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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. ------

EDMUND P. DANDRIDGE, JR., CHAIRMAN OF THE MARYLAND STATE BOARD OF PUBLIC WELFARE, ET AL.,

Appellants,

v.

LINDA WILLIAMS, ET AL.,

Appellees.

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

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The initial opinion of the United States District Court for the District of Maryland is reprinted at App. 1a; the supplemental opinion of the District Court, after reargument, is reprinted at App. 13a. Copies of the original and supplemental opinions and the final decree are attached hereto as Appendix "A"; the opinions are not as yet officially reported.

JURISDICTION

This suit was brought under 28 U.S.C.A. §1343(3) and 42 U.S.C.A. §1983, to enjoin enforcement of the Maryland

maximum grant regulation applicable to AFDC recipients, to declare its invalidity, and to require the State to make payments equal to "minimum subsistence and shelter needs as established by the Maryland State Board of Public Welfare". The final decree of the District Court was entered on March 18, 1969 and notice of appeal was filed in that Court on March 20, 1969. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C.A. §1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *King v. Smith,* 392 U.S. 309; *Alabama Pub. Serv. Comm. v. Southern R. Co.,* 341 U.S. 341, 343-44 n. 3.

QUESTIONS PRESENTED

1. Is a state economic regulation, conceded by the District Court to be proper as applied to some situations, subject to invalidation *in toto* for "overbreadth", notwithstanding the absence of any First Amendment or similar question requiring the validity of the regulation to be judged on its face?

2. Did the District Court apply the proper standard of review in invalidating, following explicit inquiry into legislative motive, a broad state regulation supportable on the basis of, and founded on, the economic principle of "less benefit"?

3. Did the District Court err in founding a judgment of invalidity upon assumptions as to the effect of the maxium grant regulation entirely unsupported by the record before it relating to these matters of "constitutional fact"?

4. Did the District Court err in finding no rational basis for the regulation, notwithstanding the reasonableness of the regulation as a means of:

a) providing work incentives and reinforcing other State efforts to induce seeking of, and to discourage abandonment of, gainful employment and vocational rehabilitation;

b) avoiding the encouragement of desertion by heads of families and consequent growth in the "absent parent" segment of the AFDC program, the largest and fastest growing segment of the program and the focus of federal and state legislative concern;

c) insuring that families dependent on public welfare are not afforded an economic insulation from the costs of child-bearing which is not provided to families more economically able to support children;

d) maintaining public confidence in and support for the fairness of the welfare program on the part of employed wage-earning groups earning modest incomes;

e) implementing the State's interest in allocating limited funds so as to fully meet the needs of the largest possible number of families?

STATUTES INVOLVED

The challenged regulation, Rule 200, §X,B of the Maryland Department of Social Services (formerly Rule 200, VII, 1), reads as follows:

"B. *Amount*—The amount of the grant is the resulting amount of need when resources are deducted from requirements as set forth in this Rule, subject to a maximum on each grant from each category:

1. $250—for local departments under any 'Plan A' of Shelter Schedule
2. $240—for local departments under any 'Plan B' of Shelter Schedule

Except that:

a. If the requirements of a child over 18 are included to enable him to complete high school

or training for employment (III-C-3), the grant may exceed the maximum by the amount of such child's needs.

b. If the 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)

3. A grant is subject to any limitation established because of insufficient funds."

A number of federal statutes have expressly recognized the validity of state maximum grant regulations. These include Public Law 90-248, §213(b), 42 U.S.C.A. §602(a)(23), enacted in 1967, requiring the upward adjustment of state maximums to reflect cost-of-living increases; Public Law 87-543, §108(a), enacted in 1962, permitting states with maximum family grant requirements which did not otherwise limit payments to less than state-determined need, to utilize protective payments to third persons, a privilege subsequently made available to states not meeting need requirements by the 1967 amendments; and Public Law 90-248, §220, 42 U.S.C.A. §1396(b)(f)(1)(B)(ii), providing for disregard of state maximum grant regulations, at the discretion of the Secretary of Health, Education and Welfare, in computing income limitations on eligibility for federally aided medical assistance programs.

In addition, certain regulations of the Department of Health, Education and Welfare likewise recognize the validity of state maximum grant regulations. These include 45 CFR §233.20 (a)(2)(ii and iii), 34 Fed. Reg. 1394 (1969), preceded by the Interim Policy on Need Require-

ments issued May 31, 1968. The federal statutes and regulations are set forth in Appendix "B" hereto.

STATEMENT

The present case involves a Maryland regulation, present in differing forms in 26 other states, which establishes (subject to certain exceptions) a ceiling of approximately $250.00 per month on welfare grants under the AFDC program.

The AFDC program finds its antecedents in the Mothers' Pension Laws adopted by various states. These, in turn, derived from the discussions of the White House Conference on Children and Youth of 1909. Prior to 1909, the dominant form of public assistance in the United States, in respect to both the aged and dependent children, was "indoor" (almshouse and orphanage), as distinct from "outdoor" (money payment) relief. The references in legislative history to "aid to dependent children in their own homes" must be viewed against this background. The dominant philosophy of public assistance in the United States, until the early years of this century, was that of the British Poor Law Commission of 1835 in its almost undiluted form, with its fear of a cycle of dependency and its view that the situation of the ablebodied:

> "Shall not be made really or apparently so eligible [desirable] as the situation of the independent laborer of the lowest class * * * It is shown that in proportion as the condition of any pauper class is elevated above the condition of the independent laborers, the condition of the independent class is deprived; and industry is impaired, and employment becomes unsteady, and its remuneration in wages is diminished. Such persons, therefore, are under the strongest inducements to quit the less eligible class of laborers and enter the more eligible class of paupers."

See Webb and Webb, *English Poor Law History,* Part II, Volume 1, pages 58, 61-2; Coll, *Perspectives in Public Welfare; The English Heritage; Welfare in Review,* March 1966, Volume 4, No. 3, page 1; Abbott, *From Relief to Social Security* (1941) 262-72.

Following the White House Conference of 1909, a number of states undertook to institute programs of Mothers' Pensions, usually confined to families where the absence of the father was due to his death. By 1922, forty-three states had made some statutory provision for aid to children in their own homes; of these 35 established monthly allowance figures by statute. In spite of the fact that grants per child were on the order of $5.00 to $20.00 per month, ten states, at that early date, saw fit to impose family maximums — ranging from $25.00 in West Virginia to $60.00 in Oregon.[1] See Eckman, *Public Aid to Children in Their Own Homes,* (U. S. Dept. of Labor, Children's Bureau, Legal Chart No. 3, 1923). In Maryland, a $40.00 maximum was imposed by Chapter 670 of the Acts of 1916, which remained part of Maryland law until enactment of Chapter 401 of the Acts of 1929, which relegated need standards to determination by county boards. By 1934, 46 states had mothers' pension programs; the majority of them imposed family maximums. See Abbott, *supra* at 276-77. In 1934, the Report of the [federal] Committee on Economic Security, adopting a recommendation of the Children's Bureau, recommended a federal ADC program. Cohen, *Factors Influencing the Content of Federal Public Welfare Legislation,* 1954 Social Welfare Forum 199, 205, 209 (1954). "[T]here was very little interest in Congress in ADC . . . The fact that the committees of Congress limited the original Federal share to one third, placed relatively

[1] These states included Kansas, Louisiana, Maryland, Missouri, Montana, Nebraska, Nevada, Oregon, Utah, and West Virginia.

low limitations on the amount of Federal aid per child and omitted any federal sharing for the mother or adult caretaker reflected the degree of the prevailing interest in the program." The bill drafted by the Committee on Economic Security provided for a closed-end appropriation. It "recognized that there would be waiting lists in that it provided that a state would have to file an annual statement of the number of children on the waiting list to receive assistance. The bill did not define what 'assistance to children' meant." Cohen, *supra,* at 205. Congress eliminated the closed-end appropriation, but otherwise engrafted further limitations on the Committee on Economic Security bill. Thus, the federal share of matching was, at the suggestion of Congressman (later Chief Justice) Vinson, limited to $18.00 a month for the first child, and $12.00 for each additional child, regardless of actual or state-determined need. "These figures were obtained by review of the Federal pensions provided for widows and children under veterans legislation of which the Ways and Means Committee at that time had jurisdiction. But whereas the veterans schedule then provided $30.00 for two children where there was no widow and increased the amount to $46.00 where there was a widow, the committee did not include any payment for the mother under ADC. It was not until 1950 — fifteen years later — that this defect was corrected." Cohen, *supra,* at 205. Further "[t]he 'decency and health' plan requirement was deleted from the legislation, primarily due to the criticism from members of both the House and Senate Committees that this would give the Federal authority the right to set standards relating to amount of assistance." Cohen, *supra,* at 206. These limitations were recognized by this Court in *King v. Smith,* 392 U.S. 309, 334, referring to the states' "undisputed power to set the level of benefits *and* the standard of need." (Emphasis supplied).

In Maryland, establishment of benefit levels following implementation of AFDC by Chapter 148 of the Acts of 1936 was confided to county boards, some, at least, of which imposed maximum grant requirements. The Minutes of the State Board of Public Welfare of February 2, 1945 (included in the record as part of Item 23, Exhibit E), reveal that in 1945 the State Board of Public Welfare adopted a resolution seeking to limit restrictive policies of county boards. Prior to this time, State ADC grants were limited to the federal maximum grant with some local supplementation from general assistance funds. Subsequently, commencing on July 1, 1947, in consequence of requirements imposed by federal regulations, the State imposed statewide needs standards, including a maximum grant regulation providing for a maximum grant of $170.00 per month for families of eleven or more persons.[2] Subsequently, protests were received from local boards. "Several of the local governments were finding it difficult to accept the principle of State standardization and grants, even with adjustment of those standards for different areas of the State . . . in some areas of the State the maximum grant allowable . . . was deemed by the local authorities to be excessive for the recipient's normal pattern of living. A part of this problem [was] to keep the public assistance grant from exceeding the earnings available to a comparable family which is self-supporting . . . The belief is widespread among county boards, and there is some evidence tending to confirm it, that meagerness of grant is serving successfully as an incentive for recipients' regaining self-support." (*Report on the Department of Public Welfare,* (Maryland) Commission on Governmental Efficiency and Economy (1948)). In consequence of these

[2] The regulation, which appears in the record as part of item 23, Exhibit A, provided for a maximum grant of $100.00 for four persons.

objections, the counties were classified into four groups beginning on July 1, 1948, with allowable maxima for families of eleven (11) or more ranging from $159.00 to $170.00 in the various county groups. Beginning on October 1, 1948, the maximum grant prescribed was for families of ten persons or more and ranged from $165.00 to $176.00 in the various counties. On February 21, 1950, the maximum grants for families of ten or more were reduced to amounts ranging from $147.00 to $159.00. On January 31, 1952 flat maximum grants applicable to families of all sizes were initiated, the allowable sums ranging from $145.00 to $165.00 depending on the county. Beginning in September 1952 a uniform state maximum applicable to families of all sizes of $175.00 (subsequently increased to $180.00) was imposed. In 1956 and again in 1958 the regulation underwent intensive administrative review, data being collected on the costs of eliminating the regulation and on average weekly wages for state-insured employment, for production workers in manufacturing industry, and for farm labor, on average disposable income after taxes, and on the attitudes of county boards (Item 23, Exhibit E). On October 1, 1958 local variations based on differing shelter costs were again authorized, the authorized grants ranging from $190.00 to $210.00 depending on the county. This limit was adopted after objections by some county boards to elimination of a maximum. In a communication (included in Item 23, Appendix E) to county boards dated June 27, 1958, the Director of the State Department of Public Welfare noted that "(S)ince 1952 we have had one overall maximum on an assistance grant, thinking that an assistance grant should not go higher than the lower wages in the community." See also the affidavit of the former Supervisor of Plans and Standards of the State Department of Public Welfare (Item 23,

Exhibit I), and her memorandum of March 21, 1958 on the history of the regulation (Item 23, Exhibit A). These figures were progressively increased to the $240.00-$250.00 limits now under attack.

While the State Department of Public Welfare unsuccessfully sought elimination of the maximum grant regulation in its budget requests beginning in 1967, such requests were not transmitted to the Legislature in the Governor's budget (see Maryland Const., Art. III, Sec. 52) and at least one legislative committee expressed concern that even the existing maximum grant level operated as a disincentive to employment and as an incentive to desertion by wage earners. Maryland Legislative Council, *Report to the General Assembly of 1967,* at 478 (*Report of the Legislative Council Committee on Public Welfare Cost,* October 1966). (Item 23, Exhibit F)

Each and all of the approximately 20 versions of the maximum grant regulation were submitted to, and accepted for incorporation in the State Plan by the Department of Health, Education and Welfare. (Stipulation, Item 27 and see Item 23, Exhibit H). Each such acceptance constituted a finding by the federal authorities that the state maximum grant regulation plan was in accord with the requirements of the Social Security Act, including 42 U.S.C.A., §602 (a) (g). See 42 U.S.C.A., §602(b); Department of Health, Education and Welfare, *Handbook of Public Assistance Administration,* Part VII, Section 1100, pp. 1-15, 57-63; cf. *King v. Smith,* 392 U.S. 309, 317, 326, 337 and nn. 11 and 23 on the significance of acceptance of incorporation of regulations. The Department of Health, Education and Welfare, beginning in 1961 and continuing annually to date, issued an annual informational release entitled *State Maximums and Other Methods of Limiting Money Payments to Recipients* listing maximum grant

regulations in some twenty-seven states. See also Sparer, *Social Welfare Law Testing,* 12 Prac. Law. 13, 21 (1966). These compilations indicate that the Maryland maximum is one of the highest state maximums and bears a clear relationship to the minimum wage rate;[3] the other family maximums ranging downward to the $81.00 maximum applicable until recently in Florida.

The present action was instituted on February 28, 1968. The District Court denied the State's motion to dismiss by order dated June 25, 1968 (Item 20). The complaint asserted the invalidity of the regulation under Article 88A, Sections 44A and 49 of the Maryland Code as well as under the Federal Constitution and Social Security Act. Notwithstanding this fact, the District Court denied the State's Motion to Dismiss on the basis of the doctrine of equitable abstention.[4] Clearly, a decision that the unconstrued Maryland statutes barred the regulation would have avoided the grave constitutional question, rendering abstention appropriate in favor of state judicial remedies under the doctrine of *Harrison v. N.A.A.C.P.*, 360 U.S. 127 and *Zwickler v. Koota*, 389 U.S. 241. Abstention was nevertheless denied, notwithstanding the inapplicability of *Damico v. California*, 389 U.S. 416, which related only to abstention in favor of state *administrative*, remedies. See *Boone v. Wyman*, 295 F. Supp. 1143, 1151, (S.D.N.Y. 1969).

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[3] As at February 25, 1969, the date of the supplemental opinion of the court below, the weekly minimum wage (based on a 40 hour week) was $52-64 under the federal law (29 U.S.C.A. §206) and $46-52 under the state law (Md. Code Ann. Art. 100, §83). At the date of the court's initial opinion, the federal minimum wage was $46-64 and the state minimum wage $46. Welfare payments are of course tax-free. See 1938-2 Cum. Bull. 136; 1957-1 Cum. Bull. 26; Md. Code Ann. Art. 81, §280. In addition, recipients are generally eligible for medical assistance and other forms of assistance in kind, such as the food stamps received by the plaintiff Williams (Stipulation, Item 19).

[4] The doctrine of abstention is properly raised by a Motion to Dismiss. *Government & Civic Employees Organizing Committee v. Windsor*, 353 U.S. 364; *Shipman v. Du Pre*, 339 U.S. 321, compare *Steinbach v. Mo Hock Ke Lok Po*, 336 U.S. 368.

On December 13, 1968, the District Court rendered its initial decision invalidating the regulation under both the Equal Protection Clause and Section 402 (a) (9) of the Social Security Act. On December 23, 1968, the Defendants filed a motion for reargument, etc., under Fed. R. Civ. P. 52 and 59; on February 25, 1969 a supplemental opinion was filed in which the District Court retracted its finding of invalidity under the Social Security Act and found the regulation void under the Equal Protection Clause only for "overbreadth" (Supplemental Opinion, Item 30, App. 28a-31a). In retracting with some reluctance its finding of invalidity under the Social Security Act, the court relied upon the implied recognition of maximum grant regulations in Section 402 (a) (23) of the Social Security Act (42 U.S.C.A. §602 (a) (23), added by Section 213 (b) of Public Law 90-248. The District Court referred to this amendment as "inexplicable". (Supplemental Opinion, App. 21a). But apart from the fact that, as already noted, Congress had on several previous occasions expressly recognized state maximum grant regulations (see e.g. Cohen and Ball, *The Public Welfare Amendments of 1962,* 20 Public Welfare 191, at 229-30 (1962), Item 29), and apart from the fact that 42 U.S.C.A. §602 (a) (23) on which the court originally relied for a conclusion of invalidity had the very limited purpose of eliminating state waiting lists,[5] it is clear that §602 (a) (23) is not an "inexplicable" sport in the law. Section 602 (a) (23) resulted from an effort on the part of the then administration to secure enactment of a provision which *would* have invalidated state maximum grant regulations, as well as fraction-of-need regulations,

[5] See Cohen, *Factors Influencing the Content of Federal Public Welfare Legislation,* 1954 Social Welfare Forum 199, 205, 209, Item 31, and see 1950 U.S. Cong. & Adm. News, 3470-71, 3507 (House Committee report on §602 (a) (9)) and 95 Congressional Record 13934 (1949) (Remarks of Representative Forand).

by requiring all states to fully meet state-determined need and to adjust payments upward to reflect increases in the cost of living. See *President's Proposals for Revision in the Social Security System,* Hearings before the Committee on Ways and Means, House of Representatives, 90th Congress, 1st Session, part 1, pages 6, 59-60 (1967); Committee on Ways and Means, *Section-by-Section Analysis * * * of H.R. 5710 * * * prepared and furnished by the Department of Health, Education and Welfare,* 118 (1967). Rather than adopting this proposal, Congress confined itself to accepting that portion of it relating to cost-of-living increases in existing maximum grant levels and declined to require the states to otherwise fully meet state-determined need. It is hard to see how Congress could have said more clearly that it regarded maximum grant regulations as permissible under the Social Security Act. By reason of the District Court's failure to abstain and the clear validity of the regulation under the Social Security Act, this Court is now squarely confronted with the issues under the Equal Protection Clause.

THE QUESTIONS ARE SUBSTANTIAL

1. As previously noted, more than twenty states have maximum grant regulations similar to the Maryland regulation. Until the decision in the instant case, the validity of such regulations under the federal constitution and statutes had been generally assumed.[6] Since the decision, federal courts in Arizona (*Dews v. Henry,* No. 6417 and *Inclan v. Graham,* No. 2548 D. Arizona, decided March 13,

[6] The 4-3 decision of the Supreme Court of Iowa in *Collins v. State Board of Social Welfare,* 248 Iowa 369, 81 N.W. 2d 4 (1957) invalidating a regulation under the equal protection clause of the Iowa constitution does not supply authority to the contrary. The standards applied by the Iowa court in reviewing state economic legislation are for more stringent than those applied by this court. See e.g., *Bulova Watch Co. v. Robinson Wholesale Co.,* 252 Iowa 740, 108 N.W. 2d 365 (1961).

1969) and Maine (*Westberry v. Fisher*, No. 10-80, D. Me., decided March 21, 1969) have invalidated state maximum grant regulations in reliance on the present case. In those cases, unlike this one, the sole ground urged in support of the regulations by the State Attorneys General was their character as fund-saving measures. Litigation attacking state maximum grant regulations is pending in California, the District of Columbia, Georgia, Louisiana, Mississippi, Texas, Washington, and West Virginia, among other jurisdictions. The estimated cost to the State of Maryland of removal of the maximum grant regulation (assuming no proportionate reduction of other grants such as that carried out in Florida, see 16 Welfare Law Bulletin 4 (1969)) is on the order of $1,440,000 per year (Affidavit in Support of Application for Stay). Even larger amounts are involved in other states, and the sums involved will be drawn almost entirely from state funds, since the existing federal matching grants are already paid with respect to each child in the family regardless of state limitations on aid to large families. (See 42 U.S.C.A. §603; Item 37, pp. 17-19 (Testimony of Thomas Schmidt)). In the event an appropriation by the legislature is not forthcoming or surplus funds are not available from the present welfare budget, implementation of the decision of the court below would require a uniform reduction in welfare payments to the entire class of welfare recipients generally, some 140,000 persons, including the aged, blind, disabled, etc., (exclusive of foster care recipients) in an amount approximating 4% of each grant (Affidavit in Support of Application for Stay).

2. The court below, while recognizing the rationality of maximum grant regulations affecting employable persons (Supplemental Opinion, App. 30a), found the regulation in its entirety invalid for "overreaching". It thus gave the

named plaintiffs, whose situation was highly exceptional,[7] standing to attack the regulation "on its face". The court below also seriously misstated the proportion of AFDC recipients who were potentially employable, equating employability with the AFDC-U category. (Supplemental Opinion, App. 29a). The court below cited the Senate Report (No. 744, 90th Congress, 1st Session) on the 1967 work incentive amendment as embodying a congressional judgment that mothers of pre-school children, and mothers generally, were not eligible for referral under work incentive programs (App. 30a, n. 14). But the Senate's judgment was rejected in conference and in the final bill. "The conference agreement contains the provisions of the Senate amendment, with amendments * * * (3) eliminating mothers and other relatives who care for pre-school children or children under 16 attending school from the specified classes of persons for whom referral under the program is declared to be inappropriate." Conference Report No. 1030, 90th Congress, 1st Session, 2 U.S. Code Cong. & Adm. News 3204 (1967). See Carter, *The Employment Potential of AFDC Mothers*, 6 Welfare in Review #4, 1, 8-9 (1968). Decisions of this court make clear that state economic legislation, unlike legislation involving first amendment rights, is not subject to attack "on its face". See *Shelton v. Tucker*, 364 U.S. 479, 488 n. 8 and authorities there cited, and cf. *Louisiana v. N.A.A.C.P.*, 366 U.S. 293, 296-97; *N.A.A.C.P. v. Alabama*, 377 U.S. 288, 307-08 on the First Amendment basis of the "void for overbreadth" rule. It is plain that the maximum grant regulation cannot be deemed invalid even as applied to the named plaintiffs. See *Purity Extract Co. v. Lynch*, 226 U.S. 192, 204; *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80, 83.

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[7] The Williams parents were a disabled mother and an absent father; the Gary parents were both disabled. The typical AFDC situations — an able-bodied mother and absent or disabled father, were conspicuously unrepresented.

3. The court below referred repeatedly to the supposed effects of the maximum grant regulation, which was said to be "uniformly applied * * * to encourage the disbanding of large families" (Supplemental Opinion, App. 26a), to have "pernicious results" (Supplemental Opinion, App. 26a), and to "subvert the statutory goal of preserving intact the family unit" (Supplemental Opinion, App. 29a). Similar charges might of course be levelled at the state practices authorized by 42 U.S.C.A. §604 (b). But both the record and the published social science literature appear utterly bare of evidence that maximum grant regulations have in fact resulted in family disintegration in consequence of the banishing of children of large families from the home in order that they may secure added benefits in foster homes or the homes of other relatives. Rather it is a fair inference that in the vast majority, if not all, cases the children of large families remain in the home, supported, perhaps, less adequately then they otherwise might be, but in the home nonetheless. The court's finding of factual subversion of family relationships on the basis of a syllogism drawn from the statutory framework is reminiscent of the judicial techniques used in invalidation of much early social legislation. See Comment, *The Presentation of Facts Underlying the Constitutionality of Statutes,* 49 Harv. L. Rev. 631, 637-39 (1936), and see Laski, *Judicial Review of Social Policy in England,* 39 Harv. L. Rev. 832, 842 ff. (1926). While the published literature contains no evidence that exiling of children and consequent family disintegration is an effect of maximum grant regulations, there is a substantial body of literature and contemporary discussion dealing with the phenomenon of "welfare desertion"[8]

[8] The District Court's treatment of the welfare desertion problem is found at App. 28a and 29a: "A parent who is willing to desert to give his children or his family eligibility for AFDC on this basis can hardly be presumed to voice stringent objection to

which points to a precisely opposite conclusion — that in jurisdictions with high benefit levels not imposing maximums, the availability of AFDC to broken but not intact families has operated as an inducement to employed fathers to desert their families in order to render them eligible for benefits in excess of the wage rate. See, e.g. Burns, *Social Security and Public Policy* (1956), at 86; New York Times, February 24, 1969, 40:4; March 20, 1969, 48:1; March 21, 1969, 44:2. Indeed, it is well known that the "absent-parent" category makes up the lion's share of AFDC cases; and is the fastest growing AFDC category. In appraising the effects of welfare regulations on family solidarity, the state was surely entitled to address itself to the most pressing evil. Cf. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489; *McDonald v. Bd. of Election Commrs.*, 37 L.W. 4379, 4381 (Apr. 28, 1969).

4. The state was also entitled, in the interest of providing work incentives and avoiding the provision of disincentives, to enforce a maximum grant requirement related to the minimum wage rate. It is clear that maximum grant regulations do provide an incentive to employment not present in states not imposing maximums by allowing recipients to retain earnings in excess of the grant, and that the effect of such regulations is to decrease tenure on the welfare rolls. See Schorr, *Explorations in Social Policy* (1968) at 29, comparing the experience in maximum-grant and non-maximum grant states, and Carter, *The Employment Potential of AFDC Mothers*, 6 Welfare in

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further breakup of the family unit to gain advantage from this unusual aspect of the maximum grant regulation. Thus, the maximum grant regulation not only subverts the statutory goal of preserving intact the family unit, but it is also ineffective to discourage eligibility by continued absence from the home." This would not seem in fact or logic a sufficient answer to the state's position that removal of the maximum grant would operate as an incentive to desertion.

Review #4, 1, 8-9 (1968) which suggests that experience under maximum grant regulations provided part of the inspiration for the 1967 work incentive amendments to the Social Security Act. See also Burns, *Social Security and Public Policy* (1956), pp. 57, 62 (referring to young workers, casual and intermittent workers, and women as groups most prone to abuse of generous unemployment and disability insurance systems), and Shultz, *The Dynamics of a Labor Market* (1951), ch. 6. See also Hausman, *The 100% Welfare Tax Rate: Its Incidence and Effects* (1967); Durbin, *The Labor Market for Poor People in New York City* (1968).

This court has recognized "a state purpose to encourage employment" as an "admittedly permissible" state objective in the design of welfare programs. *Shapiro v. Thompson,* 37 L.W. 4333, 4337 (Apr. 21, 1969). Under the *Shapiro* rule, since the classification here does not touch on any independent fundamental right, such as that of interstate movement, the traditional standard of whether the regulation is "without any reasonable basis" (*Shapiro v. Thompson,* 37 L.W. 4333, 4339 n. 20; *Lindsley v. National Carbonic Gas Co.,* 220 U.S. 61, 78, see also *Flemming v. Nestor,* 363 U.S. 603; *Snell v. Wyman,* 281 F. Supp. 853 (S.D. N.Y. 1968), affd. 37 L.W. 3246; is applicable. The elaborate "psychoanalysis" of the legislative body carried out by the District Court (Supplemental Opinion, App. 27a-28a, Initial Opinion, App. 11a) is inappropriate under this standard, see *United States v. Constantine,* 296 U.S. 287, 298-99 (Cardozo, J.), since "legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them". *McDonald, supra,* 37 L.W. at 4381. The application

of a maximum grant regulation was rational to avoid disincentives to employment on the part of families with employable members (including women eligible for work incentive referral under the 1967 amendments) and was also rational in its application to families with unemployed or disabled members, for whom benefit levels under state workmen's compensation and unemployment compensation laws have traditionally been set at a fraction of earnings in order to avoid disincentives arising from imperfect administration of eligibility requirements. As already noted, the regulation is rational in relation to the "absent parent" category, the other large category remaining in AFDC after recent expansions of OASDI assistance, and it is also the most rational way of allocating limited state funds so as to fully meet the needs of the largest possible number of families. The AFDC program nationally has been criticized for encouraging desertion and for its "welfare tax" features discouraging employment by recipients; the State was entitled to consider that elimination of the maximum would exacerbate both these defects. The rationality of the regulation as a whole, and as to the overwhelming number of situations to which it was to be applied, is apparent, and the legislative authorities "(were) not bound to resort to a discrimination * * * which * * * would facilitate subterfuges and frauds and fetter the enforcement of the law. A contrary conclusion, logically pressed, would save the nominal power while preventing its effective exercise." *Purity Extract Co. v. Lynch,* 226 U.S. 192. It is to be noted that even many of the most ardent proponents of expanded social welfare benefits frequently state that the complete displacement of the indirect incentives provided by economic want will necessarily give rise to demands for more direct methods of social control in the form of detailed regulation of the conduct of beneficiaries or government conscription and compulsion of labor. See E. H. Carr,

"From Economic Whip to Welfare State", *The New Society* (1951), pp. 59-60, alluding to "the necessity of some form of sanction for a direction of labour to take the place of the discarded * * * economic whip," and compare Myrdal, *Nation and Family* (1945), 142. Maryland was entitled to act on the belief, in designing its welfare program, that some measure of *laissez faire*, with all its cruelties and anomalies, was preferable to the political and economic problems and curtailments of freedom which might follow in the train of the government direction of labor possible if the principle of less benefit was totally dispensed with in the design of welfare programs. The state was entitled to believe that the use of administrative means to encourage employment was a greater evil than the limitations imposed by the maximum grant regulation, that such means would be less effective, see Carter, *supra*, at 8-9; Schorr, *supra*, at 29, and that there was no less restrictive alternative to that regulation. Compare Comment, *Compulsory Work for Welfare Recipients under the Social Security Amendments of 1967*, 4 Colum, J. L. & Soc. Prob. 197 (1968), criticizing the administrative methods of control provided by the 1967 Social Security amendments as a form of involuntary servitude.

Moreover, the regulation is independently sustainable on at least three other grounds: (1) As a means of maintaining an equity between welfare and wage earning families[9] necessary to insure public support for welfare programs, see Steiner, *Social Insecurity: The Politics of Welfare* (1966), 131 and Moynihan, T*he Crises in Welfare*, 10 *The Public Interest*, 1, 20-22 (1968) and as a product of normal processes of political compromise, as distinct from an all-or-nothing approach to public probems; (2) as a

[9] Maryland, like the federal government and unlike some states, has no state general assistance program of wage supplements.

reasonable limitation on the extent to which the state will provide subsidies for child support to welfare recipients which it does not provide to the public generally, given the fact that the ordinary economic disincentives to childbearing are less operative among persons whose income, unlike that of most wage earners, increases with each new child, see Moynihan, *supra,* at 10-11,[10] and cf. the Report of the [British] Royal Commission on Population, (Cmd. 7695 (1949), Art. 452), and (3) as a less socially damaging means than across-the-board cuts of carrying out necessary economies, see Abbott, *From Relief to Social Security,* 286 (1941).

CONCLUSION

Reduced to its essentials, this case involves the constitutionality of a state regulation founded on the principle of "less benefit", a basic tenet of economic *laissez faire,* chosen as an alternative to more generous policies of assistance which would be accompanied by greater and perhaps less effective direct social controls. The case puts to the test as clearly as any case could the continuing vitality of the principles of Justice Holmes' dissenting opinion in *Lochner v. New York,* 198 U.S. 45, 75 (1905):

> ". . . [A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire.* It is made for people of fundamentally differing views . . . the 14th Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute

[10] While invasions of privacy or the use of criminal or other drastic sanctions to discourage family growth undoubtedly runs afoul of constitutional safeguards, it is a far cry from this to say that the state may not withhold child subsidies from welfare recipients which are not made available to the public generally.

> proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us."[11]

The drastic constitutional decision of the lower court, reached in disregard of principles of equitable abstention and in disregard of the principles which have governed federal judicial review of state economic legislation for the last thirty years should be summarily reversed. *United States v. Haley*, 358 U.S. 644; *Snell v. Wyman*, 37 L.W. 3246 (January 13, 1969); *McInnis v. Ogilvie*, 37 L.W. 3354 (Mar. 24, 1969).

Respectfully submitted,

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May 16, 1969.

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[11] Compare *Schneider v. Smith*, 390 U.S. 17, 25: "The purpose of the Constitution and Bill of Rights, unlike more recent models promoting a welfare state, was to take government off the backs of people."

APPENDIX A

INITIAL OPINION

WINTER, Circuit Judge:

Before us now[1] on the pleadings, stipulations and testimony are plaintiffs' prayers that we declare invalid and permanently enjoin the enforcement of the "maximum grant" regulation of the Maryland Department of Public Welfare which, summarized, provides that, irrespective of the need and eligibility, a family receiving benefits under the Aid to Families with Dependent Children Program (AFDC), established by the Social Security Act of 1935, as amended, 42 U.S.C.A. §§601-609, may not receive in excess of $250.00 per month. The declaration sought is that the "maximum grant" regulation is inconsistent with the Social Security Act and that it denies equal protection of the laws. Jurisdiction is properly invoked under Civil Rights Act, 28 U.S.C.A. §1343(3) and (4), and 42 U.S.C.A. §1983, and the case is an appropriate one for a three-judge District Court under 42 U.S.C.A. §2281. *King v. Smith*, 392 U.S. 309 (1968).

Maryland participates in AFDC. 8A Ann. Code of Maryland, Art. 88A, §§44A, *et seq.* By regulations approved by the Secretary of Health, Education and Welfare, Maryland has adopted a schedule setting forth standards of need. The schedule lists the monetary need for family units of one to ten persons, with decreasing additional amounts for each person over the original recipient but with a fixed additional amount for each person over ten persons. Maryland has also adopted a "maximum grant" regulation, Maryland Manual of the Department of Public Welfare, Part II, Rule 200, §VII, 1, which provides that, irrespective of the resulting figure after the resources of a family are

[1] For the reasons stated in an oral opinion from the bench, we heretofore denied a motion to dismiss, based on various grounds. We also indicated that to the extent that the prayers of the complaint might be construed to require the Governor and General Assembly of Maryland to appropriate additional moneys to make larger payments to plaintiffs, such relief was barred by the Eleventh Amendment.

deducted from its need as prescribed in the schedule, the maximum grant permitted under AFDC in Baltimore City is $250.00 per month.[2] The maximum grant regulation is applicable only to members of a family unit who live together; it does not apply to an eligible recipient who resides in another household or a child-care institution.

Plaintiffs have sued for themselves and on behalf of the class which they represent. Plaintiff Linda Williams resides with her eight children, who range in age from four years to sixteen. Their father is continuously absent from her home and she and one of her children are in poor health. They are totally without financial resources. This condition did not arise until sometime after the birth of her youngest child. Under the standards of need, her family should receive benefits in the amount of $296.15 per month while, in fact, she is granted maximum welfare in the amount of $250.00 per month by reason of the application of the maximum grant regulation.

Plaintiffs Junius Gary and his wife live together with their eight children, who range in age from four years to eleven. Mr. Gary is totally disabled from working for medical reasons, and Mrs. Gary, who is required to remain at home to care for her children, is also in ill health. They are totally without financial resources. This condition did not arise until after the birth of their youngest child and until Mr. Gary became disabled for employment. According to the standards formulated by the Department of Public Welfare they should receive $331.50 per month for themselves and their eight children, but they are limited to a monthly grant of $250.00 by reason of the maximum grant regulation.

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

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[2] In the case of recipients who do not reside in Baltimore City the maximum grant is $240.00 per month. All plaintiffs in the instant case are residents of Baltimore City.

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 they and their six remaining children would still be eligible to receive the maximum grant of $250.00.

From the testimony in the case, it appears that the maximum grant regulation has its genesis and rationale in the fact that the Governor and the General Assembly of Maryland have failed to appropriate sufficient funds for Maryland's share of the cost of AFDC to satisfy the state-determined need of all persons entitled to benefit thereunder. The purpose of the maximum grant regulation is solely to to conserve state funds, by allocating state funds (less in amount than state-recognized need) among only some of the the persons entitled thereto. Because the amount of federal funds to support AFDC is computed on the basis of the need of recipients, rather than the extent to which the State satisfies that need, the maximum grant regulation has the incidental effect of increasing the federal government's share of the cost of the total program beyond what would be the amount of that share had the maximum grant regulation not been adopted.

I.

The history, the scope and the basic purposes of the AFDC program, initiated as part of the Social Security Act of 1935, are fully developed in *King v. Smith, supra,* to which reference is made for a fuller treatment. It suffices to state that while State participation in the scheme of cooperative federalism is voluntary on the part of each State, and while each State "is free to set its own standards of need," as well as "to determine the level of benefits by the amount of funds it devotes to the program" (*King v. Smith, supra,* at 318-319), those which desire to take advantage of the substantial federal funds available for distribution to needy children are required to submit an AFDC plan for the approval of the Secretary of Health,

Education and Welfare. 42 U.S.C.A. §§601-604.[3] The plan, to be valid, must conform to the requirements of the Act and applicable regulations of the Secretary.[4]

Section 402 of the Act, 42 U.S.C.A. §602, sets forth the mandatory requirements of a state plan for aid and services to needy families with children. *Inter alia,* the plan must "provide, effective July 1, 1951, that all individuals wishing to make application for aid to families with dependent children shall have the opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to *all* eligible individuals" (emphasis supplied). The mandate is clear that, within the framework of state-determined standards of need, the State must meet those needs in regard to "all eligible individuals."

Who are "eligible individuals" is supplied by other provisions of the Act. Section 401 of the Act, 42 U.S.C.A. §601, states that the legislative purpose of appropriations under AFDC is:

> "For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, *to needy dependent children and the parents or relatives with whom they are living* to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the

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[3] This record does not reflect whether Maryland's "maximum grant" regulation has been given such approval. Presumably, because of its newness, it has not. But approval, while of interest, would beg the question of whether it comports with the Act and the Constitution.

[4] Congress has the unquestioned power to fix the terms upon which its allotments to states shall be disbursed. *King v. Smith, supra; Ivanhoe Irrigation District v. McCracken,* 357 U.S. 275 (1958); *Oklahoma v. United States Civil Serv. Com.,* 330 U.S. 127 (1947).

maintenance of continuing parental care and protection * * *." (emphasis supplied).[5]

"Dependent child" is defined in §406, of the Act, as amended, 42 U.S.C.A. §606(a).[6] Where there exists a "dependent child," the "aid to families with dependent children," which is the object of the legislation, is defined to include money payments or medical care to the relatives with whom the dependent child is living; and if that relatives is a parent, to the spouse of such parent, under certain circumstances. 42 U.S.C.A. §606(b).[7] The amount of such aid, under the circumstances just mentioned, is thus computed by treating the relative, parent or spouse of parent, as the case may be, of the "dependent child" as a part of the family unit.

It will be noted that the definitions contain no limitation on eligibility by reason of the fact that one, who is

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[5] As originally enacted, AFDC permitted State disqualification for benefits on the grounds of illegitimacy or state determination that a dependent child did not reside in a "suitable home." As part of legislation outlawing immorality and illegitimacy as disqualifying factors, Congress enacted 42 U.S.C.A. § 608 to permit payments to States for benefits to "dependent children" placed in foster homes and child-care institutions. See discussion *King v. Smith,* pp. 322-324.

[6] The full text of § 606(a) follows:

"§ 606. Definitions

When used in this subchapter—

(a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending school, college, or university, its equivalent, or regularly attending a course of vocational or technical training designed to fit him for gainful employment."

[7] 42 U.S.C.A. § 608 modifies this definition, however, to permit a child to be treated as a "dependent" child when he has been placed in a foster home or a child-care institution under the conditions set forth in that section. See also, ft. 5, *supra.*

otherwise a "dependent child," resides in a household with or without one or more other siblings or other persons. Nor do the definitions or any other portion of the Act[8] vest in any state the authority to embroider upon the definition of "dependent child," so as to insert conditions and limitations beyond those imposed by Congress. For practical purposes, Maryland's maximum grant regulation means (assuming that the family lacks other financial resources) that in computing the amount of an award, any dependent child in excess of the fourth dependent child living with both parents, or any dependent child in excess of the fifth dependent living with one parent, does not count as a "dependent child." In effect, therefore, Maryland's maximum grant regulation would permit Maryland to avoid the mandate of §402 that it provide payments to *"all"* eligible individuals.[9]

Maryland's maximum grant regulation also violates part of the basic philosophy underlying AFDC. As originally enacted, §406 of the Act, 49 Stat. 629, defined a "dependent child" as one under age sixteen, in need, and living with his parents or a certain class of relatives.[10] The designated class of relatives was expanded in 1956 by 70 Stat. 850,

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[8] We discuss, *infra,* defendants' contention that the Social Security Act Amendments of 1967 constitute implied Congressional recognition of the validity of Maryland's maximum grant regulation.

[9] Of course, in the case of a "dependent child" moneys disbursed for him are paid not to him but to a responsible adult, child-care institution, child-placement or child-care agency for his benefit. See, *e.g.,* 42 U.S.C.A. § 608. Other provisions of the Act make clear, however, that a benefit so paid is treated strictly as a benefit for the child and not to the recipient. For example, 42 U.S.C.A. § 602(b) enjoins the Secretary not to approve a State plan which denies aid with respect to any child who has not met certain age or residency requirements; and 42 U.S.C.A. § 605 permits a State to provide counseling and guidance services "[W]henever the State agency has reason to believe that any payments of aid to families with dependent children made with respect to a child are not being or may not be used in the best interests of the child." That the "dependent child" is an "eligible" recipient is manifest.

[10] i.e., grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle or aunt.

855.[11] And as we have noted, in 1961 the definition of "dependent child" was amended to permit benefits to be granted to needy children in foster homes or in child-care institutions. The 1961 amendment, 75 Stat. 75, also permitted aid to children whose need arose from unemployment of their parents not attributable to physical or mental incapacity. It is clear, nevertheless, that one of the principal purposes of AFDC was to preserve intact the family unit.[12] The inclusion of relatives, other than parents, and the subsequent expansion of the class of qualifying relatives were to take care of the situations where both parents were dead or continually absent from the home and a relative was acting *in loco parentis*. Provision for aid to children whose parents were unemployed for reasons other than physical or mental incapacity was to respond to need, while provision for aid to children in foster homes or child-care institutions was, again, to meet need under a scheme which recognized that "there are some home environments that are clearly contrary to the best interest of these children." It is interesting to note that Senate Report No. 165, 87th Cong. (1st Sess.), 1961 U. S. Code Cong. and Adm. News, pp. 1716, 1721, in which the quoted statement was made, reaffirmed that "[t]he objective of the aid to dependent children program is to provide cash assistance for needy children in their own homes."[13]

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[11] This amendment added first cousins, nephews and nieces to the qualifying group.

[12] Senate Report No. 628, 74th Congress (1935) states: "Through cash grants adjusted to the *needs* of the family *it is possible to keep young children with their mother in their own home,* thus preventing the necessity of placing children in institutions. This is recognized by everyone to be the least expensive and altogether most desirable method for meeting the needs of these families that has yet been devised." (Emphasis supplied.)

House Report No. 615, 74th Congress (1935) also states: "* * * 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.*" (Emphasis supplied.)

[13] It is also worthy of note that 8A Ann. Code of Md., Art. 88A, § 44A states: "It is hereby declared that the primary purpose of aid

The Maryland maximum grant regulation is in conflict with this legislative purpose, both as expressed in the Act and in its legislative history. As has been shown, the maximum grant regulation provides a powerful economic incentive to break up large families by placing "dependent children" in excess of those whose subsistence needs, when added to the subsistence needs of other members of the family, exceed the maximum grant, 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.

Defendants contend that the portion of the Social Security Act Amendments of 1967 which amended §403 of the Act, 42 U.S.C.A. §603, by adding a new subsection (d) thereto, is clear Congressional recognition that a State may impose a maximum grant limitation on benefits which it disburses. In general, §403 provides for payments to the State of the federal portion of the cost of AFDC and specifies how that portion is to be computed. The text of the new subsection (d) is set forth in the margin.[14]

We do not think that §403(d) of the Act has the effect which defendants claim. Section 403(d) relates only to

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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 for child care* established by law in this State." Plaintiffs suggest a conflict between the regulation and this statute. Since plaintiffs do not press the point, we do not consider it.

[14] "(d) Notwithstanding any other provision of this Act, the average monthly number of dependent children under the age of 18 who have been deprived of parental support or care by reason of the continued absence from the home of a parent with respect to whom payments under this section may be made to a State for any calendar quarter after June 30, 1968, shall not exceed the number which bears the same ratio to the total population of such State under the age of 18 on the first day of the year in which such quarter falls as the average monthly number of such dependent children under the age of 18 with respect to whom payments under this section were made to such State for the calendar quarter beginning January 1, 1968, bore to the total population of such State under the age of 18 on that date."

a determination of the amount of federal matching funds. It limits federal funds to the number of certain defined individuals who fall within the definition of "dependent children" but it does not purport to affect a State's obligation to *all* of the individuals who fall within that definition if a State participates in AFDC as required by §602. The limitation on federal funds is applicable *only* (a) to dependent children under age 18 (while the definition of "dependent children" contained in §406(a) of the Act includes some children between 18 and 21), and (b) to dependent children deprived of parental support by reason of the continued absence of a parent (while the definition of "dependent child" contained in the Act also includes need arising from the death or physical or mental incapacity or unemployment of a parent. By contrast, Maryland's maximum grant regulation cuts a broad swath on a non-selective basis.

Much of the legislative history of new subsection (d) is irrelevant, but there is enough history to provide an explanation for its selective operation. House Report No. 544, 90th Con., 1st Sess., p. 110, where subsection (d) had its genesis, states that its purpose would limit federal expenditures in the absent parent subcategory of "dependent children," which is the fastest growing subcategory of need, and "should also give the States an incentive to make effective use of the constructive programs[15] which the bill would establish." The addition of subsection (d) was eliminated by the Senate but reinserted, in modified form, by the Conference Committee. In the Second Session of the 90th Congress, another effort was made in the Senate to eliminate subsection (d), but the attempt was abortive.

The statement of Representative Mills, who was Chairman of the House Ways and Means Committee, where the

[15] The 1967 Amendments, P. L. 90-248; 81 Stat. 821, *inter alia,* established a work incentive program for recipients, provided for the employment of qualified recipients in administering the program and provided means for locating parents who desert or abandon dependent children, including the furnishing of last-known addresses by the Internal Revenue Service.

AFDC freeze provision originated and who was also floor manager of the bill, is significant in explaining the purpose of the bill and *in negating the effect claim for it by defendants.* He said:

> "Finally, Mr. Chairman, the bill would add a provision to present law which would limit Federal financing for the largest AFDC category — where the parent is absent from the home — to the proportion of each State's total child population that is now receiving AFDC in this category. This provision, we believe, would give the States an additional incentive to make effective use of the constructive programs which the bill would establish. Moreover, this *limitation on Federal matching will not prevent any deserving family from receiving aid payments. The States would not be free to keep any family off the rolls to keep within this limitation* because there is a requirement in the law that requires equal treatment of recipients and uniform administration of a program within a State. . . ." 113 Cong. Rec. H. 10670 (August 17, 1967; unbound) (emphasis supplied).[16]

Because of its selective nature, because it applies only to a determination of the amount of a federal grant and because its legislative history shows that it had a special purpose other than that ascribed to it by defendants, we conclude that subsection (d) is of no aid or comfort to defendants. Thus, the basic purpose of the Act that, when a State participates in AFDC, all dependent children receive benefits thereunder according to need is unsullied, and the Maryland maximum grant regulation is manifestly in conflict. Therefore, Maryland's maximum grant regulation cannot stand.

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[16] In regard to the last part of Chairman Mills' statement, it should be noted that § 402 of the Act, 42 U.S.C.A. § 602, requires that AFDC be effective in all political subdivisions of a participating State, as well as aid be furnished with reasonable promptness to all eligible individuals.

II.

Our view that the Maryland regulation is invalid is reinforced by our conclusion that the regulation cannot stand under the equal protection clause. It is, therefore, appropriate that we discuss the constitutional issue.

We have searched the record in vain for any state purpose to be served by the maximum grant regulation other than to fit the total needs of the State's dependent children, as measured by the State's standards of their subsistence requirements, into an inadequate State appropriation. The search was important, and the absence of another reason fatal to the defense, because, clearly, dependent children of large families receive different treatment from dependent children of small families. Discrimination of this type, not to run afoul of the equal protection clause, must be founded on reason in the light of its purpose. *McLaughlin v. Florida,* 379 U.S. 184, 189 (1964). While a State may classify persons for various purposes, it may not do so on arbitrary or irrational grounds. *Yick Wo v. Hopkins,* 118 U.S. 356 (1886); *Carrington v. Rash,* 380 U.S. 89 (1965). As most recently stated by the Supreme Court, in a case holding a wrongful death statute which denied recovery to illegitimate children while permitting recovery to lawful issue invalid under the equal protection clause:

> "While a State has broad power when it comes to making classifications * * * it may not draw a line which constitutes an invidious discrimination against a particular class. * * * Though the test has been variously stated, the end result is whether the line drawn is a rational one. * * *" *Levy v. Louisiana,* 391 U.S. 68, 71 (1968).

See also, *Glona v. American Guar. & L. Ins. Co.,* 391 U.S. 73 (1968).

That under these rules the maximum grant regulation is offensive is easily demonstrable. AFDC is a program to provide support for dependent children. By the standards of need set by Maryland, a dependent child is in as great need and as deserving of aid, whether he be the fourth or

the eighth child of a family unit, although if the latter, the amount of his need may not be quite as great as that of the former, because it is cheaper to provide clothing, food and shelter for the eighth child than for the fourth. Yet, the maximum grant regulation, in accomplishing its purpose of conservation of inadequate funds, assumes that a child, because he is the eighth (or any other number where to grant him benefits would bring the aggregate benefits to the family unit over the maximum grant) is either not in need or that his need must go unsatisfied. Reason and logic will not support such a result. The fact that such a child, if moved to the home of an eligible relative, may receive such benefits lends additional support to this conclusion. In effect, Maryland impermissibly conditions his eligibility for benefits upon the relinquishment of the parent-child relationship. *Cf., Sherbert v. Verner,* 374 U.S. 398 (1963). The result we reach is fully in accord with that of other courts which have considered the same or similar questions. *Collins v. State Board of Social Welfare,* 248 Iowa 369, 81 N.W. 2d 4 (1957); *Anderson v. Schaefer,* ..... F. S. ..... (N.D. Ga. 1968); *Metcalf v. Swank,* ..... F. S. ....., 37 L.W. 2277 (N.D. Ill. 1968) (dictum). We hold, therefore, that the maximum grant regulation transgresses the equal protection clause.

III.

Lest our holdings be misunderstood, some additional words are required. We do not hold that Maryland must appropriate additional funds to support its participation in the program of AFDC; we reiterate our previous holding that the Eleventh Amendment deprives courts of the United States from jurisdiction to grant such relief.

We hold only that if Maryland has appropriated insufficient funds to meet the total need under AFDC, as measured by the standards for determining need that Maryland has prescribed, Maryland may not, consistent with the Social Security Act or the equal protection clause, correct the imbalance by application of the maximum grant regulation. No other proposed solution to this problem is before us, and we express no other opinion.

Within ten days counsel may agree upon and present a form of order consistent with these views.

/s/ HARRISON L. WINTER,
United States Circuit Judge.

/s/ ROSZEL C. THOMSEN,
Chief Judge,
United States District Court.

/s/ ALEXANDER HARVEY, II,
United States District Judge.

SUPPLEMENTAL OPINION ON MOTION

WINTER, Circuit Judge:

After the filing of our opinion in this case, defendants filed a multi-faceted motion, purportedly under Rules 52(b) and 59, *Fed. R. Civ. P.*, in which they ask, alternatively, that we amend our findings of fact and judgment, grant a new trial, or receive additional evidence and alter or amend the judgment. Basically, the new or additional facts that defendants want us to consider are not in the nature of newly-discovered evidence; and no compelling excuse is offered as to why they were not previously brought to our attention.[1] Understandably, plaintiffs vigorously question defendants' right to proceed, and they cite persuasive authority in support of their position.

The case is an important one. Proof has been offered to establish that twenty-seven states have maximum grant regulations similar to that of Maryland; other litigation questioning their validity is pending in other courts. In an effort to arrive at a correct decision, we should give full and complete consideration to all relevant materials. We prefer, therefore, to deal with the motion on its facts and the merits of the contentions it presents, rather than on the procedural grounds urged by the plaintiffs.

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[1] The facts, themselves, are not in dispute. They were stipulated to be true in open court at the hearing on the motion; others were the subject of a post-hearing written stipulation.

As will appear from what is said hereafter, the motion is granted in part and denied in part.

I.

In regard to the question of the proper construction to be placed on the Social Security Act of 1935, as amended, and whether the Maryland maximum grant regulation conflicts therewith, defendants point out that Maryland has had a maximum grant regulation in some form continuously since January 1, 1947. It is asserted that the Secretary of Health, Education and Welfare (HEW) has "approved" the Maryland regulation, as well as its counterpart in some twenty-seven other states, and that this "approval" is entitled to great weight, if, indeed, it is not conclusive, in deciding whether the regulation conflicts with any provision of the Act. The text of the maximum grant regulations in other states is not before us; nor is any evidence of how they are applied. Finally, it is contended that the legislative history of clause 9 of § 402[2] indicates that it has a more restrictive meaning than the one we ascribed to it, so that there is no conflict between it and the regulation.

We accept the correction that the Maryland maximum grant regulation is not new and that it has its counterpart elsewhere. We find that HEW has never expressly disapproved the regulation; whether it has approved it is another matter, as is the legal effect of what has been done. We state first, drawing on the parties' stipulation, what HEW has and has not done.

HEW has at no time issued any regulations dealing specifically with the problem of maximum grant regulations,

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[2] Clause 9 is the portion of § 402, 42 U.S.C.A. § 602, which requires that a State AFDC plan *must* include a provision:

> "(9) * * * effective July 1, 1951, that all individuals wishing to make application for aid to families with dependent children shall have the opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals * * *."

Since the 1968 amendments, clause 9 has become clause 10 of § 402.

nor has it circulated any reasoned decisions or statements detailing its position. Indeed, there is no indication whatever that any of the arguments urged in this proceeding or adopted in our previous opinion have been presented to HEW. The sole contacts which HEW has had with the regulation in issue, so far as we are informed by the parties, are as follows: (1) at various times HEW has "incorporated" revisions of the maximum grant regulation into Maryland's previously approved AFDC plan; (2) HEW issued, in October, 1962, a booklet entitled "State Maximums and Other Methods of Limiting Money Payments to Recipients," which details, *inter alia*, the AFDC maximum grants in the respective states employing such regulations; (3) an Interim Policy Statement of May 31, 1968, specifies that a state AFDC plan must provide by July 1, 1969, for increases in any maximum grants in order to reflect changes in living costs.

From the foregoing, we distill the obvious, namely, that HEW implicitly considers maximum grant regulations not to be violative of the Act. In view of the fact, however, that there is no indication from administrative decision, promulgated regulation, or departmental statement that the question of the conformity of maximum grants to the Act has been given considered treatment,[3] we believe that the various actions and inactions on the part of HEW are not entitled to substantial, much less to decisive, weight in our consideration of the instant case.

In adopting this view, we cast no doubt whatsoever upon the general doctrine that the views of administrative agencies entrusted with the administration of a statute are to be given due deference when issues of statutory interpretation arise. See, generally, Annot., *Administrative or Practical Construction of Statute as Precedent for Judicial Construction*, 84 L. Ed. 28 (1939). Nevertheless, whether administrative interpretation in the abstract is deemed to be

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[3] Some corroboration for this statement is found in the implicit assumption in the discussion of maximum family grants, Note, *Welfare's "Condition X,"* 76 Yale L. J. 1222, 1232-33 (1967).

"pertinent," to have "weight," to have "persuasive weight," or to be of such significance that it "ought not to be overruled without cogent reasons," *Anderson v. McKay*, 211 F. 2d 798, 805 (D.C. Cir.), *cert. den.*, 348 U.S. 836 (1954), the attitudes, practices and interpretations of an administrative agency are certainly not absolute rules of law but, at best, merely "helpful guides to aid courts in their task of statutory construction." *Sims v. United States*, 252 F. 2d 434, 438 (4 Cir. 1958), *aff'd*, 359 U.S. 108 (1959). The ultimate authorities on issues of statutory interpretations are the courts, *Volkswagenwerk v. FMC*, 390 U.S. 261, 272 (1968), which have the final responsibility to declare what a statute means. *Fishgold v. Sullivan Drydock & Repair Corp.*, 154 F. 2d 785, 790 (2 Cir.) (L. Hand, J.), *aff'd*, 328 U.S. 275 (1946). To the same effect, see, *e.g.*, *Folsom v. Pearsall*, 245 F. 2d 562, 564-65 (9 Cir. 1957); *Commissioner v. Winslow*, 113 F. 2d 418, 423 (1 Cir. 1940). Where a conflict arises between the administrative and judicial constructions of a statute, the latter will necessarily prevail. *Deeg v. Lumbermen's Mut. Cas. Co.*, 279 F. 2d 491, 494 (10 Cir. 1960); *Cory Corp. v. Sauber*, 266 F. 2d 58, 61 (7 Cir. 1959), *rev'd on other grounds*, 363 U.S. 709 (1960); *Louisiana Pub. Serv. Comm'n v. SEC*, 235 F. 2d 167, 172 (5 Cir. 1956), *rev'd on other grounds*, 353 U.S. 368 (1957); *Woods v. Benson Hotel Corp.*, 177 F. 2d 543, 546 (8 Cir. 1949). See, 1 Davis, *Administrative Law Treatise*, § 5.06, at 326-328 (1958). In determining the proper weight to be accorded to an administrative decision, account must be taken of the consistency of the agency's interpretation with the underlying purposes of the statute which is being construed. *P. Lorillard Co. v. FTC*, 267 F. 2d 439, 443 (3 Cir.), *cert. den.*, 361 U.S. 923 (1959). 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 Thloot Har Wong*, 224 F. S. 155, 165 (S.D. N.Y. 1963).

Furthermore, it is clear that the thoroughness with which an administrative agency has dealt with a particular prob-

lem of statutory construction is a highly relevant factor in determining the weight to be assigned to the agency's resolution of the matter. Such weight will be dependent upon "the thoroughness evident in * * * [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). If the agency's construction has resulted from an uncontested non-adversary proceeding, it has been said that the agency's interpretation is entitled to "relatively little weight." *SEC v. Sterling Precision Corp.*, 393 F. 2d 214, 220 (2 Cir. 1968). See, *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 290 (1946). Finally, to the argument that Congress has not stepped in to alter or amend HEW's apparent interpretation that Maryland's maximum grant regulation conforms to the Act, we are reminded of our Court of Appeals' admonition that "courts are properly chary of equating mere inaction with approval, in the absence of a solid foundation for the inference of conscious ratification [by Congess]." *Duncan v. Railroad Retirement Bd.*, 375 F. 2d 915, 919 (4 Cir. 1967).

If the unequivocal command that "aid * * * shall be furnished with reasonable promptness to *all* eligible individuals," were all that we must consider, we would not be disposed, in the light of the legal principles which we have set forth and of the limited nature of the administrative action taken by HEW in regard to maximum grant regulations, to assign controlling significance to HEW's apparent views. To the extent that these views hold that maximum grant regulations are consistent with the language and purposes of the Act, we would decline to follow them. See, *King v. Smith*, 392 U.S. 309, 333, n. 34 (1968).

We turn to the argument that the legislative history of clause 9 demonstrates that it has a more restricted meaning than we have given it. Essentially, defendants' argument is that the portion of the Social Security Act Amendments of 1950, 64 Stat. 549, which added clause 9, on which we

placed principal reliance in concluding that there was a conflict between the regulations and the Act, was addressed to a practice in Maryland and in other states of dealing with revenue crises in AFDC by instituting a freeze on the receipt of new AFDC applications, rather than to devise some other uniform or equitable way of reducing AFDC expenditures. The requirement of clause 9 — "that all individuals wishing to make application for aid to families with dependent children shall have the opportunity to do so" — was, so the argument runs, specifically directed to this practice. The "all eligible individuals" to whom aid must be furnished, the argument continues, are the applicants for aid referred to in the beginning of clause 9, and not the family members benefited by the application.

We reject defendants' second argument for the reasons set forth in footnote 9 of our original opinion. Although clause 9 may contemplate that the application for aid be made by a responsible adult, child-care institution, child-placement or child-care agency, it requires that the amount of aid granted be commensurate with the needs of all of those on behalf of whom an application is made. Defendants' argument is essentially that the command of the entire clause is met if the applicant, i.e., the responsible adult, is furnished some aid, even though the amount is less than that which the state has determined is the extent of need and appropriate benefit for the members of his family. If his needs as an individual are satisfied in whole or in part, the clause requires no more. The basic purpose of AFDC to provide support for "dependent children" makes the hollowness of this argument manifest.

We see nothing inconsistent between the claimed legislative intent as expressed in clause 9 and the liberal meaning we have given it. If the evil to be corrected was the states' freezing consideration of new applications for aid, it would not be unreasonable for Congress to say that the application should be received, and considered, and that the amount of aid should be granted promptly to *all* who were eligible, lest some state devise some other subterfuge, such as receiving an application and considering it but postpon-

ing any benefits thereon or granting less than the benefits indicated thereon until it was financially more convenient to do so.

More importantly, closer scrutiny of the legislative materials relevant to the purposes of clause 9 satisfies us that we have not expanded its meaning beyond the initial legislative intent in its enactment. The basic purpose of clause 9 was explained in the report of the House of Representatives where the bill, H. R. 6000, which added clause 9, originated.[4] H. R. 6000 was not reported by the Senate until the following session, and, while the House version required a state to furnish aid "promptly," clause 9 was amended in the Senate to require a state to furnish aid "with reasonable promptness." This substitution in phraseology was thought to assure that a state would have sufficient time to make investigations. It was the only amendment; otherwise, the

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[4] The pertinent sections of the report read:

"D. Opportunity to apply for and receive assistance promptly

Shortage of funds in aid to dependent children has sometimes, as in old-age assistance, resulted in a decision not to take more applications or to keep eligible families on waiting lists until enough recipients could be removed from the assistance rolls to make a place for them. As noted in the discussion of this problem in the section on old-age assistance, this difference in treatment accorded to eligible people results in undue hardship on needy persons and is inappropriate in a program financed from Federal funds. The requirement that State plans must provide opportunity to apply to all persons wishing to do so and that assistance shall be furnished promptly to all eligible families is included in the proposed amendments to title IV of the Social Security Act."

* * * * * *

"Requirement relating to opportunity to apply for assistance and receive it promptly

The provisions of section 3(a) of the Social Security Act are also amended by the bill by the addition of a new clause (9). This clause would add a specific requirement designed to make it clear that a State plan, in order to be approved, must provide that all individuals wishing to make application for assistance shall have an opportunity to do so and that assistance shall be furnished promptly to all eligible individuals. This new requirement would take effect July 1, 1951."

H. R. Rep. No. 1300, 81st Cong., 1st Sess., pp. 48, 148 (1949).

Senate sought to achieve the same objectives as the House.[5] It should be stressed that H. R. 6000 also expanded AFDC (which was theretofore a program solely of aid to children) to include the relative with whom any dependent child is living. The purpose of the expansion was described in the report of the House Committee.[6] The essential emphasis,

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[5] "Title III — Amendments to Public Assistance and Maternal and Child Welfare Provisions of the Social Security Act

Requirements of State Plans

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Requirements relating to opportunity to apply for and receive assistance

The provisions of section 3(a) of the Social Security Act are also amended by the bill by the addition of a new clause (9). This clause would add a specific requirement designed to make it clear that a State plan, in order to be approved, must provide that all individuals wishing to make application for assistance shall have an opportunity to do so and that assistance shall be furnished with reasonable promptness to all eligible individuals. This new requirement would take effect July 1, 1951.

The same addition has been made by sections 321 and 341 of the bill to sections 402(a) and 1002(a), respectively, of the Social Security Act, although in the latter case the new clause is numbered (11).

These amendments proposed by the bill are the same in substance as those proposed on the same subject by the bill as passed by the House except that the latter would have required the assistance to be furnished 'promptly' instead of 'with reasonable promptness' as proposed by your committee. The change was made in order to assure the States reasonable time to make investigations and complete any other action necessary to determine eligibility and extent of need for assistance."

S. Rep. No. 1669, 81st Cong., 2nd Sess.; 2 U. S. Code Cong. Ser. 3470-71 (1950).

[6] "XIV. Aid To Dependent Children

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"A. Inclusion of mother or other relative caring for child

In the present law, aid to dependent children is defined as payments with respect to a dependent child. No specific provision is made for the need of the parent or other relative with whom the child is living. Particularly in families with small children, it is necessary for the mother or another adult to be in the home full time to provide proper care and supervision. Since the person caring for the child must have food, clothing, and

in this statement, on the needs of the dependent children, and the concept that aid to the relative with whom the children were living was necessary *so as not to diminish the realizable benefit to the children* belies the interpretation of clause 9 pressed by defendants.

Inexplicably, however, Congress, in the Social Security Amendments of 1967, P. L. 90-248, 81 Stat. 821, amended § 402 of the Act in a manner which may have a substantial effect on the apparent conflict between the regulation and the Act. The record, however, is insufficient for us to express any final conclusion.

The amendment, contained in § 213(b) of the Act, cited as Social Security Amendments of 1967, added a new clause

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other essentials, amounts allotted to the children must be used in part for this purpose if no other provision is made to meet her needs. The maximum monthly amount of assistance in which the Federal Government will now share is $27 for one child in a family and $18 for each child beyond the first.

Because of the lack of specific provision for Federal participation in assistance to the mother or other relative and the inadequacy of the $27 and $18 maximums to cover the cost of essentials for the children and an adult as well, States have been forced to make a very large proportion of payments larger than the maximum amounts subject to Federal sharing. In December 1948 about one-half of all payments were above the maximums. More than three-fourths of all payments exceeded these amounts in 24 States. Often States have been unable to make payments that were at all realistically related to the need of the dependent children and the relative caring for them.

To correct the present anomalous situation wherein no provision is made for the adult relative and to enable States to make payments that are more nearly adequate, the bill would include the relative with whom the dependent child is living as a recipient for Federal matching purposes. The maximum amount of assistance for a relative in which the Federal Government would share would be $27. The maximums of $27 for one child in a family, and $18 for each additional child, would remain unchanged. Thus, for a relative and one dependent child the maximum amount of the payment subject to Federal sharing would be $54 instead of $27. For a three-child family, the maximum would be $90 instead of $63."

H. R. Rep. No. 1300, 81st Cong., 1st Sess., pp. 45-46 (1949).

to § 402(a), to be known as clause 23, which requires, as an additional condition, 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.)

Section 213(a) amended various other sections of the original Act to provide that recipients under various programs need not suffer a reduction in benefits if they had income up to $7.50 per month, instead of the previous ceiling of $5.00 per month, i.e., 42 U.S.C.A. §§ 302(a)(1)(A)(i) [state old-age and medical assistance plans], § 1202(a)(8)(C) [state plans for aid to blind], § 1352(a)(8)(A) [state plans for the permanently and totally disabled], and § 1384(a)(14)(D) [state plans for aid to aged, blind or disabled or for such aid and medical assistance for aged].

Section 213 of the amending Act was added to the House Bill by amendment in the Senate, later concurred in by the House.[7] As it shows on its face, § 213(b) was designed to increase benefits to keep pace with increased living costs. The references to it in the committee reports are no more informative.[8] Elsewhere in the extensive amendments to

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[7] See discussion in Conference Report No. 1030, 90th Cong., 1st Sess., 2 U. S. Code Cong. Ser. 3179, 3208 (1967).

[8] Clause 23 was added by § 213(b) of the amending Act. As passed by the Senate, the amending Act added clause 23 by § 213(a) and referred to clause 23 as clause 24. In the Senate Report, the following was said:

> "Paragraph (5) of section 213(a) of the bill amends section 402(a) of the Act by adding (after the new clause (23) added to such sec. 402(a) of the act by sec. 211(a) of the bill) a new clause (24) which requires a State plan for the dependent children program to provide that by July 1, 1969, and at least annually thereafter, the amounts used by the State to determine the needs of individuals will be adjusted to reflect fully changes in living costs since such amounts were established, and that any

the original Act, benefits were increased generally,[9] the conditions attaching to AFDC benefits were liberalized to encourage AFDC recipients to make the transition to becoming self-supporting, and new protections to children in AFDC families and provisions to make more certain the fulfillment of parental responsibilities were added.[10]

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maximums that the State imposes on the amount of aid paid to families will be proportionately adjusted."

Senate Report No. 744, 90th Cong., 1st Sess., 2 U. S. Code Cong. Ser. § 133 (1967).

The Conference Report which recommended concurrence in the Senate amendment contained no discussion of its purpose or need, beyond the barest description of its terms. Conference Report No. 1030, 90th Cong., 1st Sess., 2 U.S. Code Cong. Ser. § 209 (1967).

[9] See, *e.g.*, Senate Report No. 744, 90th Cong., 1st Sess., 2 U. S. Code Cong. Ser. 2834, 2835 [old-age, survivors, and disability insurance], 2836 [health insurance], 2838 [public assistance].

[10] Senate Report No. 744, op. cit. n. 8. At p. 2837, the general program in this report was thus summarized:

"Aid To Families With Dependent Children

The bill would make the following reforms in the aid to families with dependent children programs:

(1) For the purpose of providing greater incentives for appropriate members of families drawing aid to families with dependent children (AFDC) payments to obtain employment so that they need no longer be dependent on the welfare rolls the bill would—

(a) exempt a portion of earned income for members of the family who can work;

(b) establish a new work incentive and training program for individuals to be administered by the Department of Labor upon referral by the State welfare agency;

(c) require State welfare agencies to assure adequate child care arrangements for the children of working mothers;

(d) require the State welfare agencies to establish a social service plan for each AFDC family; and

(e) modify the optional unemployed fathers program to provide for a uniform definition of unemployment throughout the United States.

In order to enable the States to implement these requirements, the Federal Government would supply Federal matching for services (including child welfare and day care) which the States would be required to furnish. Federal matching would also be

In the context in which clause 23 was added, that is to say, having regard to the overall amendments to the AFDC program made by the amending Act, we find it difficult to say that §213(b) represented a considered judgment by Congress that it wished to validate all maximum grant regulations and that it wished to depart from the basic objectives of prior Congresses, reaffirmed by it, that bene-

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provided for training, supervision, materials, and other items and services needed in the work incentive program."

The provisions of existing law and proposed changes to liberalize the earnings exemptions of dependent children are described at p. 2861.

The overall changes in the AFDC program are summarized at pp. 2982-83, as follows:

"The plan which the committee has developed, with the advice and help of the Department of Health, Education, and Welfare and the Department of Labor, amounts to a new direction for AFDC legislation. It follows that the basic outline of the bill passed by the House but incorporates certain desirable changes in the method of administration and program emphasis. The committee is recommending the enactment of a series of amendments to carry out its intent of reducing the AFDC rolls by restoring more families to employment and self-reliance.

The first series of amendments is designed to encourage and make possible the employment of adults in AFDC families. Three provisions are aimed at this purpose:

(1) the establishment of a work incentive program under the Department of Labor for the purpose of restoring members of AFDC families (including those with little or no work experience) to regular employment through counseling, placement services and training, and arranging for all others to get paid employment in special work projects to improve the communities in which they live;

(2) A requirement that all States furnish day-care services and other social services to make it possible for adult members of the family to take advantage of the work and training opportunities under the work incentive program; and

(3) A requirement that all States exempt part of the AFDC recipient's earnings to provide incentives for work in regular employment.

The second series of amendments would set up new protections for the children in AFDC families and would make more certain the fulfillment of parental responsibilities:

(1) A requirement that the States establish a comprehensive plan of social services for each AFDC child to assure

fits under AFDC be granted to *all* eligible individuals and that to the maximum extent feasible for their interest dependent children be kept in their own family units.[11] The brevity of the discussion of §213(b) in the legislative reports, as compared to the considered treatment of other amendments, leads to the reasonable assumption that Congress gave no real thought to the effect of maximum grant regulations in its oft-expressed basic legislative purposes,

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the child the maximum opportunity to become a productive and useful citizen;

(2) A requirement that State welfare agencies refer cases of child abuse or neglect to appropriate law-enforcement agencies and courts;

(3) A requirement that protective payments and vendor payments be made where appropriate to protect the welfare of the children;

(4) Federal payments for additional foster care situations under the AFDC program;

(5) A requirement to assure that fathers who desert or abandon their families will contribute to the support of their families by using available tax records and the enforcement power of the Internal Revenue Service. In addition, there would be a requirement that the States establish separate units to enforce the child-support laws, including financial help to the courts and prosecuting agencies to enforce court orders for support; and

(6) A program of emergency assistance to families with minor children for a temporary period.

(7) A more definitive and uniform program for the children of unemployed fathers.

The third series of amendments would make other changes in the program designed to deal with the expanding AFDC rolls.

(1) A requirement that all States establish programs to reduce the number of children born out of wedlock; and

(2) A requirement that all States offer family planning services to appropriate AFDC recipients."

[11] As part of the amending Act, Congress also amended § 401, 42 U.S.C.A. § 601, in a technical respect not itself significant here. What is significant is that an amendment was made to the section containing the recital that a purpose of AFDC was "to help maintain and strengthen family life" without any alteration thereof. Presumably, family life is strengthened and maintained by holding a family together. Yet, as has been previously shown, the Maryland maximum grant regulation in its operation encourages the very opposite.

but simply concluded that if it was increasing benefits generally it should include a direction that maximum grants should be increased, also. Yet, clause 23 is unmistakable recognition by Congress that some states have maximum grant regulations, and, utilizing accepted canons of statutory construction, we are bound to give effect to this recognition.

The problem is what is the scope of Congressional recognition and implied approval of maximum grant regulations. The language of Congress in clause 23 is general and the Congressional intent expressed therein is uncertain. Manifestly, it cannot validate that which the Constitution does not permit. Equally important, it must be construed in the light of all other provisions of the Social Security Act, as amended, so as to achieve an harmonious whole. Even if clause 23 is treated as an implied amendment of clause 9, we do not know, and the parties have offered no proof to show us, what are the terms and provisions of the maximum grant regulations of other states and how they are applied. To be specific, we do not know if they are similar and are uniformly applied like that of Maryland to encourage the disbanding of large families so that Congressional recognition may be deemed an amendment of §402 of the Act, as well as a departure from the original legislative intent of clause 9 and the underlying purposes of the AFDC program to strengthen family life.

In short, clause 23 may well be properly construed to imply recognition by Congress of the concept of maximum grant regulations in the abstract without the additional implication that a congressional imprimatur has been placed upon every conceivable maximum grant regulation, no matter what its operative effects may be in furthering or retarding basic congressional policy. Thus, while Congress has indicated its view that a maximum grant regulation is not *per se* in conflict with the Act, prior to the 1967 amendments, as we have construed it, we cannot, on the present record, impute to Congress the intention to endorse specifically the Maryland regulation with its pernicious results, absent a statement of endorsement or circumstances of endorsement which speak with unmistak-

able clarity. In other circumstances, we would direct the parties to present additional proof to enable us to resolve this issue. We do not find this necessary in the instant case, however, because we are still satisfied that the regulation cannot hurdle the constitutional barrier of the equal protection clause.

II.

In regard to the question of whether Maryland's maximum grant regulation denies equal protection of the law, the evidence before us at the original trial was crystal-clear that the only reason why the maximum grant regulation was continued was financial, i.e., that the Governor and General Assembly of Maryland had failed to appropriate sufficient funds to finance the cost of AFDC, absent the operative effect of the maximum grant regulation in reducing expenditures. Now defendants assert that, at least initially, the maximum grant regulation was rationally supportable for constitutional purposes on the basis of the so-called "principle of less benefit." The thrust of the principle in the case at bar is that public assistance or welfare programs should not serve as an inducement to individuals to abandon useful employment, or to decline useful employment, or to abandon their families and the obligation to support them. Accordingly, the benefits derivable from such assistance should, in no event, be greater than the remuneration which could be achieved from gainful employment. In order to achieve this result, so the argument runs, the maximum grant is keyed to the minimum wage, so that an individual family receiving assistance would obtain no more than a family in which one member thereof was employed at the minimum wage level.

Specifically, under the principle of "less benefit," defendants assert that the maximum grant regulation serves a rational function in that it (a) discourages desertion of children by the wage earner or the wage earners of the family, (b) it provides an inducement to a surviving parent to seek employment, and (c) it encourages parents to limit the sizes of their families.

Even if we assume that the maximum grant regulation was adopted for the purposes that defendants assert,[12] and even if we accept the contention that the validity of the regulation under the equal protection clause may be saved by the original purposes for its promulgation, notwithstanding that those are not the purposes for its continuance, we find no merit in the argument that the less benefit principle may validate this regulation. We reach this conclusion because the regulation on its face is not limited to any subcategories of AFDC eligibles, but purports to apply, and is applied, to AFDC eligibles as a group. While the purposes which defendants assert may have a logical connection with one or more subcategories of AFDC eligibles, alone or in combination, they have no logical connection with the group as a whole; hence, the regulation is invalid on its face for overrearching. We turn to a consideration of the claimed rational functions which defendants assert.

AFDC is not limited to dependent children or families with dependent children deprived of parental support or care by reason of continued absence from the home. Discouragement of desertion as a rational basis for the maximum grant regulation can have application 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. Even when eligibility for AFDC is predicated upon continued absence from the home, dependent children and families with dependent children may still receive payments in excess of the maximum grant, if those children in number in excess of the cut-off point are placed with other relatives, a child-care institution, a child-placement or a child-care agency. A parent

[12] On the evidence before us the conclusion is equally tenable that the maximum grant regulation was adopted to make the entire AFDC program more palatable politically. Perhaps those purposes were inspired, however, by unarticulated notions of the "principle of less benefit."

who is willing to desert to give his children or his family eligibility for AFDC on this basis can hardly be presumed to voice stringent objection to further breakup of the family unit to gain advantage from this unusual aspect of the Maryland regulation. Thus, the maximum grant regulation not only subverts the statutory goal of preserving intact the family unit, but it is also ineffective to discourage eligibility by continued absence from the home.

The same is true with regard to the claimed purpose of inducing a surviving parent to seek employment, namely, that it is inapplicable to inability to work or lack of employment and is ineffective to achieve its purpose even in the subcategory to which it might be efficacious. Other considerations also come into play. The basic purpose of AFDC is to aid needy *children*, and to achieve this schedules of need based upon the cost-of-living have been established by the state. The principle of "less benefit" can have no application to those under the age when the state will permit them to work.[13] The evidence indicates that only a relatively small percentage of families (166 out of 2,537, or 6.5%) receiving AFDC payments are classified as having employable numbers. To what percentage of the 6.5% of total AFDC beneficiaries the maximum grant regulation is applicable is not disclosed. The evidence does show that the plaintiffs Junius Gary and Jeanette Gary, his wife, are receiving AFDC payments because of sickness and disability, and neither they nor the named plaintiff Linda Williams are employable. It is simply irrelevant to apply the "less benefit" principle of encouraging employment to individuals who could not, in any event, be gainfully employed.

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[13] Like every enlightened jurisdiction, Maryland regulates the employment of minors. Those under 14 are prohibited from engaging in any gainful employment. Those over 14 but under 16 may not be employed during school hours, with certain exceptions, or in certain occupations. All minors under 18 are prohibited from engaging in certain occupations and females over 16 but under 18 from engaging in certain occupations permissible for males. See, generally, 8B Ann. Code of Md., Art. 100, §§ 4, *et seq.*

These ages should be compared to the age limitations to qualify one as a "dependent child," i.e., under the age of 18, or, in the case of a student, under the age of 21. 42 U.S.C.A. § 606.

The state may have a legitimate interest in reducing its welfare rolls by encouraging those capable of so doing to seek and maintain gainful employment, but this goal can be furthered by such devices as work incentive programs, which are aimed precisely at aiding and encouraging those who are in fact employable,[14] or by limiting the application of the regulation to those to whom it may be said to have some logical relation.

Defendants' contention that the maximum grant regulation was also initially promulgated to encourage parents to limits the sizes of their families is diffidently pressed. This asserted purpose merits little discussion. If, indeed, this is a purpose, the regulation, again, invalidly overreaches. It is not limited to children born after AFDC eligibility is established and, from the evidence, it appears that in the case of the named plaintiffs at bar no children

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[14] We call attention to the provisions of § 407 of the Act, 42 U.S.C.A. § 607, which, beginning in 1961, expanded the definition of "dependent child" to include needy children deprived of parental support or care by reason of the unemployment of a parent. This section requires as part of the state's AFDC plan, in addition to the other conditions of § 402 of the Act, that the state provide such assurances as will satisfy HEW that fathers of dependent children will be referred to the Secretary of Labor for participation under a work incentive program, and for providing vocational education to encourage the retraining of individuals capable of being retrained. Moreover, the state is permitted to deny AFDC to any child or eligible relative "if, and for so long as, such child's father is not currently registered with the public employment offices in the state * * *." § 407(b)(2)(C)(i).

It is significant that the 1968 Amendments in expanding the work incentive program also limited its application to "unemployed fathers" rather than "unemployed parents." The legislative history of the 1968 Amendments makes clear that the new work incentive program which they established was not intended to apply to "a mother who is in fact caring for one or more children of preschool age, if such mother's presence in the home is necessary and in the best interest of the children." Senate Report No. 744, 90th Cong., 1st Sess., 2 U. S. Code Cong. Ser. 2859, 2984 (1967). Plaintiff, Linda Williams is literally within that category. Thus, there is legislative recognition that the principle of less benefit was not intended to apply to her and others similarly situated.

have been born after the circumstances to produce AFDC eligibility occurred.[15]

Thus, in the case of the named plaintiffs at bar, it appears that the claimed purposes of the maximum grant regulation are either totally inapplicable or patently ineffective to accomplish their objectives, and consideration of the several bases of eligibility for AFDC within the group on whose behalf the named plaintiffs sue, indicates that the same is true of other categories, the substantiality of which is not disclosed. Because it cuts too broad a swath on an indiscriminate basis as applied to the entire group of AFDC eligibles to which it purports to apply, the maximum grant regulation cannot be sustained under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

III.

We modify our previous opinion to the extent that we do not decide whether Maryland's maximum grant regulation conflicts with the Act, as amended. On the constitutional basis of our prior decision, however, we find no reason to reach a result different from that previously announced. We reiterate our previous conclusion that Maryland's maximum grant regulation transgresses the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

The Clerk is directed to enter a short order on the docket, granting in part, and denying in part, defendants' motion, as set forth in this opinion. In accordance with our previous instructions, plaintiffs have submitted a proposed form of decree. Defendants shall present their com-

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[15] The objective of family planning is part of the Act and treated with greater specificity and logic therein. By the 1968 Amendments, § 402 of the Act, 42 U.S.C.A. § 602, now requires, as part of the state's AFDC plan, that the state develop a program to achieve the objective of "preventing or reducing the incidence of births out of wedlock and otherwise strengthening family life," and for implementing this program by assuring that "in all appropriate cases family planning services are offered to them [applicants for AFDC] * * *" § 402(a)(15) of the Act, 42 U.S.C.A. § 602(a)(15).

ments thereon, and, if they be so advised, their suggested form of decree, within five days.

/s/ HARRISON L. WINTER,
United States Circuit Judge.

/s/ ROSZEL C. THOMSEN,
Chief Judge,
United States District Court
for the District of Maryland.

/s/ ALEXANDER HARVEY, II,
United States District Judge.

ORDER

In accordance with the opinions of the United States District Court for the District of Maryland dated December 13, 1968, and February 25, 1969, and the Court being of the view that from the facts and for the reasons stated therein plaintiffs are suffering and will suffer irreparable injury unless defendants are permanently restrained from enforcing the maximum grant regulations described therein.

It is hereby ORDERED, by the United States District Court for the District of Maryland, this 18th day of March, 1969, that the defendants be and they are hereby permanently enjoined from enforcing the maximum grant regulation applicable to all AFDC recipients generally set forth in the Maryland Manual of the Department of Social Services, Part II, Rule 200, Section VII, 1, against the plaintiffs named in this action and the class represented; provided that the effectiveness of this Order is stayed for a period of forty-five days.

/s/ HARRISON L. WINTER,
United States Circuit Judge.

/s/ ROSZEL C. THOMSEN,
Chief Judge,
United States District Court.

/s/ ALEXANDER HARVEY, II,
United States District Judge.

APPENDIX B

P.L. 87-543 LAWS OF 87TH CONG.—2ND SESS.

* * * * * *

Protective Payments Under Dependent Children Program

Sec. 108. (a) Section 406(b) of the Social Security Act is amended by inserting "(1)" after "includes" and by inserting before the semicolon at the end thereof: ", and (2) payments with respect to any dependent child (including payments to meet the needs of the relative, and the relative's spouse, with whom such child is living) which do not meet the preceding requirements of this subsection, but which would meet such requirements except that such payments are made to another individual who (as determined in accordance with standards prescribed by the Secretary) is interested in or concerned with the welfare of such child and relative, but only with respect to a State whose State plan approved under section 402 includes provision for—

"(A) determination by the State agency that the relative of the child with respect to whom such payments are made has such inability to manage funds that making payments to him would be contrary to the welfare of the child and, therefore, it is necessary to provide such aid with respect to such child and relative through payments described in this clause (2);

"(B) making such payments only in cases in which such payments will, under the rules otherwise applicable under the State plan for determining need and the amount of aid to families with dependent children to be paid (and in conjunction with other income and resources), meet all the need of the individuals with respect to whom such payments are made;

"(C) undertaking and continuing special efforts to develop greater ability on the part of the relative to manage funds in such manner as to protect the welfare of the family;

"(D) periodic review by such State agency of the determination under clause (A) to ascertain whether conditions justifying such determination still exist, with provision for termination of such payments if they do not and for seeking judicial appointment of a guardian or other legal representative, as described in section 1111, if and when it appears that the need for such payments is continuing, or is likely to continue, beyond a period specified by the Secretary;

"(E) aid in the form of foster home care in behalf of children described in section 408(a); and

"(F) opportunity for a fair hearing before the State agency on the determination referred to in clause (A) for any individual with respect to whom it is made".

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P. L. 90-248 LAWS OF 90TH CONG. — 1ST SESS.

Authority To Disregard Additional Income of Recipients of Public Assistance

Sec. 213. (a) (1) Section 2(a) (10) (A) (i) of the Social Security Act is amended by striking out "not more than $5" and inserting in lieu thereof "not more than $7.50".

(2) Section 1002(a) (8) (C) of such Act is amended by striking out "not more than $5" and inserting in lieu thereof "not more than $7.50".

(3) Section 1402(a) (8) (A) of such Act is amended by striking out "not more than $5" and inserting in lieu thereof "not more than $7.50".

(4) Section 1604(a) (14) (D) of such Act is amended by striking out "not more than $5" and inserting in lieu thereof "not more than $7.50".

(b) Section 402(a) of such Act is amended by inserting before the period at the end thereof the following: "; and (23) provide that 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".

Part 2 — Medical Assistance Amendments

Limitation on Federal Participation in Medical Assistance

Sec. 220. (a) Section 1903 of the Social Security Act is amended by adding at the end thereof the following new subsection:

"(f) (1) (A) Except as provided in paragraph (4), payment under the preceding provisions of this section shall not be made with respect to any amount expended as medical assistance in a calendar quarter, in any State, for any member of a family the annual income of which exceeds the applicable income limitation determined under this paragraph.

"(B) (i) Except as provided in clause (ii) of this subparagraph, the applicable income limitation with respect to any family is the amount determined, in accordance with standards prescribed by the Secretary, to be equivalent to 133⅓ percent of the highest amount which would ordinarily be paid to a family of the same size without any income or resources, in the form of money payments, under the plan of the State approved under part A of title IV of this Act.

"(ii) If the Secretary finds that the operation of a uniform maximum limits payments to families of more than one size, he may adjust the amount otherwise determined under clause (i) to take account of families of different sizes."

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Interim Policy May 31, 1968

Need — Requirements

For State Public Assistance Plans

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U. S. Department of Health, Education, and Welfare
Social and Rehabilitation Service
Office of the Administrator

* * * * * *

Interim Policy

3. Requirements for State Plans:

A State plan for OAA, AFDC, AB, APTD or AABD must, as specified below:

A. *General:*

Provide that the determination of need and amount of assistance for all applicants and recipients will be made on an objective and equitable basis and all types of income will be taken into consideration in the same way, except where specifically authorized by Federal statute.

B. *Standards of Assistance:*

1. Specify a State-wide standard, expressed in money amounts, to be used in determining (i) the need of applicants and recipients and (ii) the amount of the assistance payment.
2. Provide that by July 1, 1969, the State's standard of assistance for the AFDC program will have been adjusted to reflect fully changes in living costs since such standards were established, and

and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted.

3. Provide that the standard will be uniformly applied throughout the State.
4. Include the method used in determining needs, which must be one of the three methods described in "Guides and Recommendations" or a comparable method which meets the conditions specified in such guides and is approved by the Assistance Payments Administration.

* * * * * *

Federal Register, Vol. 34, No. 19 — Wednesday, January 29, 1969

Chapter II — Social and Rehabilitation Service (Assistance Programs), Department of Health, Education, and Welfare

Part 233 — Coverage and Conditions of Eligibility in Financial Assistance Programs

Need and Amount of Assistance

Interim Policy Statement No. 4 setting forth the regulations for the programs administered under titles I, IV — Part A, X, XIV, and XVI of the Social Security Act, with respect to need, was published in the Federal Register of July 17, 1968 (33 F.R. 10230). Views of interested persons were requested, received and considered, and, in the light thereof, certain changes in the regulations were made. The following are the major changes: (1) The method for disregard of earned income has been modified. In arriving at the amount of earned income to be applied against the assistance budget the amount to be disregarded is to be deducted from gross income rather than from net income. Next, the amount allowed for work expenses is to be deducted. The remaining amount is then applied against the assistance budget (§ 233.20(a)(7)). (2) The regulations now permit several options for the disregard of income in

the AFDC program prior to July 1, 1969, not included in the Interim Policy (§ 233.20(a)(11) (i) and (ii)). (3) In regard to the requirement to adjust AFDC standards by July 1, 1969 the regulations now make it clear that while States must update their standards, if the States do not have the money to pay according to such standards they may make a ratable reduction (Section 233.20(a)(2) (ii)).

Accordingly, such regulations, as amended, are hereby codified by adding a new § 233.20 in Part 233, Chapter II of Title 45 of the Code of Federal Regulations as set forth below.

§ 233.20 Need and amount of assistance.

(a) *Requirements for State Plans.* A State Plan for OAA, AFDC, AB, APTD or AABD must, as specified below:

(1) *General.* Provide that the determination of need and amount of assistance for all applicants and recipients will be made on an objective and equitable basis and all types of income will be taken into consideration in the same way, except where otherwise specifically authorized by Federal statute.

(2) *Standards of assistance.* (i) Specify a statewide standard, expressed in money amounts, to be used in determining (*a*) the need of applicants and recipients and (*b*) the amount of the assistance payment.

(ii) In the AFDC plan, provide that by July 1, 1969, the State's standard of assistance for the AFDC program will have been adjusted to reflect fully changes in living costs since such standards were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted. In such adjustment a consolidation of the standard (i.e., combining of items) may not result in a reduction in the content of the standard. In the event the State is not able to meet need in full under the adjusted standard, the State may make ratable reductions in accordance with subparagraph (3)(viii) of this paragraph. Nevertheless, if a State maintains a system of dollar maximums, these maximums

must be proportionately adjusted in relation to the updated standards.

(iii) Provide that the standard will be uniformly applied throughout the State.

(iv) Include the method used in determining needs, which must be one of the three methods described in "Guides and Recommendations" or a comparable method which meets the conditions specified in such guides and is approved by the Assistance Payments Administration.

(v) If the State agency includes special need items in its standard, (*a*) describe those that will be recognized, and the circumstances under which they will be included, and (*b*) provide that they will be considered in the need determination for all applicants and recipients requiring them.

(vi) If the State chooses to establish the need of the individual on a basis that recognizes, as essential to his well-being, the presence in the home of other needy individuals, (*a*) specify the persons whose needs will be included in the individual's need, and (*b*) provide that the decision as to whether any individual will be recognized as essential to the recipient's well-being shall rest with the recipient.

(3) *Income and resources; OAA, AFDC, AB, APTD, AABD.* (i) Specify the amount and types of real and personal property, including liquid assets, that may be reserved, i.e., retained to meet the current and future needs while assistance is received on a continuing basis. In addition to the home, personal effects, automobile and income producing property allowed by the agency, the amount of real and personal property, including liquid assets, that can be reserved for each individual recipient shall not be in excess of two thousand dollars. Policies may allow reasonable proportions of income from businesses or farms to be used to increase capital assets, so that income may be increased.

(ii) Provide that, in establishing financial eligibility and the amount of the assistance payment: (*a*) All income and

resources, after policies governing the allowable reserve, disregard or setting aside of income and resources have been applied, will be considered in relation to the State's standard of assistance, and will first be applied to maintenance costs; (*b*) if agency policies provide for allocation of the individual's income as necessary for the support of his dependents, such allocation shall not exceed the total amount of their needs as determined by the statewide standard; (*c*) only such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered; (*d*) current payments of assistance will not be reduced because of prior overpayments unless the recipient has income or resources currently available in the amount by which the agency proposes to reduce payment; except that where there is evidence which clearly establishes that a recipient willfully withheld information about his income or resources, such income or resources may be considered in the determination of need to reduce the amount of the assistance payment in current or future periods; and (*e*) income and resources will be reasonably evaluated.

(iii) Provide that no inquiry will be made of the amount of earnings of a child under 14 years of age.

(iv) Provide that, in determining the availability of income and resources, the following will not be included as income: (*a*) Income equal to expenses reasonably attributable to the earning of income; (*b*) loans and grants, such as scholarships, obtained and used under conditions that preclude their use for current living costs; and (*c*) home produce of an applicant or recipient, utilized by him and his household for their own consumption.

(v) Provide that agency policies assure that when support payments by absent parents have been ordered by a court, a regular amount of income is available monthly to meet the determined needs of the mother and children, whether or not the support payments are received regularly, and the agency does not delay or reduce public assistance payments on the basis of assumed support which is not actually available.

(vi) If the State agency holds relatives responsible for the support of applicants and recipients, (*a*) include an income scale for use in determining whether responsible relatives have sufficient income to warrant expectation that they can contribute to the support of applicants or recipients, which income scale exceeds a minimum level of living and at least represents a minimum level of adequacy that takes account of the needs and other obligations of the relatives; and (*b*) provide that no request will be made for contributions from relatives whose net cash income is below the income scale. In family groups living together, income of the spouse is considered available for his spouse and income of a parent is considered available for children under 21.

(vii) If the State agency establishes policy under which assistance from other agencies and organizations will not be deducted in determining the amount of assistance to be paid, provide that no duplication shall exist between such other assistance and that provided by the public assistance agency. In such complementary program relationships, nonduplication shall be assured by provision that such aid will be considered in relation to: (*a*) The different purpose for which the other agency grants aid, such as vocational rehabilitation; (*b*) the provision of goods and services that are not included in the statewide standard of the public assistance agency, e.g., a private agency might provide money for special training for a child or for medical care when the public assistance agency does not carry this responsibility; or housing and urban development relocation adjustment payments for items not included in assistance standards; or (c) the fact that public assistance funds are insufficient to meet the total amount of money determined to be needed in accordance with the statewide standard. In such instances, grants by other agencies in an amount sufficient to make it possible for the individual to have the amount of money determined to be needed, in accordance with the public assistance agency standard, will not constitute duplication.

(viii) Provide that payment will be based on the determination of the amount of assistance needed and that, if

full individual payments are precluded by maximums or insufficient funds, adjustments will be made by methods applied uniformly statewide.

(ix) Provide that the agency will establish and carry out policies with reference to applicants' and recipients' potential sources of income that can be developed to a state of availability.

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