges from multi-unit dwellings with a single water meter and the municipality's interest in its revenue bond rating. The court held the classification of applicants invalid for failing to distinguish credit-risk consumers and non-credit-risk consumers.[67] The collection scheme, in the court's view, disregarded the legal accountability of the debtor for the service charges.[68] No valid governmental interest in protecting the municipal revenue bond rating was found to justify the intolerable effects of the utility's action—forcing the tenants either to pay the landlord's utility bill, or remain in a residence that would rapidly become uninhabitable without water service, or vacate the residence.[69] The tenant's conditional right to continued utility service is justified since it does not affect the ultimate suit against the debtor-landlord.[70] The water department's fear that its municipal revenue bond rating would suffer was considered illusory given "the concededly small number of similar applicants, the miniscule percentage of the department's revenue that is affected, the minimal cost of instituting constitutionally sufficient procedures, and the availability of other collection methods."[71]

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280 N.E.2d 208 (1972); Boston Housing Authority v. Hemingway, ... Mass. ....., 293 N.E.2d 831 (1973); Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 268 A.2d 556 (Dist. Ct. 1970). The Supreme Court of California has developed a consumer protection theory for the urban tenant:

> Through a residential lease, a tenant seeks to purchase "housing" from his landlord for a specified period of time. The landlord "sells" housing, enjoying a much greater opportunity, incentive and capacity than a tenant to inspect and maintain the condition of his apartment building. A tenant may reasonably expect that the product he is purchasing is fit for the purpose for which it is obtained, that is, a living unit. Moreover, since a lease contract specifies a designated period of time during which the tenant has a right to inhabit the premises, the tenant may legitimately expect that the premises will be fit for such habitation for the duration of the term of the lease. . . .

Green v. Superior Court, 10 Cal. 3d 616, 627, 517 P.2d 1168, 1175, 111 Cal. Rptr. 704, 711 (1974).

67. 497 F.2d at 145.

68. *Id.* at 144-45.

69. *Id.*

70. *Id.* at 145.

71. *Id.*; *see* Appendix, *supra* note 11, at 237: "[The] Water Department prepares and renders normally 65,000 water and sewer bills a month. Approximately, 2,200 accounts are notified that their bills are delinquent, and service is discontinued on about 350 accounts because of non-payment."

In his memorandum plaintiff argued:

> The very definition of shelter or housing in the urban environment today has come to mean more than four walls and a roof. It includes utilities, safe access and reasonable maintenance and repair . . . . Water can thus be treated as either a direct necessity entitled to due process protection in its own stead or as a definitional element and necessary concomitant of "shelter," which has been held to be a necessity . . . [and] entitled to due process protection. . . .[72]

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72. Note, *The Emerging Constitutional Issues in Public Utility Consumer Law*, 24 U. FLA. L. REV. 744, 751 n.68 (1972). The *Davis* decision, however, failed to analyze the relation between the right to utility service as an entitlement and the concept of a "right to shelter." *See* Michelman, *The Advent of a Right to Housing: A Current Appraisal*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 207 (1970); Note, *Procedural Due Process in Government-Subsidized Housing*, 86 HARV. L. REV. 880, 903-10 (1973). When the city gave notice to the landlord that the water service for his tenement would be terminated, the user of the service, plaintiff-tenant, was faced with three choices: pay the landlord's utility bill, remain in a residence that would rapidly become uninhabitable, or vacate the residence. In effect, the municipal water department's action evicted the tenant. Perhaps standards for procedural due process in the eviction of tenants of public and federally subsidized housing will be applied to protect consumer-tenants against the administrative discretion of public utilities. *See* Joy v. Daniels, 479 F.2d 1236, 1241 (4th Cir. 1973) (notice and pre-eviction hearing requirements for procedural due process in eviction from section 221(d)(3) subsidized housing); Housing Authority v. United States Housing Authority, 468 F.2d 1 (8th Cir. 1972) (notice and pre-eviction hearing requirements for procedural due process in eviction from public housing).

Regarding equal protection developments, the Supreme Court has held that the "need for decent shelter" and the "right to retain peaceful possession of one's home" are not to be protected as "fundamental interests." Lindsey v. Normet, 405 U.S. 56, 73-74 (1972). The *Lindsey* Court upheld the constitutional validity of the Oregon Forcible Entry and Wrongful Detainer Statute:

> We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement. Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions. Nor should we forget that the Constitution expressly protects against confiscation of private property or the income therefrom.

Id. at 74. Contrary to the Gunther model for the 1971 term, the Court justified the Oregon procedure as "rationally related" to the protection of the landlord's interest in real property. *See* note 64 *supra*. The Court, however, held that the Oregon statutory requirement of a double-bond by the tenant as a pre-condition for an appeal from an adverse district court decision was not rationally related to the statutory purpose of efficient administration of landlord-tenant disputes. 405 U.S. at 74-79. *See also* 7 URBAN L. ANN. 309 (1974); 58 VA. L. REV. 930 (1972).

Davis has been cited as a significant application of procedural due process for the protection of consumers of public utilities.[73] The decision, however, may prove to have greater precedential significance in its extension of the Marshall paradigm for equal protection analysis to protect consumers against the monopolistic power of public utilities in their collection policies.

Michael B. Phillips

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73. *See* Note, *Constitutional Safeguards for Public Utility Customers: Power to the People*, 48 N.Y.U.L. REV. 493, 518 (1973).