COMMENT
EISENSTADT V. BAIRD: STATE STATUTE PROHIBITING DISTRIBUTION OF CONTRACEPTIVES TO SINGLE PERSONS VOID ON EQUAL PROTECTION GROUNDS

I. INTRODUCTION

In the landmark case of *Griswold v. Connecticut*,[1] which involved a Connecticut law prohibiting married couples from using contraceptives, the United States Supreme Court established a constitutionally protected marital right to privacy extending to the use of contraceptives. In *Eisenstadt v. Baird*[2] the Court refused to expand the right of privacy articulated in *Griswold* in order to encompass the right of individuals, married or single, to have access to contraceptives. Instead, the Court relied on an equal protection analysis to find that the Massachusetts statute forbidding distribution of contraceptives to single persons, except to prevent disease, was violative of the fourteenth amendment. The complex equal protection analysis employed by the Court and the references in dicta to *Griswold* indicate both the conflicting attitudes about the right to privacy existing among the participating Justices and the Court's desire to fashion a flexible equal protection test.

At issue in *Eisenstadt* was a Massachusetts statute which made it a felony for anyone to give away a drug, medicine, instrument or article for the prevention of conception, except in the case of (1) a registered physician administering or prescribing it for a married person or (2) an active registered pharmacist furnishing it to married persons presenting a registered physician's prescription.[3] The appellee, William Baird, was convicted of violating this statute after he gave a woman contraceptive foam at the close of a lecture on contraception. The Supreme Judicial Court of Massachusetts, by a four-to-three vote, sustained the conviction.[4] A petition for a writ of habeas corpus was dismissed in the federal district court in Massachusetts,[5] but the Court of Appeals for the First Circuit vacated the dismissal and remanded the action with directions to grant the writ discharging Baird.[6] On appeal by the Sheriff of Suffolk County, Massachusetts, the United States Supreme Court upheld the First Circuit and granted the writ.[7]

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1 381 U.S. 479 (1965). Justice Douglas, writing for the majority, stated that there was a marital right to privacy derived from penumbras emanating from specific guarantees in the Bill of Rights, and held the statute unconstitutional as violative of this right. Id. at 438. Six other Justices supported the result. One, Mr. Justice Clark, joined in the majority opinion without further comment. Three others, Justices Goldberg, Warren and Brennan, joined in the opinion but additionally relied on the ninth amendment as implicitly guaranteeing a right of privacy. Id. at 491-92. Justice Harlan, concurring in the result, found Connecticut's invasion of privacy invalid under the fourteenth amendment, because it violated basic values "implicit in the concept of ordered liberty." Id. at 500. Concluding that the Connecticut statute was arbitrary and ineffective and therefore deprived married couples of liberty without due process of law, Justice White also concurred in the result. Id. at 502-05. The conflict among the Justices concerning the derivation of the marital right to privacy raised many questions concerning the scope and applicability of such right.

2 405 U.S. 438 (1972).

3 Mass. Gen. Laws ch. 272, §§ 21-21A.

4 Commonwealth v. Baird, 355 Mass. 746, 247 N.E.2d 574 (1969).

5 Baird v. Eisenstadt, 310 F. Supp. 951 (D. Mass. 1970).

6 Baird v. Eisenstadt, 429 F.2d 1398 (1st Cir. 1971).

7 405 U.S. at 443.

II. THE OPINIONS OF THE COURT

A. The Majority Opinion

Since appellee Baird was neither an authorized distributor under the statute nor a single person unable to obtain contraceptives, the Court was confronted with a threshold issue of his standing to contest the constitutionality of the statute. Justice Brennan, writing for the majority, found that Baird had sufficient interest in challenging the statute's validity to satisfy the constitutional requirement in Article III of a "case or controversy."[8] The Court sustained Baird's right to contest the statute on two different grounds. Citing *Barrow v. Jackson*,[9] where the white seller of land was allowed to contest a racially restrictive covenant on the ground that enforcement of the covenant violated the rights of prospective non-Caucasian purchasers, the Court reasoned that Baird, as an advocate of the rights of single people to obtain contraceptives, had standing to assert such rights. Secondly, the Court noted that individuals desiring contraceptives were not subject to prosecution under the statute and, therefore, were denied a forum in which to assert their rights, unless a person in Baird's position were allowed to contest the statute on their behalf.[10]

Turning to the merits of the case, Justice Brennan stated that the question to be determined was "whether there [was] some ground of difference that rationally explained the different treatment accorded married and unmarried persons under the Massachusetts General Laws ch. 272, §§ 21 and 21A."[11] Answering that question in the negative, the Court discounted both the deterrence of premarital sexual relations[12] and the promotion of health[13] as the actual purposes behind the Massachusetts legislation and held that, if the statute served solely to prohibit contraception, it was violative of the equal protection clause of the fourteenth amendment.[14]

First, the Court rejected the argument that the statute deterred illicit sexual relationships.[15] Since the statute enabled married persons to obtain contraceptives without regard to whether they were living with their spouses, the Court reasoned that the statute had no deterrent effect on extra-marital relationships.[16] In addition, the admitted widespread availability to all persons in the State of Massachusetts, unmarried as well as married, of birth control devices for the prevention of disease cast doubt on the legislation's effect in discouraging extra-marital relationships.[17] Also, the Court stated that even if the state regarded extra-marital and pre-marital relations as different problems requiring different remedies, it would be "plainly unreasonable" for the Massachusetts legislature to prescribe an unwanted child as punishment for fornication,[18] which is a misdemeanor under Massachusetts law.[19] Finally, the Court "could

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8 Id. at 443-46.

9 346 U.S. 249 (1953).

10 405 U.S. at 445-46.

11 Id. at 447.

12 Id. at 447-50.

13 Id. at 450-52.

14 Id. at 452-55.

15 Id. at 443, 448-50. This argument evolved from Sturgis v. Attorney General, ____ Mass. ____, 260 N.E.2d 687 (1970), a suit brought by several Massachusetts doctors for a declaratory judgment concerning the constitutionality of the Massachusetts contraceptive statutes. The Supreme Judicial Court, relying heavily on Justice Goldberg's concurring opinion in *Griswold*, in which he spoke of the state's legitimate concern about illicit sexual relationships, affirmed the constitutionality of the Massachusetts statute as a proper regulation of immoral practices.

16 405 U.S. at 449.

17 Id. at 448-49.

18 Id. at 448.

19 See Mass. Gen. Laws ch. 272, § 18 (1970) (penalty for fornication); Mass. Gen. Laws ch. 274, § 1 (1970) (fornication as misdemeanor). See also text accompanying notes 63-64.

not believe" that the Massachusetts legislature had adopted a statute carrying a five-year penalty for one who facilitates an act, as a deterrent to the commission of an act which carried a maximum penalty of ninety days.[20]

Secondly, the Court rejected health as the purpose of the legislation. The statute's history as a regulation of morals rendered dubious its stated intent to promote health.[21] Furthermore, the majority found that if the statute were to be regarded as a health measure, it discriminated against single persons. If there were a need to have a physician dispense contraceptives, the need was as great for unmarried persons as for married persons.[22] Also, since the statute regulated all contraceptives, whether dangerous to health or not, the Court rejected the statute as overbroad with respect to married persons whose right to use contraceptives was impinged upon by the state's requirements of a prescription for harmless contraceptives.[23]

Finally, the Court held that if the statute served solely to prohibit contraception, it would violate the equal protection clause of the fourteenth amendment. The First Circuit Court of Appeals, relying on *Griswold v. Connecticut*,[24] had stated that forbidding contraceptives to unmarried persons was in conflict with fundamental human rights, and in the absence of demonstrated harm, beyond the competence of the state.[25] However, the Supreme Court refused to rule on this substantive due process issue. Instead, the majority found that regardless of the application of *Griswold* to the individual's rights of access to contraceptives, the instant case could be decided on equal protection grounds, since the rights of access of the unmarried and the married must be the same.[26]

If under *Griswold* the distribution of contraceptives to married persons could not be prohibited, the majority held that a ban on distribution of contraceptives to single persons would be equally impermissible.[27] At this point, the *Eisenstadt* court strayed from its earlier resolve not to discuss *Griswold* and stated:

> If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[28]

Alternatively, if *Griswold* was not a bar to a prohibition on the distribution of birth control devices, the Court held that it would be a violation of the equal protection clause to proscribe distribution solely to unmarried persons. The Court reasoned that because the "evil" was identical for both married and unmarried persons, the statute's treatment of single persons would be an invidious underinclusion.[29]

B. The Concurring Opinions

Mr. Justice Douglas concurred in the majority opinion but found that the case could be decided on first amendment grounds. He emphasized that, if only Baird's lecture were involved, there would be no doubt about first amendment protection.[30]

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20 405 U.S. at 449.

21 Id. at 450.

22 Id. at 450-51.

23 Id. at 451.

24 381 U.S. 479 (1965). See note 1 supra.

25 Baird v. Eisenstadt, 429 F.2d 1398, 1401-02 (1st Cir. 1971).

26 405 U.S. at 454.

27 Id. at 453.

28 Id. The Court cites Stanley v. Georgia, 394 U.S. 564 (1969) in addition to *Griswold*. Id. at n.10.

29 Id. at 454. See Tussman and ten Broek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341 (1949) for a discussion of underinclusion.

30 405 U.S. at 455.

Massachusetts could never require a license of or impose a tax upon those who desired to lecture on contraception.[31] Reminding the Court that first amendment rights were not limited to verbal expression, Justice Douglas contended that Baird's distribution of the contraceptive was merely an adjunct to his lecture and therefore entitled to first amendment protection.[32]

Justices White and Blackmun, concurring in the result, used an analysis flavored with both substantive due process and equal protection and held the law invalid because it was overbroad as a health measure.[33] The concurrence noted that Baird was convicted as an illegal distributor of contraceptives, and not for distributing to an unmarried person. Justice White reasoned that by requiring prescriptions for harmless as well as harmful contraceptive devices, the statute unreasonably infringed upon the fundamental rights of married persons to use contraceptives.[34] Therefore, Baird could not be convicted for distributing vaginal foam to a married person.[35] Since the record did not indicate that the recipient of the foam was unmarried, by settled constitutional doctrine[36] the conviction could not stand. Therefore, the concurring opinion refrained from discussing the issue of the distribution of contraceptives to unmarried individuals.[37]

C. The Dissenting Opinion

Chief Justice Burger dissented on the grounds that the Court was not applying a proper standard of limited judicial review in assessing the statute's validity.[38] He reasoned that the statute's restriction on dispensing contraceptives was the only issue

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31 Id.

32 Id. at 460. Justice Douglas's discussion of the contraceptive as a "demonstrative device" protected by the first amendment's guarantee of free speech is an extension of the "symbolic speech" theory. According to principles developed by the Court in the protest cases of the 1960's, conduct which is indistinguishable from speech as a form of expression is entitled to the same protection accorded speech under the first amendment. See Tinker v. Des Moines, 393 U.S. 503 (1966) (wearing of armbands was closely akin to "pure speech" and was therefore protected); Murphy, Constitutional Law-Freedom of Speech-Symbolic Protest by the Use of Opprobious Language, 21 DePaul L. Rev. 546 (1972). Yet, the demonstrative nature of the contraceptive is probably not sufficiently like the subject of Baird's speech to justify first amendment protection. See, e.g., United States v. O'Brien, 391 U.S. 367 (1968) (draft card burning not equivalent of statement of protest against the Vietnam War and, therefore, not protected by the freedom of speech guarantee). The conflicting views of Justices Douglas and Burger illustrate the Court's continuing dilemma in applying this theory. See generally, Hinchey, The First Amendment Freedom of Speech: A Rediscovery of Absolutes, 23 Mercer L. Rev. 473, 511-13 (1969).

Justice Douglas's concurring opinion illustrates his struggle with the privacy issue. As the author of *Griswold*, he undoubtedly agreed that privacy was a constitutionally protected right, yet perhaps he thought it unnecessary to determine the case on a right not as firmly established as first amendment guarantees, when issues of free speech were involved.

33 405 U.S. at 464.

34 Id. Justice White's concurrence stated that where a restriction burdens the constitutional right of married individuals to use contraceptives, a right established in *Griswold*, the Court could not accept without question the state's classification of a particular contraceptive as dangerous to health. Accordingly, the concurring opinion examined the basis for restricting the vaginal foam distributed by Baird and found no proof that it was dangerous. Id. This analysis incorporated both substantive due process: questioning the attainment of these ends (health) by these means (regulating contraceptives) and equal protection: is this class (harmless contraceptives) a proper subject of regulation.

35 405 U.S. at 464.

36 Under the rationale of Stromberg v. California, 283 U.S. 359 (1930), a conviction can only stand if the record indicates that the conviction was founded upon a theory which can constitutionally support the verdict.

37 Id. at 463. This concurring opinion, however, impliedly disagrees with the Court's affirmance of a right of privacy: Justice White notes that if the statute had applied to the "pill," he would have sustained the statute.

38 Id. at 467.

before the Court and that Baird had no standing to assert the rights of distributees.[39] Contrary to the majority, he argued that the statute was a health measure and as such was reasonable. He conceded that at present the Massachusetts law seemed overbroad in regulating all contraceptives. But, since there was a possibility that some heretofore harmless contraceptives could be found harmful, the legislature had not acted unreasonably in regulating all contraceptives.[40] Nor did he think that the limitation on the class of lawful distributors had significantly impaired the right of married people to use contraceptives in Massachusetts.[41]

In addition, Justice Burger implied that even if the statute were underinclusive in not according single people the health protection it had accorded married individuals, a statute could not fail because it did not completely remedy the evil which the legislature sought to prohibit.[42] The Chief Justice concluded that the analysis of the legislative purposes found in the majority and concurring opinions were based more on personal predilections than on law. He argued that the other members of the Court were using the equal protection clause in such a manner as to revitalize substantive due process analysis.[43]

III. EQUAL PROTECTION: THE *EISENSTADT* APPROACH AND ITS IMPLICATIONS

According to established principles governing application of the equal protection clause, two standards of review have been available to the Court when a statute was challenged on equal protection grounds. The traditional equal protection standard is that of reasonableness. It requires that "the classification ... be reasonable, not arbitrary, and ... rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[44] The more recent equal protection standard is that of a compelling state interest. Under this standard, when certain classifications regarded as "suspect"[45] or certain rights deemed "fundamental"[46] are involved, the Court will require that the

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[39] Id. at 465-66.

[40] Id. at 469.

[41] Id. at 472.

[42] Id. at 468.

[43] Id. at 467. See text accompanying notes 56-64 infra.

[44] F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

[45] The following cases have established certain classifications as suspect: McLaughlin v. Florida, 379 U.S. 184 (1964) (race); Korematsu v. United States, 323 U.S. 214 (1944) (ancestry); Sei Fujui v. State, 38 Cal.2d 718, 242 P.2d 617 (1952) (lineage). Several cases have discussed wealth as a suspect classification. See, e.g., Harper v. Bd. of Elections, 383 U.S. 663 (1966); Douglas v. California, 372 U.S. 353 (1963). But in James v. Valtierra, 402 U.S. 137 (1971), the Court rejected wealth as a suspect classification. The Court refused to apply the strict scrutiny rationale of Hunter v. Erickson, 393 U.S. 385 (1969) to the California constitution's requirement of a voting referendum on proposed low cost housing. The Supreme Court reasoned that *Hunter* had dealt with a referendum law placing special burdens on racial minorities, a situation not existing in the case at bar. The Court's refusal in *James* to put a poverty classification on a par with racial distinctions calls into question the viability of poverty as a suspect classification warranting a stricter standard of judicial review.

[46] A number of cases had used a strict standard of review in situations involving what were termed fundamental rights. See, e.g., Dunn v. Blumstein, 405 U.S. 330 (1972) (right to travel; right to vote); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969) (right to vote); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (right to vote). The Supreme Court has recently stated that to deserve strict scrutiny, a fundamental right must also be a constitutionally protected one. Dandridge v. Williams, 397 U.S. 471, 484 (1970). But in a later case, decided after *Eisenstadt*, Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972), which involved the right of illegitimates to recover under Louisiana's workmen's compensation law for the natural father's death, the Court

state prove the presence of a compelling interest in order to justify its use of the "suspect" classification[47] or its infringement of the "fundamental" right.[48]

Against this background, two facts make the *Eisenstadt* Court's use of the reasonableness standard significant. First, *Griswold* had already established a right of marital privacy.[49] And, secondly, the majority in *Eisenstadt* explicitly stated that if the Massachusetts statute infringed upon fundamental freedoms,[50] the state would have to justify the statutory scheme by proving a compelling interest. Since the Court did apply the reasonable classification standard, the more lenient standard of judicial review, it could be concluded that the status of individual privacy as a fundamental right remains uncertain.

The Court indicated that its choice of the reasonable classification standard was a matter of judicial convenience.[51] Since the statute failed under the most lenient standard, it was unnecessary for the Court to assess the possibility of a compelling state interest. However, in previous decisions involving state infringement of fundamental rights,[52] the Court had unhesitatingly affirmed the asserted right and applied the stricter standard of review, even though the statute also failed under the less stringent reasonable classification standard.[53] A more persuasive explanation of the Court's disregard of the fundamental rights test in *Eisenstadt* can be found in the Court's previous decision in *Dandridge v. Williams*.[54] There the Court held that the only fundamental freedoms requiring the application of the stricter standard are those which are constitutionally protected.[55] Since the *Eisenstadt* Court refused to rule that access to contraceptives was a constitutionally protected freedom, the *Dandridge* rationale required the application of a reasonableness test. The *Eisenstadt* Court's unorthodox application of the reasonableness standard possibly indicates that the Court thought that privacy deserved more protection from legislative interference than other non-fundamental rights, even if granting such increased protection to the right of privacy required a modification of traditional equal protection standards. A comparison of the Court's opinion with Chief Justice Burger's dissent illustrates this point.

For example, Justice Burger objected to the majority's dismissal of a state court's explication of a state statute.[56] And clearly, Justice Brennan's facile disbelief that the

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noted that it exercises a stricter standard of review when fundamental personal rights are affected by the state statutory classifications. The opinion does not state that these rights must be constitutionally protected ones. 406 U.S. at 172.

47 See cases cited in note 45 supra.

48 Loving v. Virginia, 388 U.S. 1 (1967); Harper v. Bd. of Elections, 383 U.S. 663 (1966); Griffin v. Illinois, 351 U.S. 12 (1956); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

49 381 U.S. 479 (1965).

50 405 U.S. at 447 n.7.

51 Id. For a discussion of the principles governing the equal protection clause and the Court's application of these principles through the compelling state interest and reasonable classification standards of review, see Note, Developments in the Law: Equal Protection, 82 Harv. L. Rev. 1065 (1969).

The reasonable classification standard may have been chosen to insure the majority of the Court's support for the holding, for it is doubtful that Justice Stewart would have joined in the opinion had it been decided solely on the right of privacy. Justice Stewart had dissented in *Griswold*. He considered the Connecticut statute an "uncommonly silly law" but denied that there was a general right of privacy protected by the Constitution. 381 U.S. 479, 530. Furthermore, Justice Stewart wrote the opinion of the Court in Dandridge v. Williams, 397 U.S. 471 (1970), wherein he stated that a constitutionally protected right must be asserted before the Court would apply the compelling state interest standard of review. Id. at 484.

For a fuller discussion of the reasonable classification standard applied in *Eisenstadt*, see text accompanying notes 54-66 infra.

52 See note 46 supra.

53 See, e.g., Justice Brennan's majority opinion in Shapiro v. Thompson, 394 U.S. 618, 634, 638 (1969).

54 397 U.S. 471 (1970). But see Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) and note 46 supra.

55 Dandridge v. Williams, 397 U.S. 471, 484 (1970).

56 405 U.S. at 467.

Massachusetts legislature[57] intended the statute to serve as a health measure did break with the Court's general refusal to look beyond the stated purpose of a statute in determining its constitutionality under the rational basis test.[58]

Chief Justice Burger further objected to the Court's finding the statute unconstitutional on the grounds of underinclusion.[59] Though the equal protection clause has been interpreted to prohibit the state from regulating a certain class of people when others similarly situated with respect to the purposes of the law are not so regulated,[60] the Court has generally refused to strike down legislation on this basis.[61] The Court's holding that the statute was invalid because it did not include married as well as single people in its ban on the distribution of contraceptives[62] is another indication that the Court subjected the Massachusetts statute to a higher standard than that normally associated with the reasonableness standard.

The Court's analysis of statutory purpose supports this suggestion that a higher standard. Justice Brennan stated that the legislative means needed to be rationally related to a valid public purpose; and then investigated in extreme detail the validity of the purposes as articulated by the state. Since the Court doubted that the Massachusetts legislature intended to prescribe a penalty twenty times greater for the facilitator of a prohibited act (fornication) than for the performer of such an act, it concluded that the prevention of illicit intercourse could not possibly be a purpose of the statute.[63] Yet, if the majority had so desired, it clearly could have found a reasonable basis for the different punishment accorded the distributor of contraceptives vis-a-vis the individual guilty of fornication. The legislature may have felt that, since the distribution of contraceptives promoted many illicit acts of intercourse, it should be punished more severely than one act of fornication. However, the Court refused to accord a presumption of validity to the legislation. This refusal conflicts with the standard reasonable classification analysis, which upholds the statute's constitutionality if any conceivable basis can be found to support the legislative scheme in question.[64] Finally, invalidating a statute under the reasonableness standard is distinctive in itself. Since equal protection

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57 Id. at 450.

58 See Justice Frankfurter's majority opinion in Goesaert v. Cleary, 335 U.S. 464, 466-67 (1948), where the Court employed the rational basis test: "We cannot cross-examine either actually or argumentatively the mind of the Michigan legislators nor question their motives." Accord, Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220 (1949); Kotch v. Bd. of River Boat Pilots, 330 U.S. 552 (1947). But see Gomillion v. Lightfoot, 364 U.S. 339 (1960).

59 405 U.S. at 468.

60 Such regulation is termed "underinclusive" because it does not succeed in regulating all those who are participating in the "evil" which the statute was intended to prohibit. For a general discussion of the underinclusion principle, see Note, Developments in the Law: Equal Protection, 82 Harv. L. Rev. 1065, 1082 (1969); Tussman and tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341, 348 (1949).

61 McDonald v. Bd. of Election, 394 U.S. 802 (1968) (denial of absentee ballots to pre-trial detainees, although Illinois provided absentee ballots to the medically incapacitated and those residing outside their home counties); Williamson v. Lee Optical Co., 348 U.S. 483, 488-89 (1955) (optometrists or opthamalogists authorized to fit glasses, while licensed opticians were not); Ozan Lumber Co. v. Union County Nat'l. Bank, 207 U.S. 251 (1907) (regulation of sale of patented articles; merchants and dealers selling such articles in the usual course of business exempt from the regulation). Contra, Rinaldi v. Yeager, 384 U.S. 305 (1966) (state statute requiring an unseccessful appellant to repay the cost of transcript used in preparing the brief applied only to prison inmates – possible suspect classification according to inmate status); Carrington v. Rash, 380 U.S. 89 (1965) (stricter equal protection standard applied to Texas constitutional provision denying certain members of the armed services the right to vote – involved fundamental right to vote).

62 405 U.S. at 454.

63 Id. at 449.

64 See, e.g., McDonald v. Bd. of Election, 394 U.S. 802, 808-09 (1968); McGowan v. Maryland, 366 U.S. 420, 425 (1966); Goesaert v. Cleary, 335 U.S. 464 (1948); Kotch v. Bd. of River Boat Pilots, 330 U.S. 552 (1947).

analysis replaced substantive due process, only two other decisions[65] have struck down statutes by using this lenient standard of evaluation.

From the foregoing analysis, it is clear that the Court was applying a more rigid standard of review to this statute than the Court's initial choice of standard indicated. The *Eisenstadt* approach may be characterized as a "midpoint" standard, for it is less rigorous than the compelling state interest standard, involving a presumption of invalidity,[66] and less permissive than the traditional reasonableness standard.[67]

Two explanations may be offered for the different approach to the equal protection clause taken by the Supreme Court in *Eisenstadt v. Baird.* First, it is possible that the Court wished to fashion a more flexible standard than the somewhat rigid standards of review currently applied in evaluating a statute under the equal protection clause. The Court's quotation from Justice Jackson's concurring opinion in *Railway Express Agency v. New York*,[68] emphasing the necessity of avoiding any minority discrimination, possibly indicates a growing reluctance on the part of the Court to tolerate discrimination in areas in which neither a fundamental right nor a suspect classification is involved. *Eisenstadt* may represent the first expression in a majority opinion of a view expressed before solely by dissenting Justices,[69] that the Court should actively test the reasonableness of legislation rather than uphold every statute to which it can attribute any conceivable, legitimate legislative purpose.

This new approach has recently been followed by the Court in *Weber v. Aetna Casualty & Surety Co.*[70] The *Weber* Court refrained from specifying whether a compelling interest standard or a reasonableness standard was being employed. Though the Court referred to fundamental personal rights[71] and implied that illegitimacy may be a suspect classification,[72] the Court assessed the statute's constitutionality by

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65 Reed v. Reed, 404 U.S. 171 (1971) (Idaho probate code gave preference to men over women when persons of the same priority applied for appointment as administrator of a decedent's estate; court applied reasonable classification standard of review, refusing to declare sex a suspect classification); Morey v. Dowd, 354 U.S. 457 (1957) (Illinois statute exempted money orders of the American Express Company from the requirement that any firm selling money orders in the state must secure a license and submit to state regulation).

66 See text accompanying notes 45-48 supra.

67 See text accompanying note 61 supra.

68 405 U.S. at 454, quoting 336 U.S. 106, 112-13 (1949).

69 See the dissenting opinion of Justice Marshall, joined in by Justice Brennan in Dandridge v. Williams, 397 U.S. 471, 520-21 (1969):

> The extremes to which the Court has gone in dreaming up rational bases for state regulation ... may ... be ascribed to a healthy revulsion from the Court's earlier excesses....
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> In my view, equal protection analysis ... is not appreciably advanced by the *a priori* definition of a "right," fundamental or otherwise. Rather, concentration must be placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits they do not receive, and the asserted state interests in support of the classification.
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> ... 'In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the state claims to be protecting, and the interests of those who are disadvantaged by the classification.' (citations omitted)

Accord, Richardson v. Belcher, 404 U.S. 78, 90 (1971) (Marshall and Brennan, JJ., dissenting):

> Judges should not ignore what everyone knows, namely that legislation regulating business cannot be equated with legislation dealing with destitute, disabled or elderly individuals.

But see Reed v. Reed, 404 U.S. 1717 (1971), where the majority opinion implied that the nature of the discrimination called for a more stringent reasonable classification standard.

70 406 U.S. 164 (1972). See also Chicago Police Dep't. v. Mosley, 408 U.S. 92 (1972); Bullock v. Carter, 405 U.S. 134 (1972).

71 Id. at 172.

72 Id. at 175-76.

employing a method similar to that used in *Eisenstadt*. By weighing the importance of the right endangered by the classification against the possible purposes of the legislative classification, the Court invalidated the statute.[73]

A second possible explanation for the Court's application in *Eisenstadt* of a seemingly new equal protection standard rests on the particular issues presented in the instant case. One commentator[74] visualized the interplay of classification and right in equal protection decisions as two intersecting gradients. On one gradient is a hierarchy of classifications, with the "suspect" classifications at the top. Along the other gradient are arranged the "fundamental" rights.[75] When the classification drawn is clearly invidious, the affected interest does not have to be an important one for the Court to apply a compelling interest test.[76] Similarly, if the right asserted is "fundamental," the classification need not be "suspect."[77]

In *Eisenstadt*, the Court spoke of the discrimination between married and single persons as "invidious."[78] The classification according to marital status, though not as "suspect" as race, does raise questions that the statute is unreasonably discriminatory[79] and may rank at the midpoint of the classification gradient. Similarly, although the Court refused to define the scope of constitutional protection accorded the right of privacy, it assumed that some right of privacy for single as well as married persons exists.[80] Even though privacy is less "fundamental" than the right to vote, it ranks higher on the "fundamental" interest gradient than the right to fit eyeglasses without prescription,[81] for example. The interplay of these two factors of classification and affected right[82] calls for a more active judicial role in assessing this particular statute's validity than if the legislation dealt solely with economic disadvantage.[83]

Such an analysis implies that in cases similar to *Eisenstadt*, involving the private conduct of an individual, the Court might be inclined to fashion a more flexible equal

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[73] Id. at 176.

[74] Note, Developments in the Law: Equal Protection 82 Harv. L. Rev. 1065, 1120-21 (1969).

[75] See the discussion of Dandridge v. Williams and Weber v. Aetna Cas. & Sur. Co., note 46 supra. These cases, decided after this concept was devised, speak to the issue of whether only constitutionally protected interests constitute fundamental rights.

[76] See, e.g., Takahasi v. Fish & Game Commn., 334 U.S. 410 (1948) (classification: alienage; interest: fishing licenses). See also the discussion in note 46 supra.

[77] Reynolds v. Sims, 377 U.S. 533 (1964) (classification: non-racial; interest: voting).

[78] 405 U.S. at 454.

[79] The Supreme Court has begun to look unfavorably on discriminations based on marital status. See, e.g., Stanley v. Illinois 405 U.S. 645, 658 (1972) (denial to father of illegitimate children of hearing to determine his parental qualifications in proceeding for their custody, while all other parents were entitled to such a hearing on their fitness, was violative of equal protection clause); Justice Brennan's dissent joined in by Justices Douglas, White and Marshall in Labine v. Vincent, 401 U.S. 532, 551-53 (1971) (questioning discrimination between illegitimate and legitimate children on the basis of their parents' marital status).

[80] See text accompanying note 28 supra. See also 405 U.S. at 453, quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969): "[A]lso fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."

[81] See Williamson v. Lee Optical Co. 348 U.S. 483 (1955).

[82] An analagous situation to *Eisenstadt* arose in Skinner v. Oklahoma, 316 U.S. 535 (1942). In *Skinner*, procreation was the right asserted and there was an inference that the classification was made according to economic status, since "white collar" crimes were excluded from the punishment. Embezzlers were not subject to the penalty of sterilization; those convicted of larceny were. In applying a reasonable classification standard, the Court noted:

> when the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. Id. at 541.

[83] See Justice Marshall's dissent in Richardson v. Belcher 404 U.S. 78, 90 (1971), suggesting that a more lenient standard of review is appropriate in cases involving state regulation of business.

protection inquiry. In such an analysis the Court will carefully investigate and compare the interests of those disadvantaged by the classification with the legislative interest in seeking to effect a specific purpose through regulating personal behavior.

IV. IMPLICATIONS OF *EISENSTADT* FOR A RIGHT OF PRIVACY

While it follows from the above discussion that *Eisenstadt* cannot be read as a declaration of the individual's right to conduct his private life free of any state interference, the decision should not be interpreted solely as a contraceptive case. Dictum in the majority opinion in *Eisenstadt* suggested that the right of privacy, if it meant anything, extended to the right of an individual, married or single, to decide whether to or not to bear or beget a child.[84] Therefore, if the Court decides to act upon this dictum, future challenges to legislation governing personal behavior will turn upon the nature of the right of privacy asserted. The question then becomes: In what other matters is the person so fundamentally affected as to preclude governmental interference?

The matter most closely related to the contraceptive issue is voluntary sterilization. This operation is outlawed in one state and made difficult to obtain in most other states, since local medical boards are reluctant to sanction it.[85] The *Eisenstadt* dictum would seem to strike down any state action preventing this operation as violative of the Constitution.

Abortion also involves a matter similar to the contraceptive issue: choosing to bear a child. Several district courts have already invalidated state abortion statutes by citing *Griswold* for the proposition that the mother has a fundamental right to decide whether or not to have her child.[86] *Eisenstadt* has also been cited recently for this proposition.[87] However, a recognition of the state's interest in protecting the life of the fetus has diminished the effectiveness of the privacy argument because such an interest on the part of the state is often held sufficiently compelling to justify the state's infringing upon the right of privacy.[88]

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[84] 405 U.S. at 453.

[85] Utah still prohibits voluntary sterilization. Utah Code Ann. §64-10-12 (1953). For an example of the opposition of local medical boards to voluntary sterilization, see McCabe v. Nassau County Medical Center, 453 F.2d 698 (1971), where the twenty-five year old plaintiff was denied the operation because she had four children and the hospital's rules required that, for a woman her age to be eligible, she must already have five children. See also Forbes, Voluntary Sterilization of Woman as a Right, 18 DePaul L. Rev. 560, 562 (1969), stating that physicians are reluctant to accept an opinion on the part of the woman, her husband and her doctor that for socio-economic reasons alone the couple wants no more children.

The *Eisenstadt* holding's application to the decisions of medical boards, of course, could be effected only if the decisions of these boards were seen as state action. Thus, in *McCabe*, *supra*, the federal court assumed jurisdiction to hear the plaintiff's constitutional objections to the Board's ruling because the hospital was partially maintained by public funds.

[86] Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill. 1971), appeal docketed sub.nom. Hanrahan v. Doe, Heffernan v. Doe, 41 U.S.L.W. 3018 (U.S. July 11, 1972) (No. 70-105, 70-106); Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970), reargued October 11, 1972, 41 U.S.L.W. 3201 (U.S. Oct. 17, 1972) (No. 70-18); Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis. 1970), appeal dismissed, 401 U.S. 1 (1970); U.S. v. Vuitch, 305 F. Supp. 1032 (D.D.C.1969), rev'd on other grounds, 402 U.S. 62 (1971); California v. Belous, 71 Cal. 2d 954, 80 Cal. Rptr. 354, 458 P.2d 194 (1969), cert. denied, 397 U.S. 915 (1970).

[87] Citing *Eisenstadt*, a Connecticut federal district court declared Connecticut's abortion statutes unconstitutional because they abridged the rights of a woman "to privacy and personal choice in matters of sex and family life." See N.Y. Times, Sept. 21, 1972 at 1, col. 2.

[88] Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971), appeal docketed, 41 U.S.L.W. 3019 (U.S. July 11, 1972) (No. 71-92); Steinberg v. Brown, 321 F. Supp. 741 (N.D. Ohio 1970). Note that Justice Brennan's enunciation of a right to privacy in *Eisenstadt* was a statement of freedom from unwarranted governmental intrusion. See text accompanying note 28 supra.

Eisenstadt v. Baird suggests a secondary and novel argument that could encourage reform of existing abortion legislation. One reason why the Massachusetts legislation at issue in *Eisenstadt* was invalidated was that the statute provided a punishment for the one who facilitated the prohibited act of illicit sex that was twenty times more severe than that accorded the actual performer of the act.[89] Present abortion statutes punish the one who performs the act,[90] but this person is really the agent of the one who desires the abortion: the mother. Therefore, it is as the facilitator of the mother's wishes that the abortionist is penalized by the state. The mother is not only free of blame[91] but also is considered to be the victim of the abortionist.[92] Yet, as a recent dissenting opinion noted "[i]f the state's interest is really to protect the life of the fetus, why does it fail to deter the person most directly responsible for taking it?"[93] Therefore, it could be argued that the punishment scheme employed in abortion statutes involves an unreasonable discrimination, totally unrelated to the stated purpose of the statute: the protection of fetal life. Certainly if an abortion statute failed on these equal protection grounds it should be struck down. Alternatively, the mother could be punished equally with the abortionist, but public sympathy for the mother would probably militate against extending the punishment to her.

Eisenstadt v. Baird may also affect laws which seek to regulate the private consensual behavior of adults. Homosexuality, fornication, lewdness and sodomy statutes apply to matters analagous to contraception, since the decision of with whom, or how, one engages in sexual relationships affects a person as much as the decision whether or not to have a child. And yet it must be recognized that such issues present more complex problems than the contraceptive issue.

Even though these statutes have been severely criticized,[94] the Court, as *Eisenstadt* indicated, is reluctant to consider the constitutionality of state regulations pertaining to morals.[95] Supreme Court decisions dealing with contraception[96] and the rights of illegitimate children[97] have indicated that the regulation of sexual promiscuity is a proper legislative purpose.

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89 For a discussion of this argument as it relates to the reasonable classification test, see text accompanying note 64 supra.

90 See La. Rev. Stat. Ann. § 14:87 (Supp. 1972). See also Rosen v. Louisiana State Bd. of Medical Examiners, 318 F. Supp. 1217, 1241 (E.D. La. 1970).

91 See cases cited in notes 86-88 supra.

92 People v. Reinard, 220 Cal. App. 2d 720, 33 Cal. Rptr. 908 (1963) (abortee is considered the victim of the crime).

93 Rosen v. Louisiana State Bd. of Medical Examiners, 318 F. Supp. 1217, 1242 (E.D. La. 1970).

94 See, e.g., Couris, Sexual Freedom for Consenting Adults — Why Not?, 2 Pac. L. J. 206 (1971); Fisher, The Sex Offender Provisions of the Proposed New Maryland Criminal Code: Should Private, Consenting Adult Homosexual Behavior be Excluded?, 30 Md. L. Rev. 91 (1970); Comment, Criminal Law — Consensual Homosexual Behavior — The Need for Legislative Reform, 57 Ky. L.J. 591 (1969); Comment, Constitutional Law — Sodomy Statutes: the Question of Constitutionality, Buchanan v. Batchelor, 50 Neb. L. Rev. 567 (1971).

95 405 U.S. at 447-49.

96 In *Griswold*, Justice Goldberg refers in his concurring opinion to the state's "proper regulation of sexual promiscuity or misconduct," 381 U.S. 479, 498-99; and Justice White, also concurring, speaks of the "state's policy against all forms of primiscuous or illicit sexual relationships, be they premarital or extramarital" as a "permissible and legitimate legislative goal." Id. at 505. In Poe v. Ullman, 367 U.S. 497 (1961), Justice Harlan noted in his dissent:

> Thus, I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced. So much has been explicitly recognized in acknowledging the state's rightful concern for its people's moral welfare. Id. at 553.

97 Writing for the majority in Labine v. Vincent, Justice Black noted the law's prejudice against illicit sexual relationships. 401 U.S. 532, 538 (1971).

Most of the recent challenges to sodomy[98] and fornication[99] laws on the basis of *Griswold*'s assertion of the right to privacy have failed in the lower courts. Some of these cases have distinguished *Griswold* as relating only to marital privacy.[100] Others have seen fornication[101] or homosexuality[102] as acts so different in kind from marital relations that the rights asserted in *Griswold* would be inapplicable. Furthermore, there is the general feeling that, since these laws are so rarely enforced, either by the police,[103] or the courts,[104] there is no reason to challenge them.[105] Yet, since people are still prosecuted under these statutes,[106] the Court does have a responsibility to assess their validity in view of *Eisenstadt.*

Finally, the social welfare laws are inextricably involved with the issue of the individual's right to privacy and with distinctions made according to marital status. The most controversial welfare program, Aid to Families with Dependent Children, allocates payment to families who, for various reasons, have no visible means of support.[107] By definition, the recipient of the aid is not living with his or her spouse.[108] All the states have adopted this program.[109] The courts have in recent years prohibited some of the gross invasions of privacy perpetrated by the states under the guise of state

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98 E.g., People v. Roberts, 256 Cal. App. 2d 488, 64 Cal. Rptr. 70 (1967); People v. Ragsdale, 177 Cal. App. 2d 676, 2 Cal. Rptr. 640 (1960); State v. White, 217 A.2d 212 (Me. 1966); Washington v. Rodrigues, 82 N.M. 428, 483 P.2d 309 (1971); Everett v. State, 465 S.W.2d 162 (Tex. 1971); Pruett v. State, 463 S.W.2d 191, 194-95 (Tex. 1971); People v. Rhinehart, 70 Wash. 2d 649, 424 P.2d 906, cert. denied, 389 U.S. 832 (1967). But see People v. Schwarz (No. A-282165, Superior Court of California, Los Angeles County, September 13, 1972), where the constitutionality of the California sodomy statute (Cal. Penal Code § 288a) was drawn in question. The court held that the sodomy statute was unconstitutional as applied to husband and wife on the basis of *Griswold.* Citing *Eisenstadt*, the court held the statute unconstitutional as applied to all consenting adults, because there was no reasonable basis for a classification according to marital status in view of the purpose of the statute. See also In re Labady, 326 F. Supp. 924 (S.D.N.Y. 1971) ("private conduct which is not harmful to others, even though it may violate the personal moral code of most of us, does not violate public morality which is the only proper concern of § 1427" (naturalization law). Id. at 927-28).

99 E.g., New Jersey v. Clark, 58 N.J. 72, 275 A.2d 137 (1971); New Jersey v. Lutz, 56 N.J. 314, 272 A.2d 753 (1971).

100 See, e.g., New Jersey v. Lutz, 56 N.J. 314, 272 A.2d 753 (1971); Pruett v. State, 463 S.W.2d 191 (Tex. 1971); Comment, Constitutional Law — Sodomy Statutes: the Question of Constitutionality, Buchanan v. Batchelor, 50 Neb. L. Rev. 567 (1971).

101 State v. Jones, 2 Conn. Cir. 698, 205 A.2d 507 (1964) (sexual relations among unmarried persons are obscene, unchaste, and immoral).

102 Washington v. Rodrigues, 82 N.M. 428, 431, 483 P.2d 309, 312 (1971).

103 See New Jersey v. Clark, 58 N.J. 72, 275 A.2d 137 (1971); Fisher, The Sex Offender Provisions of the New Maryland Code: Should Private Consenting Homosexual Behavior be Excluded?, 30 Md. L. Rev. 91, 95-97 (1971); Weyrauch, Informal and Formal Trends in Family Organization, 28 U.Chi. L. Rev. 88, 107, n.96 (1960).

104 Often courts construe these statutes as requiring that the prohibited acts be committed in public. See City of Chicago v. Murray, 333 Ill. App. 233, 77 N.E.2d 452 (1947); State v. Metje, 269 S.W.2d 128 (Mo. App. 1954); State v. O'Keefe, 205 S.W.2d 939 (Mo. App. 1947).

105 There is also an obvious reluctance on the part of homosexuals to reveal their sexual practices in an attempt to change the existing laws. See generally, Poe v. Ullman, 367 U.S. 497 (1961); Comment, Consensual Homosexual Behavior — The Need for Legislative Reform, 57 Ky. L.J. 591, 595 (1969).

106 See State v. Plummer, 5 Conn. Cir. 35, 241 A.2d 198 (1967) for a particularly offensive situation, where two officials, acting on the tip-off of the woman's welfare worker, observed her in bed with her lover and arrested her for "lascivious carriage."

107 42 U.S.C. § 602 (1969) [hereinafter AFDC].

108 42 U.S.C. § 607 (1969) provides for aid to married couples with children (AFDC-UP). Only twenty-two states have enacted this program.

109 Wyman v. James, 400 U.S. 309, 310 (1971).

interest in reducing welfare fraud.[110] Yet, invasions of the individual's right to privacy continue to occur in the implementation of these laws.[111]

For example, a section of the federal law governing the AFDC program requires the state to develop a program with the objective of preventing or reducing the incidence of illegitimate births in families receiving welfare payments.[112] In theory, the acceptance of such a plan is optional for the recipient of the aid.[113] In reality, the recipient's choice is severely limited. The recipient might not want to participate in the program because she regards it as an invasion of her privacy. While the statute provides that the recipient's refusal to participate in the plan will not result in the loss of her stipend, she may, at the discretion of the welfare worker, lose such "extras" as additional clothing, club fees or tools for her children to participate in work training.[114]

In another recent, related development, the United States Supreme Court, in *Wyman v. James*,[115] approved New York's statute providing that welfare benefits to AFDC mothers be terminated if a mother refused to admit welfare workers into her home without a search warrant. Although the arguments of counsel focused on the mother's fourth amendment rights, the mother's right to privacy was also asserted.[116] Nevertheless, *Griswold* was virtually ignored by the Court.[117] It would seem that the cost of welfare for the recipient includes an increased vulnerability to government infringement on one's personal life.[118] In light of *Wyman*, it would be imprudent to predict that *Eisenstadt* will have any effect upon the right of privacy of welfare recipients. Yet, *Eisenstadt* could become the focus of future challenges to welfare practices infringing upon the individual's freedom from state interference in his private life.

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110 Lawrence v. Martin, 397 U.S. 552 (1970) (outlawing contribution statutes, i.e., those statutes presuming that a man residing in the house was contributing to the children's support); King v. Smith, 392 U.S. 309 (1968) (invalidating an Alabama provision which denied payments to AFDC children if the mother cohabitated with a male who had no financial responsibility to her children). See also the invalidation by a variety of district courts of state statutes requiring the mother to reveal the name of their illegitimate children's fathers. Doe v. Swank, 332 F. Supp. 61 (N.D.Ill. 1971); Meyers v. Juras, 327 F. Supp. 759 (D. Ore. 1971), aff'd, 404 U.S. 803 (1972); Doe v. Shapiro, 302 F. Supp. 761 (D. Conn. 1969). Contra, Saiz v. Goodwin, 325 F. Supp. 23 (D.N.M. 1971) vacated on other grounds, 450 F.2d 788 (10th Cir. 1971).

111 In order to obtain welfare payments, the applicant must submit to continual invasions of privacy. In applying the means test to determine eligibility, the welfare department thoroughly investigates the background of the recipient to determine if there are other sources of support available to her. Part of this inquiry includes the solicitation of names and addresses of recipients' relatives, who are then checked by the agency. Once her eligibility has been established, the recipient's financial status is periodically rechecked to determine if her need level has changed. The caseworker's services to the mother, including instructions on housekeeping, raising children and budgeting the grant necessarily involve further questions about the family's personal life. See Wickham, Restricting Home Visits: Toward Making the Life of the Public Assistance Recipient Less Public, 118 U. Pa. L. Rev. 1188, 1192-93 (1970). See also, Handler and Rosenheim, Privacy in Welfare: Public Assistance and Juvenile Justice, 31 Law & Contemp. Prob. 377, 393-94 (1966); Reich, Midnight Welfare Searches and the Social Security Act, 72 Yale L.J. 1347 (1963).

112 42 U.S.C. § 602 (a)(15)(A)(ii) (1969).

113 42 U.S.C. § 602 (a)(15)(C)(1969).

114 Handler and Rosenheim, supra note 111.

115 400 U.S. 309 (1971).

116 Briefs of Counsel, Wyman v. James, 27 L. Ed.2d 881.

117 Justice Douglas cited *Griswold* in his dissenting opinion. 400 U.S. at 331.

118 See Handler and Rosenheim, supra note 111; see also discussion of "unconstitutional condition" in Justice Marshall's dissent in *Wyman*, where, on the theory of state interference with a fundamental right, he challenges the ability of the state to impose a condition on a benefit to which the recipient is statutorily entitled. 400 U.S. at 345.

V. CONCLUSION

Eisenstadt v. Baird presents many questions in the areas of equal protection and right to privacy. The Court's failure to rule expressly on the rights of married and single persons to have access to contraceptives allowed the majority to apparently modify the "fundamental" rights approach in the equal protection area and fashion a test midway between reasonableness and compelling state interest. Justice Brennan's pronouncement of what the right to privacy means, shortly after his refusal to discuss the applicability of *Griswold*, indicated an implicit attempt by the majority of expand the right of privacy to include the right of any individual to be free from unwarranted government intrusion in deciding whether to beget or bear a child. This attempt appeared to provide a stimulus for the Court to apply what they call the test of reasonableness with a far higher level of scrutiny than precedent would allow. This new test could pave the way for a more flexible application of equal protection principles in future decisions.[119]

Since the Court acknowledged a shadowy concept of the right of privacy, *Eisenstadt* will certainly be used in attempts to effect change in laws impinging upon individual privacy. The success of these attempts remains uncertain, for the Court's treatment of the privacy issue established only a shaky foundation for future litigation in this area.

KATHERINE R. JONES

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119 See Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972), decided after *Eisenstadt*. The Court again appeared to abandon the old equal protection dichotomy to apply a test similar to that used in *Eisenstadt*. See text accompanying notes 70-73 supra.