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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 131

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

REPLY BRIEF FOR THE APPELLANTS

ARGUMENT

INTRODUCTION

Before considering the arguments advanced in the Brief for Appellees, reference should be made to two features of the introductory portions of that brief which have some bearing upon determination of this case. Appellees' "Statement" elaborately recites the facts relating to the individual situations of the exceptionally circumstanced named plaintiffs, as contained in the stipulation of facts below (A. 71). It should be noted that the stipulation, in addition to reciting the income, expenditures budget and welfare payments made to the named plaintiffs, also makes

reference to the additional receipt, by the named plaintiffs of substantial benefits in kind, such as those provided the plaintiff Williams, by the federal food stamp program (A. 73) and medical assistance received (A. 72, 74). Such income in kind cannot operate to reduce the amount of welfare grants by reason of the provisions of the federal food stamp regulations (7 C.F.R. 1601.1 (c) & (d) and the federal legislation relating to medicaid.[1]

Appellees also, in summarizing the questions presented, suggest that one objectionable feature of the Maryland regulation is that it "in effect treat(s) the family as the proper unit of assistance" (Brief for Appellees, page 2) Appellants do not accept the suggestion that the validity of the Maryland regulation under the Social Security Act can be deemed to turn on the question whether the Maryland regulation "treat(s) the family as the proper unit of assistance". Even if this is deemed the approach of the Maryland regulation it is an approach fully consistent with federal law, which has traditionally, with some exceptions, adhered to the "cash benefit" principle requiring benefits for a family to be paid in a lump sum to the family head.[2]

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[1] Such benefits in kind payable to welfare recipients are far from insubstantial as recognized in Rein, *Choice and Change in the American Welfare System,* 1969, The Annals 89 at 108 (cited at page 16 of appellees' brief) which points out that such benefits in kind aggregate approximately 6.0 billion dollars for the fiscal year 1970, citing for this proposition Budget of the United States, Fiscal Year 1970 Special Analysis, Table M-9, page 185.

[2] See Cohen, *Factors Influencing the Content of Federal Public Welfare Legislation,* 1954 Social Welfare Forum 199 (1954). In addition, appellees' position is scarcely given support by the terms of the 1962 amendments to the Social Security Act (Public Law 87-543, Title I, Section 104 (a) (i), 76 Stat. 185) changing the designation of the federal program to "Aid and Services to Needy Families with Children" in substitution for the preceding title "Aid to Dependent Children", "in line with the new emphasis on family services" (1962 U.S. Code Cong. and Adm. News at 1955).

I.

APPELLEES HAVE ENTIRELY FAILED TO RESPOND TO APPELLANTS' CHALLENGE TO THE PROPRIETY OF JUDGING STATE ECONOMIC REGULATIONS "ON THEIR FACE".

The Brief for Appellees as well as the *Amici* Brief in support of their position, significantly ignores the substantial point made at pages 21 to 26 of Appellants' Brief: that whatever the validity or invalidity of the regulation as applied to the situation of the named plaintiffs, judgment of state economic regulations "on their face", and concomitant invalidation of them for "underbreadth" or "overbreadth" is not proper. The question whether a state economic regulation may be properly invalidated *in toto* on such grounds is a question of overriding importance far surpassing in significance any other questions relating to welfare maximums. To uphold the invalidation *in toto* by the court below would be to accord federal district courts a power over state economic regulations similar in nature to that exercised by state governors accorded veto power. The exercise of judicial power over state legislation has traditionally been confined to the protection of the fundamental rights of individuals or members of classes ascertained to be fairly represented by such individuals. The cases invalidating legislation for overbreadth are an exception to this rule founded upon the view that the mere existence of a statute, as distinct from its application, will operate to deter persons not before the court from the exercise of fundamental rights. This consideration has no bearing in litigation over economic questions.

As noted, appellees have failed to address themselves to this phase of Appellants' Brief, unless their statement that the regulation is "grossly overinclusive" (Appellees' Brief, page 7) is to be deemed their response. In appellants' view, addition of the word "grossly" to the terminology

relating to overbreadth utilized in the opinion of the district court does not render a first amendment rule applicable to economic cases. It should be further pointed out that the statement that the regulation is "grossly overinclusive" embodies a quantitative judgment which courts are ill-equipped to make and which could not be founded upon the record before the district court in this case. In support of their conclusion that the regulation is "grossly overinclusive", appellants make a number of factual statements that are simply insupportable. They first state that "only a relatively small number of families receive AFDC assistance as a result of parental desertion" (Brief for Appellees, page 8). In fact, as noted in the initial opinion of the court below, the absent parent subcategory of dependent children "is the fastest growing subcategory of need" (A. 96) and has also been authoritatively described as "the largest AFDC category" (A. 96, 113 Congressional Record (Daily Edition) 10670 (Remarks of Representative Mills)).

Appellees further represent that the work incentive program under the 1967 Social Security Amendments "has completely pre-empted whatever limited efficacy the maximum grant regulation might have had in inducing parents of large AFDC families to seek employment" (Brief for Appellees, page 7). In fact the new work incentive program as a means of inducing such parents to seek employment has, to date, been of limited effectiveness.[3] More-

[3] As of June 30, 1969, 194,531 welfare recipients throughout the nation had been found appropriate for referral to work incentive programs, as of that date only 143,371 had been actually referred and only 80,607 had been actually enrolled in training programs. Only 84,753 spaces in training programs were approved prior to July 1, 1969. (Chart — "AFDC: Work Incentive Program — Numbers of Recipients Assessed for Appropriateness for Referral, found Appropriate for Referral, Referred for Enrollment, Enrolled, and Training

over, it, unlike the maximum grant regulation, results in added costs — costs which led Maryland to postpone its implementation of the third phase of the program to the maximum extent allowable under federal regulations.

Appellants also represent that the "*sole* purpose (of the maximum grant regulation) is to coerce mothers of large AFDC families to seek employment" (Appellees' Brief, page 7), since employable male family members are required to seek employment as a condition of eligibility. Given the limited effectiveness of administrative means of encouraging employment (see Comment, *Compulsory Work for Welfare Recipients under the Social Security Amendments of 1967*, 4 Colum. J. L. & Soc. Prob. 197 (1968)), the maximum grant regulation cannot be deemed without effect on male as well as female applicants. Moreover, it must be pointed out that the work incentive program, unlike the maximum grant regulation, does not provide for the retention of all earnings above the welfare grant, but only the retention of the first 30 dollars plus one-third of additional earnings.

Appellees also overstate the exemption for mothers contained in the 1967 work incentive amendments. The exemption in fact is confined to "persons whose presence in the home on a substantial basis is required because of the illness or incapacity of another member of the household" (42 U.S.C.A. § 602 (a) (18) (A) (vii), and see the discussion of the legislative history at pages 23 and 24 of Appellants' Brief).

Spaces, with Percentage Comparisons by Region and State through June 30, 1969" (Preliminary, subject to revision)), prepared by National Governors' Conference, Office of Federal-State Relations.

II.

THE APPELLEES MISSTATE THE TRADITIONAL STANDARD OF REVIEW APPLICABLE TO STATE ECONOMIC LEGISLATION.

The appellees take the position that the appropriate standard of review to be applied to this case is the standard applicable to basic political and civil rights — the standard applied in such cases as *Williams v. Rhodes,* 393 U.S. 23 (1968) (elections); *Shapiro v. Thompson,* 394 U.S. 618 (1969) (right to travel); *Harper v. Virginia Board of Elections,* 383 U.S. 662 (1966) (voting franchise) and *Levy v. Louisiana,* 391 U.S. 68 (1968) (rights of illegitimate children) (Appellees' Brief, page 12). They maintain this standard is what they characterize as the "traditional" standard applicable to economic legislation, and maintain that even under the "traditional" standard the regulation is invalid. However, in fact, appellees have cited none of the cases embodying the traditional standard applicable to state economic legislation. All of the cases which they refer to as embodying the "traditional" standard are in fact cases involving either suspect classifications or political rights. However, the proper standard applicable to state economic legislation is not that found in the cases cited by appellees such as *McLaughlin v. State of Florida,* 379 U.S. 184 (1964) (race); *Rinaldi v. Yeager,* 384 U.S. 305 (1966) (criminal law); *Carrington v. Rash,* 380 U.S. 389 (1965) (voting franchise); *Yick Wo v. Hopkins,* 118 U.S. 356 (1886) (race and alienage).[4]

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[4] Appellees also rely on *Truax v. Corrigan,* 257 U.S. 312 (1921); *Truax v. Raich,* 239 U.S. 33 (1915); *Southern Railway v. Green,* 216 U.S. 400 (1910), and *Gulf v. Ellis,* 165 U.S. 150 (1897) as embodying the standard presently applicable to state economic legislation. But the approach of *Truax v. Corrigan* and like cases has long since been repudiated. See *International v. Vogt,* 354 U.S. 284, 287-89 (1957). It should also be noted that the percentage increase in money payments under federally assisted public welfare programs in Maryland between 1957 and 1967 was 218%, the highest in the nation

The cases announcing the standard applicable to state economic legislation are the cases referred to in the recent decision of this court in *McDonald v. Board of Election Commissioners,* ..... U.S. ..... (1969) — cases such as *McGowan v. Maryland,* 366 U.S. 420 (1961); *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61 (1911); *Williamson v. Lee Optical Co.,* 348 U.S. 483 (1955) and *Ozan Lumber Co. v. Union County National Bank,* 207 U.S. 251 (1907). See *Snell v. Wyman,* 281 F. Supp. 853, affd. 89 S. Ct. 553 (1969); *Lampton v. Bonin,* 299 F. Supp. 336 (1969). Extended demonstration is not necessary to indicate that the maximum grant regulation with its several rational bases (Appellants' Brief pages 32-41) does not run afoul of the standards of these cases.

III.

THE MAXIMUM GRANT REGULATION IS RATIONAL AS A WORK INCENTIVE.

In denying the relatively self-evident proposition that imposition of a ceiling on welfare grants with allowance for retention of earnings above the ceiling operates as a work incentive appellees advance several propositions. The basic proposition is that the objective of encouraging employment — an objective this court in *Shapiro v. Thompson* recognized as a permissible state interest in the design of welfare programs notwithstanding the relationship of such programs to the relief of need (see *Shapiro v. Thompson,* 394 U.S. 618 at note 20), may be better attained through the use of other devices such as the work incentive program. But the very article that they cite, Rein, *Choice and Change in the American Welfare System,* 1969

(A. 120) — a fact casting doubt on appellees' postulate that like the District of Columbia residents in *Hobson v. Hansen,* 269 F. Supp. 401 (D.D.C. 1969), they are "disenfranchised".

The Annals at 89, makes clear that programs of wage supplements such as those implemented in the work incentive program and those proposed by the Administration in its new family assistance plan are in themselves not without defects insofar as they cause the income of recipients of wage supplements to exceed that of persons who derive their sole income from either work or welfare. In considering this aspect of a wage supplement or work incentive program, Rein observes:

> "Welfare and employment are widely regarded as alternative rather than complementary or overlapping sources of income * * * this is consistent with the theory of public assistance that is embodied in the original Social Security Act of 1935 which assumed that social insurance protected members of the labor force when their income was interrupted, while federally financed social assistance was for the unemployable (at 100).
>
> The separation between benefits and wages can, of course, be achieved by policies designed either to keep benefit levels low or to keep wage rates high. The low benefit approach has an ancient history (at 103)."

Appellees observe that the principle of less benefit finds one of its previous, though not its earliest, manifestations in the Poor Law of 1834, "part of the England of Charles Dickens" (Appellees' Brief, page 14). Rein, in the article cited by appellants points out that a similar approach continues to play a part in British welfare legislation in the England of the Beveridge Report:

> "The English have tried to resolve this awkward policy problem by a system of wage-stops, which prevents a worker entitled to welfare benefits from getting more in benefits, regardless of his needs, than he could have earned when he was employed. Here is the principle of 'less eligibility' at work in the mid-twentieth century under a Labour Government" (at 107).

The pertinent British legislation is the Ministry of Social Security Act 1966 (Chapter 20), Schedule 2, Section 5 (46 Halsbury's Statutes of England (2d ed.), 494, 501, 520). That enactment provides that the weekly allowance payable to a head of family with respect to himself and his dependents under the national assistance program plus part-time earnings shall not "exceed what would be his net weekly earnings if he were engaged in full-time work in his normal occupation". This limitation is mandatory in all cases where it is determined "that the right of any person to a supplementary allowance shall be subject to the condition that he is registered for employment * * * " (Ministry of Social Security Act 1966, Chapter 20, Schedule 2, Section 5). In addition, this grant limitation may be applied to other persons who, by reason of temporary circumstance are not subject to the condition that they be registered for employment.

The continuance in effect in modern England of this legislation, in a system which has as its objective determination of grants according to ascertained need, should provide a sufficient answer to the appellees' contention that the use of maximum grant regulations as a work incentive is unconstitutional by the traditional standards applicable to state economic legislation.

Appellees also assert that the irrationality of the maximum grant regulation as a work incentive is demonstrated by the fact that it was applied to AFDC recipients prior to extension of the AFDC program to certain unemployed but employable persons in 1961 (Brief for Appellees, page 14, note 11). This argument rests on the proposition that the only potentially employable persons eligible for AFDC are those persons whose eligibility is due to unemployment (AFDC-U). But, in fact, many persons in the AFDC-

disabled category may be potentially employable on a part-time basis and many employable persons are rendered eligible for AFDC benefits by reason of the absence of a parent from the home. It is not accurate to state that "employable persons were not covered" prior to 1961. It is only accurate to state that persons whose sole basis of eligibility was unemployment were not covered prior to 1961.

Appellees also make the point that the Maryland maximum cannot be deemed to be rationally related to work incentives since changes in it have generally been related to cost of living changes rather than changes in prevailing wage rates. Appellees' statement is not a fully accurate characterization of the materials in the record relating to the basis for adjustment of the maximum grant regulation (A. 114-116, 129-144, 194).

Appellees further assert that very few heads of families receiving AFDC benefits are potentially employable and that "mothers are rarely employable persons" (Appellees Brief, page 16). This proposition is not supported by at least one of the more recent studies on the subject. See Warren and Berkowitz, *The Employability of AFDC Fathers and Mothers*, Welfare in Review, July-August 1969. It is true as appellees suggest that present Maryland regulations implementing the work incentive program restrict referral of some categories of mothers on the basis of family size and on the basis of such countervailing factors as "the availability or unavailability of older children in the home". The availability of day care centers also enters into these determinations. The initial statistics relating to the number of welfare recipients found appropriate for referral for employment under the WIN program indicate that the several states vary widely in the percentage of recipients found eligible for referral for employment. It

must be borne in mind that we are here concerned not with the judgments made by particular state welfare departments at particular times but with the general validity of maximum grant regulations as a matter of federal constitutional law. Many states take the view that a large majority of welfare heads of families are potentially employable, and, as noted, that view is not without support in the social science literature. Appellees dispute the state's suggestion that the situation of the named plaintiffs, all of whom are unemployable as a result of illness or disability, is exceptional. Again, the statistics relied upon by appellees themselves reveal that a substantial majority of both poor adult males and poor adult females are not ill or disabled and that the largest single cause of welfare dependency is the absence from the home of an adult male (A. 154).

It is undoubtedly true that when the aged, the blind, and young children in AFDC families are included, statistics may validly show that only a very small percentage of the total universe of welfare recipients are employable. When attention is restricted to the *heads* of AFDC families the employable percentage is much larger and depends upon the definition of employability used in a state and the attitude taken toward the necessity for the full-time presence of the mother in the home.

The balance of appellees' argument relating to the regulation as a work incentive proports to show that the regulation is under-inclusive. However, the potential welfare benefits of heads of smaller families are less high than those payable to larger families and payments of need in full to heads of such families operate as less of a disincentive to employment since the benefits payable to smaller families do not approach the minimum wage. As the *Williamson* case makes clear, the state has the right to address itself to the most pressing cases first.

IV.

THE REGULATION IS RATIONAL TO AVOID DISINCENTIVES TO FAMILY SOLIDARITY.

Plaintiffs urge that the maximum grant regulation is irrational as a means of avoiding incentives to desertion and like evils because it does not operate to discourage desertion in small families. But when the benefits to be secured by desertion do not substantially exceed the minimum or average wage level, the incentive to desertion resulting from welfare programs is much more limited. Appellees also minimize the significance of the regulation as a means of discouraging abandonment of families, observing that a 1966 report of the Maryland Legislative Council "showed that only 15.2% of AFDC families were eligible for assistance because of parental desertion" (Appellees Brief, page 22, citing A. 154). However, the report referred to by appellees also indicates that a very high percentage of AFDC cases were created by causes closely related to desertion. Thus, in addition to the 15.2% of cases attributable to desertion, 31.3% were due to the fact that the father was not married to the mother, 14.0% were due to separation without court decree and 5.0% were due to divorce or legal separation, a total in the four categories of 65.5%. Moreover, the percentage might have been much higher had the maximum not been in effect. Thus, it cannot be said that the maximum grant regulation viewed as a means of avoiding incentives to family break-up is "a classification that penalizes 85% of its members for the purpose of affecting the behavior of the remaining few". That the availability of high welfare benefits has some relationship to the creation of the category of assistance cases in which no marriage has taken place as well as the category in which there has been desertion or separation

is the view of at least some authorities. See the article by Moynihan cited at page 40 of the Brief for Appellants.[5]

V.

THE REGULATION IS RATIONAL AS A LIMITATION ON STATE ASSUMPTION OF PARENTAL CHILD SUPPORT OBLIGATIONS.

The validity of the regulation as a limitation on the extent to which the state will provide subsidies for child support to welfare recipients not provided to the public generally is evident. What plaintiffs seek in this litigation is essentially a judicially conferred family allowance system limited to welfare recipients. The family allowance systems of those European nations possessing them found their origin in concern related to inadequate population. The comprehensive study of the British family allowance system carried on by the British Royal Commission on Population of 1949 (cited at page 41 of Appellants' Brief) recognized that the premises of a family allowance system would be called into question if a stable as distinct from ascending population became an objective of British social policy. This observation is pertinent in considering appellees' claim to a family allowance system benefiting only persons who, with or without government subsidy, are most lacking in material means to bring up children.

In arguing for a rule which would amount to constitutional compulsion of a family allowance for families in the limited categories included in the AFDC program (but

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[5] See also the report of the Maryland Commission to Study Problems of Illegitimacy among the Recipients of Public Welfare Monies in the Program for Aid to Dependent Children (1961) at 17, 73. Peculiarly puzzling is the statement of *amici curiae* that the maximum grant regulation does not operate to limit desertion because the majority of recipients do not know of it (Amicus Brief, page 45). If benefits on the order of $400-500 per month were available by reason of invalidation of maxima, it is likely that their availability would become known to potentially affected recipients.

not for other families, poor or otherwise), respondents urge that to impose limitations upon such an allowance would invalidly "discourage procreation only among welfare recipients" (Appellees' Brief, page 23). They urge that the limitation is invalidly discriminatory by reason of the fact that it "penalizes families with seven or more for the birth of additional children" which is said to be an invalid discrimination visited "upon those who do not believe in artificial means of controlling birth" (Appellees' Brief, page 24). One of the difficulties with this argument is that it proves too much. By the same standard child support laws could be characterized as unconstitutionally discriminatory against parents of large families, whose support obligations are necessarily larger than those of parents with smaller families, and it could similarly be urged that the state's action in throwing any obligations of child support upon parents constituted invalid "discouragement (of) procreation". To state these consequences of appellees' arguments is only to dramatize the extent to which they would require the state to eliminate the normal economic checks on population increase on behalf of the class purportedly represented but not on behalf of other equally poor families. The maximum grant limitation is more properly viewed not as a discriminatory restriction imposed upon the class represented by appellees but rather as a rational limitation upon benefits made available to that class but not made available to the 'working poor' or the public at large. At a time of rising concern with population increase it would also seem unwise to foster as a constitutional principle the notion that all benefits made available to families must be made available upon a per capita basis. While respondents properly suggest that there are constitutional restrictions against infringement by government of marital privacy, nothing in the cases involving criminal sanctions and compulsory

sterilization upon which they rely requires the state to make available to AFDC recipients per capita benefits not extended to the public generally or requires all programs of family aid to be designed on a per capita basis.[6]

VI.

THE REGULATION IS RATIONAL AS A MEANS OF MAINTAINING EQUITY BETWEEN WELFARE AND WAGE-EARNING FAMILIES.

The rationality of the regulation as a means of maintaining an equity between welfare and wage earning families is evident. The appellants urge that assertion of this purpose is assertion of the "right to be arbitrary rather than a valid defense of the maximum regulation" (Appellees' Brief, page 25). The recent report of the President's Commission on Income Maintenance Programs supplies an effective answer to this assertion, containing as it does repeated references to the undesirability of permitting welfare payments to reverse the order of families upon the income scale. Similar concerns are expressed in Rein, *Choice and Change in the American Welfare System*, 1969 The Annals 89, cited at page 16 of the Brief for Appellees. This argument as to rationality is not only an argument founded on political expediency but also upon the public sense of justice as related to wage earning families — surely not an inadmissible constitutional criterion. Plaintiffs are concerned only with increasing their own income vis-a-vis

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[6] The appellees urge that the regulation is invalid as applied to families which were already large when application was originally made for AFDC. While grandfather clauses in legislation may on occasion be valid they are scarcely constitutionally compelled if the regulation is valid in the generality of its applications. In any event, it is not asserted that the appellees' families were already large as of the date when the maximum grant regulation was instituted in the 1940's, and that, rather than the date of their individual applications, would appear the appropriate point of reference in determining the validity of the regulation as applied to them.

that of other members of the welfare population (and possibly at the expense of other members of the welfare population). Allowance of their claims will exacerbate the graver inequities which already exist between the lot of welfare recipients and that of the "working poor".

VII.

THE REGULATION IS RATIONAL AS A MEANS OF ALLOCATING LIMITED STATE FUNDS TO FULLY MEET NEEDS OF THE LARGEST POSSIBLE NUMBER OF FAMILIES.

The respondents further allege that the regulation is irrational as a means of allocating public funds to fully meet state determined need of the largest possible number of families. This argument is founded on the notion that "under the Social Security Act the intended direct beneficiary is the dependent child" (Appellees' Brief, page 25). The difficulty with this position is clear when the pertinent revisions of the Social Security Act relating to "aid to *families* with dependent children" are considered (see infra page 17). Large families are not disqualified from benefits but receive payments at least equal to those paid smaller families. In any case, whatever the merits of appellees' argument with respect to the intended beneficiary under the Social Security Act, the asserted purpose is still rational where the issue is the *constitutional* issue of equal protection, since the Social Security Act itself requires payments for child support to be made in a lump sum to the head of the family, save in exceptional circumstances.[7]

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[7] *Amici Curiae*'s (Center on Social Welfare Policy, et al) attempt to induce the court to invalidate not merely family but individual maximums (*Amici curiae* Brief, pp. 6-11) runs afoul of the fact that the validity of such maximums is not involved in this case. It is not clear whether *amici* would have the court invalidate also the individual maximums unrelated to need embodied in the federal reimbursement formula, the obvious inspiration for state individual maximums. See

VIII.

THE REGULATION IS CLEARLY VALID UNDER THE SOCIAL SECURITY ACT.

Appellees' Brief represents that the state "has completely neglected to give this court the benefit of its own position in regard to the statutory violation *vel non* of the maximum grant regulation here under attack (Appellees' Brief, page 35).

The state's position with respect to the validity of the regulation under the Social Security Act is set out at pages 15 through 21 of Appellants' Brief. It may be summarized as follows:

The regulation is valid under the Social Security Act because:

1. Congressional enactments have repeatedly referred to and recognized the validity of maximum grant regulations. See Public Law, 87-543, Section 108a (1962), Public Law, 90-248, Section 213b (1967) and Public Law 90-248, Section 222c (1967).[8]

2. The provision of the Social Security Act, Section 602, (a) (9), relied upon by the district court for its decision

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42 U.S.C.A. § 603, limiting federal matching to state expenditures not exceeding $32.00 per recipient (A. 80). The inclusion of such maxima unrelated to need in the federal act itself impairs plaintiffs' contention that state maxima, individual or family, are unconstitutional in light of the purposes of the federal act.

[8]It is significant that Appellees' Brief totally fails to answer appellants' argument (Appellants' Brief, pages 3-4, 18-19) based on Public Law, 87-543, Section 108a (1962) and 42 U.S.C., Section 1396 (b) as well as the argument based upon the nature of the President's proposals in 1967 and their non-adoption by Congress save in the limited form represented by Section 602 (a) (23). *Amici*'s position that 42 U.S.C. Section 1396 (b) can be disregarded on the ground that in enacting it Congress was not directly concerned with grant maximums under AFDC as distinct from medicaid, overlooks the fact that Congress directly addressed itself to AFDC maximums in 42 U.S.C. Section 602 (a) (23), part of the same act.

that the act required per capita aid for each child in a family had no such purpose but was confined to requiring applications submitted by heads of families to be dealt with immediately and not placed on waiting lists (Appellants' Brief, page 19, note 4 and authorities cited). "All eligible individuals" as used in Section 602, (a) (9) refers to eligible applicants as distinct from family members represented by them,[9] and all members of large families share in the grants (see Brief of *Amici* Center on Social Welfare Policy, *et al*, p. 11).

3. In 1967, Congress was invited to invalidate state individual and family maximum grant regulations and fraction of need regulations and expressly declined to do so (see the Brief of *Amici* Center on Social Welfare Policy, *et al.*, at 55-56), requiring only that the family maximum regulations be adjusted in accordance with increases in the cost of living (Appellants' Brief, pages 18 and 19).[10]

4. The legislative history of the Social Security Act of 1935 and this court's decision in *King v. Smith* make clear "the states' undisputed power to set the *level of benefits and* the standard of need". (*King v. Smith*, 392 U.S. 309, 334). See Appellants' Brief, pages 8 and 9.

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[9] The lower court in its opinion suggested (A. 243-44) that Section 602 (a) (9) must be read as requiring aid to be furnished per capita lest its purpose of eliminating waiting lists be subverted by state subterfuges "such as receiving an application and considering it but postponing any benefits thereon or granting less than the benefits indicated thereon until it was financially more convenient to do so". However, Section 602 (a) (9) can be read as preventing such subterfuges discriminating between old and new applications without reading it as invalidating regulations, such as the maximum grant regulation, which apply alike to old and new applications.

[10] The position of *amici curiae* that the language about maximums in Section 602 (a) (23) was not addressed to family maximums specifically, but to individual maximums and indeed percentage reductions also is inconsistent with the language of that section ("maximums * * * on the amount of aid paid to families") and with its construction in *Rosado v. Wyman,* 419 F. 2d 170, 178-79 (2d Cir. 1969).

5. The Department of Health, Education and Welfare has approved Maryland's maximum grant regulation on at least twenty occasions (A. 183-93, 213) and these approvals necessarily constitute findings as to the conformity of the regulation with the federal act (Appellants' Brief, pages 15 and 16).

6. The Department of Health, Education and Welfare has similarly recognized the existence and validity of maximum grant regulations in some twenty-seven other states (Appellees' Brief, page 16)[11] and has indeed regularly issued monographs describing them. Regulations promulgated by the Department of Health, Education and Welfare recognize the validity of maxium grant regulations under the Social Security Act (Appellants' Brief, pages 5 and 6 and see 45 C.F.R. Section 233.20).

7. The regulation conflicts with neither the preamble of the Social Security Act (which cannot in any case be deemed controlling) nor with its basic purpose. Regulations aimed at avoidance of incentives to desertion and encouragement of employment are not inconsistent with the thrust of the federal act toward "capability for the maximum self-support" and "maintenance of continual parental care and protection" as set forth in its preamble nor with the 1967 amendments with their emphasis on work incentives and discouragement of desertion.

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[11] Contrary to the suggestion of the lower court (A. 251) the Maryland regulation is not peculiarly objectionable — indeed the maximum set out in it is one of the higher maximums (A. 124-25). Moreover, unlike the versions invalidated in Maine and Arizona the Maryland maximum is a maximum on the welfare grant, not a maximum on the welfare family's total budget. It is difficult to regard the decisions in the Maine and Arizona cases as relevant to the Maryland regulation, notwithstanding the apparent position of the *amici curiae* Center on Social Welfare Law and Policy, *et al.*, that Maryland should suffer for the sins of Maine and Arizona. (Brief of *Amici Curiae,* pp. 9-10, 35, 41), as well as those of Mississippi (p. 36).

CONCLUSION

The thrust of appellees' position in this case is most clearly stated in the portion of their brief (pages 30-32) devoted to the dissenting opinion of Mr. Justice Field in *Munn v. Illinois*, 94 U.S. 113, 142, the language of which is used to assert a constitutional right to state appropriation of a minimum level of welfare benefits. The irony inherent in the use of Justice Field's words is, of course, self-evident.[12] The present case in itself is of limited practical importance. It is by no means unlikely that in the event of reversal the Maryland State Board of Social Services will repeal the maximum grant regulation.[13] The doctrinal significance of the case is, however, greater. It has been well stated by the director of the Center on Social Welfare Policy and Law, *amicus curiae* for appellees:

> "* * * The path of educating the judiciary to the plight and needs of the poor is an arduous and tortuous one. This can only be done in well chosen and well planned cases.
>
> * * * * * *
>
> On the more fundamental issue of the amount of the grant, the attack should be three-fold: The utilization of special grant provisions, * * * the exploration

[12] See the chapter devoted to Justice Field in McCloskey, *American Conservatism in the Age of Enterprise.*

[13] The practical significance of the case for some states is much greater. See the *amicus curiae* brief of the State of California. Particular problems in the event of affirmance will be presented in states such as West Virginia with lower maximums and large welfare caseloads, where invalidation of family maximums will almost inevitably result either a) in sizable reductions in benefits paid to other welfare recipients (members of small families, the blind, the aged) not represented in the litigation or b) in greatly increased state appropriations and state taxes, the cost of which will fall, in no small measure, on the equally unrepresented "working poor". That the relief granted constitutes affirmative relief against a state government barred by the Eleventh Amendment despite its form as a negative injunction, is apparent. See the Brief for Appellees in *Rosado v. Wyman* (October Term 1969), at 37-38.

and use of Section 402 (a) (23) of the Social Security Act requiring adjustment in grants in accordance with the rise in cost of living; and finally the use of the equal protection clause to challenge arbitrary maxima, percentage or family, on levels of assistance. All of these may seem rather piecemeal and not designed to guarantee an adequate grant. One may ask, why not a plain old-fashioned due process attack on the adequacy of the grant? My objection is purely tactical. The time is not right and a suit would be counterproductive".[14]

It has been pertinently observed elsewhere that:

"* * * the kind of law that is made depends significantly on the kind of law-making agency that is employed. The courts are well adapted to weigh the competing claims of individual litigants; but they are poorly equipped to resolve broad issues of policy involving, for example, the reallocation of resources among large social groups or classes. Judicial law making in the latter areas is confronted by a dual peril: it may ignore considerations relevant to intelligent policy formulation, or, in taking them into account, it may inspire doubts about the integrity of the judicial process."[15]

The present litigation does not primarily involve the level of public assistance grants payable in Maryland or in the United States. Unless judges with life tenure are to assume the taxing power, no judicial decision can do much to affect that. Cf. Hazard, *Social Justice Through Civil Justice*, 36 University of Chicago Law Review 699, 710-11 (1969). Rather this case involves the restrictions to be placed upon the states, and by inference the federal government, in the future design of welfare programs, and

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[14] Albert, *Choosing the Test Case in Welfare Litigation,* National Clearinghouse for Legal Services, Clearinghouse Review, Vol. 1, No. 13 (November 1968) at 28.

[15] Francis A. Allen, Preface to Freund, *Standards of American Legislation* (2nd Edition, 1965) at xxviii-xxix.

the extent to which effects upon the labor force, family solidarity, and the growth of population may be taken into account in drafting such programs. Enough has been said to show that reasonable men can believe that the principle of less benefit can play a part in the design of public assistance programs in a society in which the private sector of the economy remains paramount. Some supporters of the new administration programs urge that welfare reform should take the path of work incentives and wage supplements to working families in order to reduce inequity between employed persons and welfare recipients. Others, including elements of organized labor, would prefer increased minimum wages and public works programs to a program of wage supplements, at least partly on the ground that the latter program results in differentials in favor of families deriving income from both work and welfare (cf. Rein, *supra*) and tends to depress wage rates. Still others believe in the principle of less benefit in its traditional form as partially embodied in maximum grant regulations. But there are few indeed among responsible commentators on this complex of problems who believe, with appellees, that public assistance can be viewed as a closed system to be assessed on the basis of its own internal logic divorced from its effect upon the labor market or its relation to the economic position of nonrecipients.[16] However, sympathetic the cases of the individual appellees may be,[17] regard for both future public policy and protection of the

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[16] There are of course some who would construct welfare policy solely on the premise that "ours is a 'subsidy enterprise' economy and the subsidies go to those who are enterprising in the use of their political influence" see Cloward and Piven, *The Poor Against Themselves,* The Nation, November 28, 1968, 258 at 260.

[17] Cf. Freund, *Standards of American Legislation* (2nd Edition) at 48: "When interests are litigated in particular cases, they not only appear as scattered and isolated interests, but their social incidence is obscured by the adventitious personal factor which colors every controversy."

political debate on basic issues essential to the functioning of democracy demands that the judgment of the court below be reversed.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General of Maryland

ROBERT F. SWEENEY,
Deputy Attorney General
of Maryland,

GEORGE W. LIEBMANN,

J. MICHAEL MCWILLIAMS,
Assistant Attorneys General
of Maryland,
For Appellants.

December 5, 1969

PROOF OF SERVICE

I, Robert F. Sweeney, one of the attorneys for appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 3rd day of December, 1969, I served a copy of the foregoing Brief for the Appellants on the Appellees herein, by hand delivery, to Joseph A. Matera, Esquire, 341 N. Calvert Street, Baltimore, Maryland 21202.

ROBERT F. SWEENEY,
Deputy Attorney General
of Maryland,
Attorney for Appellants.