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CASES:

CONSTITUTIONAL AND STATUTORY PROVISIONS:

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 131

EDMUND P. DANDRIDGE, *et al.*,

Appellants,

vs.

LINDA WILLIAMS, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BRIEF FOR APPELLEES

Opinions Below

The initial opinion of the United States District Court for the District of Maryland is reprinted at A. 87. The supplemental opinion and order of the District Court, after reargument, is reprinted at A. 238. The opinions are reported at 297 F.Supp. 450.

Jurisdiction

The decree of the three-judge district court declaring unconstitutional the maximum grant regulation set forth in the Maryland Manual of the Department of Social Services, Part II, Rule 200, Section VII, 1. (now Rule 200 X, B) and permanently enjoining its enforcement was entered on March 18, 1969. Notice of appeal was filed on March 20, 1969 and probable jurisdiction was noted on October 13, 1969. The jurisdiction of this Court is conferred by 28 U.S.C. 1253 which provides for direct appeals from decisions of three-judge district courts.

Questions Presented

1. Whether the provisions of Rule 200 § X, B (formerly Rule 200 § VII, 1.) of the *Maryland Manual of the Department of Social Services, Part II,* which deny assistance to some of the children in large families, participating in the Aid to Families With Dependent Children Program, Title IV of the Social Security Act of 1935, regardless of determined need, violates the guarantee of equal protection of the laws contained in the Fourteenth Amendment to the United States Constitution.

2. Whether the provisions of Rule 200 § X, B (formerly Rule 200 § VII, 1.) of the *Maryland Manual of the Department of Social Services,* by disregarding the needs of some of the children of large families, and in effect treating the family as the proper unit of assistance, providing a powerful incentive to fragment the family unit, violates the fundamental purposes of the Aid to Families With Dependent Children Program, Title IV of the Social Security Act of 1935.

Constitutional and Statutory Provisions Involved

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part that:

> [N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 200 § X, B (formerly Rule 200 § VII, 1., the originally challenged regulation which the lower Court invalidated), of the *Manual of the Maryland Department of Social Services* provides in pertinent part that:

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 resource 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).

Statement

A. The Pleadings and Procedure

These proceedings were commenced on February 28, 1968, when Appellees, Linda Williams, Junius Gary and Jeanette Gary, for themselves and on behalf of their minor children and all other parents, relations or minor children similarly situated, filed a complaint *in forma pauperis* (A. 5) in the United States District Court for the District of Maryland requesting that a three-judge court be convened to determine the controversy and to enter a permanent injunction enjoining Appellants from enforcing the provisions of Rule 200, VII, 1. of the *Manual of the Maryland Department of Social Services* (now Rule 200 § X, B), the family maximum grant regulation. The complaint further requested a declaratory judgment declaring that the Maryland maximum grant regulation contravened the purpose and intent of the AFDC Program, 42 U.S.C. §§ 601 *et seq.* and Article 88A, §§ 44A and 49, Annotated Code of Maryland, and denied Appellees due process and equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution. Filed simultaneously with the complaint were Appellees' Motions for a Temporary Restraining Order and Preliminary Injunction (Docket Items 5 and 6). The complaint alleged that the maximum

grant regulation, limiting the grant to Two Hundred Fifty Dollars ($250.00) per month regardless of family size or determined need, discriminated against large families in that it ignored the determined needs of some of the children in a family of seven (7) persons or more, the maximum being based upon and restricted to meeting the full subsistence and shelter needs of a family of six (6) persons or fewer.

Pursuant to the Notification and Request for a Three Judge Court, a panel was designated (Docket Item 10). Following the filing of Appellants' Motion to Dismiss on March 21, 1968 (Docket Item 12), and their Amended Motion to Dismiss (A. 55), filed on June 21, 1968, a hearing was held and an oral opinion rendered on June 25, 1969, denying Appellants' Amended Motion to Dismiss (A. 83). An order of the court was entered denying the motion on June 26, 1968 (Docket Item 19).

In an opinion rendered on December 13, 1968, the Court below ruled that the maximum grant regulation violated the basic philosophy underlying the Aid to Families With Dependent Children Program (AFDC) and was in conflict with the legislative purpose and history of the Social Security Act of 1935, as amended, 42 U.S.C.A. §§ 601-609, and further, that it transgressed the equal protection clause (A. 87). Subsequent to the filing of the court's opinion, Appellants filed, on December 23, 1968, a Motion to Amend Findings of Fact and Judgment, Etc. (A. 100). After full argument again on January 3, 1969, the Court, in a second opinion rendered on February 25, 1969, granted in part and denied in part Appellants' motion (A. 238).

In its opinion, the Court again held unconstitutional the maximum grant regulation as violative of the equal protection clause although not deciding whether the maximum

grant regulation conflicted with the Social Security Act, as amended (A. 256).

In accordance with its two opinions, the Court permanently enjoined Appellants from enforcing the maximum grant regulation against Appellees and the class represented, staying such order for a period of forty-five (45) days from the date of its order, March 15, 1969, and by its order denied a requested further stay. Notice of Appeal to the Supreme Court of the United States was filed on March 21, 1969. Application for Stay of Order was made to the Supreme Court of the United States by Appellants and was denied on April 28, 1969. Jurisdiction was noted on October 13, 1969.

B. The Appellees

1. *Linda Williams*

The Stipulations of Fact entered into by all parties to this case (A. 71-74) establish that Linda Williams is a thirty-three-year-old mother of eight children ranging in age from four years to sixteen. She resides in Baltimore City and began receiving public assistance when her husband, William Williams, left her shortly after the birth of their youngest child three years ago. Since her husband's departure she has had no means of support other than public assistance under the AFDC Program. Under the standard of need, as determined by the Appellant, the Maryland Department of Social Services, Mrs. Williams' family should receive benefits in the amount of $296.15 per month. In fact, until the final order of the Court below on March 18, 1969, Mrs. Williams was receiving $250.00 per month by reason of the application of the maximum grant regulation (A. 89).

Mrs. Williams is unable to supplement her welfare payments in any way because of a serious breast condition which has required five operations. In addition, because she has no relatives to assist her, it is necessary that she stay at home continually to care for her children (A. 72).

The payment of rent and heating expenses left Mrs. Williams with less than $175.00 per month to feed and clothe her family and obtain other necessities of life. She is presently seriously in debt in her attempt to provide for her family and keep it together and, if she were required to survive on $250.00 a month, she would have a difficult time supporting her family (A. 72).

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 (A. 89).

2. *Junius Gary*

The Stipulations (A. 71-74) show that Junius Gary is the thirty-eight-year-old husband of Jeanette Gary and the father of eight children ranging in age from four to eleven years. He and his family reside together in Baltimore.

Because Mr. Gary is medically disabled, as determined by the Department of Social Services, and thus, unable to obtain employment, he has been receiving AFDC assistance since March of 1962. He has attempted to earn extra money but has been unable to hold a job because of his physical condition. At the time he began receiving AFDC all of Mr. Gary's children were already born (A. 73).

After paying the monthly rent of $75.00 and the gas and electric bill, Mr. Gary had left less than $150.00 to feed and clothe his family and obtain all other necessities, prior to the order of the Court below. This amount of money prohibited the purchase of food stamps and compelled Mr. Gary to buy his family's clothing and shoes on credit resulting in a constant state of indebtedness (A. 74).

According to the minimal standards formulated by the Maryland Department of Public Welfare, the members of the Gary family require $331.50 per month for basic subsistence requirements, but, until the order of the court below, they had been limited to a monthly grant of $250.00 by reason of the maximum grant regulation (A. 71).

Mr. Gary wishes to keep his family together but will have a difficult time achieving this goal if his family is unable to receive more than the maximum grant of $250.00 (A. 74).

If Mr. and Mrs. Gary were to place two of their children between the ages of six and twelve with relatives, each child so placed would be eligible for assistance in the amount of $65.00 per month, and the Garys and their six remaining children would still be eligible to receive the maximum grant of $250.00 (A. 89).

3. *Jeanette Gary*

The Stipulations of Fact show that Jeanette Gary is the thirty-eight-year-old wife of Junius Gary and lives together with him and their family. She is in ill health, suffering from high blood pressure and arthritis and is being treated at Johns Hopkins Hospital Clinic. She is required to remain home because of her illness and to care for her children (A. 74).

Summary of Argument

A. The Maryland maximum grant regulation, Rule 200-X, B (formerly Rule 200, VII, 1.) of the *Maryland Manual of the Department of Social Services,* denies Appellees, and the class they represent, equal protection of the laws in contravention of the Fourteenth Amendment to the United States Constitution because it allows the statutory entitlement of the first six members of a large family receiving assistance pursuant to the Aid to Families with Dependent Children Program (Title IV of the Social Security Act of 1935, as amended, hereinafter referred to as AFDC) to be recognized and fulfilled while arbitrarily disregarding the statutory entitlement of all needy dependent children who subsequently become a part of the family. Because the regulation distinguishes between similarly situated needy children solely on the basis of family size and since the classification contained in the regulation bears no rational relation to a valid state objective, it is an arbitrary and unreasonable discrimination invalid under traditional concepts of equal protection.

The record establishes that the regulation neither encourages employable recipients to seek employment nor promotes family unity by discouraging desertion, as the State asserts. However, assuming *arguendo* that the regulation encourages a few recipients to seek employment, the classification contained in the regulation is so grossly overinclusive as to be unconstitutional under traditional concepts of equal protection. In addition, the 1967 Amendments to the Social Security Act of 1935, 42 U.S.C. §§ 630-44, presently effective in Maryland, contain a comprehensive work-incentive program that requires certain employ-

able AFDC recipients to seek employment and provides that income derived from employment may, in part, be added to the AFDC grant. This program also provides job training and employment rehabilitation for these individuals. This program has completely pre-empted whatever limited efficacy the maximum grant regulation might have had in inducing parents of large AFDC families to seek employment since higher benefits are not a disincentive to employment. Furthermore, the maximum grant regulation seeks to achieve an impermissible objective, one prohibited by the Social Security Act, in that its *sole* purpose is to coerce mothers of large AFDC families to seek employment[1] in contravention of the Work-Incentive Program, 42 U.S.C. §§ 630-44, which specifically exempts from compulsory employment mothers needed in the home.

Nor does the State regulation promote family stability by discouraging desertion among the marginally employed, as the State alleges. On the contrary, the effect of the maximum regulation is to induce parents of large AFDC families to place a fifth or sixth child in the home of a relative, or in an appropriate institution, where pursuant to Maryland welfare regulations[2] the child's need will be met, leaving the family grant intact.

In regard to this purpose of discouraging desertion; because only a relatively small number of families receive AFDC assistance as a result of parental desertion, the

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[1] Unemployed but employable males who receive AFDC assistance are required as an original and continuing condition of eligibility, to regularly seek, and be unable to find, employment. Therefore, the State regulation plays no role in encouraging male AFDC recipients to find jobs. 42 U.S.C. § 606(a) (1964); Maryland Manual of the Department of Social Services, Rule 200 (III)(D)(1)(d).

[2] *See,* lower Court's Initial Opinion, A. 94, 95.

regulation's classification is constitutionally infirm because it is grossly overinclusive,[3] penalizing dependent children in all AFDC families of seven or more regardless of the reason for the family's dependency.

Thus the maximum grant regulation is unconstitutional under the traditional standard of equal protection, because it is not reasonably related to a valid state purpose. *McLaughlin* v. *State of Florida,* 379 U.S. 184 (1964).

Appellees contend, however, that because the maximum grant regulation impairs the exercise of fundamental rights and contains a "suspect classification" it must withstand a more demanding judicial review and can only be upheld if it promotes a compelling governmental interest. *Shapiro* v. *Thompson,* 394 U.S. 618 (1969). This "special scrutiny" test is appropriate in this case because the State's regulation penalizes Appellees for having large families, substantially infringing upon Appellees' right to marital privacy, *Griswold* v. *Connecticut,* 381 U.S. 479 (1965) and procreation, *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942) and because it denies Appellees, and the class they represent, the most basic right of all, the right to life. In addition, the classification contained in the regulation is "suspect" insofar as it discriminates against dependent children because of their *status* as young children in a large family, *Levy* v. *Louisiana,* 391 U.S. 68 (1968).

Because the maximum grant regulation promotes no compelling governmental interest, *Shapiro* v. *Thompson,* 394 U.S. 618 (1969) and because there are available less onerous alternatives by which the State may accomplish any legitimate purposes it ascribes to the maximum grant regu-

[3] *Carrington* v. *Rash,* 380 U.S. 89 (1965).

lation, *Sherbert* v. *Verner,* 374 U.S. 398 (1965); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969), the State's regulation must fall under the "special scrutiny" test of equal protection.

B. The regulation also violates the essential purposes of the Social Security Act of 1935, as amended, 42 U.S.C.A. § 601, *et seq.,* by providing a powerful incentive for parents to fragment their family and by disregarding completely the needs of certain dependent children.

Section 401 of the Social Security Act, 42 U.S.C.A. § 601, declares, as a purpose of the Act, the strengthening of family life. The Maryland statute authorizing State participation in the AFDC Program, Article 88A, § 44A, Annotated Code of Maryland (1957) provides that this is the *primary* purpose of AFDC. This Congressional and State decision to actively encourage poor families to remain intact and together is substantially frustrated and undermined by the State regulation's built-in incentive inducing family fragmentation.

The Act is further violated insofar as the regulation arbitrarily ignores the need of certain dependent children by imposing, as an additional prerequisite of eligibility, that a child be born into a small family. *Doe* v. *Shapiro,* 302 F.Supp. 761 (D.Conn., 1969). This State decision to treat the family as the appropriate unit of assistance under the AFDC Program directly contradicts the guarantee of 42 U.S.C.A. § 602(a)(10) that assistance be given all eligible individuals.

Furthermore, penalizing needy dependent children for a *parental decision* to have a large family cannot be recon-

ciled with this Court's decision in *King* v. *Smith,* 392 U.S. 309, 325 (1967) where it was held that public assistance cannot be denied to needy, dependent children as a result of misconduct by a parent.[4]

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[4] Contrary to Appellants' assertion (Brief of Appellants, 17, 18) it was not inappropriate, for a number of reasons, for the lower Court to refuse to abstain (Oral Opinion, A. 86, 87). Most importantly, this case lacks the "extreme circumstances" stated by this Court in *Zwickler* v. *Koota,* 389 U.S. 241 (1967) to be the necessary factor requiring abstention. Abstention is not required merely to give state courts the first opportunity to vindicate a federal claim. *Zwickler* v. *Koota, supra* at 251; *Gorun* v. *Fall,* 393 U.S. 398, 399 (1968) (Justice Douglas, Concurring Opinion); *McNeese* v. *Board of Education,* 373 U.S. 668 (1962). Also, assertion of jurisdiction by the lower Court caused no needless friction between enforcement of the state and federal policies. *King* v. *Smith,* 392 U.S. 309 (1967); *Holmes* v. *New York City Housing Authority,* 398 F.2d 262, 266 (2d Cir. 1968). Furthermore, Appellees did not, and do not now, question the clarity of the maximum grant regulation and there is no possible construction of that regulation which could "avoid or modify the constitutional question". *Zwickler* v. *Koota, supra* at 249; *United States* v. *Livingston,* 179 F. Supp. 9, 12-13 (E.D.S.C. 1959), *aff'd* 364 U.S. 281 (1959). In this case there was a need for immediate judicial relief to safeguard basic civil rights and prevent irreparable injury making abstention further inappropriate. *Williams* v. *Rhodes,* 393 U.S. 23, 70 (1968) (Chief Justice Warren, Dissenting Opinion); *Wright* v. *McMann,* 387 F.2d 519, 525 (2d Cir. 1967); *Holmes* v. *New York City Housing Authority, supra* at 266; *Bozanich* v. *Reetz,* 297 F. Supp. 300, 304 (D. Alas. 1969). Finally, the state law claim was not, as the lower Court rightly concluded, one upon which Appellees relied (First Opinion, A. 94, n.13). *See,* Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, Docket Item 15.

ARGUMENT

I.

The Provisions of Rule 200, VII, 1. [now Rule 200-X, B] of the Manual of the Maryland Department of Social Services, Part II, Which Arbitrarily Deny Assistance to Some of the Children in Large Families Participating in the Aid to Families With Dependent Children Program, Title IV of the Social Security Act of 1935, Regardless of Determined Need, Violate the Guarantee of Equal Protection of the Laws Contained in the Fourteenth Amendment to the United States Constitution.

The maximum grant regulation, Rule 200, VII, 1. [now Rule 200, Sec. X, B], *Manual of the Maryland State Department of Social Services* (hereinafter referred to as *State Manual*), limits assistance payments under the Aid to Families with Dependent Children Program (AFDC) to $250.00 per month. The AFDC program is a categorical assistance program enacted by Congress as a part of the 1935 Social Security Act under a scheme of "cooperative federalism." *King* v. *Smith,* 392 U.S. 309, 312 (1968). Subject to the $250.00 family maximum, AFDC assistance payments are based on minimal standards of individual need as determined by the State Department of Social Services, for subsistence items: shelter, food, clothing, school supplies and transportation. *State Manual,* Part II, Rule 200. If the determined needs of an AFDC family exceed $250.00 per month, the assistance payment will not meet the excess need. The standards formulated by the State put AFDC families of six (6) persons or less below the maximum grant and put the needs of AFDC families of seven (7) persons or more above the maximum. The dependent chil-

dren in small families receive full assistance needs, whereas dependent children in large families receive less than minimal subsistence needs. Obviously, the disparity between the amount of the grant and the amount of determined need increases in even larger families. For example Appellee Linda Williams and her eight children should receive $296.15 per month according to the State's standards of need or $46.15 more than the $250.00 maximum. Appellees Junius and Jeanette Gary and their eight children should receive $331.50 per month under the same State schedules or $81.50 more than they actually received prior to the enforcement of the lower Court's order (Stipulation of Facts, A. 71). As a result, the dependent children of large AFDC families live without essential food, clothing and shelter. The Court below, and every other court to consider the issue of family maximums, fully recognized that dependent children are needy whether they belong to large or small families. Accordingly, every court to consider the constitutionality of maximum grant regulations has held them unconstitutional because they violated the Fourteenth Amendment's guarantee of equal protection of the laws.[5]

A. The Requirements of Equal Protection.

Traditionally this Court has interpreted the equal protection clause of the Fourteenth Amendment to invalidate legislation (or administrative regulations) unsupported by a rational basis, thus condemning statutes containing

[5] *Collins* v. *State Board of Social Welfare*, 248 Iowa 369, 81 N.W. 2d 4 (1957); *Dews* v. *Henry and Inclan* v. *Graham*, 297 F. Supp. 587 (D. Ariz. 1969); *Westberry* v. *Fisher*, 297 F. Supp. 1109 (D. Me. 1969); *Lindsey* v. *Smith*, —— F. Supp. —— (D. Wash. Civ. No. 7636, August 20, 1969). Cf. *Anderson* v. *Burson*, 300 F. Supp. 401 (N.D. Ga. 1969); *Metcalf* v. *Swank*, 293 F. Supp. 268 (N.D. Ill. 1968); *Kaiser* v. *Montgomery*, —— F. Supp. —— (N.D. Cal. Civ. No. 49613, August 4, 1969).

classifications that are not reasonable in light of the purposes the statute is intended to serve.[6] This standard has been verbalized by the Court on numerous occasions:

> [Classification] . . . must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.
>
> *Gulf, C. & S.F.R. Co.* v. *Ellis,* 165 U.S. 150, 155 (1897).

> The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose.
>
> *McLaughlin* v. *State of Florida,* 379 U.S. 184, 191 (1964).

It is, of course, fundamental that not all discriminatory treatment of a class is unconstitutional and that a statute "which affects the activities of some groups differently from the way in which it affects the activities of other groups" is not automatically constitutionally impermissible. *Kotch* v. *Board of River Port Pilot Commissioners,* 330 U.S. 552, 556 (1947). It is only arbitrary and unreasonable discriminations that are proscribed by the Fourteenth Amendment.[7] It is "[w]hen the existence of a distinct class is demonstrated, and [when] it is further shown

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[6] *See,* 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); *Truax* v. *Corrigan,* 257 U.S. 312, 337 (1921); *Truax* v. *Raich,* 239 U.S. 33, 42 (1915); *Southern Ry.* v. *Green,* 216 U.S. 400, 417 (1910).

[7] *Levy* v. *Louisiana,* 391 U.S. 68, 71 (1968); *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886).

that the . . . different treatment is not based on some reasonable classification, [that] the guarantees of the Constitution have been violated." *Hernandez* v. *Texas,* 347 U.S. 475, 478 (1954).

Assuming the statutory purpose itself is constitutionally proper the central inquiry, under the traditional test of equal protection, is whether there is a sound reason for differentiating among similarly situated individuals and according some disparate treatment.

That this standard of judicial review is not appropriate in all equal protection cases has been demonstrated often.[8] In determining that all constitutional challenges should not be reviewed in exactly the same manner this Court has "been extremely sensitive when it comes to basic civil rights," *Levy* v. *Louisiana,* 391 U.S. 68, 71 (1968), and has held that, where fundamental rights are at stake, "strict scrutiny of the classification . . . is essential . . . " *Skinner* v. *Oklahoma,* 316 U.S. 535, 541 (1942), to assure that none are denied equal protection of the laws. Fundamental rights may not be abridged by a showing of merely *some* rational relationship between a statute's classification and a proper legislative purpose and the burden is upon the State to justify infringement of these rights in order to safeguard a "compelling state interest." [9]

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[8] *See,* e.g., *Shapiro* v. *Thompson,* 394 U.S. 618 (1969); *Skinner* v. *Oklahoma,* 316 U.S. 535, 541 (1942); *Levy* v. *Louisiana,* 391 U.S. 68 (1968); *Griswold* v. *Connecticut,* 381 U.S. 479 (1965); *Harper* v. *Virginia Board of Elections,* 383 U.S. 663 (1966); and pp. 36 to 39, *infra.*

[9] *Williams* v. *Rhodes,* 393 U.S. 23, 31 (1968); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969); *Skinner* v. *Oklahoma,* 316 U.S. 535, 541 (1942); *Harper* v. *Virginia Board of Elections,* 383 U.S. 663 (1966); *Kramer* v. *Union Free School District,* 394 U.S. 621, 627 (1969).

A similarly stringent standard of judicial review is called for when statutes contain "suspect classifications" based upon, *inter alia,* race, status, wealth and alienage.[10]

Because this case involves both a suspect classification and the infringement of basic and fundamental rights, "special scrutiny" of the maximum grant regulation is required. Due to the absence of a compelling state interest and the existence of less onerous alternatives to accomplish valid state objectives the regulation must, as the lower Court properly concluded, fall under this more demanding standard of judicial review. (See, p. 36 to p. 39, *infra,* for a more detailed discussion of this point.)

However, the maximum grant regulation is also constitutionally defective under the traditional standard of equal protection because it contains a classification not reasonable in light of the regulation's purposes and thus, subjects Appellees, and the class they represent, to arbitrary and invidious discrimination.

B. The Maximum Grant Regulation Under Traditional Standards of Equal Protection Effects an Arbitrary and Unreasonable Discrimination Against Appellees and the Class They Represent and Achieves No Legitimate State Objective.

The result of the maximum grant regulation is to create two subclasses of AFDC recipients, those who are members of large families containing seven or more people and those who belong to families of six members or less. The statu-

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[10] *Hunter* v. *Erickson,* 393 U.S. 385 (1969); *Korematsu* v. *United States,* 323 U.S. 214, 216 (1944); *Griffin* v. *Illinois,* 351 U.S. 12 (1956); *Douglas* v. *California,* 372 U.S. 353 (1963); *Loving* v. *Virginia,* 388 U.S. 1 (1967); *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942).

tory entitlement of members of the smaller families is recognized and implemented, i.e., total subsistence need as determined by the Maryland Department of Social Services is paid. Members of the larger families, on the other hand, receive less than determined need, are forced to live below subsistence level and suffer severe pressures to fragment their family because of the maximum. (See Stipulation of Facts, A.72, 73, 74.) The *sole* reason for this differential treatment is family size.

Appellants do not contest that the maximum discriminates against large families but urge several theories to support the regulation. They suggest that the regulation operates as a work incentive by making marginal employment more financially attractive than public assistance. A related proposition is that a maximum on welfare benefits maintains these benefits at a point below minimum wage levels and thus discourages desertion by employed family heads. A third purpose ascribed to the regulation by Appellants is one of population control, i.e., a maximum discourages procreation and family growth. It is also suggested that the maximum insulates the welfare system from public antagonism and criticism. Finally, it is simply alleged that the regulation is a rational way of allocating state funds to best meet the needs of the poor.

Appellees contend that the regulation is not a rational means of effectuating legitimate state purposes and is, instead, counterproductive in many instances.[11]

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[11] It is important to note that Appellants raised these theories for the first time below in their Memorandum in Support of their Motion to Amend (Item 29); thus only after the initial opinion was rendered by the court below. This tardiness is indicative that the purposes ascribed to the maximum grant regulation are more contrived than real. Other evidence also supports this con-

1. *The Maximum as a Work Incentive*

Appellants contend that the maximum grant regulation, by limiting benefits below minimum wage levels, provides recipients of AFDC with an incentive to seek employment. The State of Maryland has thus sought to present an extremely over-simplified approach to a very complex question, the creation of economic independence among the poor. It seeks to do this by reliance on the ancient doctrine embodied in the New Poor Law of 1834, part of the England of Charles Dickens, which held that no income derived from welfare benefits should exceed the amount that the lowest paid independent worker in the community could earn; the so-called doctrine of "less-eligibility" or "less-benefit". This hoary principle of setting benefit levels low in an attempt to creat an incentive to work conflicts clearly and dramatically with our present day acceptance of the social welfare principle that all needy, dependent individuals in our society should be assured a basic level of financial assistance and that the disadvantaged in our society should be rehabilitated and not punished by unfair administrative regulations such as the maximum grant regulation.

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clusion. According to the affidavit of the defendant Raleigh Hobson, Director of the State Department of Social Services, the maximum has been adjusted to reflect changes in the cost of living rather than changes in prevailing wage rates or minimum wage standards. Affidavit in Support of Defendants' Motion to Amend, Etc. Ex. B (A.15). Until 1961 the AFDC program excluded unemployability of the breadwinner as a basis of eligibility. 42 U.S.C. §607. Presently, about 25 states have opted to participate in this aspect of the program. Historically, the State's work incentive principle has been enforced through a maximum, although employable persons were not covered and geared to the cost of living rather than to wage levels. Moreover, the State's only witness, Thomas Schmidt, indicated that the inadequacy of State appropriations was the sole reason for retaining the $250.00 ceiling. Transcript, A.77, 78.

The central premise of the "less-eligibility" or "less-benefit" theory, that the regulation would provide the incentive to seek gainful employment, has been completely vitiated by the passage of the 1967 Amendments to the Social Security Act (P.L. 90-248, 42 U.S.C. §§ 630-44). These Amendments not only provide recipients with a powerful incentive to *voluntarily* search for employment by allowing employed recipients to keep the first thirty ($30) dollars plus one-third (⅓) of the net take-home pay (after deductions for allowable work expenses),[12] but also *compel* all employable recipients, subject to certain limited exceptions,[13] to undertake training and to seek employment or forfeit their right to assistance.[14]

The maximum grant regulation therefore plays no role in encouraging employment since higher benefits are not a disincentive to employment. Certainly a state regulation which is unrelated to the achievement of a legitimate state purpose is constitutionally defective under traditional concepts of equal protection. (See p. 15 to p. 20 *supra.*)

Thus, the harsh theory of less-benefit has been rejected and replaced by more modern and humane methods of inducing employment.[14a] This more constructive approach is characterized by principles of education and manpower-retraining to teach useful occupational skills, rather than the

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[12] In Maryland, this provision is contained in the *Manual of Public Assistance,* Part II, Rule 200, VI, B (8) (c) (2).

[13] *See* p. 23 *infra.*

[14] The Work Incentive Program is now being implemented in Maryland, *State Manual,* Rule 200, B, and, unlike the maximum regulation, is directed "precisely at aiding and encouraging those who are in fact employable." Second Opinion, A.255.

[14a] As a matter of fact, the principle of "less-benefit" was denounced over a century and a half ago in England, the situs of the origin of this principle. De Schweinitz, *England's Road to Social Security,* 188 (1943).

coercion implicit in the "less-benefit" principle which further penalizes and degrades the poor. This Work Incentive Program also provides recipients with needed social services, counselling, and day-care centers for young children to facilitate the transition from welfare to work and includes an income exemption to improve the level of life for those recipients who are able to work.

Appellees do not undertake to enter into sociological debate with the State of Maryland. The issues here are clearly legal and constitutional issues, to be resolved by this Court in the light of clearly established principles of law. However, in view of the heavy sociological emphasis in Appellant's Brief, Appellees would be remiss in not making this summary reference to this extremely complex question of the efficacy of competing theories of eliminating poverty in our nation. The matter has indeed been dealt with in depth by sociologists, as referred to in the State's Brief, and elsewhere.[15]

The classification contained in the maximum grant regulation is constitutionally infirm for another reason; it is grossly overinclusive. The Court below found, citing statistics on AFDC-UP (Aid to Families with Dependent Children of Unemployed Parents) and other factors, that a very small percentage of AFDC families are employable. (A. 254, citing Plaintiffs' Ex. "E" attached to Memorandum of Plaintiffs in Opposition to Defendants' Motion to Amend,

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[15] *See,* for example, an excellent recent article by Martin Rein, *Choice and Change in the American Welfare System,* The Annals of the American Academy of Political and Social Science, September, 1969, pp. 89-109; also note this Court's footnote 22, in *King* v. *Smith,* 392 U.S. 309, 325, in which this Court recognized the "* * * new emphasis on rehabilitative services began with the Kennedy Administration '* * * [which have] demonstrated what can be done with creative . . . programs of prevention and social rehabilitation'."

Etc., Docket Item 26.) In fact, the statistic exaggerated the importance of the regulation's work incentive since the maximum did not affect all AFDC-UP families but only those containing seven or more members.

It is clear that the "employables" the State refers to are mothers of large families since under the subcategory of AFDC which provides assistance to families of unemployed fathers (AFDC-UP) a continuing condition of eligibility is a requirement that the recipient report, at least monthly, to the Department of Employment Security to see if work is available. If a job is open, the recipient must take it or lose his right to assistance. *State Manual,* Rule 207-5 (now Rule 200, III (D)(1)(d), 42 U.S.C. § 606(a) (1964).[16]

Mothers of large, needy families have parental responsibilities which form great obstacles to gainful employment. Carter, *The Employment Potential of AFDC Mothers,* 6 Welfare in Review No. 4 at 4 (1968). In such cases welfare experts agree that mothers are rarely employable persons. Carter, *supra,* at 7. The social science references cited by Appellants in their Brief do not suggest a different viewpoint and do not touch on the employability of mothers in large families. Appellants' use of the word "employable" plays fast and loose with the harsh realities faced by a mother of a large, needy family.

In fact, the state-wide criteria of the Work Incentive (WIN) Program indicate that referral of AFDC mothers may be inappropriate where many children or pre-school children are in the home. This is made abundantly clear by the State's own regulations. Rule 200 IX A (2) (b) (5)

[16] This matter is referred to and argued in depth in Memorandum of Plaintiffs in Opposition to Defendants' Motion to Amend, Etc., pp. 13, 14, 15. (Docket item 26).

of the *State Manual* prohibits referral of an AFDC mother who is needed in the home according to the following criteria:

> (a) The day to day demands on the mother in carrying out household work and meeting home needs of the children. In this context *the size of family* together with age distribution of children, and the ability and availability of older children and others in the home to meet such demands will be considered (emphasis supplied).
>
> (b) The needs of pre-school age children.
>
> (c) The special emotional needs or special needs for adult supervision of one or more children, which could be met best by the mother *being in the home* (emphasis supplied).

The above regulation is effective November 1, 1968, implementing Section 406, "Program Standards" Work Incentive Program Handbook, issued by the Manpower Administration of the U. S. Department of Labor. The regulation excludes by clear inference mothers of large families from the WIN program.

The 1967 Amendments did not, as Appellants suggest, adopt an employable mother rule as to all AFDC families regardless of individual circumstances. The concept of employability must be carefully applied to AFDC families, especially those with many children in order to avoid family breakup. Especially after the 1967 Amendments, family rehabilitation is the most relevant aspect of the AFDC program. *King* v. *Smith,* 392 U.S. 309, 325 (1968).

Finally, all of the potentially employable persons who are members of the Williams or Gary families are disabled by

poor health or other circumstances from seeking employment.[17] It is simply irrelevant to apply the "less-benefit" principle of encouraging employment to individuals who could not, in any event, be gainfully employed.[18] Second Opinion, A. 254.

The State in its Brief (p. 23) blandly characterizes the situation of the named plaintiffs, all of whom were unemployable as a result of illness and disability, as "highly exceptional." Statistics belie such a light-handed treatment of the plight of the poor on welfare. Figures made available to the Joint Economic Committee in congressional hearings indicate that 28 percent of the adult, non-aged poor in 1964 were classified as ill or disabled. About 17 percent of all poor adult males and 42 percent of poor adult

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[17] *See* Second Opinion, A. 254 and Parties' Stipulations of Facts, A. 71, 72, 74.

[18] A major premise of the less benefit principle, that there are jobs available for recipients, is demolished by the reality of the labor market. In a 1966 Report by the Legislative Council Committee on Public Welfare Cost, Exhibit "F" attached to Defendants' Memorandum in Support of Motion to Amend, A. 127, it is stated:

> As of May, 1966 there were 3,752 job openings of all kinds in the Baltimore metropolitan area. This is estimated by the Maryland State Employment Service to represent not more than 20% of all jobs available in the area. On this basis, the maximum number of jobs available in the Baltimore area would be 18,760. At the same time there were 26,000 individuals unemployed looking for work in the same area. *If all AFDC parents in the Baltimore area were trained in all the categories of the available jobs ranging from engineers to waitresses, there would not be enough jobs available to employ all of them* (emphasis added).

Another premise of the "less benefit principle" that stands on a very shaky foundation is the theory that given the choice between equal financial gain from employment and public assistance, people will choose the latter. *See,* Briar, *Welfare From Below: Recipients' Views of the Public Welfare System,* 54 *Calif. L. Rev.* 370 (1966).

females were found to be ill or disabled. Further studies revealed that among the adult poor who did not work, 44 percent of the men were classified as disabled, as compared with 10 percent of the women.[19]

Appellees recognize that a classification, to be constitutional, need not be made with "mathematical nicety," *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U.S. 61, 78-79 (1911) but contend that the classification contained in the maximum grant regulation is so patently overinclusive as to guarantee much more than the necessary "play in the joints of governments," *Bain Peanut Co.* v. *Pinson,* 282 U.S. 499, 501 (1930) and go far beyond tolerable dissymmetry. *Patsone* v. *Pennsylvania,* 232 U.S. 138, 144 (1913).

Not only is the regulation grossly overinclusive,[20] but also defectively underinclusive as well.[21] If AFDC families

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[19] U. S. Congress, Joint Economic Committee, Subcommittee on Fiscal Policy, Hearings on Income-Maintenance Programs, 90th Congress, 2nd Sess., June, 1968, Vol. 1, table 4, p. 165. *See also,* p. 8 of the Report of these hearings where Mitchell Ginsberg, former Commissioner of the New York City Department of Welfare, stated that:

> By and large the major part of the caseload is made up of the aged, the very young, and the disabled—people who cannot reasonably be expected to work either at the present time or in the foreseeable future . . .

[20] *See Carrington* v. *Rash,* 380 U.S. 89 (1965), where this Court held unconstitutional a statute containing a classification suffering from similar overinclusiveness. For further support, *see Developments in the Law—Equal Protection,* 82 *Harv. L. Rev.* 1065, 1086-87 (1969).

[21] In an extensive comment on equal protection the editors of Harvard Law Review noted that:

> In fact, it appears from the cases that an overinclusive classification is frequently underinclusive as well, and the courts are properly more reluctant to permit such classifications to stand. *See, e.g., Rinaldi* v. *Yeager,* 384 U.S. 305 (1966); *Carrington* v. *Rash,* 380 U.S. 89 (1965). *Developments in the Law—Equal Protection,* 82 *Harv. L. Rev.* 1067, n. 48 (1969).

are to be encouraged to work, all recipients, not merely members of large families should be subject to the "economic whip."[22] This Court recently recognized this principle in *Shapiro* v. *Thompson,* 394 U.S. 618, 637-38 (1969), stating:

> A state purpose to encourage employment provides no rational basis for imposing a one-year waiting period restriction on new residents only.[23]

Similarly, "a state purpose to encourage employment provides no rational basis for imposing" a maximum grant regulation on large families only.

2. *The Maximum as a Family Stabilizer*

There can certainly be no quarrel with the legitimacy of a state goal of increased family stability and cohesiveness.[24] In fact this is an avowed purpose of the Social Security Act of 1935, as amended, 42 U.S.C.A. §§ 601-609. 42 U.S.C.A. § 601 provides that a purpose of the Act is to encourage:

> *The care of dependent children in their own homes* or in the homes of relatives,[25] . . . enabling each State

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[22] *See Rinaldi* v. *Yeager,* 384 U.S. 305 (1966) employing traditional test of equal protection to invalidate an underinclusive classification.

[23] The court specifically stated that a one-year waiting requirement was invalid under both traditional criteria of equal protection and the "compelling interests" test. *Shapiro* v. *Thompson,* 394 U.S. 618, 638 (1969).

[24] *See, The Negro Family—The Case for National Action,* Office of Policy Planning and Research, United States Department of Labor, March, 1965.

[25] Presumably, only where the original family unit has been dissolved. *See,* lower Court's Initial Opinion, A. 93, 94.

> 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* and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance and continuing parental care and protection . . . (emphasis added).

Similarly, the Maryland Code announces, as the *primary* purpose of the Social Security Act,

> The strengthening of family life through services and financial aid * * * . *Maryland Code Annotated,* Article 88A, Section 44A (1964).

It is, however, quite apparent that the maximum grant regulation, rather than providing incentives to encourage family stability, creates powerful pressures to fragment and dissolve the family unit. (*See,* Stipulation of Facts, A. 72, 73, 74.)

Maryland law allows a large family receiving AFDC to maximize its benefits by placing some children with eligible relatives or agencies or an additional assistance unit.[26]

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[26] *See,* Second Opinion, A. 253. Judge Winter, in his Initial Opinion (A. 89) details the exact amount of extra benefits to be gained by this family dissolution.

> 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. If Mr. and Mrs. Gary were to place two of their children between the ages of six

Placement of some dependent children in this way circumvents the cruelties of the maximum grant regulation but, in obvious contravention of the purposes of the Social Security Act, shatters the basic family unit.[27] These economic realities reveal the counterproductivity of this regulation and fully support the lower Court's conclusion that,

> The maximum grant regulation provides a powerful economic incentive to break up large families by plac-

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and twelve with relatives, each child so placed would be eligible for assistance in the amount of $65.00 per month, and they and their six remaining children would still be eligible to receive the maximum grant of $250.00.

At least two other courts, *Dews* v. *Henry and Inclan* v. *Department of Public Welfare,* 297 F. Supp. 587, 592 (D. Ariz. 1969) and *Westberry* v. *Fisher,* 297 F. Supp. 1109, 1114, n. 15 (D. Me. 1969) have expressly recognized and condemned this divisive feature of the maximum grant regulation, and another court, *Collins* v. *State Board of Social Welfare,* 248 Iowa 369, 81 N.W. 2d 4, 8, 9 (1957) acknowledged the powerful incentive to "farm out" children provided by such a regulation.

[27] A pernicious side effect of the maximum grant regulation, further contributing to destruction of family unity and cohesiveness, is its subjection of large AFDC families to the neglect provisions of Maryland law which permit the State to file a neglect petition against parents, requesting guardianship of children, when a child is "neglected." *Maryland Code Annotated,* Article 26, Section 78. A presumption of neglect arises when a child is:

> (1) Malnourished, ill-clad, dirty, without proper shelter or sleeping arrangements;
>
> * * * * *
>
> (2) Exposed to unwholesome and demoralizing circumstances. *Maryland State Department of Social Services, Manual,* Part II, Rule 209.8.

Denial of benefits to additional children in large families can but result in inevitable "neglect" as defined above.

> ing dependent children . . . in the homes of persons included in the class of eligible relatives.
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> Initial Opinion, A. 94, 95.[28]

Furthermore, the regulation is so crudely imprecise in its classification as to negate any possible rational connection between the regulation and a valid state purpose.

A 1966 legislative report showed that only 15.2% of AFDC families were eligible for assistance because of parental desertion. (*See,* Exhibit "F" attached to Defendant State of Maryland's Memorandum in Support of Motion to Amend, etc., Report of the Legislative Council Committee on Public Welfare Cost, October, 1966 [A. 154].) A classification that penalizes 85% of its members for the purpose of affecting the behavior of the remaining few suffers from such extraordinary overinclusiveness as to render it patently unreasonable and arbitrary, especially where no evidence exists indicating its success in reaching the tiny fraction it intends to affect. This unreasonableness renders the regulation unconstitutional under the traditional test of equal protection.[29]

When applied to the Appellees the irrationality of the maximum regulation is graphically obvious as the Court below correctly concluded, stating,

> Discouragement of desertion as a rational basis for the maximum grant regulation can have application

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[28] For a reaffirmation of this conclusion *see* the lower court's Second Opinion, A. 250, n. 11. *Accord, Dews* v. *Henry* and *Inclan* v. *Department of Public Welfare,* 297 F. Supp. 587 (D. Ariz. 1969), and *Westberry* v. *Fisher,* 297 F. Supp. 1109 (D. Me. 1969).

[29] *See, Carrington* v. *Rash,* 380 U.S. 89 (1965); *Developments in the Law—Equal Protection,* 82 *Harv. L. Rev.* 1065, 1086-87 (1969).

> only to the continued absence subcategory of AFDC; it can have no application to dependency which arises because of death, unemployment, or physical or mental incapacity of the wage earner. The named plaintiffs Junius Gary and Jeanette Gary are examples of eligibles to whom this purpose has no logical application.
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> Second Opinion, A. 253.

Furthermore, since the maximum does not serve to discourage desertion in small families whose financial condition could improve upon desertion of a marginally employed parent, the regulation's classification does not include all, or even approximately all, those similarly situated. This Court should, as the Court below properly did, reject such a classification as violative of equal protection.[30]

3. *The Maximum Grant Regulation as a Disincentive to Child-Bearing*

The right of Appellees, as married persons, to freedom of choice concerning procreation and reproduction and to marital privacy has been firmly established.[31] (See pp. 39 to 41, *infra.*)

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[30] *See, Rinaldi* v. *Yeager,* 384 U.S. 305 (1965).

[31] *Griswold* v. *Connecticut,* 381 U.S. 479 (1965); *Meyer* v. *Nebraska,* 262 U.S. 390, 394 (1922); *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942); *McLaughlin* v. *Florida,* 379 U.S. 184 (1964); *Loving* v. *Virginia,* 388 U.S. 1 (1966). *See, Prince* v. *Massachusetts,* 321 U.S. 158, 166 (1944), recognizing "a realm of family life which the state cannot enter without substantial justification" and Justice Harlan's dissenting opinion in *Poe* v. *Ullman,* 367 U.S. 497, 548, 552 (1960) where he concludes that "the privacy of the home in its most basic sense" is "a most fundamental aspect of 'liberty' . . ." ". . . of this whole private realm of family life it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations."

This Court has left no doubt that, while under certain exceptional circumstances infringement, by government, of this right of procreation and marital privacy will be upheld,[32] it constitutes impermissible invidious discrimination to discourage one class of individuals from exercising these basic rights while zealously safeguarding the exercise of those rights by others similarly situated.[33]

Assuming it is a proper State objective to discourage parents from having large families, the maximum grant regulation is unnecessarily limited in that it discourages procreation only among welfare recipients and is impermissibly broad because it deleteriously affects families, such as Appellees[34] which were *already* large when application was made for AFDC.[35] Thus even under the traditional test of equal protection the classification is invalid.[36]

It is clear, however, that a regulation abridging or discouraging the exercise of these basic rights must withstand a much more demanding judicial examination, i.e., "special scrutiny," and, to be valid, must be based upon a compelling and overriding state interest.[37]

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[32] *See, e.g., Buck* v. *Bell,* 274 U.S. 200 (1927) and *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942).

[33] *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942).

[34] *See, Stipulation of Facts,* A. 72, 73 and Second Opinion, A. 255, 256.

[35] *Accord, Westberry* v. *Fisher,* 297 F. Supp. 1109, 1115, n. 17 (D. Me. 1969).

[36] *See, Carrington* v. *Rash,* 380 U.S. 89 (1965) and *Rinaldi* v. *Yeager,* 384 U.S. 305 (1966).

[37] *Skinner* v. *Oklahoma, supra; Griswold* v. *Connecticut, supra; Shapiro* v. *Thompson,* 394 U.S. 618 (1969) and cases cited at pp. 36 to 39, *infra.*

The "special scrutiny" or "compelling interest" test is also appropriate in this case because the State's alleged "birth control" objective affects only those individuals poor enough to qualify for public assistance and not members of all families, or at least, all large families, and thus constitutes an invidious discrimination based upon poverty.[38]

The State's cryptic suggestion that it may withhold benefits from large families to discourage procreation because there is no general right to public assistance[39] is the same tired assertion of arbitrary power condemned by this Court in a long line of cases.[40]

Here, as in *Shapiro* v. *Thompson, supra,* savings in welfare expenditures are not a sufficiently "compelling state interest" to justify discouragement of basic rights of procreation and marital privacy.

Furthermore, the maximum grant regulation by diluting the size of the grant made to all children when parents choose to have a large family,[41] punishes innocent children

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[38] *Harper* v. *Virginia Board of Elections,* 383 U.S. 663 (1966); *Griffin* v. *Illinois,* 351 U.S. 12 (1956). *See,* pp. 36 to 39, *infra.*

[39] Brief for Appellants, p. 39 n. 11.

[40] *Sherbert* v. *Verner,* 374 U.S. 398 (1965); *Keyishian* v. *Board of Regents,* 384 U.S. 589 (1967); *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 239 (1957); *Garrity* v. *New Jersey,* 385 U.S. 493 (1967); *Spevack* v. *Klein,* 384 U.S. 511 (1967). The State can't condition public assistance upon surrender of the right to marital privacy and procreation any more than they could condition the same privilege upon the surrender of the right to travel. *Shapiro* v. *Thompson, supra.*

[41] The maximum grant regulation, by coercing family size, operates directly contrary to the principle of *voluntary* family planning contained in the Social Security Act. Social Security Act of 1935 as amended, §§402(a)(14)(15); 42 U.S.C. §§602a(14), (15); H.E.W., Report on Family Planning I, 1966. By penalizing families of seven or more for the birth of additional children the regula-

for the acts of their parents. This was denounced by this Court in *King* v. *Smith,* 392 U.S. 309 (1968) as violative of the Social Security Act[42] and in *Levy* v. *Louisiana,* 391 U.S. 68 (1968) as a denial of equal protection. The Court stated in *Levy,*

> [I]t is invidious to discriminate against them [children] when no action, conduct or demeanor of theirs is possibly relevant . . .
>
> *Levy* v. *Louisiana,* 391 U.S. 68, at 72.

4. *The Maximum Grant as a Means of Best Allocating Limited Funds and Method of Decreasing Public Antagonism*

Appellants' last two arguments are simply assertions of their right to be arbitrary rather than a valid defense of the maximum regulation and require only summary discussion.

This Court's recent decision in *Shapiro* v. *Thompson, supra* and numerous lower court decisions have settled beyond dispute that the saving of welfare costs cannot be

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tion's harshness falls heaviest upon those who do not believe in artificial means of controlling birth.

[42] Justice Douglas, concurring in *King* v. *Smith,* 392 U.S. 309, 336 (1967) expressed his belief that it is a denial of equal protection, as well as violative of the Social Security Act, to punish some children for the acts of their mother when all children are equally needy. Likewise, the original Court to strike down a maximum grant regulation as violative of equal protection came to a similar conclusion invalidating the regulation because,

> [it] is clearly discriminatory between dependent children . . . and is purely arbitrary and unreasonable in view of the announced purpose of the act.
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> *Collins* v. *State Board of Social Welfare,* 248 Iowa 369, 81 N.W. 2d 4, 9 (Sup. Ct., 1957).

an independent ground for an invidious classification.[43] *Shapiro* v. *Thompson, supra,* at 633. Under the Social Security Act the intended direct beneficiary is the dependent *child.* (See discussion at p. 55, *infra.*) Thus, Appellants' suggestion that they can reach more *families* by use of a maximum grant regulation bears no relation to the purpose of the Act and is an admission of the regulation's illegality and unconstitutionality.

Assuming *arguendo* that the maximum regulation plays some role in minimizing public antagonism aimed at the welfare system it does so by use of an invidious discrimination denying Appellees and the class they represent equal protection of the laws. This Court has, in the past, refused to allow the constitutional rights (here the right to equal protection) of a few to be sacrificed because of general public disapproval.[44]

Just as the burden of governmental economizing cannot fall unequally upon any one class, the burden resulting from "political compromise" cannot be borne solely by one small group of individuals indistinguishable from others.[45]

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[43] Accord, *Westberry* v. *Fisher,* 297 F.Supp. 1109, 1114-15 (D. Me. 1969); *Dews* v. *Henry* and *Inclan* v. *Department of Public Welfare,* 279 F. Supp. 587, 592 (D. Arizona 1969); *Kaiser* v. *Montgomery,* —— F. Supp. —— (N.D. Cal. Civ. No. 49613, Aug. 4, 1969); *Rothstein* v. *Wyman,* 303 F. Supp. 339 (S.D.N.Y. 1969); *Green* v. *Department of Welfare,* 270 F. Supp. 173 (D. Del. 1967); *Harrell* v. *Tobriner,* 279 F. Supp. 22 (D.D.C. 1967); *Smith* v. *Reynolds,* 277 F. Supp. 65 (E.D. Pa. 1967). *See, Rinaldi* v. *Yeager,* 384 U.S. 305 (1966).

[44] *Cooper* v. *Aaron,* 358 U.S. 1 (1958); *Wright* v. *Georgia,* 373 U.S. 284 (1963); *Terminiello* v. *City of Chicago,* 337 U.S. 1 (1949); *Cox* v. *Louisiana,* 379 U.S. 536 (1965).

[45] In the emotional dialogue about rising welfare expenditures it is usually forgotten that "while actual dollar costs have risen, public welfare expenditures have decreased as a percentage of both National Personal Income and Gross National Product." Maryland State Department of Public Welfare, Research Report No. 2, July, 1967.

C. THE APPROPRIATE STANDARD OF REVIEW IN THIS CASE IS THE "SPECIAL SCRUTINY" TEST OF EQUAL PROTECTION. THE MAXIMUM GRANT REGULATION IS UNCONSTITUTIONAL UNDER THIS TEST

1. *Origin and Evolution of This Standard*

This 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 confined." *Harper* v. *Virginia Bd. of Elections,* 383 U.S. 663, 670 (1965); *Skinner* v. *Oklahoma,* 316 U.S. 535, 541 (1942). Infringement of such a fundamental right, to be valid, must promote "a *compelling* state interest." *Shapiro* v. *Thompson, supra,* at 634.[46]

The "special scrutiny" standard is also proper when classifications are based upon "suspect" criteria such as race,[47] wealth,[48] alienage or nationality[49] or status.[50]

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[46] Among those rights that have been recognized as fundamental by this Court are the right to travel, *Shapiro* v. *Thompson, supra;* the right to vote, *Harper* v. *Bd. of Elections, supra; Reynolds* v. *Sims,* 377 U.S. 533, 561-62 (1964); the right to procreate, *Skinner* v. *Oklahoma, supra;* the right to an education, *Brown* v. *Board of Education,* 347 U.S. 483 (1954); *Bolling* v. *Sharpe,* 347 U.S. 497 (1954); and the right to marry, *Loving* v. *Virginia,* 388 U.S. 1 (1967). *See generally, New Developments in the Law—Equal Protection,* 82 Harv. L. Rev. 1065 (1969).

[47] *Korematsu* v. *United States,* 323 U.S. 214, 216 (1944); *Loving* v. *Virginia, supra; Brown* v. *Bd. of Education, supra; McLaughlin* v. *Florida,* 379 U.S. 184 (1964).

[48] *Harper* v. *Bd. of Elections, supra; Griffin* v. *Illinois,* 351 U.S. 12 (1956); *Douglas* v. *California,* 372 U.S. 353 (1963).

[49] *Oyoma* v. *California,* 332 U.S. 633 (1948); *Takahashi* v. *Fish and Game Commission,* 334 U.S. 410 (1948); *Korematsu* v. *United States, supra.*

[50] *Levy* v. *Louisiana,* 391 U.S. 68 (1968); *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942).

In either case, that is, one involving a fundamental right or suspect classification, to uphold the classification the State must show more than some tenable, rational justification for the statute or "a mere . . . rational relationship" [51] between the purpose to be served by the statute and the classification. In such cases, traditional standards of equal protection are inapplicable,[52] and in reviewing state statutes or regulations under the "special scrutiny" test the Court may properly invalidate the legislation because the legislature has disregarded existent less onerous alternatives which could have achieved the same purpose without such deleterious effect upon basic rights.[53]

A third consideration which has influenced courts to review state acts with "special scrutiny" arises when the law penalizes or harshly affects a class that exercises little control over the political process. Thus, in *United States* v. *Carolene Products Co.*, 304 U.S. 144, 153, n. 4 (1938) this Court noted that:

> [P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of these political processes ordinarily to be relied upon to protect minorities, and, which may call for a correspondingly more searching judicial inquiry (citations omitted).

Similarly, Judge Skelly Wright, in *Hobson* v. *Hansen,* 269 F.Supp. 401, 507, 508 (D.D.C. 1967), *aff'd sub nom.,*

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[51] *Shapiro* v. *Thompson, supra* at 634.

[52] *Id.*

[53] *See, Developments in the Law—Equal Protection,* 82 Harv. L. Rev. 1065, 1122 (1969) and cases cited therein, and p. 66 *infra*.

408 F.2d 175 (D.C. Cir. 1969) stated the necessity for careful scrutiny when reviewing legislation adversely affecting disadvantaged minorities.

> The explanation for this additional scrutiny of practices which, although not directly discriminatory, nevertheless fall harshly on such groups relates to the judicial attitude toward legislative and administrative judgments. Judicial deference to these judgments is predicated in the confidence courts have that they are just resolutions of conflicting interests. This confidence is often misplaced when the vital interests of the poor and of racial minorities are involved. For these groups are not always assured of a full and fair hearing through the ordinary political processes . . . because of the abiding danger that the power structure . . . may incline to pay little heed to even the deserving interests of a politically voiceless and invisible minority. These considerations impel a closer judicial surveillance and review of administrative judgments adversely affecting racial minorities, and the poor, than would otherwise be necessary.

The maximum grant regulation, by infringing upon basic and fundamental rights, containing a suspect classification, and adversely affecting a disadvantaged political minority requires "special scrutiny" and can only be upheld if necessary to achieve a "compelling" governmental interest. Because it advances no such interest the maximum grant regulation must fall as violative of equal protection.

2. *The Maximum Grant Regulation Infringes Upon Basic and Fundamental Rights*

a. *The Right to Procreate and Marital Privacy*[54]

In *Skinner* v. *Oklahoma,* 316 U.S. 535, 541 (1942), Justice Douglas, writing for the majority, referred to the right of procreation within a marriage as "one of the basic civil rights of man," being "fundamental to the very existence and survival of the race." [55] Applying a "strict scrutiny" test the Court invalidated, as violative of equal protection, a state statute providing for sterilization of some criminals while leaving unaffected criminals within the same class. The critical defect in the state law was its underinclusive classification.[56]

The Court in *Griswold* v. *Connecticut,* 381 U.S. 479 (1965) insured further protection for the marital relationship by holding that personal decisions concerning sexual relations and control of family size were insulated, by a zone of privacy from governmental interference. Justice Douglas, writing the Opinion of the Court, said,

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[54] *See,* p. 31 to p. 33, *supra.*

[55] In an earlier case, this Court held that the Fourteenth Amendment guarantees the right "to marry, establish a home and bring up children . . . " *Meyer* v. *Nebraska,* 262 U.S. 390, 399 (1922). *See, Loving* v. *Virginia,* 388 U.S. 1, 12 (1966).

[56] At least three State Supreme Courts had, prior to *Skinner* v. *Oklahoma, supra,* ruled invalid statutes providing for the sterilization of some institutionalized persons holding that, in light of the broad purposes of the statutes (to prevent procreation by the "genetically" insane), the classifications contained therein were defectively underinclusive since insane persons outside institutions were not included within the scope of the classfication. *In Re Thompson,* 169 N.Y.S. 638 (Sup. Ct. 1918); *Haynes* v. *Lapeer, Circuit Judge,* 201 Mich. 138 (Sup. Ct. 1918); *Smith* v. *Board of Examiners,* 85 N.J.L. 46 (Sup. Ct. 1913).

> The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which . . . seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms" (citation omitted).
>
> *Griswold* v. *Connecticut,* 381 U.S. 479 at 485.[57]

Justice Douglas cryptically pointed to the First Amendment (more particularly the promise of freedom of association) as a primary source of the guarantee of privacy for the marital relationship when he concluded:

> We deal with a right of privacy older than the Bill of Rights, older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an *association* that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet, it is an *association*

[57] Justice Goldberg concurring (joined by Chief Justice Warren and Mr. Justice Brennan) described the right to privacy as a "fundamental personal right, emanating 'from the totality of the Constitutional scheme under which we live.'" *Griswold* v. *Conn., supra,* at 494. *See, Time, Inc.* v. *Hill,* 385 U.S. 374, 415 (1966), where Justice Fortas, dissenting, stated that "[p]rivacy, then, is a basic right."

> for as noble a purpose as any involved in our prior decisions (emphasis added).
>
> *Griswold* v. *Conn., supra,* at 486.[58]

Griswold and *Skinner,* therefore, establish, as fundamental and basic rights, the right to marital privacy[59] and uncoerced family planning. The cases further establish as the appropriate standard of equal protection the "special scrutiny" or "compelling interests" test (*see,* p. 32 *supra*) where interference with marital privacy occurs. The state of Maryland is seriously infringing and encroaching upon these rights by conditioning public assistance upon the surrender, by parents with large families, of these personal rights and therefore, the special scrutiny test is appropriate in this case.

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[58] Commentators have noted the significance of *Griswold* in assuring that decisions as to family size must be protected from governmental interference.

> The constitutional right of privacy in the United States encompasses protection of the family relationship; and the *Griswold* decision indicates that, absent a compelling and overwhelming public interest, the governmental authorities may not compel the determination of family size. Kutner, *Due Process of Family Privacy,* 28 U. Pitt. L. Rev. 597, 615 (1967).
>
> That the right of spouses to be free from governmental coercion in their decisions as to family size (large or small) and method of carrying out the decisions is of fundamental importance cannot be denied. (Footnote omitted.) [S]erious constitutional questions would be involved if . . . coercion [by welfare officials against recipients to compel limitation of family size] and invasion of privacy could not be adequately protected against. Sirilla, *Family Planning and the Rights of the Poor,* 13 Catholic Lawyer, 42, 45 and 49 (1967).

See also, Welfare's Condition X, 76 Yale L.J. 1222, 1232-33 (1967).

[59] *See, Cotner* v. *Henry,* 394 F.2d 873 (7th Cir. 1968) confirming and protecting this right.

b. *The Right to Life*

In their often cited dissent Mr. Justice Field and Mr. Justice Strong, in the case of *Munn* v. *Illinois,* 94 U.S. 113, 142 (1876), defined the meaning of the term "life" as used in the Fourteenth Amendment. They stated:

> By the term 'life', as here used, something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and facilities by which life is enjoyed. * * * The deprivation not only of life, but of whatever God has given to everyone with life, for its growth and enjoyment, is prohibited by the provision in question, if its efficacy be not frittered away by judicial decision.

The maximum grant provision strikes at this most basic right of all, the right to life itself. It allows the Department of Public Welfare to deny any family consisting of more than six persons minimal subsistence that the Department has itself, in determining the standard of need, defined to be necessary to life.

The tragic effect of the denial of the minimal subsistence benefit necessary for life was recently recognized in the report of the President's National Advisory Commission on Civil Disorders. In recognizing that the national average grant for welfare recipients was well below the poverty subsistence level of $3,335 for an urban family of four, the Commission reported the effect of this inadequacy. It quoted the Advisory Council of Public Welfare, in stating that these inadequacies:

> * * * are themselves a major source of such social evils as crime and juvenile delinquency, mental illness,

> illegitimacy, multi-generational dependency, slum environments, and the widely deplored climate of unrest, alienation, and discouragement among many groups in the population. *Report of the National Advisory Commission on Civil Disorders,* Bantam Books, 1968, p. 460.

This recognition of poverty as a cause and source of other deprivations is critically important. Without the bare necessities of life the full and active exercise of guaranteed rights, such as freedom of speech and association, is curtailed.[60] As a result of indigency many have not participated in the political processes. *United States* v. *Carolene Products Co.,* 304 U.S. 144, 153, n. 4 (1938); *Hobson* v. *Hansen,* 269 F.Supp. 401, 507 (D.C.D.C. 1967), *aff'd sub nom.,* 408 F.2d 175 (D.C. Cir. 1969).

It is indeed the purpose of the welfare system "to protect the fundamental rights of children to the sustenance and stable family life which will enable them to develop into full members of our society capable of exercising their rights and responsibilities under the United States Constitution". *Rosado* v. *Wyman,* 414 F.2d 170, 185 (2d Cir. 1969).

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[60] This proposition is borne out in the instant cases. Appellees are constantly in debt and unable to supply their children with the basic necessities of life. The children of Appellees occasionally must miss school because they are without adequate clothing. Appellees Junius and Jeanette Gary furthermore, are forced to suffer through winter months without heat and light because of their inability to pay gas and electric bills on time. Their AFDC grant does not even provide sufficient money to allow them to participate in the Food Stamp Program which would make available to their children more nutritious food in greater quantity. This last deprivation is especially critical in light of recent evidence indicating that inadequate nutrition in early childhood can cause irreversible brain damage. *Hunger, U.S.A.* (1968). *See,* A. 71-74.

When a legislative classification has the effect of placing such additional burdens on a class of persons characterized by its extreme poverty and a practical inability to escape from problems which the classification creates, strict scrutiny of the classification is appropriate. *Harper* v. *Board of Elections,* 383 U.S. 663 (1966); *Griffin* v. *Illinois,* 351 U.S. 12 (1956); *Douglas* v. *California,* 372 U.S. 353 (1963).

Furthermore, as discussed previously, when legislation encroaches upon fundamental rights, strict scrutiny is appropriate (*see,* pp. 35 to 39, *supra*). Fundamental rights include those rights basic to survival and well-being whether or not they are specifically expressed in the Constitution. *Harper* v. *Board of Elections,* 383 U.S. 663 (1966); *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942); *Griswold* v. *Connecticut,* 381 U.S. 479 (1965); *Shapiro* v. *Thompson,* 394 U. S. 618 (1969). Certainly, in any hierarchy of rights the right to bare necessities of life and minimal physical well-being ranks as high as the right to procreate, privacy, vote, marry or travel.[61] Indeed, as mentioned previously, these rights presuppose the existence of a basic right to life and are dependent upon such a right. Any right "preservative of other basic civil and political rights" must be considered fundamental and any alleged infringement of this right "must be carefully and meticulously scrutinized".[62]

This Court, in *Shapiro* v. *Thompson,* 394 U.S. 618, 627 (1969) stated the vital importance of welfare aid, "upon

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[61] In *Bell* v. *Maryland,* 378 U.S. 226, 255 (1964), Mr. Justice Douglas rhetorically asked,

> Is the right of a person to eat less basic than his right to travel . . . ?

[62] *Reynolds* v. *Sims,* 377 U.S. 533, 562 (1963).

which may depend the ability of the families to obtain the very means to subsist—food, shelter, and other necessities of life".[63]

Other courts have indicated their belief that rights of such crucial importance can only be infringed upon a showing, by the government of "compelling interest." In *Rothstein* v. *Wyman,* 303 F.Supp. 339 (S.D.N.Y., 1969) the Court stated:

> Where legislative classifications . . . operate to the detriment of a disadvantaged minority, they are "closely scrutinized and carefully confined," . . . and will be upheld only if it is necessary and not merely rationally related, to the accomplishment of a permissible state policy . . . The standard has more recently been described in even stricter terms as one making constitutionality depend upon whether the statute "promotes a *compelling* state interest" . . .
>
> Receipt of welfare benefits may not at the present time constitute the exercise of a constitutional right. But among our Constitution's expressed purposes was the desire to "insure domestic tranquility" and "promote the general welfare". Implicit in these phrases are certain basic concepts of humanity and decency. One of these, voiced as a goal in recent years by most responsible governmental leaders, both federal and state, is the desire to insure that indigent, unemployable citizens will at least have the bare minimums required for existence, without which our expressed fundamental constitutional rights and liberties frequently cannot be exercised and therefore become

[63] *See,* dissenting opinion of Mr. Justice Harlan at 660-661.

> meaningless. Legislation with respect to welfare assistance, therefore, like that dealing with public education, access to public parks or playgrounds, or use of the mails, deals with a critical aspect of the personal lives of our citizens whether such assistance be labelled a "right," "privilege" or "benefit". *See, Sherbert* v. *Verner,* 374 U.S. 398, 404 (1962). Its importance is magnified by the defenseless and disadvantaged state of the class of citizens to which it relates, who are usually less able than others to enforce their rights. It can hardly be doubted that the subsistence level of our indigent and unemployable aged, blind and disabled involves a more crucial aspect of life and liberty than the right to operate a business on Sunday or to extract gas from subsoil. We believe that with the stakes so high in terms of human misery the equal protection standard to be applied should be stricter than that used upon review of commercial legislation and more nearly approximate that applied to laws affecting constitutional rights. (Footnotes and citations omitted).

Similarly, in *Harrell* v. *Tobriner,* 279 F.Supp. 22, 31 (D.D.C.—1967) the Court said,

> This natural movement toward assistance where assistance is needed, and the human terms of the problem, permit the court somewhat greater latitude in deciding that this difference in the treatment of those in our midst who are in need amounts to unequal protection of laws than if the treatment were with respect to some matter less critical to their living conditions.

The right to life, guaranteed by the Fourteenth Amendment, recognizes that a man is not a mere animal but a

political and social creature as well. *Munn* v. *Illinois, supra* (dissenting opinion). The maximum grant regulation undermines this basic right, placing in the balance, "all that makes life worth living". *Ng Fung Ho* v. *White,* 259 U.S. 276, 284 (1922).

3. *By Differentiating Among Children Because of Family Size the Maximum Grant Regulation Contains a Suspect Classification*

The *status* of a child, as the fifth, sixth, etc., member of a family, provides no reason for denying him a statutory entitlement. This Court, very recently, established this principle when it held unconstitutional in *Levy* v. *Louisiana,* 391 U.S. 68 (1969) a state statute disallowing an illegitimate child's suit for the wrongful death of its mother. The Court reached its decision without expressly determining whether there was a rational connection between the statute and a valid state purpose (discouraging illegitimate births) by applying the special scrutiny test. The Court explained its use of this standard of judicial review by stating:

> [W]e have been extremely sensitive when it comes to basic civil rights (citations omitted) and have not hesitated to strike down an invidious classification even though it had history and tradition on its side. (Citations omitted.) *The rights asserted here involve the intimate familial relationship between a child and his own mother. Levy* v. *Louisiana,* 391 U.S. 68 at 71. (Emphasis added.)

The Court, speaking through Mr. Justice Douglas, concluded that:

> [I]t is invidious to discriminate against them [children] when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother. *Levy* v. *Louisiana, supra* at 72.

The clear mandate of *Levy* is that a classification based upon a child's *status* (be it illegitimacy or position in a large family) will be constitutionally suspect requiring a heavy burden of justification by the State. The mere fact of being a young child in a large family is a "neutral fact constitutionally, an irrelevance like race, creed or color," *Edwards* v. *California,* 314 U.S. 160, 184-85 (1941) (Justice Jackson concurring), and the State should not be allowed to treat these individuals as "non-persons." *Levy* v. *Louisiana, supra.*

II.

The Maximum Grant Regulation, by Disregarding the Needs of Some of the Children of Large Families and in Effect Treating the Family as the Proper Unit of Assistance Provides a Powerful Incentive to Fragment the Family Unit, Violating Two Fundamental Purposes of the Aid to Families With Dependent Children Program, Title IV of the Social Security Act of 1935.

The duty of the Court below was to reach and decide the question of statutory conformity before deciding the constitutional question. *Rosenberg* v. *Fleuti,* 374 U.S. 449, 451 (1962). The Court in its first opinion found a violation of Section 402 (a) (9) (now 402 (a) (10)) of the Social Security Act, as amended, 42 U.S.C.A. § 602 (a) (9) (now 602 (a) (10)), and of the general purpose of the Act aimed at strengthening family life, 42 U.S.C.A. § 601. The reasoning of the Court below in its second opinion confirms

and supports its original finding of statutory violations, despite its reluctance to make such a finding.

The Appellant State of Maryland in its brief has completely neglected to give this Court the benefit of its own position in regard to the statutory violation *vel non* of the maximum grant regulation here under attack. It has instead contented itself with rephrasing and quoting in large part its Jurisdictional Statement, directed to the constitutional arguments, in a sociological setting. Appellees feel it important to thoroughly present the statutory base of the Social Security Act of 1935 as it applies to this case, since it is traditional that this Court's disposition of cases be made on statutory rather than constitutional grounds, in the absence of insurmountable problems of statutory construction. *King* v. *Smith,* 392 U.S. 309, 334 (Concurring Opinion of Mr. Justice Douglas).

The central purpose of the AFDC Program, 42 U.S.C. §§ 601-609, is to provide financial assistance, in accordance with computed need, to each dependent child. Congress intended this assistance to achieve two related objectives. It was intended to insure that no child is denied basic necessities of life because of his parents' poverty. Secondly, assistance, under the AFDC Program, was envisioned as a means of strengthening and improving the child's family life and home environment. The existence of a maximum grant regulation effectively frustrates the achievement of both these objectives in the cases of Appellees and the class they represent.

A. A Fundamental Purpose of the AFDC Program Is to Strengthen Family Life

The Federal and State statutes and regulations creating and implementing the AFDC Program declare, as an essen-

tial purpose of AFDC, the encouragement of a stable and cohesive family unit.

The Social Security Act of 1935, as amended, states that an objective of the Act is:

> "[*T*]*o help maintain and strengthen family life* and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence *consistent with the maintenance of continual parental care and protection . . .* "[64] (emphasis added). 42 U.S.C. § 601.

The United States Department of Health, Education and Welfare defines, more specifically, what is meant by the phrase "Strengthen Family Life":

> Strengthening family life means sustaining and increasing the ability of parents to carry their parental responsibilities in the care, protection, and support of their children; and to sustain and increase the capacities of children to carry their appropriate role in total family life, to the end that children may have a home life conducive to healthy, physical, emotional, and social growth and development. Families have the right and responsibility to provide for adequate health care, education, and vocational training in accordance with

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[64] The administrative interpretation of basic federal policy is set forth in Regulation 3401, Part IV of the *Federal Handbook of Public Assistance Administration*:

> To live in the family to which he belongs is the foundation of a child's security. The public has an interest and an obligation in sustaining the contribution which parents and immediate family make to the development of a child. Financial inability to meet a child's needs, therefore, should not be allowed to force a parent to surrender responsibility for bringing up the child.

> the capacities of their children; and to provide for their participation in community life. HEW, HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, Pt. IV, § 4223.1.

In Maryland, the State statute authorizing State participation in the AFDC Program contains a similar unequivocal declaration of purpose.

> * * * It is hereby declared that the primary purpose of aid given under this subtitle is the *strengthening of family life through services and financial aid,* whereby families may be assisted to maximum self-support in homes meeting the requirements of child care established by law in this State * * * . (Emphasis supplied.) *Annotated Code of Maryland,* Article 88A, § 44A (1957).

This Congressional and State decision to actively encourage, by the AFDC Program, poor families to remain intact and together reflects a judgment that poverty does not disqualify people as parents and is best combatted by the promotion of family unity. Keeping parents and children together in their own homes, rather than institutionalizing the children of the poor, it was decided, "is the least expensive and altogether most desirable method for meeting the needs of these [poor] families that has yet been devised".[65]

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[65] Senate Report No. 628, 74th Congress, 1st Sess. (May 13, 1935). The initial House version of the Social Security Act contained a similar declaration of philosophy stating that "it has long been recognized in this country that the best provision that can be made for families of this description [without a potential breadwinner] is public aid with respect to dependent children *in their own homes.*" House Report No. 615, 74th Congress, 1st Sess. (1935). (Emphasis supplied.)

The AFDC Program then, is "designed to hold broken families together".[66] In *Lampton* v. *Bonin,* 299 F.Supp. 336, 340 (E.D. La. 1969) the Court emphatically recognized the fostering of family unity as the *primary* purpose of AFDC.

> [T]he primary purpose of ADC [AFDC] appropriations, unlike appropriations for the other three categories [of public assistance], is not simply to enable the States to furnish assistance to needy children. True, these funds are to be used for this purpose, but the enabling of States to furnish assistance to needy children is only a means to the real primary purpose; 'the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives . . . to help maintain and strengthen family life . . .'. It is not enough that the dependent children be given simply financial assistance; the chief purpose of the Social Security Act section on dependent children is to see that such children are raised by their parents or relatives in a family atmosphere.[67]

The maximum grant regulation, rather than encouraging family cohesiveness, fosters the dissolution and fragmentation of large families. The actual economic advantage to be gained by Appellees' division of their families has been discussed previously (*see,* p. 28 and n. 26 *supra*). The Parties Stipulations of Fact in this case describe Appel-

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[66] Statement made by Senator Harrison of the Senate Committee on Finance during Senate debate on the House Ways and Means Committee proposals for Title IV, 79 *Cong. Rec.* 9269 (1935). *See also,* lower Court's Initial Opinion, A. 93.

[67] Accord, *Jefferson* v. *Hackney,* —— F.Supp. ——, Civil Action No. 3-3012-B (N.D. Tex. 1969).

lees' daily financial struggle (A. 71-74) and the excessive pressures caused by the maximum grant regulation which force Appellees to consider family dissolution as a means of providing their families with the necessities of life (A. 73, 74).

It was these economic realities that led the lower Court to conclude, in its initial opinion, that:

> [T]he maximum grant regulation provides a powerful economic incentive to break up large families by placing 'dependent children' . . . in the homes of persons included in the class of eligible relatives. If this is done, the pernicious effect of the maximum grant regulation is avoided, but the purpose of keeping them in their own home is defeated. Initial Opinion of lower Court, A. 94, 95.

The lower Court, thus correctly concluded, in its initial opinion, that the maximum grant regulation violated "part of the basic philosophy underlying AFDC" (A. 93). In its second opinion the Court, while not deciding whether the regulation was in conflict with the Social Security Act, did *not* modify its original finding that the maximum encouraged family breakup, and Appellees contend that the lower Court's initial conclusion was correct; the maximum is in direct conflict with the Social Security Act of 1935.

This contention finds considerable support in two decisions, both rendered by three-judge District Courts subsequent to the lower Court's second opinion in this case.

In *Westberry, et al.* v. *Fisher, et al.,* 297 F.Supp. 1109, 1114 (D. Me. 1969) the Court stated:

> In its standard schedule of need, the State does not suggest that the need of a seventh or eighth dependent

> child is any less than that of a third or a fourth dependent child. Yet the effect of the two maximum regulations is to deny a dependent child, because he is the seventh or eighth (or any subsequent number), the payment which the State has found necessary if he is to live in 'decency and health'. The regulations thus create a class of needy children who receive a lesser amount of public assistance than do other children who are in all respects similarly situated, except they live in smaller families. *Such a result cannot be reconciled with the purposes of the AFDC program.* (Emphasis supplied.)

While the Court in *Westberry* v. *Fisher, supra,* did not base their opinion on the statutory violation (holding the maximum unconstitutional under the Fourteenth Amendment) the United States District Court for the District of Arizona did specifically find that Arizona's maximum grant regulation contravened the purposes of the Social Security Act, stating:

> Actually, the maximum grant statutes now enacted provide an economic club aimed at breaking up the family unit and thus frustrating and defeating the stated purpose of Congress in enacting the legislation designed to aid needy, dependent children and families with such dependent children . . . Under such provisions, the obvious pressures would be to split the family into units of threes in order to gain the fullest amount of assistance under the maximum grant and statutes. This would be contrary to the federal statutes and therefore invalid. *Dews* v. *Henry, and Inclan* v. *Department of Public Welfare,* 297 F.Supp. 587, 592 (D. Ariz. 1969).

Because Maryland's maximum grant regulation strongly induces Appellees, and the class they represent to dissolve their families, it directly contravenes 42 U.S.C. § 601, as the Court below correctly concluded in its initial opinion (A. 94, 95). This Court should similarly hold the maximum void as violative of the Social Security Act.[68]

B. A Fundamental Purpose of the AFDC Program Is to Provide Assistance to All Eligible Individuals

The maximum grant regulation contravenes the express purposes of the AFDC Program in another fundamental sense. It disregards the computed needs of the fifth, sixth, etc. child or children in families of seven or more members and, thus, treats the family, rather than the individual needy child, as the appropriate unit for determining the amount of assistance under the AFDC Program. Ignoring the computed need of dependent children in this way can't be reconciled with 42 U.S.C. § 602(a)(10)[69] which requires that:

> 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.)

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[68] *See, Welfare's Condition X,* 76 Yale LJ 1222, 1232-1233 (1967) wherein it is stated that "[T]o the extent that the rules [maximum grant regulations] impel large families to farm out children to other relatives, they frustrate the [42 U.S.C.] Sec. 601 purpose of maintaining 'continuing parental care and protection' ".

[69] Previously 42 U.S.C. 602(a)(9) and referred to as such in the case below.

If indeed the phrase "all eligible individuals" was meant to refer specifically to "all individuals wishing to make application", as the State argued below, Congress would have made this abundantly clear by simply making its second reference to "such eligible individuals" or to "said eligible individuals" as normal usage would dictate. The Act, however, quite pointedly says *"all* eligible individuals", which should certainly be interpreted as the means Congress used to emphasize its intent to benefit all eligible children under the AFDC Program and not as a mere lapse by Congress into redundancy.[70]

This viewpoint is further reinforced by the 1967 Amendments to the Social Security Act, Public Law 90-248, 90th Congress, H.R. 12080. While not specifically passing upon the matter of meeting the full needs of welfare recipients, the amendment does contain implicit recognition that the individual is the proper unit of assistance in that it requires, in Section 402(a)(23) (42 U.S.C. 602(a)(23)), that the 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 established * * * ". (Emphasis added.)[71]

This Court, in *King* v. *Smith,* 392 U.S. 309, 313 (1967) gave judicial recognition to this Congressional intention

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[70] This Court should not adopt an interpretation of §602(a)(10) which renders one part a mere redundancy. *Jarecki* v. *E. D. Searle & Co.,* 367 U.S. 303 (1961).

[71] It is also relevant that the Federal Government's share of the AFDC Budget is measured by computing its contribution to *individual* recipients; five-sixths (5/6) of the first eighteen (18) dollars with a ceiling for Federal participation set at thirty-two (32) dollars a month per recipient. 42 U.S.C.A. §603 (1969 Cum. Annual Pocket Part).

to supply AFDC assistance to individual children rather than a more comprehensive unit, stating:

> The category singled out for welfare assistance by AFDC is the *'dependent child'* who is defined in Section 406 of the Act, 49 Stat. 629, as amended, 42 U.S.C. § 606(a) (1964), as an age-qualified *'needy child'* * * *. (Emphasis added.)

King v. *Smith, supra,* establishes that a child, to qualify for assistance under the AFDC Program, need only be needy and dependent (within the meaning of 42 U.S.C. § 606(a) (1964). Additional eligibility requirements, unrelated to need, are statutorily impermissible.

A recent decision rendered by a three-judge District Court reaffirmed the principle established in *King* v. *Smith, supra.* In *Doe* v. *Shapiro,* 302 F.Supp. 761 (D. Conn. 1969) a Connecticut Welfare regulation requiring, as a condition of AFDC eligibility for illegitimate children, that the mother disclose the name of the child's father, was held to constitute an unwarranted eligibility requirement, unrelated to the need of a dependent child. As such it violated the mandate of 42 U.S.C. § 602(a)(10) that assistance be furnished *all eligible individuals.* The Court stated that:

> Congress has determined that the primary and inescapable obligation of participating states is to provide financial assistance to 'needy' and 'dependent' children. The protection of such children is the paramount goal of AFDC (citation omitted).[72]

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[72] *Accord, Westberry* v. *Fisher,* 297 F. Supp. 1109, 1112, n. 6 (D. Me. 1969).

The maximum grant regulation, like the regulation invalidated in *Doe* v. *Shapiro, supra,* also "imposes an additional condition of eligibility not required by the Social Security Act," *Doe* v. *Shapiro, supra,* at 764, that a child, to be eligible for AFDC assistance, must be fortunate enough to have been born no later than the fourth or fifth child in a family.

Especially frivolous, after *King* v. *Smith,* 392 U.S. 309 (1967) is Appellants' contention that a destitute child may be denied assistance, notwithstanding his status as a needy, dependent child, because of a *parental* decision to have a large family. As in *King* v. *Smith, supra,* this Court should not accept the view:

> [T]hat Congress, at the same time that it intended to provide programs for the economic security and protection of *all* children, also intended arbitrarily to leave one class of destitute children entirely without meaningful protection . . . Such an interpretation of Congressional intent would be most unreasonable, . . . ". *King* v. *Smith,* 392 U.S. 309 (1967).

The Court concluded that the purpose of the AFDC program was to provide economic security and services to needy children who lost the support of a "breadwinner". Parents of a large family are, because of the maximum, required to completely ignore the needs of children beyond the sixth individual in a family, which is humanly inconceivable, or to spread already inadequate resources thinner. The effect of the maximum grant regulation is, thus, the same as the effect of the "man in the house rule" condemned in *King* v. *Smith, supra,* to arbitrarily leave one class of destitute children entirely without meaningful protection.

This Court's decision in *King* v. *Smith,* 392 U.S. 309 (1967), indicates that the availability of existing alternatives already protecting valid state interests is relevant in deciding whether a state regulation, harshly affecting recipients while allegedly promoting some state interest, is consistent with the purposes and philosophy of the Social Security Act.

Congress has provided the states, in recent amendments to the Social Security Act, with numerous statutory alternatives by which they may accomplish the purposes *allegedly* served by the maximum grant regulation. Thus the State's legitimate interest in encouraging employable recipients to work and in discouraging desertion is adequately protected.[73] And, as mentioned previously,[74] the State of Maryland may utilize existent provisions of the Social Security Act to provide family planning advice and services to parents with large families. It is the State's obligation to employ these "rehabilitative measures" to accomplish legitimate purposes "rather than measures that punish dependent children" since "protection of . . . [needy, dependent] children is the paramount goal of AFDC." *King* v. *Smith,* 392 U.S. 309, 325 (1967).

C. Neither Congress Nor the United States Department of Health, Education and Welfare Has Approved Maryland's Maximum Grant Regulation.

The Court below decided, quite properly, not to infer Congressional approval of Maryland's Maximum regulation from the general reference to maximums contained in Sec-

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[73] *See,* p. 21 *supra,* and pp. 64, 65, *infra,* for a full discussion of these alternatives.

[74] *See* p. 33, n. 41.

tion 402(a)(23) of the Social Security Act, as amended (42 U.S.C. § 602(a)(23)).[75] This section provides that a state AFDC plan must:

> provide by July 1, 1969, the 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 established, *and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted* (emphasis supplied).

Such a vague and general acknowledgement of the existence of "maximums", which take many forms and have various effects, should not be construed to bestow Congressional approval upon Maryland's maximum, when that maximum so seriously frustrates the basic purposes of the Social Security Act, strengthening family life and providing AFDC assistance to needy individuals. (*See,* Second Opinion, A. 251.) This Court has stated that:

> We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole act, and that in fulfilling our responsibility in interpreting legislation, 'we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy.'
>
> *Richards* v. *United States,* 369 U.S. 1, 11 (1961).

Construing § 602(a)(23) to mean Congress specifically approved Maryland's maximum would put § 602(a)(23) in conflict with 42 U.S.C. § 602(a)(10), providing for as-

[75] Second Opinion, A. 251.

sistance to needy individuals, and 42 U.S.C. § 601, declaring a purpose of the Social Security Act to be the strengthening of family life. This would violate the well-accepted canon of statutory construction requiring inconsistent provisions of a statute to be harmonized if possible. *Federal Power Comm'n* v. *Panhandle Eastern Pipe Line Co.,* 337 U.S. 498 (1948); *Hattaway* v. *United States,* 304 F.2d 5 (5th Cir. 1962).

It is also apparent from the face of § 602(a)(23), that it could reasonably be interpreted as representing *disapproval* of maximums by Congress rather than approval. This is the interpretation given to this section by one court that dealt at length with § 602(a)(23). In *Lampton* v. *Bonin,* —— F.Supp. ——, No. 68-2092-E (E.D.La. July 15, 1969) a three-judge Court suggested that the intended effect of § 602(a)(23) was to induce the states to eliminate the use of arbitrary maximums in favor of a more equitable form of decreasing welfare expenditures.

Interpreting § 602(a)(23) in this way is supported by this Court's decision in *Shapiro* v. *Thompson,* 394 U.S. 618 (1968). In *Shapiro* the Court interpreted 42 U.S.C. § 602 (b), which provided that the Secretary of H.E.W. should not approve a state plan requiring, as a condition of eligibility, that recipients reside in the state for *more* than one year, *not* as a declaration of Congressional approval of a one-year state residency requirement but as a "directive to curb hardships resulting from lengthy residence requirements." *Shapiro* v. *Thompson,* 394 U.S. 618, 639 (1968).

Similarly, 42 U.S.C. § 602(a)(23) should be viewed as a means of ameliorating the harshness and arbitrariness caused by state maximums.

Furthermore, assuming, *arguendo,* that § 602(a)(23) contains Congressional approval of Maryland's maximum grant regulation, it still must withstand, as it cannot,[76] a Constitutional challenge under the Equal Protection Clause. "Congress may not authorize the States to violate the Equal Protection Clause." *Shapiro* v. *Thompson,* 394 U.S. 618, 641 (1969).

H.E.W., like Congress, has given only collateral recognition to Maryland's grant regulation and has never issued any decision, regulation or policy statement dealing directly with the validity of the regulation. (*See,* lower Court's Second Opinion, A. 240.) H.E.W.'s sole contact with the regulation has occurred with its purely ministerial "acceptance for incorporation" of Maryland's maximum grant regulations as part of Maryland's complete AFDC plan, and its issuance of a booklet and policy statement acknowledging the existence of the regulation. (*See,* the lower Court's comment in this regard, Second Opinion, A. 240.) These ambiguous actions should not be construed as administrative affirmation of the regulation especially in light of H.E.W.'s forceful adherence to the policies of promoting AFDC family unity and fully meeting individuals' computed needs. (See p. 55 and n. 36 *supra.*) Furthermore, H.E.W. expressly stated, in their Brief in *Lampton* v. *Bonin,* 299 F.Supp. 336 (E.D.La., 1969) that:

> [T]he use of dollar maximums adds an element of arbitrariness. Family maximums in particular, result in patently different treatment of individuals.[77]

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[76] *See* constitutional argument, *supra.*

[77] Brief of Robert H. Finch, Secretary of Health, Education, and Welfare as Amicus Curiae, 18.

At any rate, it is clear that administrative action is only a "helpful" guide to statutory interpretation. Ultimately, construction and interpretation of ambiguous statutes is a judicial function. *Volkswagen Werks* v. *FMC,* 390 U.S. 261, 272 (1968); *Davies Warehouse Company* v. *Bowles,* 321 U.S. 144, 156 (1944); *Fishgold* v. *Sullivan Drydock & Repair Corporation,* 154 F.2d 785, 790 (2nd Cir. 1946), *Aff'd,* 328 U.S. 275 (1946); *Folsom* v. *Pearsall,* 245 F.2d 562, 564-65 (9th Cir. 1957); *Commissioner* v. *Winslow,* 113 F.2d 418, 423 (1st Cir. 1940). As the court below correctly concluded,

> In no event is a court 'compelled to follow an administrative interpretation that it regards as inconsistent with the legislative purpose of the provision in issue. *In Re Petition of Chin Thlott Har Wong,* 224 F. Supp. 155, 165 (S.D.N.Y. 1963). (Lower Court's Second Opinion, A. 242.)

In summary, the District Court's finding in its First Opinion, not contradicted in its Second Opinion, that the regulation violated the fundamental purposes of the AFDC program, 42 U.S.C. 601 *et seq.,* was correct and should provide the basis for a finding by this Court that the regulation is invalid.

Conclusion

It is highly questionable that the purposes belatedly ascribed to the maximum grant regulation, raised for the first time by Appellants on reargument, were actually the purposes prompting the regulation and that any other consideration, besides governmental economizing, led to the regulation.[78] Assuming, however, that they were indeed the reasons behind the regulation, the maximum regulation

[78] *See* p. 19, n. 11, *supra.*

is so indiscriminate in its scope as to be completely unrelated to either the purpose of the Social Security Act of 1935[79] or the purposes suggested by Appellants. Five courts directly,[80] besides the lower Court in this case, and two courts by way of dicta,[81] have come to this conclusion. All five courts, with only one summary dissenting opinion, have invalidated the maximum grant regulation under traditional criteria of equal protection,[82] hold that family size is a completely arbitrary factor and constitutionally unacceptable reason for denying statutory entitlements to some needy dependent children, while granting them to others.

Because the State is presently implementing and utilizing various provisions of the Social Security Act which achieve the purposes the maximum grant regulation is allegedly intended to accomplish, the regulation has no conceivably rational function.

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[79] [A] statutory discrimination must be based on differences that are reasonably related to the purpose of the Act in which it is found. *Morey* v. *Doud*, 254 U.S. 457, 465 (1967). This is especially true where the purpose of the Act is certain and unambiguous. *Two Guys from Harrison—Allentown, Inc.* v. *McGinley*, 366 U.S. 582 (1961).

[80] *Collins* v. *State Board of Social Welfare*, 248 Iowa 369, 81 N.W. 2d 4 (1957); *Dews* v. *Henry and Inclan* v. *Graham*, 297 F.Supp. 587 (D.Ariz. 1969); *Westberry* v. *Fisher*, 297 F.Supp. 1109 (D.Me. 1969); *Kaiser* v. *Montgomery*, No. 49613, N.D. Cal. (decided Aug. 28, 1969); *Lindsey* v. *Smith*, No. 7636, W.D. Wash. (decided Aug. 20, 1969).

[81] *Metcalf* v. *Swank*, 293 F.Supp. 268 (N.D. Ill. 1968); *Anderson* v. *Burson*, 300 F. Supp. 401 (N.D. Ga. 1969). Also, at least one other state, Louisiana, has voluntarily repealed its maximums "because of serious doubts as to their validity". *Lampton* v. *Bonin*, No. 68-2092-E (E.D.L.A., July 15, 1969).

[82] It is clear that the courts in these cases did consider the purposes of the maximum regulation might serve in addition to that of decreasing welfare expenditures. *See, e.g., Westberry* v. *Fisher*, 297 F.Supp. 1109, 1115, n. 17 (D.Me. 1969).

If the purpose of the regulation is to encourage employment, the regulation is irrelevant since this is presently being accomplished by the implementation of existing provisions of the Social Security Act, the 1967 Amendments (WIN Program), 42 U.S.C. §§ 630-44, which allow an employed recipient to keep a percentage of his salary and provide for employment training and rehabilitation and job placement for recipients who are found to be employable.

If the purpose of the regulation is to discourage desertion, once again the 1967 Amendments to the Social Security Act provide a less onerous method of deterring welfare desertion by employed fathers. Section 402(a), as amended, authorizes federal funds to secure support from deserting fathers through interstate or intrastate prosecution, and to establish a single agency responsible for collecting support payments. 42 U.S.C. § 602(a), as amended, P.L. 90-248, Section 201(a), (1)(C)(17), 81 Stat. 878 (1969). The Amendment refers explicitly to full utilization of the Uniform Reciprocal Enforcement of Support Act (URESA). The problem of intrastate desertion can be curbed through criminal prosecutions for non-support brought under Article 27 Sections 88, 96 of the Annotated Code of Maryland.

If the purpose of the regulation is to prevent parents from having large families this can be accomplished, without such extreme harshness, by utilizing and implementing already existing provisions of the Social Security Act (42 U.S.C.A. § 602) which require, as part of the State's AFDC plan, that the state develop a program to achieve the objective of "preventing or reducing births out of wedlock and otherwise strengthening family life," and provide "in all appropriate cases family planning services . . ." § 402(a)(15) of the Act, 42 U.S.C.A. § 602(a)(15).

Thus, the maximum grant regulation is unconstitutional under the traditional standard of equal protection since it does not effectuate a valid state purpose.

It logically follows that the regulation must also fall under the special scrutiny standard which is appropriate in this case because the maximum grant regulation seriously infringes upon the fundamental rights of a disadvantaged and powerless minority (the right to marital privacy and procreation and the right to life) and because it contains a suspect classification.

This case is thus indistinguishable from *Shapiro* v. *Thompson,* 394 U.S. 618 (1969), where this Court applied the "special scrutiny" test to protect the exercise of a basic right, the right to travel.

The maximum grant regulation, like the residency requirement in *Shapiro,* is unable to survive this standard of judicial review because it promotes no "compelling governmental interest," *Shapiro* v. *Thompson, supra,* and because there are available to the State, less onerous alternatives to accomplish legitimate state purposes. *Sherbert* v. *Verner,* 374 U.S. 398 (1963); *Shapiro* v. *Thompson,* 394 U.S. 618, 637 (1968).[83]

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[83] It was decided long ago, *Schneider* v. *Irvington,* 308 U.S. 147 (1939) and reaffirmed in *Shapiro* v. *Thompson, supra* that fundamental rights are not to be endangered upon grounds of economy. No "compelling state interest" is advanced by the financial savings resulting from the maximum regulation and therefore such a regulation must be "*necessary,* not merely rationally related to the accomplishment of a permissible state policy." *McLaughlin* v. *Florida,* 379 U.S. 184, 196 (1964) (emphasis added). A law can never be "necessary" under this test if there are alternative methods available to accomplish legitimate purposes without encroaching upon fundamental rights. *Sherbert* v. *Verner,* 374 U.S. 398 (1963); *Bates* v. *Little Rock,* 361 U.S. 516 (1960); *Carrington* v. *Rash,* 380 U.S. 89 (1965).

By providing a powerful inducement to split apart the family and because it disregards the needs of individual needy children the State regulation also stands in irreconcilable conflict with the purposes of the Social Security Act as expressed in Sections 401 and 402(a)(10) of the Act as amended. The regulation, in effect, establishes an additional AFDC eligibility requirement, that a child be born into a small family, unrelated to the purposes and objectives of the Social Security Act.

For these reasons this Court should invalidate the maximum regulation as violative of the Social Security Act and affirm the lower Court's decision holding the regulation unconstitutional and enjoining its operation.

Respectfully submitted,

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