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CASH DEPOSITS—BURDENS AND BARRIERS IN ACCESS TO UTILITY SERVICES

Public utilities¹ understandably try not to dispense free service. In order to prevent free service in the form of bad debt losses, the vast majority of utilities require cash deposits from users they fear will default in their monthly payments. These deposits may be quite large in absolute amount, often equal to two or three months' estimated consumption.² Where the applicant has a specifically ascertainable unsatisfactory credit rating, the amounts may be much larger. Sums of \$50.00 and \$100.00 are frequent,³ but the amount may range as high as \$500.00.⁴ In any case, payment of these deposits, when demanded, is a precondition to service.

State statutes and common law uniformly require utilities to pay interest on the deposits they have collected. The rates required vary from about 4% to 6%.⁵ While these rates are comparable to those available to low income consumers in time deposits at commercial savings institutions, they represent a saving for the utilities over the interest rates they customarily pay on borrowed capital.⁶ This interest saving is

¹ This Comment is confined to those publicly and privately owned utilities that provide water, gas, electricity, and telephone services to their customers upon the payment of user charges. It is not directed, therefore, at the provision of those municipal services which are financed out of general revenues or lump sum payments unrelated to the immediate variable cost of their use. Its reasoning and conclusions, however, may be applicable to those municipal services not furnished by public utilities which are priced in relation to incremental cost.

² Note, *Public Utilities and the Poor: The Requirement of Cash Deposits from Domestic Consumers*, 78 YALE L.J. 448, 448—49 (1969) [hereinafter cited as *Public Utilities and the Poor*]. *Public Utilities and the Poor* extensively examines the impact of deposits on the poor. It does not argue, however, that current deposit practices are unconstitutional. *Id.* 450 n.15. The aim of the present Comment is to articulate a basis under both constitutional law and traditional public utility law to challenge the validity of utility deposits in light of their documented impact upon the poor. While this Comment will contain sufficient factual data to justify these arguments, a full survey of current deposit practices is not attempted. For greater factual detail, see *id.* Cf. Note, *The Shutoff of Utility Services for Nonpayment: A Plight of the Poor*, 46 WASH. L. REV. 745 (1971) [hereinafter cited as *Shutoff of Utility Services*].

³ When gas is to be used for heating, the Southern Connecticut Gas Co. requires a minimum deposit of \$50.00. Twenty-one percent of the 209 respondents to a recent survey in Washington, D.C., revealed that they paid gas and electric deposits in excess of \$25.00. Four paid more than \$100.00. *Public Utilities and the Poor* 449 n.7. See also *Washington Gas Light Co. v. Pub. Serv. Comm'n*, 40 U.S.L.W. 2352, 2353 (D.D.C. Dec. 7, 1971).

⁴ See *Carpenter v. Home Tel. Co.*, 122 Vt. 50, 163 A.2d 838 (1960).

⁵ *Public Utilities and the Poor* 449, 450 n.12.

⁶ New issues of Aa utility bonds were sold at a recent high of 9.4% in May, 1970. In December, 1971, the figure was 7.1%. First National City Bank of New York, MONTHLY ECONOMIC LETTER, February, 1972, at 5. The absolute amounts involved are not insignificant. These amounts are small, however, relative to the utilities'

substantial at times, but may be overstated if the deposit accounts require considerable servicing.⁷ Although the sacrifices of the depositors alone provide these interest savings for the utilities, these benefits eventually aid the utilities' stockholders and are ultimately shared with all users in the form of lower rates.⁸

Most states now prohibit utilities from levying a deposit on a consumer who can demonstrate the adequacy of his credit.⁹ Apart from such a demonstration, however, utilities are free from statutory limitations on their deposit rules. Practices differ,¹⁰ but most utilities use very broad criteria of income and net worth to select those consumers from whom they will demand a deposit.¹¹ Pacific Telephone and Telegraph Co., for example, does not require a deposit if the applicant has worked continuously for two years prior to his application, or if he owns a home, or if he is a professional, a private pensioner, or an employee of a large corporation.¹² Under these broad deposit rules it is not surprising that the poor pay virtually all deposits, or that often high income residential areas are exempted altogether from the impact of cash deposits.¹³

Such rules impose severe burdens on depositors without proportionately benefitting the utilities, for deposits usually save utilities insignificant amounts of money. For example, estimations of the California Public Utilities Commission in 1967 showed that imposition of deposit rules would save Pacific Telephone & Telegraph Co. only one-tenth of one percent (00.1%) of its operating revenues.¹⁴ These small

total capital needs. As of December 31, 1970, Pacific Telephone had \$40 million in security deposits and advance payments versus \$1.9 billion outstanding in conventional long-term debt and \$2.6 billion in stockholder's equity. Moody's PUBLIC UTILITY MANUAL 1137 (1971). On the same date, American Telephone and Telegraph Co. held, nationwide, \$423.6 million in such deposits versus \$18.2 billion in long-term debt and stockholder's equity of \$25.1 billion. *Id.* at 1080.

⁷ *Public Utilities and the Poor* 449; see, e.g., p. 632 *infra*.

⁸ See TAN 38 *infra*.

⁹ See, e.g., N.J. Bd. of Pub. Util. Comm'rs Regs. § 14:407-1a; Wis. Admin. Code § 134.06 (1)(a) (1966).

¹⁰ *Public Utilities and the Poor* 448, 458. Some companies only impose deposits after an individualized credit check.

¹¹ *Id.* at 457 n.49.

¹² *Wood v. Pub. Util. Comm'n*, 4 Cal. 3d 288, 298-94, 481 P.2d 823, 825-26, 93 Cal. Rptr. 455, 457-58 (1971), *appeal dismissed*, 92 S.Ct. 293 (1971).

¹³ *Public Utilities and the Poor* 449.

¹⁴ Re the Pacific Tel. & Tel. Co., 77 P.U.R.3d 1, 9 (Cal. Pub. Util. Comm'n 1968). In 1967, Pacific Telephone & Telegraph Co. had operating revenues of about \$1.24 billion and bad debt losses of about \$14.5 million. Of approximately 5.49 million accounts, the company wrote off 0.37 million during the year as uncollectable. At that time, Pacific Telephone had no deposit policy, but after a hearing on a rate increase, the California Public Utilities Commission estimated that the company's new rules would have saved

savings contrast sharply with the large burdens imposed on those required to pay the deposits. At most, only 13.4% of those required to pay deposits under Pacific Telephone's identification criteria were actually expected to default.¹⁵ In short, 87% of Pacific Telephone's deposit-paying customers were forced to furnish security for utility service on the grounds that only 13.4% of their number might default in their monthly payments.¹⁶ At the same time, the majority was required to pay in the form of higher utility rates for their share of the bad debt losses not eliminated by the company's deposit policy. This double burden falls on all consumers who are required to pay deposits on the basis of such imprecise deposit criteria. An additional burden falls on poor depositors because deposit amounts often are large in relation to their budgets.¹⁷ Moreover, unlike the affluent, the poor cannot turn so readily to alternative utilities offering less onerous credit terms.¹⁸ In light

the company \$2.9 million in 1967. The new deposit policy, requiring deposits from 10% to 12% of the company's customers, would cost \$1.5 million a year to administer. As this procedure was only marginally superior to a random selection of depositors in identifying likely defaulters, it could not materially affect the company's bad debt losses. While under the chosen criteria ten to twelve percent of the company's users were expected to pay deposits, Pacific Telephone's bad debt losses were predicted to decline only twenty per cent or \$2.9 million. Moreover, since the company anticipated operating expenses of \$1.5 million a year, it would net savings of only \$1.4 million a year, or one-tenth of one percent of 1967 operating revenues of \$1.24 billion.

¹⁵ *Nunemaker v. Pacific Tel. & Tel. Co.*, 80 P.U.R.3d 129, 138, 148 (Cal. Pub. Util. Comm'n 1969). Since 6.7% of the company's customers defaulted in 1967, and since the new rules would have reduced bad debt losses by only 20%, assuming that these amounts are evenly distributed, only 1.34% of Pacific Telephone's customers would have both fallen within the new deposit criteria and defaulted. As few as 10% of the company's customers would have paid deposits in 1967 under the new rules.

¹⁶ The California Public Utilities Commission attempted to defend its deposit criteria by observing: "In 1966, PT&T conducted a study of 16,711 final accounts which were written off as uncollectible during a 30-day period. Among the information which came from the study was that 93 per cent of the persons having these accounts rented their living quarters, 71 per cent had the same job for two years or less, 82 per cent had service less than two years, 67 per cent had service less than one year and of those customers who had service less than one year, 46 per cent had service less than three months." *Id.* at 138.

The Commission has stood the relevant statistical inquiry on its head. To justify a requirement of deposits from all tenants, for example, one would have to show at least that most renters default, not that most defaulters rent. More importantly, if the Commission saw the need for statistics at all, it should have required a competent study. Multiple factor analysis should have been employed to determine that combination of variables which best identifies likely defaulters.

¹⁷ See, e.g., *Nunemaker v. Pacific Tel. & Tel. Co.*, 80 P.U.R.3d 129, 144-46 (Cal. Pub. Util. Comm'n 1969).

¹⁸ The poor are frequently dependent upon their landlord's fixed investment in a particular utility and cannot replace gas heating by electric heating when respective rates indicate the profitability of this change. Nor can they easily move to a dwelling or an area served by the utility of their choice. *Public Utilities and the Poor* 459.

of these burdens, the existence and application of cash deposits raise serious issues of public utility law and constitutional law.¹⁹

I. PUBLIC UTILITY LAW

Public utilities are extensively regulated by the state,²⁰ in great part because they are natural monopolies²¹ with a marked bargaining advantage over their customers. Public utilities provide services continuously to small consumers whose need for these services is constant and critical; it cannot be postponed. Accordingly, they must meet the utilities' terms or do without service.²² Since these small consumers are at such a disadvantage relative to their monopolistic providers, the state has stepped in to protect consumer interests.

Those chosen by the state to carry out this regulation of utilities have assumed two tasks. First, because utilities are natural monopolies, public utility commissions must ensure the efficient allocation of resources, supplying the discipline that the market furnishes elsewhere in the economy. In addition, they must set rates in the public interest.²³ This means not only that utility rate structures are to conform with current

¹⁹ Deposit criteria which approach absolute precision in identifying likely defaulters probably satisfy tests of public utility law or constitutional tests of due process articulated below. However, criteria that were entirely accurate might nevertheless violate the equal protection test proposed below at page 646, if the burden they imposed on the poor was sufficient to outweigh the benefits to other utility users. Given estimated savings of one-tenth of one percent of operating revenues, a negligible benefit to other users, the burden on poor depositors must be considered overriding in importance.

No such accuracy, however, is evident in any deposit criteria known to this author. In contrast, the gross imprecision of the deposit rules of Pacific Telephone appear to be typical. The representative value of Pacific Telephone's credit policies, therefore, warrants this Comment's frequent references to them. These allusions are also warranted by the recent decisions holding Pacific Telephone's credit policies to be valid under public utility law, *Nunemaker v. Pacific Tel. & Tel. Co.*, 80 P.U.R.3d 129 (Cal. Pub. Util. Comm'n 1969), and under constitutional law, *Wood v. Pub. Util. Comm'n*, 4 Cal. 3d 288, 481 P.2d 823, 93 Cal. Rptr. 455 (1971), *appeal dismissed*, 92 S.Ct. 293 (1971).

²⁰ In 1964, state commissions exercised jurisdiction over telephone companies in 49 states, gas companies in 47 states, and electric companies in 46 states. The District of Columbia regulated all three activities. *Public Utilities and the Poor* 452 n.21.

²¹ Natural monopolies arise in the provision of goods and services whose production is marked by high initial outlays and low and decreasing marginal costs. The first entrant into such production can, because of this cost structure, always underprice a subsequent entrant, preventing him from recovering his high start-up costs. The first entrant therefore becomes the only entrant. This process is reinforced where competition between two producers is thought by society to be highly inefficient and unsettling, as it would be in the case of two telephone companies tearing up the same city street to serve the same neighborhood.

²² C. Wilcox, *PUBLIC POLICIES TOWARD BUSINESS* 277 (1971).

²³ *Id.* at 276.

notions of public policy, but that public utility commissions must also prevent utilities from exploiting their monopoly positions and their bargaining advantages over small consumers.²⁴ These commissions, however, have largely abdicated their role:

Among the many possible [rate] structures that might serve equally well to cover costs and provide investors with a fair return, they have made no effort to discover and adopt the one that would best serve the public interest. Instead, they have left the initiative in fixing particular rates to the companies, accepted the pattern of rates established, subjected it to little scrutiny, and made little effort to have it modified.²⁵

Courts have been no more critical of utilities' practices than have the state utility commissions. Despite a statutory obligation on the utilities to serve all who apply on reasonable and non-discriminatory terms,²⁶ utilities have been allowed wide discretion in management decisions.²⁷ Accordingly, deposit rules have been found to be reasonable, both as a general practice²⁸ and as applied to particular individuals.²⁹

²⁴ The following examples demonstrate that notions of public interest have placed the enumerated concerns above the competing value of maintaining lower rates. A utility must take environmental, aesthetic, and recreational considerations into account in its projects. *Boston Edison Co. v. Bd. of Selectmen*, 355 Mass. 79, 242 N.E.2d 868 (1968). A utility may not discontinue service in an area where it is losing money so long as the rest of the system is operating profitably. *United Fuel Gas Co. v. Railroad Comm'n*, 278 U.S. 300, 309 (1929); *N.Y. ex rel. N.Y. & Queens Gas Co. v. McCall*, 245 U.S. 345, 351 (1917); *Ridley Twp. v. Pa. Pub. Util. Comm'n*, 172 Pa. Super. 472, 94 A.2d 168 (1953). Under Washington law, a utility cannot terminate service for nonpayment without notice and a waiting period, nor can it use the threat of termination to coerce payment for merchandise or services rendered by the utility other than the current service being billed. *The Shutoff of Service* 763. And a utility must make rate concessions to the poor. Wash. Const. art. VIII, § 7; Wash. Rev. Code §§ 80.28.080-.100, 80.36.130.

²⁵ Wilcox, *supra* note 22, at 342. For example, public utility commissions have allowed utilities to discriminate against their smaller consumers by arranging separate, lower charges for their other, more price-responsive users. *Id.*; cf. TAN 18 *supra*. The rationale and extent for this practice have been well explored. Wilcox, *supra* note 22, at 330-35; J. Bonbright, *PRINCIPLES OF PUBLIC UTILITY RATES* 89, 333 (1961); R. Davidson, *PRICE DISCRIMINATION IN SELLING GAS AND ELECTRICITY* 150-71 (1955).

²⁶ See, e.g., Cal. Pub. Util. Code § 453 (West 1965); N.Y. Pub. Serv. Law § 91(1)-(2) (McKinney 1955); N.J. Stat. Ann. § 48:3-1 (1969); Wis. Stat. § 196.22 (1969).

²⁷ See *Missouri ex rel. Southwestern Bell Tel. Co. v. Pub. Serv. Comm'n*, 262 U.S. 276, 289 (1923); *Narragansett Elec. Co. v. Kennelly*, 88 R.I. 56, 143 A.2d 709 (1958); *Carpenter v. Home Tel. Co.*, 122 Vt. 50, 163 A.2d 838 (1960).

²⁸ See, e.g., *Berner v. Interstate Power Co.*, 244 Iowa 298, 57 N.W.2d 55 (1953); *Carpenter v. Home Tel. Co.*, 122 Vt. 50, 163 A.2d 838 (1960).

²⁹ A utility, some courts have held, makes no arbitrary or unreasonable demand when it seeks a deposit from an applicant where the utility has acted in good faith and in accord

Without extensive examination of the effects of deposit practices, courts (and commissions) sustain them for two reasons. First, as utility debts are small, it would be unduly burdensome to collect them through the judicial system. If there were no deposits to eliminate such debts, they would have to be written off and passed on to paying customers in the form of higher rates, a policy which would discriminate against paying customers.³⁰ Second, some courts reason that the threat of termination of service for non-payment will not, alone, adequately deter defaults.³¹ Neither of these reasons justifies deposits in their present form.³²

The first reason masks the true issue. Since deposit rules are crudely drawn, and do not define, even grossly, those who will actually default,³³ they discriminate heavily against those from whom they are demanded and in favor of those who escape their incidence. The true issue, therefore, is whether this discrimination is any better than the discrimination which would result were alternatives to deposits required³⁴ or were the costs of bad debt losses distributed over all paying consumers. Since a large portion of a utility's bad debts are defrayed by non-defaulting consumers in any event,³⁵ and since deposit-paying consumers are only marginally more likely than others to default on their obligations,³⁶ the issue lends itself to an easy answer. Deposits ought to be avoided.

with applicable regulations. See, e.g., *Carpenter v. Home Tel. Co.*, 122 Vt. 50, 163 A.2d 838 (1961); *Underwood v. S. Cities Distrib. Co.*, 157 So. 160 (La. App. 1954). The burden of proof is placed on the consumer to establish that an existing rate structure is unreasonable. See *Antioch Milling Co. v. Pub. Serv. Co.*, 4 Ill. 2d 200, 209, 123 N.E.2d 302, 307 (1954); *City of Terre Haute v. Terre Haute Water Works*, 180 N.E.2d 110, 116 (Ind. App. 1962).

³⁰ See *Odell Smith*, 78 P.U.R.3d 317, 319 (Ark. Pub. Serv. Comm'n 1969); *Nunemaker v. Pacific Tel. & Tel. Co.*, 80 P.U.R.3d 129, 136 (Cal. Pub. Util. Comm'n 1969); *Potomac Elec. Power Co.*, 84 P.U.R.3d 250, 255-56 (D.C. Pub. Serv. Comm'n 1970).

³¹ *Public Utilities and the Poor* 451. It appears to take utilities roughly 45 days from receipt of the unpaid bill to termination of the service, although the exact figure varies somewhat between companies. See *The Shutoff of Service* 770. Providing free service during this period can be expensive for the utilities.

³² Courts and commissions also argue that deposits are necessary for utilities and not for other businesses because the latter may turn away bad credit risks whereas the utilities must serve them. This argument proves nothing, however, unless it is coupled with the first reason presented in the text. Granting that utilities are likely to have greater bad debt losses than other businesses due to their duty to serve, the real issue is how are the utilities to pay for these losses, through deposits or through other means?

³³ See p. 632 *supra*.

³⁴ See text following note 116 *infra* for alternatives to deposits.

³⁵ P. 632 *supra*.

³⁶ See p. 632 *supra*.

The second reason, upon inspection, turns out to be a variation of the first. Since the threat of termination alone will not deter most defaults, deposits must be exacted as an additional deterrent. It is true that the greater the number and size of deposits required, the smaller will be the utility's bad debt losses. But this observation is misleading, for an increase in bad debt losses will diminish the return to the utility's owners only in the short run. Utility rates are set high enough to cover all costs of operation and to earn a fair return on their investment.³⁷ As bad debt losses are a cost of operation, an increase in such losses will diminish utility profits only until the next rate increase hearing.

The argument must therefore be refined: deposits hold down utility rates. In this form the argument suffers the same defects as the first argument, for rates are held down very little by current deposit practices because most depositors do not default.³⁸ Moreover, current practices hold down rates at the depositors' expense, while allowing others who should be paying them to go free. Consequently, as in the first argument, a balance must be struck between current deposit practices, with their lower rates but disproportionate impact on depositors generally and the poor in particular, and alternative practices which might necessitate marginally higher rates but which would be more even-handed.

In striking this balance, regulators must remember that rates are to be set in the public interest. That interest is in part an expression of contemporary public policy which condemns economic and social discriminations against disadvantaged groups and the poor.³⁹ That interest is also a concern for preventing utilities from exploiting their bargaining advantages over small consumers, as they do when, through deposit requirements and often through general rate structures,⁴⁰ they demand higher rates from the poor than from their other users. The public interest is also an expression of the desire that, while non-defaulting users should not have to pay through higher rates for the defaults of a few, only those consumers who actually merit deposits should have to pay them. Fully articulated, therefore, the public interest itself embodies a balancing of considerations for and against deposits. Given the impact and imprecision of current deposit practices, courts and commissions should have no trouble in striking this balance against deposits. As shall be shown below, their failure to uphold the public interest has sufficiently implicated the state in utility deposit practices so as to generate issues of constitutional dimension.

³⁷ Wilcox, *supra* note 22, at 293.

³⁸ Had Pacific Telephone employed a deposit policy in 1967, its rates would have been lowered only 0.11%. See note 14 *supra*. In other words, a customer with a monthly bill of \$20.00 would pay \$19.98 under the new policy. See text following note 15 *supra*.

³⁹ See, e.g., *Boddie v. Connecticut*, 401 U.S. 371 (1971).

⁴⁰ See note 25 *supra*.

II. THE CONSTITUTIONAL ATTACK

A. State Action

In *Public Utilities Commission v. Pollack*,⁴¹ a case which involved constitutional provisions controlling only governmental action,⁴² the Supreme Court found in the activities of a privately owned but publicly regulated bus company sufficient regulatory involvement to warrant a finding of governmental action. The Court relied upon both the fact of regulation and the fact that the District of Columbia Public Utilities Commission had investigated the practices complained of without finding grounds for a remedial order.⁴³ Since utilities are required to file tariffs outlining their deposit practices with public commissions,⁴⁴ and since the commissions at their own discretion investigate the tariffs filed, the state regulatory body's acquiescence in the deposit practices of a utility would, under the *Pollack* decision, establish the state action necessary for a claim under the fourteenth amendment.⁴⁵

Despite *Pollack*, two courts have failed to find state action in such acquiescence. Mere filing without more, they said, was insufficient to establish state responsibility.⁴⁶ These decisions, however, appear to stray from the line of contrary ruling handed down by the Supreme Court. Almost a decade before *Pollack*, the Court in *Smith v. Allwright*⁴⁷ held that heavy regulation of the Democratic Party made it an arm of the state. Labor union abuse of "monopoly" power granted by the state has also been thought by several Justices to amount to state action.⁴⁸ Hence,

⁴¹ 343 U.S. 451 (1952).

⁴² The first and fifth amendments were in issue. *Id.*

⁴³ *Id.* at 462; *cf.* *Railway Employees' Dep't v. Hanson*, 251 U.S. 225, 232 (1956) (Railway Labor Act's approval of union shop agreements notwithstanding state law to the contrary established state responsibility for a union shop agreement made voluntarily by private parties).

⁴⁴ *Public Utilities and the Poor* 452.

⁴⁵ See *Civil Rights Cases*, 109 U.S. 3 (1883). Such a claim may not ordinarily be asserted in a federal district court because of 28 U.S.C. § 1342 (1970). See *David v. New York Tel. Co.*, 40 U.S.L.W. 2676 (S.D.N.Y. April 4, 1972).

⁴⁶ *Kadlec v. Ill. Bell Tel. Co.*, 407 F.2d 624 (7th Cir. 1969); *Taglianetti v. New. Eng. Tel. & Tel. Co.*, 80 R.I. 351, 103 A.2d 67 (1954). As a practical matter, the question could be sidestepped in litigation by filing a formal complaint with the public body first and seeking judicial review if its decision were unfavorable. *Cf.* *Wood v. Pub. Util. Comm'n*, 4 Cal. 3d 288, 481 P.2d 823, 93 Cal. Rptr. 455 (1971), *appeal dismissed*, 92 S.Ct. 293 (1971).

⁴⁷ 321 U.S. 649 (1944).

⁴⁸ *International Ass'n of Machinists v. Street*, 367 U.S. 740, 777, 789, 807 (1961) (Douglas, J., concurring; Black, J., dissenting; Frankfurter, J., Harlan, J., dissenting); *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 208 (1944) (Murphy, J., concurring). The majorities never reached the constitutional question. *Cf.* Wellington, *The Constitution, the Labor Union, and "Governmental Action"*, 78 YALE L.J. 345 (1961).

abuse of their monopoly position while subject to extensive governmental regulation should make public utilities' deposit practices instances of state responsibility under the fourteenth amendment.

The result is extremely plausible. The state has given the utilities a protected monopoly position. Unless the state in turn closely regulates the utilities, they may employ this position as leverage to exploit users generally and, by their 'increased bargaining advantage, smaller consumers in particular. The state, therefore, has a duty to protect the public because it has chosen to protect and regulate the utilities. Indeed, in failing to discharge this duty by a closer scrutiny of utilities' deposit practices, state regulatory bodies have deprived many consumers of due process of law and the equal protection of the laws.

B. Due Process

The Supreme Court recently condemned as a violation of the due process clause of the fourteenth amendment state action which deprived an individual of his means of subsistence without affording him a hearing. In *Goldberg v. Kelly*,⁴⁹ the Court observed that the termination of welfare benefits without prior notice and hearing on the issue of the recipient's eligibility "may deprive an *eligible* recipient of the very means by which to live while he waits."⁵⁰ In *Sniadach v. Family Finance Corp.*,⁵¹ the Court, identifying a deprivation of similar severity, declared that prejudgment garnishment "may as a practical matter drive a wage-earning family to the wall."⁵²

In each of these cases, poor people were deprived of part or all of their means of subsistence. For the poor a large cash deposit often presents a similarly insurmountable burden.⁵³ If it is not overcome, if the family is forced to go without heat or light or fuel for cooking or telephone service for emergency communication, a deprivation of a dimension similar to those in *Goldberg* and *Sniadach* has taken place. The requirements of due process, however, are not invoked by the scope of the taking alone. They are called into play where the deprivation is more burdensome than the state's fiscal interest in summary adjudication.⁵⁴

⁴⁹ 397 U.S. 254 (1970).

⁵⁰ *Id.* at 264 (emphasis in original).

⁵¹ 395 U.S. 337 (1969).

⁵² *Id.* at 341-42.

⁵³ P. 632 *supra*.

⁵⁴ *Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970). In *Goldberg*, *id.* at 266, the Court found that the welfare recipient's interest in her benefits and the State's interest in preventing loss of grants to eligible recipients outweighed the State's interest in holding down its taxes by minimizing administrative burdens.

A utility's demand for a security deposit amounts to summary adjudication, for the applicant is required to pay the deposit not because the utility has discovered him to be a bad credit risk, but because his circumstances place him in one of the utility's grossly imprecise non-exempt categories.⁵⁵ In order to determine whether a company's deposit rules constitute a due process violation, therefore, a court would have to weigh the impact of the rules on depositors (most of whom will be poor),⁵⁶ together with the state's interest in requiring that utilities serve all who apply,⁵⁷ against the savings effected by the requirement of deposits.

Rates, as we have seen, are held down very little by current deposit rules because they are so roughly formulated; they eliminate only a small fraction of the utility's bad debt losses.⁵⁸ Current deposit practices also weigh heavily on the poor, who pay most deposits,⁵⁹ because the amounts involved are especially burdensome on their budgets.⁶⁰ In addition, current deposit practices are unfair to all deposit-paying consumers because the vast majority of them are not expected to default,⁶¹ and because they also must pay in higher rates for their share of the defaults of those users not required to pay deposits.⁶² In light of this considerable impact on depositors with only negligible savings for utilities, courts should hold current deposit practices to be violative of the due process clause.⁶³

A decision on due process grounds, together with appropriate relief ordering more personal treatment of consumers in judging credit-worthiness, would undoubtedly aid those who have acceptable credit records but unfortunately fall within one of the present arbitrary deposit categories. However, many poor people trail a bad credit record behind them even though they may have the present means and intention to pay their utility bills.⁶⁴ For the poor, therefore, the individualized procedures which comport with due process safeguards may offer no help in their

⁵⁵ See p. 632 *supra*.

⁵⁶ P. 631 *supra*.

⁵⁷ P. 634 *supra*.

⁵⁸ See note 14, *supra*.

⁵⁹ See p. 631 *supra*.

⁶⁰ See p. 630 *supra*.

⁶¹ See pp. 631-32 *supra*.

⁶² See p. 632 *supra*.

⁶³ See *Washington Gas Light Co. v. Pub. Serv. Comm'n*, 40 U.S.L.W. 2352, 2353 (D.D.C. Dec. 7, 1971) (sustaining an order of the Washington, D.C., Public Utilities Commission forbidding the utility to require deposits from any applicant unless a credit check reveals that he is a bad credit risk).

⁶⁴ *Public Utilities and the Poor* 458.

problem of having to raise the extra money⁶⁵ needed to pay a deposit. For this group relief may be found in some arguments under the equal protection clause.⁶⁶

C. Equal Protection

1. Irrational Classification

Utility deposit rules are not the most precise classifications of consumers for the purpose of efficiently⁶⁷ reducing the bad debt losses of utilities. Nevertheless, deposit rules are calculated to reduce bad debt losses to a limited degree. While decreasing their executives' vacation pay would not conceivably cut their default losses, any deposit policy whose effect was more than trivial would have the desired result.⁶⁸

Normally this "conceivable" connection with cutting default losses might be sufficient justification to pass the rational basis test.⁶⁹ This view finds support in the disturbing case of *Dandridge v. Williams*.⁷⁰ The opinion was disturbing due to the "dramatically real factual difference between the cited cases and this one . . .".⁷¹ The majority relied on cases involving regulation of business and related economic interests, whereas *Dandridge* involved "the most basic economic needs of impoverished human beings."⁷² In spite of this difference in impact, and

⁶⁵ It should be remembered that the deposit is effectively a payment required in addition to the usual monthly bill which the poor pay along with all other users. Thus, a poor person may be able to meet his monthly bill just as other users, but due to his poverty be unable to gather enough money for the lump sum deposit.

⁶⁶ Despite the attractiveness and conceptual ease of a due process remedy, some courts may be more comfortable articulating an equal protection remedy. See Michelman, *The Supreme Court, 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 16-19 (1969).

⁶⁷ "Efficiency" used in this context does not refer to its usual meaning of least dollar cost per unit of output. Rather, efficiency here reflects the precision with which the state achieves its announced purposes. It measures the extent to which the state's classifications are overbroad or underinclusive in light of the goals to be achieved by these classifications.

⁶⁸ See pp. 631-32 *supra*.

⁶⁹ See, e.g., *Levy v. Louisiana*, 391 U.S. 68 (1968); *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961); *Goesaert v. Cleary*, 335 U.S. 464 (1948); *Kotch v. Bd. of River Port Pilot Comm'rs*, 330 U.S. 552 (1947); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911). In *Lindsley* the Court stated: "A classification having some reasonable basis does not offend against [the equal protection clause] merely because it is not made with mathematical nicety or because in practice it results in some inequality. . . . When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed." 220 U.S. at 78.

⁷⁰ 397 U.S. 471 (1970).

⁷¹ *Id.* 485.

⁷² *Id.*

in spite of strong arguments that the maximum per family welfare grant provisions being tested in the case were both overbroad and underinclusive,⁷³ Justice Stewart declared:

[T]he concept of "overreaching" has no place in this case. . . .

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

. . . [T]he Equal Protection Clause does not require that a State choose between attacking every aspect of a problem or not attacking the problem at all.⁷⁴

The *Dandridge* decision, however, may be less applicable than at first appears. First, the idea that underinclusiveness and over-reaching are irrelevant considerations for the rational basis test was rejected this term in *Eisenstadt v. Baird*.⁷⁵ There the Court struck down a Massachusetts classificatory scheme under the traditional test on the specific grounds that it was underinclusive in its reach.⁷⁶ The deposit case may also be factually distinguished from *Dandridge* and the line of cases⁷⁷ which allow a state to attack some aspects without attacking all of a given problem. In *Dandridge*, for example, the state's objective was to aid the poor, and for lack of funds or other reasons⁷⁸ the state could not solve all aspects of the poverty problem. In the case of utility deposits the saving of money is the end in itself. The utilities have not simply refrained from solving all aspects of a problem, they have affirmatively burdened a specific group. While the rational basis test does not require precision in classification, there must come a point when classes are so grossly defined and imprecise as to be irrational in producing the desired result. Utility deposit criteria which define a group of which 87% are

⁷³ In dissent, Justice Marshall argued that there was little relation between the maximum grant and the income to be generated at a minimum wage, but that if there were any relation, large families should not be singled out to bear the burden of maintaining this relationship. He also argued both that the employment incentive rationale was underinclusive since many smaller families within AFDC and within the rest of the State's welfare program could work but were not subject to this incentive, and that the incentive was overbroad in that the heads of many large families simply could not work. *Id.* at 524—28 (Marshall, J., dissenting). In short, Justice Marshall argued that the State's classifications were irrational because they did not efficiently achieve the State's own announced purposes for the classifications. *Cf. Dienes, To Feed the Hungry: Judicial Retrenchment in Welfare Adjudication*, 58 CALIF. L. REV. 555, 608 (1970).

⁷⁴ *Dandridge v. Williams*, 397 U.S. 471, 484—87 (1971).

⁷⁵ 92 S. Ct. 1029 (1972).

⁷⁶ *Id.* at 1036—38.

⁷⁷ See, e.g., *REA v. New York*, 336 U.S. 106 (1949).

⁷⁸ *Dandridge v. Williams*, 397 U.S. 471, 486—87 (1971).

not actually expected to default⁷⁹ might well push the allowable imprecision beyond the maximum limit.

Despite the possible erosion of *Dandridge* and factual distinctions, the success of an attack against utility deposits under the rational basis test is by no means assured.⁸⁰ Given the inconclusiveness of our rational basis analysis, the possibility of subjecting deposits to strict review should be considered.

2. Strict Review

The Supreme Court has invalidated classifications under the equal protection clause under a stricter test than that of irrationality. When a state law formulates a suspect classification⁸¹ or impinges upon a fundamental interest,⁸² the law is held unconstitutional unless supported by a compelling state interest. At least one commentator has pointed out that the latter part of the exercise is almost invariably academic, for if a classification is suspect, or if it suppresses a fundamental interest, a compelling state interest is almost never found.⁸³

Strict review is especially relevant to the question of deposit requirements. As suggested earlier, deposit requirements under due process and rational basis reviews may be saved by more precisely identifying likely defaulters. Under the strict review test, however, deposit rules would be unconstitutional regardless of how precisely they accomplished their purpose. The rationale for security deposits, the desire to lower expenditures, has already been held to be an insufficient state interest.⁸⁴ As a consequence, if deposit requirements create a suspect classification or impinge a fundamental interest, they will be held unconstitutional.

⁷⁹ P. 632 *supra*.

⁸⁰ *Cf. Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 489—90 (1915) (dictum); *Wood v. Pub. Util. Comm'n*, 4 Cal. 3d 288, 296, 481 P.2d 823, 828, 93 Cal. Rptr. 455, 460 (1971), *appeal dismissed*, 92 S.Ct. 293 (1971). In dissent in *Wood*, Judge Mosk argued that the deposit rules of Pacific Telephone & Telegraph, reproduced in part at TAN 12 *supra*, were both overbroad and underinclusive. *Id.* at 301—05, 481 P.2d at 833—35, 93 Cal. Rptr. at 465—67.

⁸¹ *See, e.g., Loving v. Virginia*, 388 U.S. 1 (1967) (race); *Takahashi v. Fish and Game Comm'n*, 334 U.S. 410 (1948) (alienage); *Korematsu v. United States*, 323 U.S. 214 (1944) (national origin).

⁸² *See, e.g., Shapiro v. Thompson*, 394 U.S. 618 (1969) (interstate travel); *Reynolds v. Sims*, 377 U.S. 533 (1964) (voting); *Griffin v. Illinois*, 351 U.S. 12 (1956) (criminal process); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (procreation).

⁸³ Comment, *The Evolution of Equal Protection*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 103, 148 (1972) [hereinafter cited as *The Evolution of Equal Protection*]. *Cf. Korematsu v. United States*, 323 U.S. 214 (1944).

⁸⁴ *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969); *Griffin v. Prince Edward School Bd.*, 377 U.S. 218, 233 (1964).

Deposit requirements, by their very purpose, classify for burdensome treatment those who are expected to be short of money — *i.e.*, the poor. Is such categorization suspect?

Despite abundant dicta that wealth is a suspect classification,⁸⁵ one court has observed that wealth classifications have been invalidated by the Supreme Court only in conjunction with a limited number of fundamental interests.⁸⁶ Nevertheless, the nature of a suspect classification suggests that there may be times when a classification based on wealth should be suspect even when no fundamental interest is at stake. One commentator has identified three rationales for denominating a classification as suspect, two of which are helpful here: (1) protection of politically impotent minority groups, and (2) stigma of inferiority which attaches to such classifications.⁸⁷ Where a state disburses funds, raised through the general revenues, on an explicit wealth basis — by, for example, patently and as a matter of policy distributing agricultural price support payments only to farmers with net incomes over \$10,000 a year — both rationales would be satisfied⁸⁸ and the classification would seem to be suspect.⁸⁹ In addition, the wealth classification could not be justified as an indirect, but necessary, consequence of selling goods or services at cost, for the state is dispensing benefits already financed through tax revenues. Hence, the usual pricing justification for wealth classifications could not be employed to prevent the categorization of this classification as suspect. For these reasons, when a state furnishes municipal services on wealth lines — by, for example, explicitly affording more extensive police protection to high income areas than to neighboring ghettos — as was perhaps true in a recent case,⁹⁰ the classification should be suspect.⁹¹

⁸⁵ *McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 807 (1969); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956); *Hawkins v. Town of Shaw*, 437 F.2d 1286, 1287 n.1 (5th Cir. 1971) *aff'd en banc*, 40 U.S.L.W. 2671 (April 11, 1972); *Serrano v. Priest*, 5 Cal. 3d 584, 597, 487 P.2d 1241, 1250, 96 Cal. Rptr. 601, 610 (1971).

⁸⁶ *Serrano v. Priest*, 5 Cal. 3d 584, 604, 487 P.2d 1241, 1255, 96 Cal. Rptr. 601, 615 (1971).

⁸⁷ *The Evolution of Equal Protection* 132; *cf.* Dienes, *supra* note 73, at 597.

⁸⁸ Low income farmers lack the political clout to improve their position. Moreover, one may infer that these farmers occupy an inferior status in the state's hierarchy of interests to be protected.

⁸⁹ *Cf.* *Douglas v. California*, 372 U.S. 353, 361 (1963) (Harlan & Stewart, JJ., dissenting on other grounds): "The States, of course, are prohibited by the Equal Protection clause from discriminating between 'rich' and 'poor' as *such* in the formulation and application of their laws." (emphasis in original).

⁹⁰ *Hawkins v. Town of Shaw*, 437 F.2d 1286, 1287 n.1 (5th Cir. 1971).

⁹¹ Michelman, *supra* note 66, at 28–29.

Because they are so crudely constructed, utility deposit rules might well be categorized as suspect wealth classifications. Although utilities are not dispensing benefits already financed by imposing deposit requirements, they are raising extra barriers to the receipt of benefits purchased separately. To the extent, therefore, that deposit rules are so imprecise as to render irrelevant the likelihood-of-default justification—a variant of the pricing justification discussed above, deposit rules would create a suspect wealth classification. The conclusion turns on how explicitly the rules select the poor and exclusively subject them to deposits. One who pays a deposit under Pacific Telephone's criteria cannot have worked for two years prior to his application or for a large corporation currently; nor can he own a home, be a professional, or have a private pension. An individual without *any* of these attributes of economic well-being is very likely to be poor. One need not conduct an empirical investigation of Pacific Telephone's depositors to arrive at this conclusion. One can largely deduce it from the nature of the deposit criteria themselves. Arguably, then, Pacific Telephone's rules as well as other typical deposit criteria do not incidentally pick out the poor as depositors. Patently and as a matter of policy they identify only the poor as deserving of deposit requirements. If so, deposit rules are suspect wealth classifications. By declaring the poor alone to be bad credit risks, deposit rules confer the stigma of inferiority. By identifying the poor as a minority unable to protect itself, deposit rules raise the spectre of majoritarian abuse.⁹²

Whether or not deposit requirements amount to suspect classifications, their impact on the means of subsistence of poor deposit-paying consumers might well threaten such fundamental interests as to make them unconstitutional. The Supreme Court has held certain interests to be fundamental in cases where ability-to-pay has arguably impeded access to these interests: voting,⁹³ criminal process,⁹⁴ interstate travel,⁹⁵ and the marital relationship.⁹⁶ The Supreme Court of California

⁹² See page 631 *supra*; *The Evolution of Equal Protection* 146–48; cf. *Wood v. Pub. Util Comm'n*, 4 Cal. 3d 288, 305–06, 481 P.2d 823, 836, 93 Cal. Rptr. 455, 468 (1971) (Mosk, J., dissenting), *appeal dismissed*, 92 S.Ct. 293 (1971).

⁹³ *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

⁹⁴ *Tate v. Short*, 401 U.S. 395 (1971); *Williams v. Illinois*, 399 U.S. 235 (1970); *Roberts v. LaVallee*, 389 U.S. 40 (1967); *Anders v. California*, 386 U.S. 738 (1967); *Douglas v. California*, 372 U.S. 353 (1963); *Smith v. Bennett*, 365 U.S. 708 (1961); *Burns v. Ohio*, 360 U.S. 252 (1959); *Griffin v. Illinois*, 351 U.S. 12 (1956).

⁹⁵ *Shapiro v. Thompson*, 394 U.S. 618 (1969). See also *United States v. Guest*, 383 U.S. 745 (1966); *Kent v. Dulles*, 357 U.S. 116 (1958); *Edwards v. California*, 314 U.S. 160 (1941); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867).

⁹⁶ *Boddie v. Connecticut*, 401 U.S. 371 (1971). See also *Levy v. Louisiana*, 391 U.S. 68, 71 (1968); *Loving v. Virginia*, 387 U.S. 1, 12 (1966); *Griswold v. Connecticut*, 381 U.S.

has recently added another: education.⁹⁷ One commentator contends that the Court has really indicated in these cases that certain interests are inappropriate for the normal operations of the market place. These interests are, therefore, exceptions to the general rule that it is fairest and most efficient to condition acquisition of goods and services on payment of their market price.⁹⁸ These exceptions are made because those interests are felt to be so basic to individual or societal welfare that no individual may be denied them by reason of his inability to pay.⁹⁹

Many commentators have suggested that the essential requisites of subsistence in modern America, including utility services,¹⁰⁰ deserve insulation from the market place as much as do the interests already declared by the Court to be fundamental.¹⁰¹ Those citizens unable to assure themselves of such requisites of subsistence are subjected to severe personal deprivation not unlike that suffered by the complainants in the criminal process cases.¹⁰² While voting and education are of significant social and individual import, there is little to distinguish them on either ground from unrestricted access to the essentials of subsistence.¹⁰³ As Justice Marshall has observed: "It is certainly difficult to believe that a person whose very survival is at stake would be comforted by the knowledge that his 'fundamental rights' are preserved intact."¹⁰⁴

Marshall's remark was part of his dissent in *Dandridge v. Williams*,¹⁰⁵ a case in which the majority refused to consider Maryland's ceiling on

479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Pierce v. Society of Sisters*, 268 U.S. 510, 534—35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Although the majority in *Boddie* rested on the due process clause because of the State's monopoly over the means of dissolution of a marriage, 401 U.S. at 376, the case is most easily understood as an equal protection decision, as was argued by the dissenters. *Id.* at 386, 388 (Douglas, J., dissenting; Brennan, J., dissenting). Note that in rebutting the State's contention that divorces cost the State money to try, the Court cited *Griffin v. Illinois*, 351 U.S. 12 (1956), for the proposition that a pricing justification is unacceptable where fundamental interests are involved. 401 U.S. at 382. Note too that the remedy sought was not procedural safeguards but waiver of filing fees, a form of "free" services like that sought in the other equal protection cases cited in notes 87—91.

⁹⁷ *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

⁹⁸ Michelman, *supra* note 66, at 28. The Court's holdings were actually broader than this in that they precluded the state from conditioning access to these interests on any economic impediments, whether these impediments arose from market-like operations, from taxes, or from legislative or judicial rules cast in terms of ability-to-pay.

⁹⁹ *Id.* 9, 13.

¹⁰⁰ See p. 638 *supra*.

¹⁰¹ See, e.g., Michelman, *supra* note 66, at 13—16; *The Evolution of Equal Protection* 121—22; Rawls, *Distributive Justice: Some Addenda*, 13 NAT. L. FORUM 51 (1968).

¹⁰² Cf. Ratner, *Inter-Neighborhood Denials of Equal Protection in the Provision of Municipal Services*, 4 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1, 20 (1968).

¹⁰³ Dienes, *supra* note 73, at 598.

¹⁰⁴ *Dandridge v. Williams*, 397 U.S. 471, 521 n.14 (1970) (Marshall, J., dissenting).

¹⁰⁵ 397 U.S. 471 (1970).

AFDC payments per family as infringing a fundamental interest. Instead, the statute was tested solely by "rationality" standards.¹⁰⁶ In so doing, the Court seemed to reject the notion that access to the basic needs of subsistence was a fundamental interest of constitutional dimensions. It therefore ignored the apparent similarities between failure to provide basic economic needs and deprivation of access to voting, or failure to provide access to the criminal process, education, and the marital process pointed out by the commentators cited above. Accordingly, if the language of *Dandridge* is taken as controlling, deposit requirements do not deprive consumers of a fundamental interest, and therefore do not demand a compelling state interest to support them.¹⁰⁷

The failure to find utility service a fundamental interest does not detract from our previous determination that utility deposits create a suspect wealth classification. Consequently, strict review is still in order where deposit criteria concentrate on and single out the poor for burdensome treatment. Nevertheless, the Court's reticence to find new suspect classifications¹⁰⁸ suggests that an alternative approach should be explored.

3. An Alternative Approach

The Court in *Dandridge* failed to find a fundamental interest because, it said, there is no explicit constitutional right on which to base such a finding.¹⁰⁹ This language should not be taken literally, however, for in cases both before¹¹⁰ and since¹¹¹ *Dandridge* the Court has found fundamental interests where there was no explicit constitutional guarantee. The Court in those cases simply considered these interests of sufficient importance to merit the extra protection afforded them.

The *Dandridge* Court was probably troubled by the latter part of Justice Holmes' famous jibe at Mr. Herbert Spencer's *Social Statics*: "But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*."¹¹² While the *Dandridge* Court could conceive of the fundamentality of a family's interest in subsistence, the Court seemed

¹⁰⁶ See pp. 640-41 *supra*.

¹⁰⁷ The California Supreme Court has so held. *Wood v. Pub. Util. Comm'n*, 4 Cal. 3d 288, 294, 481 P.2d 823, 827, 93 Cal. Rptr. 455, 459 (1971), *appeal dismissed*, 92 S.Ct. 293 (1971).

¹⁰⁸ *Reed v. Reed*, 404 U.S. 71 (1971).

¹⁰⁹ *Dandridge v. Williams*, 397 U.S. 471, 485 (1970); see *The Evolution of Equal Protection* 128.

¹¹⁰ *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

¹¹¹ *Boddie v. Connecticut*, 401 U.S. 371 (1971).

¹¹² *Lochner v. New York*, 198 U.S. 45, 75 (1905).

to be unsure that a proposition of such vast economic and political importance could be found in the Constitution.¹¹³ Holmes' remark should be distinguished. He was urging his Court to defer to the wishes of the legislature when it undertook to regulate business behavior. In contrast, the *Dandridge* Court confronted a state law that seriously impaired a family's essentials of survival. That difference in impact should have been grounds for finding a fundamental interest.¹¹⁴

Between the extremes of "review under the rational basis test"¹¹⁵ and the strict scrutiny test,¹¹⁶ perhaps there should be a stricter test of rationality when basic needs are at stake. Instead of sustaining any legislation that bears a plausible relationship to an appropriate state goal, under the stricter rationality test courts could not validate legislation threatening basic economic needs unless the legislation attempted to achieve legitimate goals as efficiently as possible upon consideration of (1) its impact on personal subsistence needs and (2) the administrative expense and difficulty of improving efficiency of the legislation's classifications.¹¹⁷ Legislation could not be sustained where more efficient means were present to achieve the state's goals, so long as decreased burdens upon vital personal interests outweighed any increase in administrative costs. Many persons have felt the need for such a third test for equal protection, one which allows a wider range of balancing than is permissible under the current analytic framework.¹¹⁸

In at least one instance, the Court has apparently employed a wider balancing test in invalidating a state law, without acknowledging its

¹¹³ *Dandridge v. Williams*, 397 U.S. 471, 481—82 (1970); cf. *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1132 (1969).

¹¹⁴ See *Dandridge v. Williams*, 397 U.S. 471, 520 (1970) (Marshall, J., dissenting).

¹¹⁵ See text following note 71 *supra*.

¹¹⁶ See p. 642 *supra*.

¹¹⁷ Thus, the presence of a subsistence need that is threatened by a state law is not simply the trigger for the application of this "stricter rationality" test; the subsistence need is an integral part of the actual balancing involved. Accordingly, where the personal interest affected by the state law is viewed by the court as essential or vital, then the balance should be heavily weighted against the state law. Where the personal interest is not viewed as vital but is nevertheless considered important, the balance would be correspondingly less weighted against the state law. A similar adjustment of the balance weights should occur for interests in between these two points.

In considering the application of this stricter rationality test, therefore, a court should not hesitate over whether a particular interest was really a subsistence need or not. So long as the interest was considered by the court to be sufficiently important to be subsistence-like, the court should employ the stricter rationality test, weighting the interest involved appropriately.

¹¹⁸ *Dandridge v. Williams*, 397 U.S. 471, 523 (1970) (Marshall, J., dissenting); *Wood v. Pub. Util. Comm'n*, 4 Cal. 3d 288, 307, 481 P.2d 823, 837, 93 Cal. Rptr. 455, 469 (1971) (Mosk, J., dissenting), *appeal dismissed*, 92 S.Ct. 293 (1971); *Developments—Equal Protection*, *supra* note 113, at 1120—21; *The Evolution of Equal Protection* 149, 151, 158.

departure from the traditional tests. In *Rinaldi v. Yeager*,¹¹⁹ the Court struck down a New Jersey statute requiring certain unsuccessful prisoners to pay for appellate transcripts furnished them earlier under writs of *in forma pauperis*. The statute did not require reimbursement from other unsuccessful appellants who had, however, been paroled or put on probation instead of imprisoned. The Court held that the Statute was not rationally related to the State's announced justifications for it.¹²⁰ Justice Harlan, however, contended that the law comported with the Court's traditional test of rationality, for New Jersey could have found it simpler and more advisable to collect the transcript from unsuccessful appellants lodged in prison than from those now free in society and attempting to begin life anew.¹²¹ Under the lenient rationality standards discussed above,¹²² Harlan was quite probably on solid ground. In the absence of any other possible explanation, the Court must have felt that while its effect on the access to the appellate criminal process was not sufficiently detrimental to initiate strict review, the law was so unfair in this fundamental area that it was unwarranted by the small measure of administrative and fiscal convenience it produced. Thus, although *Rinaldi* did not involve the essentials of subsistence, it did present a situation sufficiently unique to force the Court tacitly to engage in a wider balancing than that in which it ordinarily indulges.¹²³

Deposit requirements, like the situation in *Rinaldi*, demand a new constitutional test to gauge their validity. The wooden, two-tiered test

¹¹⁹ 384 U.S. 305 (1966).

¹²⁰ *Id.* at 309-10.

¹²¹ *Id.* at 311.

¹²² See text following note 62 *supra*.

¹²³ In at least two other instances the Court has departed somewhat from its rigid two-tiered test of equal protection. It dismissed the appeal of *Kirk v. Board of Regents*, 273 Cal. App. 2d 430, 78 Cal. Rptr. 260 (1969), for want of a substantial federal question, 396 U.S. 554 (1970), though in sustaining California's residence requirements for attendance at state-supported colleges, that court had attempted to distinguish *Shapiro v. Thompson*, 394 U.S. 618 (1969), in the following way: "*Shapiro* involved the immediate and pressing need for preservation of life and health of persons unable to live without public assistance, and their dependent children. Thus, the residence requirements in *Shapiro* could cause great suffering and even loss of life. The durational requirement of attendance at publicly financed institutions of higher learning do not involve similar risks." 273 Cal. App. 2d at 439-40, 78 Cal. Rptr. at 266-67. The Court may have felt, therefore, that strict review was invoked in *Shapiro* only by the presence of both an interest in interstate travel and an interest in subsistence, a combination not present in *Kirk*.

The other instance occurred in *Palmer v. Thompson*, 403 U.S. 217 (1971), where Justice Blackmun attempted to distinguish the pool-closing in *Palmer* from the school-closing in *Griffin v. Prince Edward School Board*, 377 U.S. 218 (1964), in this way: "The pools are not part of the city's educational system. They are a general municipal service of the nice-to-have but not essential variety . . ." 403 U.S. at 229 (Blackmun, J., concurring). For Justice Blackmun, therefore, *Griffin* depended upon the existence of both a racial classification and the interest in education, a combination not present in *Palmer*.

fashioned by the Court does not adequately weigh their value to the utilities against their impact on depositors. Moreover, it specifically fails to take into account the less drastic alternatives to deposits. Utilities, for example, could require credit risks to prepay each month's estimated service charge as a precondition to continued service. The time of prepayment could be sufficiently ahead of the period of service to enable utilities to avoid the long periods between nonpayment and shutoff.¹²⁴ Utilities could also protect themselves and ease the budgetary problems of the poor by eliminating large mid-winter bills that heighten defaults by means of uniform monthly billings throughout the year. Weekly billings and smaller monthly surcharges are also possible, but the former are too expensive and the latter are too like deposits themselves to be preferred over the previously suggested alternatives.¹²⁵

Given the imprecision of current deposit criteria, attempts to refine them would probably help less than replacement of deposits by the alternatives described. Of course, implementation of these alternatives could result in marginally larger bad debt and administrative costs for the utilities, who would pass them on in the form of higher rates to all their customers. Consequently, under the wider balancing test proposed, courts would have to weigh any projected cost increase against the benefits accruing from the change and the burdens of present practices. In light of the vast imprecision and the large impact of current practices, it is highly unlikely that this balance¹²⁶ would tip in favor of the status quo.

III. CONCLUSION

We have seen that the impact and imprecision of deposit requirements give rise to issues in both public utility and constitutional law. In public utility law, the purpose of public regulation of utilities dictates that, on balance, deposits should be replaced by feasible alternatives. Under constitutional principles the same result was reached through a new, stricter rationality standard of review under the equal protection clause of the fourteenth amendment, it also being found that the due process clause required at the very least that no deposit should be imposed upon a consumer who was not individually established as a credit risk.

¹²⁴ See note 31 *supra*.

¹²⁵ Although a small surcharge obviates the problem of a lump sum payment, it nevertheless takes from the poor depositor money which he could use on other needs.

¹²⁶ This balance has been elaborated in detail at pp. 638—39 *supra*.

Utility companies are only partially subjected to the discipline of the market. Society cannot depend, therefore, upon the market to allocate the services of public utilities entirely in the public interest. The state must supply the regulation which the market cannot. In the guise of commissions and courts, however, the state has been sadly lax in discharging these high duties. Regulatory bodies have been sufficiently vigilant to see that deposits are not required from the rich and those with clearly established credit, but have been indifferent to the practice of requiring deposits from the poor and those of not clearly established credit. Current deposit policies are convenient credit shorthands in which most commissions and courts unhesitatingly acquiesce. The public interest and the Constitution, however, demand more of the state than that.

—John B. Kirkwood