Loyola of Los Angeles Law Review

Volume 4 | Number 1 Article 6

2-1-1971

Redefining Federal Largess through State Maximum Grant Regulations: Dandridge v. Williams

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REDEFINING FEDERAL LARGESS THROUGH STATE MAXIMUM GRANT REGULATIONS:

DANDRIDGE v. WILLIAMS[1]

Every state in the Union participates[2] in the federally assisted program of Aid to Families with Dependent Children (AFDC).[3] Some twenty[4] of the states, in an effort to lessen burgeoning welfare expenditures,[5] have placed an upper limit on aid an eligible family may receive under this program. Maryland is one of these states.[6] In *Dandridge v. Williams* the Supreme Court of the United States considered for the first time the statutory and constitutional bases for such maximum welfare grants. Specifically, the Court found Maryland's regulation to be a legitimate exercise of state administrative policy and thus vindicated the general deployment of the maximum welfare grant by the states.

The Aid to Families with Dependent Children (AFDC) program is one of the four "categorical assistance" programs created by the Social Security Act of 1935.[7] The purpose of the Act is to encourage

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[1] 397 U.S. 471 (1970).

[2] *Id.* at 472-73.

[3] Social Security Act §§ 401 *et seq.*, 42 U.S.C. §§ 601-10 (Supp. V, 1969) *amending* 42 U.S.C. §§ 601-09 (1964). Hereinafter all citations in text or footnote will be to Title 42, unless otherwise noted.

[4] 397 U.S. at 481.

[5] From 1960 to 1969 the cost of public assistance nationally has surged from $2.5 billion to more than $10 billion annually. Brozen, *Toward An Ultimate Solution*, SATURDAY REV., May 23, 1970, at 30. The number of individuals receiving welfare in America presently exceeds 12 million. Jones, *Pressure Builds on California's Welfare System*, Los Angeles Times, Nov. 16, 1970, pt. 1, at 1, col. 1. The greatest portion of this number are AFDC recipients. *See* 7 WELFARE IN REV., Sept.-Oct., 1969, at 32 Table I.

[6] *See* 8A MD. CODE ANN., art. 88A §§ 44A *et seq.* (Michie 1969); MD. MAN. OF DEP'T OF SOC. SERVICES, Rule 200 § X, Sched. B at 23 (1970), *formerly* MD. MAN. OF DEP'T OF PUB. WELF. Pt. II, Rule 200 § VII, 1, at 20 (hereinafter cited as Rule 200 § X, B); 397 U.S. at 474 n.4.

[7] Ch. 531, §§ 1 *et seq.*, 49 Stat. 620, *as amended*, 42 U.S.C. §§ 301-1394 (1964), *as amended*, 42 U.S.C. §§ 301-1396 (Supp. V, 1969). The Social Security Act, as amended, creates the following categorical assistance programs: Aid to Families with Dependent Children, 42 U.S.C. §§ 601-10 (Supp. V, 1969), *amending* 42 U.S.C. §§ 601-09 (1964); Old Age Assistance, 42 U.S.C. §§ 302-06 (Supp. V, 1969), *amending* 42 U.S.C. §§ 301-06 (1964); Aid to the Blind, 42 U.S.C. §§ 1202-06 (Supp. V, 1969), *amending* 42 U.S.C. §§ 1201-06 (1964); and Aid to the Permanently and Totally Disabled, 42 U.S.C. §§ 1352-55 (Supp. V, 1969), *amending* 42 U.S.C. §§ 1351-55 (1964).

"Categorical assistance" is to be distinguished from "general assistance". "General assistance" programs are financed solely on the state or local level. "Categorical assistance" programs, which handle the bulk of public welfare monies, operate through a

> the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life.[8]

Under the program, public assistance is granted to a "dependent child", defined by the Act as a "needy child . . . deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent" who lives with one of a specified list of relatives and is either under the age of eighteen or is under the age of twenty-one and a full time student.[9]

While state participation in the AFDC program is voluntary, those states "which desire to take advantage of the substantial federal funds available for distribution to needy children are required to submit an AFDC plan for the approval of the Secretary of Health, Education, and Welfare (HEW)."[10] This plan must meet certain requirements established by HEW.[11] However, the states have ample latitude in assigning AFDC resources, since each state may freely prescribe its own standard of need and determine its level of benefits by the amount of funds it devotes to the program.[12]

Maryland has adopted a schedule, which has been approved by HEW, setting out its standards of need and designating what level of benefits will be paid.[13] The schedule, like the schedules in other states, calculates a family's standard of need as a dual function of the number of members in the family and the income (less the family's present resources) required for such a family to meet the cost of necessities. As a rule, the level of benefits under the schedule increases with each additional mem-

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system of matching federal grants designed to encourage states to supply aid to congressionally defined groups of needy individuals. *See* Note, *Federal Judicial Review of State Welfare Practices,* 67 COLUM. L. REV. 84 (1967); *see also* Wedemeyer & Moore, *The American Welfare System,* 54 CALIF. L. REV. 326 (1966).

8 42 U.S.C. § 601 (Supp. V, 1969).

9 *Id.* § 606(a).

10 King v. Smith, 392 U.S. 309, 316-17, (1968), *citing* 42 U.S.C. §§ 601-04 (Supp. V, 1969).

11 42 U.S.C. § 602 (Supp. V, 1969).

12 392 U.S. at 318-19.

13 The various states are free to encompass within their standard of need diverse items which other states do not include in assessing cost. There are also differences with respect to what level of benefits a state chooses to pay. Four courses of administration are possible: 1) grants may be made in full accord with the ascertained need of eligible families; 2) each eligible family may receive a percentage of its determined need; 3) grants may be made in full accord with the ascertained need of eligible families but with a maximum upper limit on aid imposed; and 4) each eligible family may receive a percentage of its determined need but with a maximum upper limit on aid imposed. Maryland employs the third alternative. 397 U.S. at 473.

ber in the family although the increments become progressively smaller.[14] Maryland's Department of Social Services has also promulgated a "maximum grant" regulation which imposes a $250 per month upper limit upon AFDC benefits payable to a family, irrespective of family size or actual need.[15] This grant limitation is not applicable to eligible mem-

[14] *See* Rule 200. At the time this action was brought the following schedule (MD. MAN. OF DEP'T OF PUB. WELFARE, Rule 200, Sched. A at 27) was in use for determining subsistence needs, exclusive of rent:

STANDARD FOR DETERMINING COST OF SUBSISTENCE NEEDS

Number of persons in assistance unit (include unborn child as an additional person)	I	II	III	IV	V
	Monthly costs when				
	No heat or utilities included with shelter	Light and/or cooking fuel included with shelter	Heat with or without light included with shelter	Heat, cooking fuel and water heating included with shelter	Heat and all utilities included with shelter
1 person living:					
Alone	$51.00	$49.00	$43.00	$40.00	$38.00
With 1 person	42.00	41.00	38.00	36.00	35.00
With 2 persons	38.00	37.00	35.00	34.00	33.00
With 3 or more persons	36.00	35.00	34.00	33.00	32.00
2 persons living:					
Alone	84.00	82.00	76.00	72.00	70.00
With 1 other person	76.00	74.00	70.00	68.00	66.00
With 2 or more other persons	72.00	70.00	68.00	66.00	64.00
3 persons living:					
Alone	113.00	110.00	105.00	101.00	99.00
With 1 or more other persons	108.00	106.00	101.00	99.00	97.00
4 persons	143.00	140.00	135.00	131.00	128.00
5 persons	164.00	162.00	156.00	152.00	150.00
6 persons	184.00	181.00	176.00	172.00	169.00
7 persons	209.00	205.00	201.00	197.00	193.00
8 persons	235.00	231.00	227.00	222.00	219.00
9 persons	259.00	256.00	251.00	247.00	244.00
10 persons	284.00	281.00	276.00	271.00	268.00
Each additional person over 10 persons	24.50	24.50	24.50	24.50	24.50

Modification of standard for cost of eating in restaurant: Add $15 per individual.

Other schedules set the estimated cost of shelter in the various counties in Maryland. *See id.*, Sched. B—Plan A, p. 29; Sched. B—Plan B, p. 30. The present schedules, which are substantially the same, appear in the Maryland Manual of Dept. of Social Services, Rule 200, pp. 33, 35. 397 U.S. at 488 (App.).

[15] Rule 200 § X, B. The Rule restricts to $250 per month the AFDC benefits payable in selected counties including the city of Baltimore, the domicile of the plaintiffs. In all other counties the upper limit is $240. The question whether a state may vary its schedule of need and benefit in accordance with the county of residence of AFDC recipients has been raised but as yet remains undecided. Rothstein v. Wyman, 303 F. Supp. 339 (S.D.N.Y. 1969), *vacated and remanded*, 398 U.S. 275 (1970).

bers of a family who reside in another household or in a child care institution.[16]

The plaintiffs-appellees are members of large families who are applicants for, or recipients of, public assistance pursuant to the AFDC program. They have brought suit for themselves and on behalf of the class which they represent. Typifying the class is plaintiff Linda Williams who lives with her eight children, ranging from four to sixteen years in age. Her husband is absent from the home, she and one of her children are in poor health, and the family is without any financial resources. Under the state-determined standard of need, her family is entitled to benefits amounting to $296.15 per month, but due to the imposition of the maximum welfare regulation she receives only $250 per month.[17]

The defendants-appellants are Edmund P. Dandridge, Jr., the head of Maryland's Department of Social Services, and other welfare officials of the state.[18]

The appellees asked a three-judge district court to declare invalid and permanently enjoin the enforcement of the Maryland maximum grant regulation.[19] They contended that the maximum grant limitation was not only inconsistent with the Social Security Act of 1935 but also discriminated against large families who receive AFDC benefits in violation of the Equal Protection Clause of the Fourteenth Amendment.[20]

The appellees advanced the argument that the Maryland Department of Social Services Rule 200, § X, B[21] was in fundamental conflict with the Social Security Act,[22] and in particular with 42 U.S.C. § 602(a)(10), as amended, which in pertinent part states:

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16 Williams v. Dandridge, 297 F. Supp. 450, 453 (D. Md. 1968).

17 *Id.*

18 Hereinafter all appellants will be referred to as "the state of Maryland".

19 The court was convened pursuant to 28 U.S.C. §§ 1343(3), (4), 2281 (1964), and 42 U.S.C. § 1983 (1964). 297 F. Supp. at 453.

20 297 F. Supp. at 453.

21 The challenged regulation, Rule 200, § X, B reads as follows:

B. *Amount*—The amount of the grant is the resulting amount of need when resources are deducted from requirements as set forth in this Rule, subject to a maximum on each grant from each category:
   1. $250—for local departments under any 'Plan A' of Shelter Schedule
   2. $240—for local departments under any 'Plan B' of Shelter Schedule
   Except that:
      a. If the requirements of a child over 18 are included to enable him to complete high school or training for employment (III-C-3), the grant may exceed the maximum by the amount of such child's needs.
      b. If the resources of support is paid as a refund (VI-B-6), the grant may exceed the maximum by an amount of such refund. This makes consistent the principle that the amount from public assistance funds does not exceed the maximum.
      c. The maximum may be exceeded by the amount of an emergency grant for items not included in a regular monthly grant. (VIII)
   3. A grant is subject to any limitation established because of insufficient funds.

22 The Supremacy Clause, U.S. CONST. art. VI, cl. 2, operates to invalidate a

> A State plan for aid and services to needy families with children . . . must provide . . . that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to *all eligible individuals.* (emphasis added)[23]

It was contended that the phrase "all eligible individuals" applies not merely to those who make application for aid under the program but to the class of all "dependent" children, without regard to their sibling ranking.[24] The application of the state regulation, it was charged, effected a denial of AFDC benefits to the younger children in large families.[25] Such a result was said never to have been countenanced either by Congress or HEW.[26]

The appellees also claimed that Maryland's maximum grant regulation, instead of providing for family stability, tended to fractionate the family unit.[27] The Maryland regulation, appellees alleged, encourages a large family on the AFDC program to maximize its benefits by "farming out" some of its "dependent" children with eligible relatives[28] or agencies, a course of conduct antithetical to the purpose of the AFDC program as outlined in 42 U.S.C. § 601.

Further, Rule 200 § X, B was denounced for precipitating the denial of assistance, regardless of determined need, to some of the children in large families participating in the AFDC program. Such a regulation, it was asserted, results in an arbitrary and unreasonable discrimination under either the traditional or "special scrutiny" tests of equal protection.[29]

The district court, invoking jurisdiction under the Civil Rights Act[30] and 42 U.S.C. § 1983, initially held the Maryland regulation to be in

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state law which "either frustrates the purpose of the national legislation or impairs the efficiency of those agencies of the Federal government to discharge the duties for the performance of which they were created." *See* Nash v. Florida Indus. Comm'n, 389 U.S. 235, 240 (1967), *quoting* Davis v. Elmira Savings Bank, 161 U.S. 275, 283 (1896).

23 42 U.S.C. § 602(a)(10) (Supp. V, 1969).

24 Brief for Appellees at 56, Dandridge v. Williams, 397 U.S. 471 (1970).

25 *Id.* at 55.

26 *Id.* at 55-63.

27 *Id.* at 28.

28 *See* 42 U.S.C. § 606 (1964) *as amended,* 42 U.S.C. § 606 (Supp. V, 1969), which reads in part:

> (a) The term 'dependent child' means a needy child . . . who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home.
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> * * * * *
>
> (c) The term 'relative with whom any dependent child is living' means the individual who is one of the relatives specified in subsection (a) of this section. . . .

29 Brief for Appellees at 18-48, Dandridge v. Williams, 397 U.S. 471 (1970).

30 28 U.S.C. § 1343(3), (4) (1964).

conflict with both the federal statute and the equal protection clause.[31] Subsequently,[32] the district court filed a modified opinion which bottomed the regulation's invalidity exclusively on the constitutional ground.[33]

The state of Maryland appealed from the injunction granted by the district court[34] and the Supreme Court noted probable jurisdiction.[35] After first reviewing the statutory grounds and discovering no support for the appellees' position there,[36] the Court found it necessary to consider, and ultimately to reject, the existence of the constitutional impairment suggested by the appellees. In reversing the district court Justice Stewart wrote an opinion supported at large by the majority of a Court of eight (Justice Blackmun was not then a member of the Court).[37] Justice Black, with whom Chief Justice Burger joined, and Justice Harlan filed short concurring opinions. Justice Douglas registered a dissent limited to the statutory grounds alone, while Justice Marshall, speaking for himself and Justice Brennan, dissented on both statutory and constitutional grounds.

In being called upon to review the construction given Subchapter IV of the Social Security Act of 1935,[38] particularly 42 U.S.C. § 602,[39] the Court treads on familiar but convoluted ground.[40] In a companion case decided the same day as *Dandridge* the difficulty in interpreting a subsection of the statute lent occasion for Justice Harlan to observe:

> The background of [§ 602(a)(23)] reveals little except that we have before us a child born of the silent union of legislative compromise. Thus, Congress,

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31 297 F. Supp. at 459.

32 After the district court's first opinion was entered the state of Maryland lodged a multi-faceted motion which the district court treated in essence as a motion to reconsider.

33 297 F. Supp. at 459 (supplemental opinion).

34 Under 28 U.S.C. § 1253 (1964) a direct appeal to the Supreme Court may be made following the granting or denial of a civil injunction by a properly convened three-judge district court. Such an appeal is a matter or right. *See* Radio Corp. of America v. United States, 95 F. Supp. 660, 664 (N.D. Ill. 1950), *aff'd* 341 U.S. 412 (1951).

35 Dandridge v. Williams, 396 U.S. 811 (1969).

36 The Supreme Court reviewed the statutory question since a reviewing court must consider whether a judgment may be supported on any ground including those not relied upon or considered by the trial court. The statutory question was reviewed first, because were it to be resolved favorably to the appellees, it would be superfluous to ruminate about the constitutional issue. 397 U.S. at 475-76 & n.6.

37 It may be assumed that Justice Blackmun would have sided with the majority in *Dandridge*. In Wyman v. James, 39 U.S.L.W. 4085 (U.S. Jan. 12, 1971), another AFDC case involving a questioned state regulation, Justice Blackmun wrote an opinion which drew support from the *Dandridge* majority, and criticism from its dissenters.

38 Ch. 531, §§ 1 *et seq.*, 49 Stat. 620, *as amended*, 42 U.S.C. §§ 601-10 (Supp. V, 1969).

39 42 U.S.C. § 602 (Supp. V, 1969), *formerly* ch. 531, §§ 1 *et seq.*, 49 Stat. 627 (1935).

40 Rosado v. Wyman, 397 U.S. 397 (1970); King v. Smith, 392 U.S. 309 (1968).

> as it frequently does, has voiced its wishes in muted strains and left it to the courts to discern the theme in the cacophony of political understanding.[41]

Justice Stewart rejects the argument that the Social Security Act precludes a state from employing a maximum grant regulation to limit the amount of AFDC aid a family eligible for welfare might receive. Primarily, he asserts that if the § 602(a)(10) requirement of provision for "all eligible individuals" is read in conjunction with § 601, which gives states latitude in meeting the Act's requirements, the maximum grant is manifestly an acceptable method of balancing demands for public assistance against the finite resources of a state's welfare budget. In addition, he reasons, although maximum grant regulations may lead to the attenuation of family bonds, they do not destroy them. It is destruction of such bonds that contravenes the purpose of the AFDC program. Lastly, HEW and Congress both have recognized and approved maximum grant regulations.

Addressing himself to the question of whether Maryland's maximum grant provision denies per capita benefits to the youngest children in the largest families, Justice Stewart comments that "a more realistic view is that the lot of the entire family is diminished because of the presence of additional children without any increase in payments."[42] Whether such a per capita diminution in the family grant is compatible with the AFDC sections[43] is the question defining the ambit of Justice Stewart's opinion.[44]

He relies upon language in *King v. Smith*[45] stressing that a state is free to set both its standard of need and the level of benefits for its AFDC program. In envisaging *King* as a necessary concomitant of § 601 of the Act, which requires a state to furnish aid "as far as practicable under the conditions in such State", Justice Stewart is noticeably willing to give a state almost free rein in the distribution of its available AFDC funds.[46]

Justice Stewart points out that in light of an expressed Congressional concern for keeping children within the nucleus of their family the states must develop responsive welfare programs.[47] Since Maryland's resources are limited, it can choose either to "support some families adequately and others less adequately, or not give sufficient support to any family."[48]

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41 397 U.S. at 412.

42 397 U.S. at 477. Justice Stewart notes that it cannot be gainsaid that it was the grant of the last child which was wholly rescinded rather than that of the first child. "In fact, it is the *family* grant that is affected." *Id.* at 477-78.

43 42 U.S.C. §§ 601-10 (Supp. V, 1969) *amending* 42 U.S.C. §§ 601-09 (1964).

44 397 U.S. at 478.

45 392 U.S. 309, 334 (1968).

46 397 U.S. at 478.

47 *Id.* at 479.

48 *Id.* This is an interesting way to describe Maryland's alternatives. It is readily apparent that those receiving "less adequate" support would in fact obtain less money than those who received "not sufficient" support.

He concludes a state may, consistent with the language in § 602(a)(10), follow either course and still comply with the dictates of the federal law as "long . . . as some aid is provided to all eligible families and all eligible children."[49]

> We see nothing in the federal statute that forbids a State to balance the stresses which uniform insufficiency of payments would impose on all families against the greater ability of large families—because of the inherent economies of scale—to accommodate their needs to diminished per capita payments. The strong policy of the statute in favor of preserving family units does not prevent a State from sustaining as many families as it can, and providing the largest families somewhat less than their ascertained per capita standard of need.[50]

Justice Stewart recognizes that family bonds may be stretched by the "farming out" of children in an attempt by some large families to minimize the effect of the maximum grant upon their per capita AFDC awards. Illustrative of how the appellee Williams could disband part of her family and thus maximize her welfare benefits is the following excerpt from the opinion of the district court:

> If Mrs. Williams were to place two of her children of twelve years or over with relatives, each child so placed would be eligible for assistance in the amount of $79.00 per month, and she and her six remaining children would still be eligible to receive the maximum grant of $250.00.[51]

Of course, the district court has employed the essential, but probably correct, assumption that Mrs. Williams and others similarly situated are versed with knowledge of the state welfare regulations and also have eligible relatives willing to take into their family an additional child or two.[52] Justice Stewart does not quarrel with this assumption. He notes that eligible relatives for such "farming out" must have a kinship tie with the dependent children. The nature of permissible kinship relations is spelled

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[49] *Id.* at 481.

[50] *Id.* at 479-480. It is also noted by Justice Stewart that the maximum grant provision causes only one-thirteenth of Maryland's AFDC families to receive less than their determined need. *See* Maryland Dept. of Social Services, 1970 Fiscal Year Budget which projects that were Maryland to allocate an identical amount of funds under a percentage limitation rule, there would be no AFDC family which would receive monies equal to its ascertained level of need. This is correct but does not truly reflect the situation. Under a percentage limitation every AFDC family might, for example, receive 95% of its need while families to whom a maximum grant applies may receive funds covering only 75-85% of its scheduled need. This is the situation of the plaintiffs as outlined in Williams v. Dandridge, 297 F. Supp. 450, 453 (D. Md. 1968). *Id.* at 480 n.10.

[51] 397 U.S. at 501 (Douglas, J., dissenting) *quoting* 297 F. Supp. at 453.

[52] This is probably a reasonable assumption since a family requiring AFDC aid is likely to both inquire about how to receive more aid and obtain feedback from other welfare recipients. The fact that the family requires public assistance in the first place indicates they have no relatives willing and capable of lending financial assistance. Those relatives who are eligible for AFDC assistance would be more than happy to bring several dependent children and the attendant money grants into their home.

out in 42 U.S.C. § 606(a). Where a § 606(a) relationship exists, Justice Stewart accepts such "farming out" of dependent children as technically legitimate.[53]

Finally, Justice Stewart buttresses his view authorizing the imposition of maximum grant regulations with: (1) the position taken by the Department of Health, Education and Welfare (HEW) in approving Maryland's maximum grant regulation for more than twenty years, and (2) the actions of Congress in noting the existence but failing to excoriate the application by the state of maximum grant limitations on AFDC benefits.[54]

In his dissent Justice Marshall decries the Maryland plan as nothing less than a declination of subsidies for the support of certain dependent children whom the state itself has classified as aid-qualified. The maximum grant regulation is criticized as a stricture unrelated to the calculation of need, premised upon an unwarranted "economies of scale" rationale, and which transgresses the federal-state AFDC funding formula. An incidental and unpermitted function of the maximum grant is the fractionation of the large AFDC family in its attempt to maximize benefits. Lastly, both HEW's and Congress' views concerning maximum grant limitations are characterized as either unknown or not directly applicable to Maryland's regulation.

The dissent of Justice Marshall makes clear his belief the words of the Act should be strictly construed. Noting that the phrase "aid to families with dependent children" appears numerous times in the Act,[55] and is defined, *inter alia,* as "money payments *with respect to* . . . dependent children",[56] he states that nowhere in the AFDC Title is a state empowered to arbitrarily select from the class of needy dependent children those to whom it will provide aid.[57] Yet just such an occurrence is, he submits, the operant result of a maximum grant which cuts off monetary assistance to those children who are the seventh and succeeding members of an eligible family.[58]

Justice Marshall declares that in no wise is the maximum grant regulation related to calculation of need,[59] and further asserts that Justice Stewart is plainly wrong in his belief that large AFDC families are better able than small AFDC families to accommodate their needs to diminished per capita payments due to the "economies of scale". In the instant case, Maryland has already computed the level of need for the large family with the

53 "The kinship tie may be attenuated but it cannot be destroyed." 397 U.S. at 480.

54 *Id.* at 481-83.

55 42 U.S.C. § 602(a)(10) (Supp. V, 1969) is the most important section where it is found.

56 *Id.* § 606(b).

57 397 U.S. at 510-11 (Marshall, J., dissenting).

58 *Id.* at 509-10 n.2.

59 *Id.* at 509.

thought in mind that because there are numerous family members a per capita deduction to compensate for the purchasing economy of the group is in order.[60] Therefore, Justice Marshall reasons, to justify the use of a maximum grant regulation by decreasing only the per capita benefits of members of large families under the guise of economies of scale is to promote arbitrariness in awarding aid under state-defined need schedules.

Justice Stewart finds the "arbitrariness" he is accused of promoting to be permissible under the Social Security Act. Having posited that the family rather than the individual is the actual recipient of welfare benefits, and recognizing that the Social Security Act favors the preservation of family units, he suggests that with the limited amount of funds Maryland has devoted to its AFDC program, a maximum grant is the best means of insuring that the greatest number of families are provided with their ascertained standard of need.[61] The conclusion is even more accurate and perhaps more fair than it appears, considering the extant possibility of large families "farming out" their children, but is bottomed on the questionable enthymeme that arbitrariness in a regulation is justified where the greatest good is obtained for the greatest number.

The economies of scale attribution argument appears vulnerable to attack on other grounds. It manifests an attempt by a state to circumvent the problem of ascertaining with specificity the measure of need for large families receiving AFDC benefits. Also the marginal utility of AFDC monies is higher for the large AFDC families from whom the monies are taken than for the smaller AFDC families amongst whom the monies are redistributed. The result is economic loss for large AFDC families.[62]

Moreover, Justice Marshall recognizes that ultimately it is inconsistency with the intent of Congress and not arbitrariness which measures whether a promulgated regulation falls outside the scope of its enabling legislation.[63]

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60 It would be worth evaluating whether the magnitude of this deduction is well considered since the very condition of being poor might in part have been brought on and maintained by the parties' lack of buying expertise. *But see* 42 U.S.C. § 605 (1964), which reads in part: ". . . the State agency may provide for such counseling and guidance services with respect to the use of such payments and the management of other funds by the relative receiving such payments as it deems advisable. . . ."

61 397 U.S. at 480.

62 Economists have generally accepted the theory of the declining marginal utility of money. *See* P. SAMUELSON, ECONOMICS 427-29 (6th ed. 1964). One can safely surmise that a state in calculating its level of need for families of differing sizes strives, albeit unintentionally, to establish a uniform level of marginal utility. The imposition of a maximum grant tips the balance of marginal utility in favor of small AFDC families. *Cf.*, Note, *AFDC Income Attribution: The Man-In-The-House and Welfare Grant Reductions*, 83 HARV. L. REV. 1370, 1375-76 (1970).

63 397 U.S. at 517 (Marshall, J., dissenting).

A closer look need be taken at 42 U.S.C. § 602(a)(10) which provides that aid "shall be furnished with reasonable promptness to *all eligible individuals.*"[64] Justice Marshall construes the phrase "all eligible individuals" to mean "*all* needy dependent children" and would thus require a State AFDC payment schedule to provide for at least a minimal allotment to each needy child.[65] On the other hand, Justice Stewart feels that there is no reason why under this provision an individual standard of need must be met in full so long as some aid is given the family. Both Justices recognize that parents in families receiving assistance under this federal-state program will distribute whatever grant they receive so as to accord benefit to *all* their children.[66]

It is not reasonable to conclude that where a child's level of benefits is scheduled at a higher dollar value than the limit set under a maximum grant that the amount of assistance the child receives necessarily must be zero. Since the parents undertake to distribute the grant in every instance, a more rational approach, as suggested by Justice Stewart, would be to consider the individual level of benefits to have been diminished on a pro rata basis.[67] Indeed, it seems proper to conclude that the existence of a maximum grant regulation in a state has in most instances little bearing on whether state aid was given to "all eligible individuals".

A more persuasive argument against the maximum grant system follows from Justice Marshall's examination of the formula[68] used to determine the federal share of funds devoted to a state's AFDC program. Federal funds comprise $22 of the first $32 given a recipient, with all additional funds supplied by the state.[69] In Maryland the state spends on the average about $40 per recipient per month.[70] The total federal subsidy is based upon "the total number of recipients of aid to families with dependent children."[71] No limitation is placed upon the number of members in any family unit for whom the state is paid a federal subsidy. A state continues to receive this subsidy for every dependent child even though, due to the operation of a maximum grant regulation, none of the subsidy is passed on for the benefit of the additional dependent children

64 42 U.S.C. § 602(a)(10) (Supp. V, 1969) (emphasis added).

65 397 U.S. at 511 (Marshall, J., dissenting).

66 *Id.* at 477-78 (majority opinion), 511 (Marshall, J., dissenting). It is meaningless to suggest, as does Justice Douglas, that the statute is contravened where parents take increments of the payment, intended for their older children, and distribute them to their younger children since this is aid by the parents and not by the state. Even when there is no maximum grant present, the parents must make a similar distribution among their children in order to compensate for the fact that the level of benefit schedule for each additional child in the family becomes progressively lower. *Id.* at 502.

67 *Id.* at 477-78.

68 42 U.S.C. § 603 (Supp. V, 1969).

69 397 U.S. at 512 (Marshall, J., dissenting).

70 *Id.*

71 42 U.S.C. § 603 (Supp. V, 1969).

in large families. There is thus effected a transference from the state to the federal government of a proportionately greater burden of support as family size increases.[72] Justice Marshall adjudges it inimical to the intent of Congress for the Court to lend approval to the depriving of a needy dependent child of the benefit of the incremental part of the federal subsidy paid on his account.[73] The position is sound but does not disallow the application of a maximum grant to situations where a dependent child receives the full amount of his federal subsidy but little or no state aid.

Another charge leveled against the maximum grant regulation by Justice Marshall is that it conflicts with the purpose of the Social Security Act by providing a powerful economic incentive to break up the family in order to maximize welfare benefits.[74] This possibility is not merely speculative,[75] but, as was pointed out earlier, Justice Stewart asserts there must exist at least a kinship tie between those children who are "farmed out" and the relatives who take them into their homes if the directive of the Act is to be followed. An unclaimed benefit of the "farming out" arrangement is the maximization of the amount of welfare assistance a state pays which inheres to the benefit of all needy persons within the state. When a large family divides itself the total per capita benefits it receives often are greater than they would be in the absence of a maximum grant regulation because increases in the level of benefits decrease progressively with each additional member of the family unit. Of course, this pecuniary advantage must be weighed against the child's loss of a badly needed "mother-father" figure. Confronted with such alternatives, a society unwilling and barely able to increase welfare must view the false economic choice as more critical than the maintenance of family unity.[76]

Justice Marshall is convinced that neither HEW nor Congress has adopted a position authorizing the maximum grant. It is significant, he argues, that both the opinions of the Secretary of HEW and the intent of Congress are, if not latently disapproving of maximum grant regulations, at best, unclear.

Justice Stewart deems the act of the Secretary of HEW in approving Maryland's public assistance program[77] with its maximum grant provi-

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[72] Justice Marshall relates the intriguing possibility of how a family with eleven or more members could, under Maryland's maximum grant, turn a "profit" for the state since the state would receive more in federal subsidy than the $250 it pays to the family. 397 U.S. at 513 (Marshall, J., dissenting).

[73] *Id.*

[74] *Id.*

[75] *Id.* at 514 n.6.

[76] *Cf.* Elman, *If You Were on Welfare*, SATURDAY REV., May 23, 1970 at 27.

[77] HEW must approve federally funded state public assistance plans. 45 C.F.R. § 201.3 (1970) provides that the state plan must:

be submitted currently so that the Commissioner may determine whether the

sion as supportive of a Department position favoring at large such grants.[78] Coupled with this approval has been HEW's acceptance of maximums imposed on family grants by some twenty other states. Moreover, a HEW publication has expressly recognized the use of maximum grant systems.[79]

The position of the Secretary of HEW in this case is unknown, Justice Marshall counters, because, contrary to the Court's admonition to the district courts to seek wherever possible the views of HEW,[80] the Supreme Court itself failed to ask HEW to submit a brief detailing its views.[81] Further, a reading of this decision makes it clear that at least five Justices support the position that approval of state administrative plans by HEW is not a binding administrative determination of compliance with the Social Security Act.[82] Only after a thorough review of HEW activities in relation to Maryland's dollar limitation on AFDC grants did the district court conclude "the various actions and inactions on the part of HEW are not entitled to substantial, much less to decisive weight in our consideration of the instant case."[83] This sentiment was echoed in the concurring opinion by Justice Black who felt even though the Secretary of HEW has found state and federal welfare provisions consonant, an individual welfare recipient is entitled to attack in court any aspect of the state's welfare plan as inconsistent with the provisions of the Social Security Act.[84] Furthermore, HEW has been extremely reluctant to challenge state welfare plans which may be operating at odds with federal law and policy.[85] In fact, during HEW's and its predecessor's thirty years of administering Social Security programs there have been only sixteen conformity hearings ordered.[86] Indeed, the position that HEW approves the use of maximum grants seems questionable.

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plan continues to meet Federal requirements and policies.
. . . (d) *Basis for approval.* Determinations as to whether State plans (including plan amendments and administrative practice under the plans) originally meet, or continue to meet, the requirements for approval are based on relevant Federal statutes and regulations and the requirements and policies set forth in the Handbook of Public Assistance Administration and other official issuances to the States.

78 397 U.S. at 481. He also notes that the majority of states pay less than the designated need requirement.

79 *Id.* at 482 n.14; HEW, STATE MAXIMUMS AND OTHER METHODS OF LIMITING MONEY PAYMENTS TO RECIPIENTS OF SPECIAL TYPES OF PUBLIC ASSISTANCE 3 (1962).

80 Rosado v. Wyman, 397 U.S. 397, 406-07 (1970).

81 397 U.S. at 515 (Marshall, J., dissenting).

82 The five are Justice Black, concurring, with whom Chief Justice Burger joined, and the three dissenters, Justices Douglas, Marshall, and Brennan.

83 Williams v. Dandridge, 297 F. Supp. 450, 460 (D. Md. 1968).

84 397 U.S. at 489 (Black, J., concurring). It is worth noting that Justice Black wrote his concurring opinion solely to raise this particular point.

85 *See* Note, *Federal Judicial Review of State Welfare Practices, supra* note 7, at 91.

86 *See* W. BELL, AID TO DEPENDENT CHILDREN 223 n.33 (1965).

Justice Marshall mentions but does not detail several alternative explanations why Congressional reference to the deployment of maximum grant regulations by the state does not automatically imply approval of the practice: (1) If Congress had permitted the states to interpose maximum grant restrictions on AFDC assistance, it would have been obvious. (2) There is no indication that Congress, if indeed it approved the use of maxima, focused on the family maximum rather than some other type of maximum. (3) Congressional reference to maxima was disapproving and directed solely toward ameliorating their harsh effects. (4) By piecing together the entire fabric of the Aid to Families with Dependent Children program it becomes manifest that Congress clearly did not grant legislative sanction to the maximum. (5) The Court in *King v. Smith*[87] construed the intent of Congress in the AFDC program to be the promotion of economic security and protection for all eligible children.[88]

Only short shrift need be given the first two explanations; they are bald conclusions constructed without supporting arguments. It can as easily be said that if Congress had *not* permitted the states to employ maximum grants, it would have been obvious; or that Congress, if it did approve the use of maxima, failed to distinguish the family maximum. In fact, the validity of the first two explanations is best measured by a consideration of the other suggested explanations. In this regard Justice Marshall appears content to defer to Justice Douglas' dissent which focuses with intensity in this area.

The dissent of Justice Douglas stresses that the clear purpose of the Social Security Act is the aiding of "each individual recipient". In addition, he emphasizes the point that the provisions of the Act and its amendments have consistently excluded any subsidy limitations based upon family size.

The state of Maryland contended that "eligible individuals" as described in § 602(a)(10) of the Act is a reference to the applicants for aid and not individual family members.[89] Justice Stewart agrees with the state but finds it unnecessary to consider the argument since in any event it is the family unit which receives the AFDC grant.[90] Justice Douglas, however, devotes considerable space to demonstrating that, in actuality, it is the individual family member whom § 602(a)(10) describes.[91]

Justice Stewart's conclusion that a maximum grant regulation affects family, not individual grants, is critical to his resolution of the question

87 392 U.S. 309 (1968).
88 397 U.S. at 517 (Marshall, J., dissenting).
89 *Id.* at 481 n.12.
90 *Id.*
91 *Id.* at 494-99 (Douglas, J., dissenting).

whether § 602(a)(10) is being violated.[92] Instead of being forced to determine if total deprivation of aid to the more recently arrived children in large families chaffs against the purpose of the federal program, Justice Stewart need only decide if a per capita diminution in aid can be justified within the perimeters of the statute. He holds that such a diminution is permissible under federal law and, drawing support for his conclusion from *King v. Smith*,[93] proclaims: (1) a state has great latitude in setting its level of welfare benefits, and (2) Congress has recognized the limited resources that a state may devote to public aid.[94]

In *King* the Court was presented with the question whether a "substitute father" regulation of the Alabama Department of Pensions and Security which prohibited the making of any "AFDC payments to the children of a mother who 'cohabits' in or outside her home with any single or married able-bodied man"[95] was consistent with the provisions of Subchapter IV of the Social Security Act[96] and with the Fourteenth Amendment Equal Protection Clause.[97] Chief Justice Warren, enunciating the view of eight members of the Court, declared the Alabama regulation invalid because it was inconsistent with § 602(a)(10) and with federal policy. The constitutional issue was not reached.[98]

Justice Stewart believes the decision of the Court in *King* is distinguishable from the present case.[99] The "substitute father" regulation in Alabama prohibited the making of any AFDC payment to children of a mother who cohabits with any able-bodied man. This clearly violated § 602(a)(10) of the Act by not providing aid to "all eligible individuals", in this case the cohabiting mother's children. The instant case is different in that *all* eligible children are given financial assistance through their family, albeit pro-rated since the amount receivable is governed by an upper limit.

On the other hand, after noting that Mrs. Williams' plight is in essence no different from that of the plaintiff in *King*, Justice Douglas implies that *Dandridge* and *King* are indistinguishable. *King* stands for the proposition, he argues, that states are not free to distribute funds in a fashion in-

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92 It is also critical to the consideration whether equal protection has been afforded members of large families.

93 392 U.S. 309 (1968).

94 397 U.S. at 478 *citing* King v. Smith, 392 U.S. 309, 318-19 (1968).

95 392 U.S. at 311.

96 Ch. 531, §§ 1 *et seq.*, 49 Stat. 620, *as amended*, 42 U.S.C. §§ 601-10 (Supp. V, 1969).

97 U.S. CONST. amend. XIV, § 1: ". . . No State shall make or enforce any law which shall . . . deny any person within its jurisdiction the equal protection of the laws."

98 392 U.S. at 313.

99 397 U.S. at 477.

consistent with the Act.[100] In *Dandridge*, as in *King*, Justice Douglas finds a state plan which completely denies aid to some eligible individuals contrary to the provisions of § 602(a)(10). Where two separate plans suffer from the same infirmity, they must be dealt with in the same manner. The regulation in *King* was held invalid; the regulation in *Dandridge* must also be struck down.

Justice Stewart, however, relies upon manifested Congressional intent to rebut the assumption upon which Justice Douglas' conclusion is based: that maximum grant regulations give no aid at all to younger children in large families. He describes the desire of Congress in enacting the AFDC Title was to provide aid to dependent children through the medium of the family. "From its inception the Act has defined 'dependent child' in part by reference to the relatives with whom the child lives."[101] The Congressional fervor for maintaining dependent children within the family structure was such, he declares, that it amended the law in 1967 to permit AFDC aid for children whose need arose solely from their parents' unemployment.[102]

Justice Stewart feels Congressional approval was lent to state maximum grant limitations by the enactment in 1967 of two amendments to the Social Security Act which recognized their existence. One amendment required a state to adjust any maximum grant limitations it employed to fully reflect changes in living cost.[103] The other limited medical assistance benefits to those families whose incomes did not exceed 133-1/3% of the highest amount of AFDC aid paid to a family of the same size without any income, but made provisions for adjustment where a maximum grant limits payments to families of more than one size.[104]

The observation of Justice Douglas is that although Congress has acknowledged the existence of maximum grant regulations, its focus seems to have been exclusively directed toward ameliorating the harsh results of their application.[105] In 42 U.S.C. § 602(a)(23)[106] Congress, in re-

[100] Whether a state has the authority to pay less than its ascertained standard of need, however, has strangely enough never been directly decided. *Id.* at 492 (Douglas, J., dissenting). In the case at hand the question revolves around the permissibility of a maximum welfare grant which happens to be less than the state assessed welfare standard. Of course, the very purpose of a maximum grant is to create this exact situation. But the possibility can be envisaged where a state ascertains the levels of need for large families to be identical despite small differences in the number of family members.

[101] *Id.* at 479.

[102] *See* 42 U.S.C. § 607 (Supp. V, 1969).

[103] *See* 42 U.S.C. § 602(a)(23) (Supp. V, 1969).

[104] *See* 42 U.S.C. § 1396b (f) (Supp. V, 1969).

[105] 397 U.S. at 506.

[106] A 1967 Amendment to 42 U.S.C. § 602(a)(23) (Supp. V, 1969) provides in part: [T]he amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were

quiring the states to adjust their welfare schedules to reflect changes in cost of living, mandated that any maximums must also reflect a proportionate adjustment. The context was not one of approval of maximums but merely an attempt to preserve the integrity of the bill. The same can be said of the context of 42 U.S.C. § 1396b(f)[107] which prevented the extension of maximum grants into the Medical Assistance Title. Justice Douglas finds it difficult to infer from these statutory references to the maximum grant that, as the state of Maryland suggests,[108] Congress implied approval of the practice. It is arguably more difficult, however, to infer Congressional disapproval of maximum grants from legislation whose central thrust was the placing of limits on the use of such grants. A better reading of the amendments leads to the conclusion that Congress has recognized maximum grants and found them appropriate in some circumstances.

Somewhere in between the state of Maryland's posture—that AFDC aid need not meet every individual's standard of need as long as some aid is provided to all eligible families and all eligible children—and the mandate of the appellees—that each individual child entitled to AFDC aid must receive funds commensurate with his state's designated level of benefit—lies the fallow middle ground first explored by Justice Marshall. Advocates from both sides could be partially accommodated by a determination that each child eligible for AFDC assistance must receive funds totaling at least the incremental amount of the federal subsidy paid the state on his account despite the imposition of a maximum grant limitation. As an incidental advantage this view would result in the reconciliation of §§ 602 (a)(10) and 603 of Title 42, which respectively require that some aid be provided to all eligible dependent children and assign the level of the federal subsidy per dependent child.

Notwithstanding that Maryland's Rule 200, § X, B was accepted by the majority of the Court as a valid exercise of state administrative policy under the auspices of the Social Security Act, the regulation must pass muster as well under the scrutiny of an equal protection inquiry.

It is clear that a state may not adopt for the distribution of its AFDC funds a system the purpose or effect of which is to invidiously discriminate against a class of welfare recipients. Use of such a system would be a patent violation of the Equal Protection Clause of the Fourteenth

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established, and any *maximums* that the State imposes on the amount of aid paid to families will have been *proportionately adjusted.* (emphasis added).

[107] 42 U.S.C. § 1396b(f)(2) (Supp. V, 1969). The new addition to the Medical Assistance Title reads:

> If the Secretary [of Health, Education, and Welfare] finds that the operation of a uniform maximum limits payments to families of more than one size, he may adjust the amount otherwise determined . . . to take account of families of different sizes.

[108] Brief for Appellants at 18-21, Dandridge v. Williams, 397 U.S. 471 (1970).

Amendment.[109] There are two standards of judicial review used to define invidious discrimination, however, and *Dandridge* marks the initial determination by the Court of the standard it will apply in public welfare cases involving maximum grant regulations.

The Equal Protection Clause has been traditionally interpreted by the Court to void state legislative or administrative regulations which have no rational basis. A legitimate classification established under such regulations must reasonably comport with the stated purpose of the regulation.[110] The "traditional" guideline used by the Court, and as set out in *Lindsley v. Natural Carbonic Gas Company*,[111] is governed by the still valid principle that under our system of government it is the legislative branch which decides the merits of and need for laws dealing with economic problems and social conditions. The principles of the *Lindsley* decision by which economic regulations are to be tested are:

> 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without *any* reasonable basis and therefore is purely arbitrary. 2. A classification having *some* reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. 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. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. (emphasis added)[112]

A statute which discriminates is not necessarily unconstitutional although it "affects the activities of some groups differently from the way in which it affects the activities of other groups."[113] Under this test the Fourteenth Amendment proscribes only those discriminations which are arbitrary and unreasonable in providing no sound reason for distinguishing between similarly situated individuals and according some disparate treatment.[114]

There are a number of cases, however, which find the traditional yardstick for measuring equal protection to be inappropriately short.[115] The Court has "long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully con-

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109 397 U.S. at 483.

110 *E.g.*, Rinaldi v. Yeager, 384 U.S. 305, 309 (1966); Carrington v. Rash, 380 U.S. 89, 93 (1965); Morey v. Doud, 354 U.S. 457, 465 (1957).

111 220 U.S. 61 (1911).

112 *Id.* at 78-79.

113 Kotch v. Board of River Port Pilot Comm'rs., 330 U.S. 552, 556 (1947).

114 Hernandez v. Texas, 347 U.S. 475 (1954).

115 *See, e.g.*, Kramer v. Union Free School District, 395 U.S. 621 (1969); Shapiro v. Thompson, 394 U.S. 618 (1969); Levy v. Louisiana, 391 U.S. 68 (1968).

fined."[116] Only a "compelling state interest" will justify the infringement of such a fundamental right.[117] The Court has also found that special concern should be given classifications based upon criteria such as nationality,[118] status,[119] wealth,[120] or race.[121]

The appellees in the instant case have taken the position that the proper standard of review is the standard set out in *Shapiro v. Thompson.*[122] They suggest that Maryland's maximum grant regulation infringes on basic and fundamental rights and can be upheld only if it can be shown to be necessary for the achievement of a "compelling" governmental interest. They further allege the regulation promotes no such interest. Indeed, they assert that it does not even comply with the traditional standard for equal protection.[123]

The state of Maryland counters with the assertion that Rule 200, § X, B meets the criteria of the "traditional" test of equal protection. Maryland's exercise of its legislative power is claimed to possess a rational basis as: (1) a work incentive, (2) a way to avoid disincentives to family solidarity, (3) a limitation on state assumption of parental child support obligations, (4) a means of maintaining equity between welfare and wage-earning families, and finally, (5) a method of allocating limited state funds to fully meet the needs of the largest possible number of families.[124]

The district court below held the Maryland rule to be "invalid on its face for overreaching"[125] and in violation of the Equal Protection Clause

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116 Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

117 Shapiro v. Thompson, 394 U.S. 618, 634 (1969). Some of the fundamental rights which have been recognized as such by the Court are: the right to an education, the right to marry, the right to procreate, the right to vote and the right to travel. For an excellent discussion of these and other rights see *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065 (1969).

118 Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948); Oyoma v. California, 332 U.S. 633 (1948); Korematsu v. United States, 323 U.S. 214 (1944).

119 Levy v. Louisiana, 391 U.S. 68 (1968); Skinner v. Oklahoma, 316 U.S. 535 (1942).

120 Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

121 Loving v. Virginia, 388 U.S. 1 (1967).

122 394 U.S. 618 (1968) (equal protection denied where public assistance made contingent upon the applicant's having lived within the state for the prior year). *Shapiro* stated that:

> [T]he traditional criteria do not apply in these cases. Since the classification . . . touches on [a] fundamental right . . . its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest. *Id.* at 638.

123 Brief for Appellees at 18, Dandridge v. Williams, 397 U.S. 471 (1970).

124 Brief for Appellants at 32-41, Dandridge v. Williams, 397 U.S. 471 (1970).

125 297 F. Supp. at 468. The Court uses "overreaching" as an equivalent of "overbreadth", a concept of recent vintage first decanted by the Supreme Court in Brown v. Louisiana, 383 U.S. 131 (1966).

> [T]he doctrine was meant to apply only in the limited area of first amendment

"[b]ecause it cuts too broad a swath on an indiscriminate basis as applied to the entire group of AFDC eligibles to which it purports to apply."[126]

Justice Stewart, writing for the majority of the Court, takes issue with the district court's finding of "overreaching". To him "overreaching" has significance in conjunction with the protection of freedoms guaranteed by the First Amendment but not in the consideration of state regulations in the social and economic field. The instant case, he states, is not concerned with problems of "overreaching" and First Amendment rights and therefore the Court must employ, as it has in the past, the traditional equal protection test governing state social and economic regulations.[127] Any disparity in benefits from the state-determined schedule of benefits payable to an AFDC family caused by the state's imposition of an upper limit on assistance does not constitute a *per se* violation of equal protection. If the state's classification is possessed of some "reasonable basis", then it is an appropriate exercise of the rule-making function.[128]

The conclusion to be drawn from *Dandridge* is that whether the right to welfare is "fundamental", heretofore an unsettled question, has been resolved in the negative. A second conclusion can be extrapolated from the majority view, namely, where welfare aid is provided by the state there exists no fundamental right to benefits equalling either one's scheduled level of need or level of benefits.

A consideration of whether public assistance is a "fundamental" right is not sidetracked by arguing that welfare is a privilege rather than a right. The distinctions recently drawn between the two concepts in constitutional law are inexact and uncertain even in those situations where the Court feels compelled to sweep clear a line.[129] In addition, the constitutional challenge remains essentially unanswered where a "right-privilege" dichotomy is raised.[130]

Article 25 of the Universal Declaration of Human Rights proclaims:

> Everyone has the right to a standard of living adequate for the health and well-

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adjudication. It constituted nothing more than the Court's recognition that when the terms of a statute affecting first amendment rights sweep so broadly as to proscribe not only unprotected, but also constitutionally protected conduct, such a statute is incompatible with our tradition of uncompromising deference to these "preferred" freedoms. Comment, *Judicial Rewriting of Overbroad Statutes: Protecting the Freedom of Association from Scales to Robel*, 57 CALIF. L. REV. 240-241 (1969).

126 297 F. Supp. at 469.

127 In Shapiro v. Thompson, 394 U.S. 618 (1968), the Supreme Court specifically avoided deciding whether welfare is a "fundamental" right by straining to find a one year state residency requirement to be a violation of the fundamental right to travel.

128 397 U.S. at 485.

129 *See* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

130 Sherbert v. Verner, 374 U.S. 398, 404 (1963).

> being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.[131]

A number of authorities echo this sentiment.[132] Assuming, *arguendo,* that welfare is a right, Justice Stewart nevertheless does not believe it is a "fundamental" one.[133]

The appellees contended that the "right of procreation" is a fundamental right infringed upon by Maryland's maximum grant regulation since the effect of the regulation is the limiting of procreation in AFDC families. As authority they cited *Skinner v. Oklahoma,*[134] a case in which a state compulsory sterilization law containing an arbitrary classification was invalidated because it violated this fundamental right. Justice Marshall admits that the "right of procreation" is affected marginally and indirectly at best by the maximum grant regulation. He does note, however, that it is difficult to conceptualize a person whose survival depends on his welfare check, but who, having been denied welfare, takes solace in the knowledge that his First Amendment rights have been preserved.[135]

Once a state begins to provide welfare benefits to eligible individuals it has been intimated that a duty arises to continue aid in accordance with the state-scheduled standards and not to place a limit upon such assistance. Thus the expectation of welfare benefits by the recipients has been likened to that of a rescuee in tort.[136] However, to the extent that such a duty exists, it is a child of Congress.[137] The *Dandridge* majority certainly appears unwilling to give it Constitutional dimension.

Justice Marshall is in complete disagreement with the Court's approach. He sees no reason why, although *Dandridge* falls within the parameter of "economics and social welfare", the *Lindsley* test should necessarily pertain. Nor does he feel equal protection analysis is advanced significantly by a definition of a right as "fundamental" *a priori.*[138] Rather than characterize the case as fitting within the perimeters of either the "traditional"

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131 Adopted at the United Nations General Assembly, G.A. Res. 217A(III), U.N. Doc. A/811 1948.

132 *See, e.g.,* Note, *Welfare Due Process: The Maximum Grant Limitation on the Right To Survive,* 3 GA. L. REV. 459 (1969); Harvith, *Federal Equal Protection and Welfare Assistance,* 31 ALB. L. REV. 210 (1967); Graham, *Public Assistance: The Right to Receive; the Obligation to Repay,* 43 N.Y.U.L. REV. 451 (1968).

133 "[P]ublic welfare assistance . . . involves the most basic economic needs of impoverished human beings . . . but we can find no basis for applying a different constitutional standard." 397 U.S. at 485.

134 316 U.S. 535 (1942).

135 397 U.S. at 520 n.14 (Marshall, J., dissenting).

136 *See* Harvith, *supra* note 132 at 243 (1967).

137 Rosado v. Wyman, 397 U.S. 397, 412 (1970).

138 397 U.S. at 520 (Marshall, J., dissenting).

or "fundamental right" tests of equal protection, he favors employing a standard which would concentrate on "the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification."[139]

Support for Justice Marshall's attack of the "fundamental right" test is found in another quarter, Justice Harlan's concurring opinion. Justice Harlan sees no basis for requiring selected statutory classifications to be justified by a "compelling" state interest in order to pass muster. He would make rationality of classification the standard for all equal protection decisions, with the exception of racial classifications.[140]

Justice Marshall expresses the operative effect of the maximum grant regulations to be the creation of two classes of needy children and two classes of dependent families—those families and their members which are small and those which are large.[141] Persons who are eligible for assistance should not receive different treatment, he concludes, unless there exists a relevant distinction between them, and further, any statutory distinction made between classes "must be based on differences that are reasonably related to the purposes of the Act in which it is found."[142]

Assuming, as does the majority, that the main purpose of the Maryland plan is to encourage those on welfare to seek employment, Justice Marshall faults the maximum grant regulation of Maryland because it creates classes which are both over-inclusive and under-inclusive. The class of individuals to whom AFDC payments are made is grossly under-inclusive because only the needy children in small families receive full AFDC payments while it is only the heads of large households who are being forced by the statute to seek employment.[143] The maximum grant regulation is also over-inclusive because people are included in the class who are incapable of work and some families were already large before the maximum grant took effect.[144]

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139 *Id.* at 521.

140 *Id.* at 489. A complete discussion of Mr. Justice Harlan's views concerning equal protection is found in his dissenting opinion in Katzenbach v. Morgan, 384 U.S. 641, 659 (1966).

141 It is immaterial whether the maximum grant is considered to operate only against the youngest members of large families or the family itself (benefits received being shared equally by all) since the support for either class is reduced below minimum subsistence levels. 397 U.S. at 518 n.11.

142 *Id.* at 519, *quoting* Morey v. Doud, 354 U.S. 457, 465 (1957).

143 397 U.S. at 519, 527 (Marshall, J., dissenting).

144 *Id.* at 526-27. It should be noted, however, that Maryland's maximum has been approved by HEW since 1947. Thus the argument is that the class is over-inclusive for large families already in existence in 1947. Since children may receive AFDC aid only until they reach the age of 21, there would be no family fitting in this category.

Where, as in Maryland, a classification is shown to be both under and over-inclusive, Justice Marshall feels the state should be compelled to present a persuasive justification for the classification.[145]

So long as some justification is shown for Maryland's maximum grant regulation it meets the traditional equal protection test of *Lindsley.* In fact, Justice Stewart says the Court "need not explore all the reasons that the State advances in justification of the regulation"[146] provided the state's action is "rationally based and free from invidious discrimination."[147]

The majority considered only two stated purposes of Maryland's maximum grant regulation: to encourage employment and to avoid discrimination between welfare families and the families of the working poor. Maryland keyed its maximum AFDC grant to the state minimum wage[148] in order to create an equitable balance between household heads who worked and those who did not.[149]

Maryland also coupled with its upper limit on AFDC benefits the permission for recipients of largeness to retain a portion of incidental monies earned without any reduction in AFDC benefits. There are, however, many AFDC families within the state who have no employable member; and other AFDC families who receive grants to which a maximum was inapplicable. Yet, despite these incidents displaying an absence of employment incentive, Justice Stewart, citing *Lindsley,* concludes "the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all."[150] He rephrases the sentiments of Justice Harlan in *Rosado v. Wyman* that it is "no business of this Court to evaluate . . . the merits or wisdom of any welfare programs."[151]

It is worth noting that the initial reason propounded by the state of Maryland for the use of a maximum grant was economic. The District Court described Maryland's policy as an attempt "to fit the total needs of the State's dependent children, as measured by the State's standards of

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145 *Id.* at 519 (Marshall, J., dissenting). See also Tussman & tenBroek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341, 348 (1949).

146 397 U.S. at 486.

147 *Id.* at 487.

148 Justice Stewart notes that the minimum 40-hour weekly wage in Maryland is $46-$52. This is not much different from the present federal minimum wage of $52-$64 per 40-hour week. 397 U.S. at 486 n.19.

149 In doing so Maryland relies on the theory of "less-benefit". This theory holds that monies receivable under a public assistance program should not exceed the income of the lowest paid worker in the community. The English New Poor Law of 1834 first propounded this concept. Brief for Appellees at 20, Dandridge v. Williams, 397 U.S. 471 (1970).

150 397 U.S. at 486-87.

151 397 U.S. 397, 422 (1970).

their subsistence requirements, into an *inadequate* state appropriation."[152] After defeat at the trial level, Maryland apparently realized that its economic rationale would not withstand a serious constitutional challenge. Its arguments before the Supreme Court were the product of its search for additional justifications.[153]

Where benefits are necessary to sustain life the Court has typically given the reasons behind classifications close constitutional scrutiny.[154] Here, Justice Marshall observes, children are being distinguished on a basis over which they have no control—the number of their brothers and sisters;[155] the reasons for the maximum grant regulation as argued by the state do not apply equally to all members of the class of eligible AFDC recipients and do not significantly advance state interest; a federal program already provides a work-incentive;[156] and the state's interest could be as well served by alternative measures calculated to be less destructive of individual interests.[157] An appraisal of these arguments when reflected against the reasons urged by Maryland in favor of its maximum grant regulations leads one to fairly question the correctness of the majority position even under the *Lindsley* standard.[158]

Two alternatives to the maximum grant which would afford AFDC recipients equal protection are: (1) pro rata deductions in individual welfare benefits,[159] and (2) increasing the amount of state funds devoted to the AFDC program so that grants are made in full accord with ascertained need. Only the first alternative is operative within the status quo of states with limited funds but it is doubtless an approach more favored by the members of the Court than the maximum grant.[160] The United States Government has also registered its preference for this proposal.

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152 297 F. Supp. at 458 (emphasis added).

153 397 U.S. at 524 (Marshall, J., dissenting).

154 *Id.* at 522.

155 *Id.* at 523. It is suggested by Justice Marshall that the present classification is comparable to the classification between illegitimate and legitimate children which the Supreme Court struck down in Levy v. Louisiana, 391 U.S. 68 (1968), as violative of the Equal Protection Clause. The real measure of the validity of a classification, however, is *not* the lack of control people have over their classification—this is the case with most classifications—but the arbitrariness of the classification itself.

156 Work Incentive Program, 42 U.S.C. §§ 630-44 (Supp. V, 1969).

157 397 U.S. at 529 (Marshall, J., dissenting).

158 *E.g.*, If "farming out" results in a state expending more funds than it would in the absence of a maximum grant regulation, how can the regulation be said to be "rational"?

159 If a percentage reduction were substantial, however, this could, in turn, place an unequal burden on small families, less able to spread expenses. Memorandum for the United States as Amicus Curiae at 6, Rosado v. Wyman, 397 U.S. 397 (1970).

160 This conclusion may be drawn from the statement of Justice Stewart, which reads: "We do not decide today that the Maryland regulation is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised." 397 U.S. at 487.

> A decision not to allocate from a state's resources to its poor all they need can never be a comfortable one; making that decision in terms of a percentage formula, however, not only is probably more fair as among the various recipients of assistance, but also makes quite plain the character of the decision being made—and so quite possibly increases political pressures against it, and a willingness to forego other possible uses of state resources in order to avoid or reduce to a minimum the cuts made.[161]

It is the opinion of the majority in *Dandridge* that "the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court."[162] The decision may be viewed as a reflex action against the steadily intensifying involvement of the federal judiciary in the review of state welfare procedures.[163] But even though the Court feels the complexity in the operation of public assistance programs makes them a more proper subject for direct HEW supervision, it is unlikely that any immediate turn of events will occur.

The reticence of HEW in challenging state welfare plans operating at odds with federal law and cutting of federal funds to states not comporting with federal law is well documented.[164] This augurs the bringing of yet more welfare litigation. But even were HEW to cut off a state's funds for non-compliance, this conceivably could serve as a springboard to an action alleging denial of equal protection to innocent welfare recipients.[165]

Dandridge itself does not resolve completely the question whether all maximum grant regulations are permissible. The decision adjudicates the validity of a maximum grant as applied to an AFDC family's benefits, but leaves unanswered the question whether an individual maximum grant will be allowed to stand.[166] This question may soon face the Court; a resolution consistent with the thinking of *Dandridge* must be expected.

New and continuing attacks on welfare provisions should not be unexpected. A recent article helps point the direction and the difficulties of a trail that may be followed:

> The path of educating the judiciary to the plight and needs of the poor is an arduous and tortuous one. This can only be done in well-chosen and well-planned cases.
>
> * * * * *
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> On the more fundamental issue of the amount of the grant, the attack should be three-fold: The utilization of special grant provisions, . . . the exploration and use of Section 402(a)(23) of the Social Security Act requiring adjustments in grants in

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161 Memorandum for the United States as Amicus Curiae at 7, Rosado v. Wyman, 397 U.S. 397 (1970).

162 397 U.S. at 487.

163 Rosado v. Wyman, 397 U.S. at 422 n.23.

164 *See* Note, *Federal Judicial Review of State Welfare Practices*, 67 COLUM. L. REV. 84, 91 (1967).

165 Harvith, *supra* note 132, at 216-17.

166 397 U.S. at 516 (Marshall, J., dissenting).

> accordance with the rise in the cost of living; and finally the use of the Equal Protection Clause to challenge arbitrary maxima, percentage or family, on levels of assistance. All of these may seem rather piecemeal and not designed to guarantee an adequate grant. One may ask, why not a plain old-fashioned due process attack on the adequacy of the grant? My objection is purely tactical. The time is not right and a suit would be counter-productive.[167]

The time, surprisingly enough, may be right even if a version of President Nixon's Family Assistance Plan (FAP) or a negative income tax were to be enacted.[168] Under either program the federal government would guarantee present AFDC recipients a subsistence schedule of payments; the state could elect (or may be compelled) to increase this schedule by adding state funds. Were a state to impose a family assistance ceiling on its private funds under one of these programs the courts might view this new legislation as an extension of the present "bramble bush" and would hopefully, like the man in the Llewellyn poem,[169] leap back in again.

*W. Michael Mayock**

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[167] Albert, *Choosing the Test Case in Welfare Litigation*, 2 CLEARINGHOUSE REVIEW 28 (Nov. 1968).

[168] A comprehensive analysis of both the FAP and the negative income tax may be found in *Welfare, Time for Reform*, SATURDAY REV., May 23, 1970, at 19, and Richardson, *In Search of Fairness in Welfare*, Los Angeles Times, Nov. 15, 1970, § F at 3, col. 1.

[169]
There was a man in our town
and he was wondrous wise:
he jumped into a BRAMBLE BUSH
and scratched out both his eyes—
and when he saw that he was blind,
with all his might and main
he jumped into another one
and scratched them in again.

K. N. LLEWELLYN, BRAMBLE BUSH 3 (1960).

* This note is dedicated to the memory of Welburn Mayock and Welburn S. Mayock.