NOTES

Zablocki v. Redhail: Due Process or Equal Protection?

This note summarizes and examines a recent United States Supreme Court case, Zablocki v. Redhail. It suggests that the majority opinion inappropriately applied equal protection analysis to a case that should have been decided on the basis of substantive due process.

In *Zablocki v. Redhail*[1] the United States Supreme Court struck down a Wisconsin statute which prevented persons who were obligated to support children not in their custody from marrying without a court order. The majority opinion by Justice Marshall held that the statute violated the equal protection clause of the fourteenth amendment to the United States Constitution.[2] Although Justice Marshall analyzed the case within an equal protection framework, the subject matter of the case, the substance of his discussion and many of the cases he cited as precedent indicate that analysis under the due process clause of the fourteenth amendment would have been more appropriate.

The state required persons who wished to marry to obtain a court order if they had children not in their custody whom they were obligated to support.[3] In order to obtain the court's permission, the person had to prove that he or she had satisfied prior support obligations and that any such children were not then, nor would become, public charges.[4] A marriage without permission was void and criminal sanctions could be imposed on a person

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[1] 434 U.S. 374 (1978).

[2] *Id.* at 382. Justices Brennan, White and Blackmun and Chief Justice Burger joined in Justice Marshall's decision. Justices Stewart, Stevens and Powell concurred in the judgment. Justice Rehnquist dissented. 434 U.S. 374, 375.

[3] *Id.* at 375. The statute applied to marriages by Wisconsin residents outside the state. WIS. STAT. § 345.10(5) (1973).

[4] A hearing would be held at which time the applicant would present proof, if any, of his compliance with the statutory requirements. The hearing could be waived by the judge upon the presence of a record sufficient to demonstrate the applicant's compliance. WIS. STAT. § 245.10(1) (1973).

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who obtained a license in violation of the statute.[5]

Plaintiff Redhail was under a court order to pay support for a child born out of wedlock when he applied for a marriage license. The court denied the application because Redhail had been unable to make the support payments. Furthermore, it was stipulated that even if he had made the payments, the child would have been a public charge. Redhail filed a class action and a three-judge panel[6] ruled that the statute violated the equal protection clause.[7] The district court enjoined the county clerks in Wisconsin from enforcing the statute. The United States Supreme Court affirmed.[8]

Justice Marshall agreed with the district court that the appropriate analytical framework was equal protection.[9] He viewed the statute as creating a class of Wisconsin residents who were not permitted to marry without obtaining a court order.[10] The first step in his analysis was to decide what standard of review should be applied to the classification.[11] According to past decisions the right to marry is a fundamental right.[12] The Court was therefore required to strictly scrutinize the statute.[13] The burden was on the

[5] WIS. STAT. § 245.30(1)(f) (1973).

[6] Redhail v. Zablocki, 418 F. Supp. 1061, 1064 (E.D. Wis. 1976). The three-judge panel was convened pursuant to 28 U.S.C. § 2284 (1948).

[7] Redhail v. Zablocki, 418 F. Supp. 1061, 1072 (1976).

[8] 434 U.S. 374, 377 (1978).

[9] *Id.* at 382.

[10] *Id.* at 375.

[11] *Id.* at 383. Suspect classifications and statutes infringing fundamental rights were subject to "strict scrutiny" which almost always resulted in the invalidation of the classification or statute. Other laws had to be merely rationally related to a legitimate legislative purpose and were almost always upheld. Gunther, *The Supreme Court 1971 Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

[12] Zablocki v. Redhail, 434 U.S. 374, 383 (1978). The cases which Justice Marshall cited in *Zablocki* to establish the fundamentality of the right to marry included Loving v. Virginia, 388 U.S. 1 (1967), Meyer v. Nebraska, 262 U.S. 390 (1923), Griwold v. Connecticut, 381 U.S. 479 (1965), Whalen v. Roe, 429 U.S. 589 (1977), Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974). Zablocki v. Redhail, at 383-385. Perhaps anticipating a reply that most of these cases did not deal expressly with the right to marry, Justice Marshall said, "As the facts of this case illustrate, it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society." Zablocki v. Redhail, 434 U.S. at 386.

[13] *Id.* Justice Marshall, quoting from Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) used the words "critical examination" which in that case were equated with "strict judicial scrutiny." *Id.* at 314.

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state to show that the infringement on the right to marry was necessary to promote compelling interests which could not be furthered in a way which would not burden the constitutionally protected right.[14] Justice Marshall maintained that this test would not invalidate regulations which did not excessively burden the right.[15]

After establishing the appropriate standard of review, Justice Marshall examined the state interests which the statute presumably advanced. The first rationale which the state proffered in support of the statute was that the permission-to-marry hearing provided an opportunity to counsel the applicant in the matter of compliance with his support obligation.[16] Justice Marshall assumed, although he noted that there was no evidence in the record on which to base the assumption, that counseling occurred.[17] However, he found that the state's interest in counseling the applicant could not justify a denial of permission to marry after the counseling was finished.[18]

The second alleged interest was protection of the welfare of out-of-custody children by encouraging parents to make payments for their support.[19] Justice Marshall perceived the statute as so characterized to be a "collection device." This interest could not justify the statute because the state had other means to collect support payments which did not interfere with the constitutionally protected right.[20]

Finally, Justice Marshall found that the statute was both over- and under-inclusive if its purpose was to ensure that parents could meet prior child support payments before incurring respon-

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[14] Zablocki v. Redhail, 434 U.S. 374, 388 (1978). A statute which infringes certain fundamental rights must serve compelling state interests under equal protection analysis. Shapiro v. Thompson, 394 U.S. 618, 634 (1968). The statute must be narrowly drawn to effect those interests without unnecessary interference with the fundamental right. Dunn v. Blumstein, 405 U.S. 330, 343 (1972). For examples of fundamental rights under equal protection *see* text accompanying note 42, *infra*.

[15] Zablocki v. Redhail, 434 U.S. 374, 386 (1978).

[16] *Id.* at 388.

[17] *Id.* at 389.

[18] *Id.* at 388.

[19] *Id.* at 389.

[20] Justice Marshall noted that under Wisconsin law "court determined support obligations may be enforced directly via wage assignments, civil contempt proceedings, and criminal penalties." *Id.* at 389-390. He also asserted that the "collection device" was, of course, ineffective in collecting payments from persons unable to pay. These people were prohibited from marrying until their economic position improved. *Id.* at 389.

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sibilities stemming from the new marriage relationship.[21] The statute was under-inclusive because it did not attempt to prevent new financial obligations in areas other than marriage. It was over-inclusive because it did not allow for the possibility that the marriage might improve the financial position of the parent and thus increase the ability of the parent to meet the support obligation. Justice Marshall therefore found that the statute was not sufficiently tailored to the state interests to survive critical examiniation.[22]

Justice Powell concurred in the judgment but wrote a separate opinion because he felt that applying the compelling state interest test to a state law which interfered with the right to marry intruded excessively into an area traditionally left to state regulation.[23] Because he recognized the special nature of the right involved in the case, however, he applied an intermediate standard of review and found that the statute did not have a "fair and substantial" relation to the alleged purposes.[24] It therefore violated both due process and equal protection.

Justice Stevens also concurred in a separate opinion. In his view, the statute discriminated between rich and poor without rational justification, thus violating the equal protection clause.[25] Justice Stevens pointed to several inconsistencies in the statute. It prevented indigent persons from marrying economically independent spouses;[26] the parent with custody of the children was not subject to regulation;[27] and those persons least likely to be able to provide for their children would, in many cases, not be covered by the statute because support orders are generally

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[21] *Id.* at 390.

[22] *Id.* at 390-391.

[23] Justice Powell was afraid that the application of a compelling state interest test "would cast doubt on the network of restrictions that the states have fashioned to govern marriage and divorce, including bans on incest, bigamy and homosexuality." *Id.* at 399.

[24] *Id.* at 400. In a concurring opinion in Craig v. Boren, 429 U.S. 190 (1976), Justice Powell discussed the standard of review and sex-based classifications saying, "Reed and subsequent cases involving gender-based classifications to make clear that the Court subjects such classifications to a more critical examination than is normally applied when 'fundamental' constitutional rights and 'suspect classes' are not present." *Id.* at 210. He then defined the standard of review as "whether the state legislature, by the classification it has chosen, had adopted a means that bears a 'fair and substantial relation' to this objective." *Id.* at 211.

[25] Zablocki v. Redhail, 434 U.S. 374, 406 (1978).

[26] *Id.* at 405.

[27] *Id.* at 405-406.

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based on the ability of the parent to pay.[28] Although Justice Stevens termed the Wisconsin statute "irrational," he indicated in a footnote that the standard of review should be less deferential than the rational test but not as demanding as the compelling state interest standard.[29]

In yet another concurring opinion, Justice Stewart disagreed with Justice Marshall's equal protection analysis but concurred in the result. Citing *San Antonio Independent School District v. Rodriguez*,[30] Justice Stewart maintained that the equal protection clause is concerned with "invidiously discriminatory classifications," not substantive rights.[31] While Justice Stewart denied the existence of a constitutional right to marry, he found that the due process clause of the fourteenth amendment guaranteed freedom of choice with regard to decisions concerning marriage and family life.[32] He therefore found that there were substantive limits on state regulation of marriage.[33]

Turning to the question of the weight of the state interests involved, Justice Stewart stated that the statute might reflect a legislative judgment that people should fulfill their obligations arising out of previous relations before beginning new responsibilities. The statute was irrational with regard to this purpose, however, when applied to persons too poor to make support payments.[34] If viewed as an attempt to ensure marriages of greater financial viability, the statute was more rational. By prohibiting marriage to achieve that purpose, however, it excessively burdened a protected right.[35]

Justice Rehnquist was the lone dissenter.[36] He relied on a case decided earlier in the term, *Califano v. Jobst*,[37] in which the Court upheld a benefit provision of the Social Security Act against constitutional challenge under the fifth amendment. The application

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[28] *Id.* at 406.

[29] *Id.* at 406 n.10.

[30] 411 U.S. 1 (1973). In *Rodriguez* plaintiffs sued to invalidate a state system of school financing which determined the expenditure per student within a district by the level of property taxes within the district. The Court found the system to be constitutional holding that there is no constitutional right to education and that wealth discrimination alone does not justify application of the strict scrutiny test. *Id.* at 18-39.

[31] Zablocki v. Redhail, 434 U.S. 374, 391 (1978).

[32] *Id.* at 392-393.

[33] *Id.* at 392.

[34] *Id.* at 393-394.

[35] *Id.* at 394-395.

[36] *Id.* at 407.

[37] 434 U.S. 47 (1977).

of the provision resulted in the termination of benefits paid to a disabled man upon his marriage to a disabled woman because she was not a beneficiary under the Act.[38] Justice Rehnquist maintained that the Court in *Califano* had applied a lenient standard of review, finding that Congress could have reasonably assumed that a disabled person who married a person not a beneficiary would be less likely to need aid after the marriage,[39] even though the termination of benefits in that situtation is a disincentive to marry. Justice Rehnquist felt *Jobst* and *Zablocki* were analogous in terms of the burden placed on the marriage relationship and that *Jobst* should be controlling as to the applicable standard of review. Applying the low level of scrutiny utilized in *Jobst* to the statute in *Zablocki,* Justice Rehnquist believed the statute should be held constitutional.[40]

Justice Marshall's opinion can be characterized as an application of the substantive branch of equal protection which the Court has developed in recent years. When the Court uses this branch of equal protection it focuses on the nature of the right which the classification affects.[41] Classic equal protection, on the other hand, concentrates on the character of the classifying factor. Before *Zablocki,* the Court had limited application of substantive equal protection to interstate travel and voting rights.[42] In *San Antonio Independent School District* the Court seemed to signal a reluctance to increase the number of substantive rights which could be accorded protection by the equal protection clause.[43]

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[38] The reason why the wife did not or could not receive Social Security benefits is not clearly indicated in the opinion. *Id.* at 48.

[39] Zoblocki v. Redhail, 434 U.S. 374, 408 (1978).

[40] *Id.*

[41] "The concern in these cases is not with the classifying factor, but rather with the importance of the state interest asserted and the closeness of the relationship between the classification and that interest." Barrett, *Judicial Supervision of Legislative Classifications - A More Modest Role for Equal Protection?* 1976 B.Y.U.L. Rev. 89, 109.

[42] *Id.* at 120. *See* Shapiro v. Thompson, 394 U.S. 618 (1969) (interstate travel or migration); Reynolds v. Sims, 377 U.S. 533 (1964) (voting rights and elections).

[43] It is not the province of this Court to create substantive constituional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing

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It would have been more historically consistent for the Court to have used a substantive due process analysis[44] in *Zablocki,* especially in light of the cases subsequent to and including *Griswold v. Connecticut*[45] which dealt with the freedom of choice in decisions concerning marriage and the family. The Court has consistently treated such rights as falling within the protective purview of the due process clause.[46]

In *Griswold* several persons were arrested and convicted of counseling married persons in the use of contraceptives.[47] The Court reversed the convictions. Justice Douglas, writing for the majority, emphasized that the right to privacy, which he held the state had invaded, was founded on the marriage relationship.[48] The Court discussed the origins and scope of the right to privacy in *Roe v. Wade,*[49] the first of the abortion cases. It included within that general right "activities relating to marriage."[50] The Court declared in *Roe* that the right to privacy was based on the "Fourteenth Amendment's concept of personal liberty and restrictions upon state action,"[51] apparently assigning the right to

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> whether there is a right to education explicitly or implicitly guaranteed by the Constitution.

411 U.S. 1, 33-34 (1973).

[44] The essence of substantive due process was described by Justice Harlan in Poe v. Ullman, 367 U.S. 497 (1961).

> The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement.

Id. at 542-543 (Harlan, J. dissenting).

[45] 381 U.S. 479 (1965).

[46] The right to privacy cases beginning with Griswold v. Connecticut, 381 U.S. 479 (1965) and including Roe v. Wade, 410 U.S. 113 (1973) and Doe v. Bolton, 410 U.S. 129 (1973), *inter alia,* are commonly thought to be substantive due process cases. Dixon, *The "New" Substantive Due Process and the Democratic Ethic: A Prolegomenon,* 1976 B.Y.U.L. REV. 43, 84-85; Hunter, *Kelly v. Johnson and Tonsorial Taste: The Death Knell of Due Process?* 41 ALBANY L. REV. 411, 433-35 (1977).

[47] 381 U.S. 479, 480.

[48] *Id.* at 485-86. Justice Douglas said, "The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees." *Id.*

[49] 410 U.S. 113 (1973).

[50] *Id.* at 113.

[51] *Id.* at 153.

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the realm of substantive due process.

The case on which Justice Marshall primarily relied in *Zablocki, Loving v. Virginia,*[52] was concerned with the racial classification of an anti-miscegenation statute. The Court found that the classification violated the equal protection clause.[53] It also concluded that a statute which burdened the right to marry with an invidious racial classification violated due process.[54] Justice Marshall in *Zablocki* cited *Loving* only to establish the fundamentality of the right to marry. He ignored the Court's application of due process analysis to that right.

Another anomaly in Justice Marshall's equal protection analysis is his statement that "reasonable regulations that do not significantly interfere with the marriage relationship may legitimately be imposed."[55] In several of the cases involving interstate travel the Court has indicated that its equal protection analysis of this substantive right would result in application of strict scrutiny of the regulation regardless of the burden imposed.[56] Justice Marshall's suggestion that the state might impose "reasonable regulations" with regard to the right to marry seems more consistent with the classic substantive due process approach of weighing the degree of the burden on the right against the state interest in imposing the burden.[57]

It may be that Justice Marshall views the equal protection clause as an all-purpose doctrinal tool applicable whether or not a statute employs a suspect classification or burdens a fundamental or protected right. His "spectrum of standards" approach to equal protection seems to embody this approach. The spectrum of standards model assumes that equal protection protects virtually all interests or activities in varying degrees.[58] Justice Marshall apparently believes such an approach to be appropriate even in cases where a specific constitutional provision protects the right in question. For example, in *Police Dept. v. Mosely*[59] he

[52] 388 U.S. 1 (1966).

[53] *Id.* at 12.

[54] *Id.*

[55] Zablocki v. Redhail, 434 U.S. 374, 386 (1978).

[56] Barrett, supra note 41, at 117.

[57] I am indebted to Prof. Edward L. Barrett, Jr., of the University of California, Davis, King Hall School of Law, for his observation.

[58] For a detailed explanation of Justice Marshall's position on the equal protection clause and his spectrum of standards model, *see* Yarbrough, *The Burger Court and Unspecified Rights: On Protecting fundamental and Not-So-Fundamental "Rights" or "Interests" Through a Flexible Conception of Equal Protection,* 1977 DUKE L.J. 143.

[59] 408 U.S. 92 (1971). The case involves an ordinance which made picketing

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used the equal protection clause to invalidate a statute which infringed first amendment freedoms. Therefore Justice Marshall has no difficulty applying the equal protection clause to virtually any right regardless of precedent or doctrine.

The concurrence of four justices in Justice Marshall's opinion is more difficult to explain. It seems unlikely that they have accepted Justice Marshall's "spectrum of standards" view.[60] It may be that the Court no longer draws a meaningful distinction between due process and equal protection for purposes of analyzing statutes which infringe fundamental rights. Arguably, present constitutional doctrine does not practically distinguish fundamental rights analysis under due process from fundamental rights analysis under equal protection.[61] An intersection of due process and equal protection occurred when substantive due process incorporated the compelling state interest test from equal protection[62] and equal protection expanded into the field of fundamental rights.[63] Therefore, there seems to be no principled reason for restricting substantive equal protection to voting, interstate travel or criminal appeals. The doctrine logically should extend to encompass all rights deemed fundamental or protected.

Although this theory might explain the concurrences in *Zablocki*, it does not appear to be the position of the Court. In *Moore v. City of East Cleveland*[64] the Court suggested that the

near a primary or secondary school from one-half hour before school started until one-half hour after it ended, an act of disorderly conduct. An exception was made for the picketing of schools in the case of a labor dispute and it was on this distinction that Justice Marshall based his application of the equal protection clause. *Id.* at 99-100. It has been suggested that the use of the equal protection clause to analyze laws which affect a constitutional right may result in a distorted analysis. *See* Barrett, supra note 41, 108-112.

[60] At least there has been no indication in previous cases that the other Justices are prone to agree with Justice Marshall. Justice Brennan may be an exception. He joined in Justice Marshall's dissent in Dandridge v. Williams, 397 U.S. 471 (1970), in which Justice Marshall outlined his spectrum of standards model.

[61] This approach is illustrated in Comment, *Of Interests, Fundamental and Compelling: The Emerging Constitutional Balance,* 57 B.U.L. Rev. 462 (1971) in which the author appears to treat the equal protection clause and the due process clause as interchangeable for purposes of analyzing a fundamental right. A possible but doctrinally unsatisfying explanation of the Court's use of equal protection in *Zablocki* is the reluctance of the Court to apply the due process clause because of the unhappy history of substantive due process. Zablocki v. Redhail, 434 U.S. 374, 394 (1978) (Stewart, J., concurring).

[62] Roe v. Wade, 410 U.S. 113, 155 (1973).

[63] Shapiro v. Thompson, 394 U.S. 618 (1969).

[64] 431 U.S. 494 (1977).

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criteria circumscribing the bounds of substantive due process are different from those delineating the contours of substantive equal protection. The Court said, "Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect for the teachings [and] solid recognition of the basic values that underlie our society.'"[65] In an accompanying footnote the Court stated that analogous restraint governed the question of which rights were entitled to protection under the equal protection clause. Such rights would be restricted to those "explicitly or implicitly guaranteed by the Constitution."[66] Thus a protected right under due process might not receive heightened judicial scrutiny under equal protection analysis and vice versa.

It appears that the right to privacy may be an example of a right which satisfies both criteria. As has been discussed above, the Court has shielded the right to privacy with the fourteenth amendment's due process clause. In *Eisenstadt v. Baird*[67] the Court said that if the statute involved in that case had infringed "fundamental freedoms under Griswold" the Court would have had to scrutinize the statute in light of the compelling state interest test under equal protection doctrine.[68] Although the Court did not elaborate the meaning of "fundamental freedoms under Griswold," it is reasonable to assume that the freedoms contemplated were the same as those represented under the right to privacy rubric. It would seem a small step to include the right to marry among those freedoms, as the Court did in *Zablocki.*

It appears, therefore, that the Court's rather surprising use of equal protection analysis in *Zablocki* may be reconciled with precedent and present constitutional doctrine. The Court in prior cases has found that the right to privacy is express or implicit in the Constitution and may therefore be protected as a fundamental right under the equal protection clause. The right to marry is included within the more general "right to privacy." In *Zablocki* the Court used the Equal Protection Clause to strike down a law which infringed the right to marry. Although *Zablocki* may be consistent with present doctrine questions concerning the consistency of the doctrine itself remain. Should the equal protection clause and its judicially created doctrine, including the

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[65] *Id.* at 503.

[66] *Id.* at 503 n.10. The Court had first said that it would restrict the application of substantive equal protection to rights "explicitly or impliedly guaranteed by the Constitution" in San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 33-34 (1973).

[67] 405 U.S. 438 (1972).

[68] *Id.* at 447 n.7.

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compelling state interest test, be applied in cases involving substantive rights at all? With the exception of Justice Stewart, the Court has not expressly addressed this question. The Court's failure to confront and satisfactorily resolve this question has resulted in an unexplained distinction in criteria between rights which qualify as fundamental under due process and those which pass muster as fundamental rights under equal protection.

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