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To Feed the Hungry: Judicial Retrenchment in Welfare Adjudication†

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Approximately 40 percent of the states have statutes or administrative regulations which establish a ceiling on the amount payable to a family under the federally funded Aid to Families with Dependent Children program. When applied, these maximum grant provisions reduce the recipients' level of support below the level of their state computed need. In Dandridge v. Williams, 397 U.S. 471 (1970), *the United States Supreme Court upheld Maryland's maximum grant provision. C. Thomas Dienes critically examines the analysis and reasoning of the Court and concludes that the maximum grant provision should have been held invalid for failure to conform to the requirements of federal law and as a denial of equal protection and substantive due process.*

To feed the hungry, to give drink to the thirsty, and to clothe the naked may be works of mercy, but the more salient question at the present time is the extent to which they are also governmental obligations. This issue confronted the United States Supreme Court in *Dandridge v. Williams*,[1] decided April 6, 1970. The character of

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This initial draft of this Article, setting forth the arguments used herein, was completed before the Supreme Court's decision in Dandridge v. Williams, 397 U.S. 471 (1970). The Article was subsequently revised to reflect and focus upon the *Williams* opinion.

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1. 397 U.S. 471 (1970), *rev'g* 297 F. Supp. 450 (D. Md. 1968), *modified*, Feb. 25, 1969. The facts of the *Williams* case were derived from the Complaint and the

the Court's response is likely to have significant repercussions not only for attorneys seeking broader welfare eligibility or increased benefits for their clients, and for welfare recipients generally, but also for the future development of the judicially-fashioned egalitarian revolution in constitutional law.[2]

Plaintiffs were Linda Williams, a 33 year old Negro welfare recipient and her eight children, ranging in age from 4 to 16, who reside with her in Baltimore. Following the birth of the youngest child, Linda's husband deserted the home. The family is totally dependent on public support through the Aid to Families With Dependent Children (AFDC) program.[3] If the Maryland Department of Public Welfare had utilized its regular schedules whereby grant levels are based on the "need" of recipients, it would have provided the Williams family with benefits of $3,553.80 per year, $296.15 per month, or a per capita monthly income of $32.91. Given the fact that the poverty level—the amount required for subsistence as defined by the Social Security Administration—for a family of seven or more is $5205.00 per year,[4] $433.75 per month, or a per capita monthly income of ap-

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memorandum in support of plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction filed by attorneys Joseph A. Matera, Gerald A. Smith and David R. Packard of Legal Aid East in Baltimore.

The three-judge federal district court invalidated Maryland's maximum grant regulation on equal protection grounds. In a supplemental opinion, the court withdrew its earlier holding that the maximum grant provisions were invalid as being in conflict with the Social Security Act. The reasoning in this and other decided maximum grant cases will be discussed under the appropriate statutory or constitutional arguments which follow. *See* May, *Supreme Court Approves Maximum Grants; Holds Sec. 402(a)(23) Permits Welfare Cuts,* 3 CLEARINGHOUSE REV. 321 (1970). For convenience, the district court decision will hereinafter be referred to as *Dandridge* and the Supreme Court opinion as *Williams.*

2. *See* Cox, *Forward; Constitutional Adjudication and the Promotion of Human Rights,* 80 HARV. L. REV. 91 (1966); Goldberg, *Equality and Governmental Action,* 39 N.Y.U.L. REV. 205 (1964); Kurland, *Egalitarianism and the Warren Court,* 68 MICH. L. REV. 629 (1970); Kurland, *Forward: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of Government,"* 78 HARV. L. REV. 143 (1964); *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1067 (1969) [hereinafter cited as *Developments*].

3. Social Security Act, 42 U.S.C. §§ 601-09 (1964), *as amended,* 42 U.S.C. §§ 601-44 (Supp. V, 1970). The basic public assistance categories include Old Age Assistance (OAA) [42 U.S.C. §§ 301-06 (1964), *as amended,* 42 U.S.C. §§ 302-06 (Supp. V, 1970)]; Aid and services to Needy Families, referred to as Aid to Dependent Children or Aid to Families with Dependent Children (AFDC) [42 U.S.C. §§ 601-09 (1964), *as amended,* 42 U.S.C. §§ 601-44 (Supp. V, 1970)]; Aid to the Blind (AB) [42 U.S.C. §§ 1201-06 (1964), *as amended,* 42 U.S.C. §§ 1202-06 (Supp. V, 1970)]; Aid to the Permaneutly and Totally Disabled (APTD) [42 U.S.C. §§ 1351-55 (1964), *as amended,* 42 U.S.C. §§ 1352-55 (Supp. V, 1970)]. The provisions relating to a special combination program [42 U.S.C. §§ 1381-85 (1964), *as amended,* 42 U.S.C. §§ 1382-85 (Supp. V, 1970)] and Medical Assistance [42 U.S.C. §§ 1396-96g (Supp. V, 1970)], are also "public assistance" programs.

4. *Hearings on H.R. 12080 Before the Senate Committee on Finance,* 90th

proximately $61.96, it is evident that the Williams family, even with the regular benefits computed on the basis of need, would not have been receiving adequate funds for subsistence. However, even this meagre standard of living was denied them through the imposition of an administrative regulation providing a $250 per month grant ceiling for AFDC families.[5]

This $250 sum is the family "maximum grant." Whether cast as an administrative regulation or a statutory norm, the effect remains the same—the limitation of assistance payments to a level below what even the state admits is necessary to satisfy basic need requirements. Although maximum grant provisions might be framed in a variety of ways,[6] they most commonly impose an arbitrary dollar ceiling on

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Cong., 1st Sess., Ser. xx, pt. 1, at 316-19 (1967) [hereinafter cited as *1967 Amendment Hearings*]. The Social Security Administration standard provides a poverty threshhold of $3,335 in 1966 dollars for an urban family of four. P. DODYK, CASES AND MATERIALS ON LAW AND POVERTY 1 (1969). *See* BUREAU OF SOCIAL SCIENCE RESEARCH, INC., LIVING COSTS AND WELFARE PAYMENTS (1969); Orshansky, *Counting the Poor: Another Look at the Poverty Profile,* in POVERTY IN AMERICA 42 (L.A. Ferman, J.L. Kornbluth & A. Haber eds. 1965). Chapter One of the latter work suggests the varied attempts to define "poverty."

The recent study of the cost of living in thirty-nine metropolitan areas and several non-metropolitan regions by the Bureau of Labor Statistics estimated that it would cost $9,076 for a "moderate" level of living, $5,915 for a "lower" level of living and $13,050 for a "higher" level of living. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. No. 1570-75, THREE STANDARDS OF LIVING FOR AN URBAN FAMILY OF FOUR PERSONS 6 (March 1969). Frequently local data on the cost of living is available as an alternative to these national standards.

It is estimated that, as of 1966, some 29.7 million Americans, approximately 15 per cent of our populace, lived on incomes below the Social Security Administration poverty level. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1968, at 329. If we were to employ more liberal standards of need, the numbers would rise astronomically. For example, Senator Joseph Clark's estimate that an urban family of four requires $6,268 annually to live in low to moderate circumstances would encompass about 50 per cent of the populace. *Hearings on Examination of the War on Poverty Before the Subcomm. on Employment, Manpower, and Poverty of the Senate Comm. on Labor and Public Welfare,* 90th Cong., 1st Sess., pt. 1, at 2 (1967).

5. Maryland Manual of the Dep't of Social Services, Pt. II, Rule 200, § VII, 1.

6. Illinois, for example, maintains a maximum shelter allowauce of $90 per month for welfare recipients. The constitutionality of this ceiling was upheld by a three-judge federal district court which noted that the decision rested on the fact that the statute provided for some exceptions to the arbitrary limit. The court indicated, however, that, absent the exceptions, a flat maximum of this type would violate the Equal Protection Clause. Metcalf v. Swank, 293 F. Supp. 268 (N.D. Ill. 1968).

Maximum limits on housing allowances may result in a recipient being denied any assistance for rent until less expensive quarters are found. *See* Davis v. Goldberg, Index No. 02922 (N.Y. Sup. Ct., N.Y. City, Spec. Term, Pt. I, Feb. 25, 1969), where the court declared that the denial of any rent grant to a recipient whose rent is above the approved rate is arbitrary and constitutes a denial of due process.

Another form that a maximum limitation may take is illustrated by an Oregon practice limiting day care payments. In *In re* Matter of Jones (Oregon Public Welfare Comm'n., 1969), the Oregon Welfare Commission reversed its previous position, and held that day care payments could not be limited to ouly one child per family,

the amount that an AFDC family may receive regardless of the number of children in the family unit.[7]

In Maryland, the imposition of the maximum grant regulation resulted in an income for the Williams family of only $3,000 annually, $250 per month, or a per capita monthly income of $27.78.[8] There is no pretense that this benefit ceiling reflects any revised computation; it is simply a dollar maximum imposed regardless of actual subsistence needs. It does not require any complex computation to determine that once the $250 benefit level is reached, each subsequent birth lessens the funds available to satisfy the basic needs of each member of the AFDC family unit in Maryland.

The existence of similar fact situations in about forty percent of the states[9] has served to generate an ever-increasing amount of litiga-

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but that such payments must be made for each child in the family who is eligible for them. See note 9 *infra*.

7. *E.g.*, in 1968, Arizona provided that:

> In no event shall the total amount of assistance paid . . . to any recipient exceed eighty dollars for any calendar month for a family containing one dependent child, and twenty-seven dollars for each additional child, but in no event shall any one family receive assistance in excess of two hundred twenty dollars per month.

ARIZ. REV. STAT. ANN. § 46-294A (1956), *as amended*, Laws 1968 ch. 91, § 8. This statute was invalidated in Dews v. Henry, 297 F. Supp. 587 (D. Ariz. 1969). *See* Sparer, *Social Welfare Law Testing*, PRAC. LAW., V. 12, No. 4, 13 (1966); Comment, *Welfare Due Process: The Maximum Grant Limitation on the Right to Survive*, 3 GA. L. REV. 459 (1969).

8. In some of the maximum grant states, it appears likely that the burden is even more severe. For example, a 1967 HEW compilation indicates that Florida imposed a family maximum grant of only $85; Mississippi, $90; South Carolina, $99. DEP'T OF HEALTH, EDUCATION & WELFARE, STATE MAXIMUMS AND OTHER METHODS OF LIMITING MONEY PAYMENTS TO RECIPIENTS OF SPECIAL TYPES OF PUBLIC ASSISTANCE, NATIONAL CENTER FOR SOCIAL STATISTICS REPORT D-4 at 9, Table 4 (1969), [hereinafter cited as HEW, NCSS REPORT]. In fact, the Maryland maximum appears to be one of the highest.

9. States with statutory maximum grants, as of 1970, were Arizona, Delaware, and Wyoming. Provisions embodied in administrative regulations were in effect in Alabama, Arkansas, Delaware, Georgia, Kentucky, Maine, Maryland, Mississippi, New Mexico, Oklahoma, Tennessee, Virginia, Washington, and West Virginia. Brief for The Center on Social Welfare Policy and Law, National Welfare Rights Organization, Associated Catholic Charities, Inc., and Seven Neighborhood Legal Services Offices Prosecuting Similar Cases as Amici Curiae at App. A, tables 1 & 2, Dandridge v. Williams, 397 U.S. 471 (1970) [hereinafter cited as Amici Brief]. Provision is sometimes made allowing grants in excess of the maximum for special circumstances. HEW, NCSS REPORT at Table 4.D. *See* DEP'T OF HEALTH, EDUCATION & WELFARE, CHARACTERISTICS OF STATE PUBLIC ASSISTANCE PLANS UNDER THE SOCIAL SECURITY ACT, PUBLIC ASSISTANCE REPORT No. 50 (1964) [hereinafter cited as HEW, CHARACTERISTICS]; ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, STATUTORY AND ADMINISTRATIVE CONTROLS ASSOCIATED WITH FEDERAL GRANTS FOR PUBLIC ASSISTANCE 51 (1964). In a supplementary opinion in Williams v. Dandridge, 297 F. Supp. 450, 459 (D. Md. 1968), the court noted that 27 states other than Maryland had some form of maximum grant limitation.

Another group of states, while not providing a grant ceiling, utilizes a de-

tion challenging the validity of these welfare standards.[10] Although it would seem that the state judicial forum might be utilized for this attack, almost all recent activity has occurred in the federal courts.[11]

The typical approach has been to bring a class action[12] for declaratory judgment and injunctive relief in the appropriate federal dis-

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creasing scale of benefits for each child as the number of children in the family unit increases. California, for example, as of 1969, provided decreasing benefits ranging from $148 for one child to $424 for fifteen children, if living with one parent or relative, and from $166 for one child to $448 for fifteen children, if living with two eligible caretakers. Amici Brief, *supra*, at App. A, Table 3, provides a compilation of states having individual, but no family, maximums. See HEW, CHARACTERISTICS at 17.

10. *See, e.g.*, the following maximum grant suits that have been decided by federal district courts: Williams v. Dandridge, 297 F. Supp. 450 (D. Md. 1968); Dews v. Henry, 297 F. Supp. 587 (D. Ariz. 1969); Westberry v. Fisher, 297 F. Supp. 1109 (D. Me. 1969); Lindsey v. Smith, 303 F. Supp. 1023 (W.D. Wash. 1969); Kaiser v. Montgomery, Civil No. 44,613 (N.D. Cal., decided Aug. 28, 1969), *vacated* 397 U.S. 595 (1970). Blackman v. Department of Pub. Welfare, Case No. 68-536-Civ.-J.E. (S.D. Fla., filed July 11, 1968), was dismissed when the plaintiffs conceded that the challenged maximum grant regulation had been rescinded. Robinson v. Hackney, Civ. No. 68-H-294 (S.D. Tex., filed April 2, 1968), was held to be moot because of a change in the Texas welfare regulations which eliminated the maximum grant provision in favor of an even more restrictive practice. Subsequently, the change was held to be invalid. Jefferson v. Hackney, 304 F. Supp. 1332 (N.D. Tex. 1969).

Challenges to maximum grants are pending in the following actions brought in federal district courts: Purvis v. Washington, Civ. No. 722-68 (D.D.C., filed March 21, 1968); Ward v. Winstead, No. 6-C-6829 (N.D. Miss., filed July 12, 1968); Thomas v. Burson, Civ. No. 2381 (M.D. Ga., filed July 29, 1968); Salazar v. Goodwin, C.A. No. 8027 (D.N. Mex., filed May 1, 1969).

11. See note 10 *supra*. The only decided case involving AFDC maxima prior to *Williams v. Dandridge*, was a state proceeding. Collins v. State Bd. of Social Welfare, 248 Iowa 369, 81 N.W.2d 4 (1957). In *Williams*, it was originally planned to file an action for a declaratory judgment and injunction in the Circuit Court of Baltimore City challenging the state maximum grant provision. Instead, it was decided to proceed in the federal courts. A mandamus proceeding might also afford a viable mode of challenging administrative regulations imposing a grant ceiling.

12. See FED. R. CIV. P. 23(a) & (b) for the requirements for maintenance of a class action. The petition must allege: that the class of AFDC recipients subject to the maximum grant provision is so numerous that joinder of all members is impractical; that there are questions of fact or law common to all members of the class; that the claims made against the provisions are typical for the class represented; and that the plaintiffs will raise all arguments and defenses necessary to protect the interest of the class.

Class actions have been allowed in the following maximum grant cases: Williams v. Dandridge, 297 F. Supp. 450 (D. Md. 1968); Westberry v. Fisher, 297 F. Supp. 1109 (D. Me. 1969). Courts have also permitted the class action in a number of other suits challenging public assistance regulations. *See* Lampton v. Bonin, 299 F. Supp. 336, 304 F. Supp. 1384 (E.D. La. 1969); Johnson v. Robinson, 296 F. Supp. 1165 (N.D. Ill. 1967); Kelly v. Wyman, 294 F. Supp. 893 (S.D.N.Y. 1968), *aff'd sub nom.*, Goldberg v. Kelly, 397 U.S. 254 (1970); Metcalf v. Swank, 293 F. Supp. 268 (N.D. Ill. 1968); Lewis v. Stark, Civil No. 50238 (N.D. Cal. Dec. 23, 1968); Harrell v. Tobriner, 279 F. Supp. 22 (D.D.C. 1967); Smith v. King, 277 F. Supp. 31 (M.D. Ala. 1967), *aff'd*, 392 U.S. 309 (1968); Ramos v. Health and Social Services Bd., 276 F. Supp. 474 (E.D. Wis. 1967); Shapiro v. Thompson, 270 F. Supp. 331

trict court alleging deprivation of rights secured by the Constitution and laws of the United States.[13] Since the resultant suits have sought to restrain enforcement of a state law on grounds of unconstitutionality, they have been appropriate for determination by a three judge court, thus permitting direct appeal to the United States Supreme Court.[14] It has also been common to move for a temporary restraining order and preliminary injunction, alleging irreparable injury to the plaintiffs from continuation of the practice and no undue inconvenience to the defendant.[15] Given the poverty of the plaintiffs, these proceedings

(D. Conn. 1967), *aff'd*, 394 U.S. 618 (1969); Green v. Department of Pub. Welfare, 270 F. Supp. 173 (D. Del. 1967); Macias v. Finch, Civil No. 50956 (N.D. Cal., temporary restraining order *filed* March 18, 1967).

13. 42 U.S.C. § 1983 (1964) provides that:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

See NATIONAL INSTITUTE FOR EDUCATION IN LAW AND POVERTY, HANDBOOK ON WELFARE LAW § 20:1 (1968); Cover, *Establishing Federal Jurisdiction in Actions to Vindicate Statutory (Federal) Rights When No Violations of Constitutional Rights Are Alleged, Part I*, 2 CLEARINGHOUSE REV. 5 (1969), and Part II, 3 CLEARINGHOUSE REV. 7 (1969). Note, 67 COLUM. L. REV. 84, 96-97 (1967). Federal court jurisdiction is invoked under 28 U.S.C. § 1343(3) & (4) (1964) and 28 U.S.C. §§ 2201, 2202 (1964), relating to declaratory judgments.

14. 28 U.S.C. § 2281 (Supp. V, 1970), sets forth the considerations for obtaining a three-judge district court. *See* King v. Smith, 392 U.S. 309, 312 n.3 (1968); McNeese v. Board of Educ., 373 U.S. 668 (1963); Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713 (1962).

Three-judge courts have been convened to consider: challenges to the validity of maximum grant provisions [Williams v. Dandridge, 297 F. Supp. 450 (D. Md. 1968); Dews v. Henry, 297 F. Supp. 587 (D. Ariz. 1969); Westberry v. Fisher, 297 F. Supp. 1107 (D. Me. 1969)]; residency requirements [Shapiro v. Thompson, 270 F. Supp. 331 (D. Conn. 1967), *aff'd*, 394 U.S. 618 (1969); Green v. Department of Pub. Welfare, 270 F. Supp. 173 (D. Del. 1967); Harrell v. Tobriner, 279 F. Supp. 22 (D.D.C. 1967)]; "substitute father" rules [Smith v. King, 277 F. Supp. 31 (M.D. Ala. 1967), *aff'd*, 392 U.S. 309 (1968)]; reduction of welfare benefits because of prior overpayment [Stallworth v. California, Civil No. 48393 (N.D. Cal., filed Dec. 13, 1967)]; Georgia's "employable mother" rule [Anderson v. Shaeffer, Civil Nos. 10443, 10882, 10991 (N.D. Ga. April 5, 1968)]; recovery of welfare payments from relatives [Snell v. Wyman, 281 F. Supp. 853 (S.D.N.Y. 1968), *aff'd*, 393 U.S. 323 (1969)]; presumptions applied by California in determining absence of parental support [Damico v. California, Civil No. 46538 (N.D. Cal. June 29, 1967) *rev'd*, 389 U.S. 416 (1967), reversing the district court's dismissal of the case for failure to exhaust administrative remedies]; to determine the right to a "prior hearing" [Wheeler v. Montgomery, 296 F. Supp. 138 (N.D. Cal. 1968), *rev'd*, 397 U.S. 280 (1970); Kelly v. Wyman, 294 F. Supp. 893 (S.D.N.Y. 1968), *aff'd sub nom.*, Goldberg v. Kelly, 397 U.S. 254 (1970)]; to challenge percentage reductions of AFDC grants [Lampton v. Bonin, 299 F. Supp. 336, 304 F. Supp. 1384 (E.D. La. 1969)]; and, to challenge the denial of benefits to families because of the full-time employment of one of the members [Macias v. Finch, Civ. No. 50956 (N.D. Cal., temporary restraining order filed March 18, 1969)].

15. *See* 28 U.S.C. § 2284(3) (1964), which provides authority to "grant a tem-

usually occur under an order granting permission to file *in forma pauperis*, thus avoiding the cost of the action and the necessity of providing security.[16]

All of the above activities were, of course, only the preliminaries setting the stage for the actual substantive argument challenging the validity of the maximum grant provision. Every lower court passing on these arguments found the maximum grant to be invalid on statutory or constitutional grounds or both.[17] Nevertheless, the United States Supreme Court in *Dandridge v. Williams*, by a five to three vote, found the state policy permissible on both counts.[18] In a companion case, *Rosado v. Wyman*,[19] the Court compounded the injury to welfare plaintiffs by recognizing the power of the state to impose "percentage reductions" whereby the state pays less than 100 percent

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porary restraining order to prevent irreparable injury". TRO's have been ordered in a number of public assistance cases upon a showing of the total dependence of the plaintiff on the payment of the benefits and the extreme burden effected by the challenged rule or practice. Macias v. Finch, Civ. No. 50956 (N.D. Cal., temporary restraining order filed March 18, 1969); Lampton v. Bonin, 299 F. Supp. 336, 304 F. Supp. 1384 (E.D. La. 1969); Kelly v. Wymau, 294 F. Supp. 893 (S.D.N.Y. 1968); Lewis v. Stark, Civil No. 50238 (N.D. Cal., Dec. 23, 1968); Wheeler v. Montgomery, 296 F. Supp. 138 (N.D. Cal. 1968), *rev'd* 397 U.S. 280 (1970); Denny v. Health and Social Services Bd., 285 F. Supp. 526 (E.D. Wis. 1968); Ramos v. Health and Social Services Bd., 276 F. Supp. 474 (E.D. Wis. 1967); Mantell v. Dandridge, Civ. No. 18792 (D. Md., filed Oct. 24, 1967); Stallworth v. California, Civ. No. 48393 (N.D. Cal., filed Dec. 13, 1967).

Although the granting of a preliminary injunction requires a balancing of the equities, Perry v. Perry, 190 F.2d 601, 602 (D.C. Cir. 1951), the permissible range of discretion narrows as the probability of success on the merits increases, given the necessity of immediate relief in light of the subsistence needs of the plaintiffs, and the minimal economic impact on the defendant which has extensive economic resources at its command. *See* Memorandum of Law filed by Michael L. Woods of the Houston Legal Foundation in Robinson v. Hackney, Civ. No. 68-294 (S.D. Tex., filed April 2, 1968).

Preliminary injunctions have been ordered in a number of cases involving challenges to residency requirements. *See, e.g.*, Burns v. Montgomery, 299 F. Supp. 1002 (N.D. Cal. 1968) *aff'd*, 394 U.S. 848 (1969); Thompson v. Shapiro, 270 F. Supp. 331 (D. Conn. 1967), *aff'd*, 394 U.S. 618 (1969); Harrel v. Tobriner, 279 F. Supp. 22 (D.D.C. 1967); Johnson v. Robinson, 296 F. Supp. 1165 (N.D. Ill. 1967) *aff'd*, 394 U.S. 842 (1969).

16. *See* 28 U.S.C. § 1915 (1964).

17. Williams v. Dandridge, 297 F. Supp. 450 (D. Md. 1968); Dews v. Henry, 297 F. Supp. 587 (D. Ariz. 1969); Westberry v. Fisher, 297 F. Supp. 1107 (D. Me. 1969); Lindsey v. Smith, 303 F. Supp. 1023 (W.D. Wash. 1969); Kaiser v. Montgomery, Civil No. 44613 (N.D. Cal., decided August 28, 1969), *vacated*, 397 U.S. 595 (1970).

18. The opinion of the Court, written by Justice Stewart, was joined by Justice White. Justice Black, joined by Chief Justice Burger, wrote a concurring opinion as did Justice Harlan. Justice Douglas wrote a dissenting opinion limited to the statutory issues, while Justice Marshall joined by Justice Brennan, wrote a dissent addressed to both the statutory and constitutional questions.

19. 397 U.S. 397 (1970).

of state-determined need.[20] Utilizing these devices, states can respond to increased welfare rolls, or the need to provide enhanced benefits for those already eligible, by imposing individual or family maximums[21] or by reducing the percentage of need met by welfare grants, thereby incurring no added expenditures. Given such a state capability, welfare attorneys may now find that any courtroom success will prove a pyrrhic victory with no real gains accruing to their poverty clientele.

The impact of *Williams*, however, goes well beyond its immediate effect on the benefits available to welfare recipients. Many of the arguments employed in challenging maximum grant provisions are directly applicable to a variety of other questionable policies and practices prevalent in the present welfare system. The maximum grant case itself had been considered by many active in welfare law as a vital first step towards the recognition of a legally enforceable "right" of a citizen to the basic means of subsistence, flowing from a governmental "duty."[22] Whether this "duty" is postulated on a constitutional basis emanating from an esoteric theory of a "right to life"[23] or on a statutory response, such as an adequate guaranteed annual income or negative income tax,[24] the revolutionary consequences of recognizing

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20. Whereas the AFDC recipient in New York received 100 percent of state-calculated need, Mississippi provides only about 23 percent. Treatment in other states varies between these extremes, *1967 Amendment Hearings, supra* note 4, at 255-60, 289. In King v. Smith, 392 U.S. 309, 319 n.15 (1967), the Court noted the great disparity in the average payment in AFDC programs (as of May, 1967): New Jersey, $244; New York, $221; Alabama, $53; Mississippi, $39; Puerto Rico, $20. As of 1967, in "seven states—Alabama, Arkansas, Florida, Georgia, Mississippi, South Carolina, and West Virginia—a family consisting of a mother and three children receiving assistance must live on less than $120 a month". HEW, 90TH CONG., 1ST SESS., SECTION-BY-SECTION ANALYSIS AND EXPLANATION OF PROVISIONS OF H.R. 5710 (Comm. Print 1967). The journal WELFARE IN REVIEW and the National Center for Social Statistics (HEW) provide regular summaries of this and similar data on state public assistance activity. Since it could be argued that the disparity is explained by cost of living differentials, the percentage of need met by the state would appear to be a more meaningful standard for comparison. HEW has supported legislation to require a state to pay 100 percent of the state computed need. *1967 Amendment Hearings, supra* note 4, at 255-56, 716.

21. See note 9 *supra*.

22. The terminology is borrowed from W. N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING (1923).

23. *See* Harvith, *Federal Equal Protection and Welfare Assistance*, 31 ALBANY L. REV. 210, 241-45 (1967); Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227, 1265 (1966); Reich, *The New Property*, 73 YALE L.J. 733 (1964); note 211 *infra*.

24. *See generally* C. GREEN, NEGATIVE TAXES AND THE POVERTY PROBLEM (1967); POVERTY IN AMERICA ch. VI (M.S. Gordon ed. 1965); THE GUARANTEED INCOME: NEXT STEP IN ECONOMIC EVOLUTION? (R. Theobald ed. 1967); *Hearings on Income Maintenance Programs Before the Subcomm. on Fiscal Policy of the Joint Economic Committee*, 90th Cong., 2d Sess. (1968); Tobin, Pechman & Mieszkowsici, *Is a Negative Income Tax Practical?*, 77 YALE L.J. 1 (1967); Comment, *A Model Negative Income Tax Statute*, 78 YALE L.J. 269 (1968).

the right-duty relationship are clear. As one step in the process of judicial acceptance of the right to a decent life, the Court's recognition of principles necessitating denigration of maximum grant provisions was of vital concern.

Nor is the importance of the Court's decision in *Williams* impaired by the possibility of a major alteration in the welfare framework. On August 8, 1969, President Nixon proposed a sweeping reform of the welfare system in the form of a Family Allowance System (FAS).[25] Although the proposal would eliminate many of the inequities in the current AFDC program, it certainly would not be a panacea for the myriad of problems plaguing the present welfare system. Not only could state maximum grant provisions continue to affect recipient benefit levels under the Nixon proposal, but the proposal itself contains a maximum grant provision.[26] Further, even if Congress does substantially accept the FAS program, it is doubtful that it could go into effect before late 1971. It is essential, therefore, that the legal and political pressure continue, not only to pursue broader coverage, enhanced benefits, and decent procedures which are needed by the poor *now* but also to further define the applicable legal principles that will be essential even under the proposed revision. The effort to require conformity by administrators with statutory and regulatory standards and with constitutional guarantees will continue to demand the constant application of legal and political knowledge, skills, and commitment.

25. The Administration proposal, introduced in the House of Representatives as the Family Assistance Act of 1969 (FAS) (H.R. 14173, 91st Cong., 1st Sess.) on October 3, 1969, would initiate a program of direct federal payments to all present recipients of AFDC and the families of the working poor and unemployed parents. FAS would assure a federal income floor of $500 annually for each of the first two family members and $300 for each additional member. Provision is made for disregard of a portion of earned income as a work incentive, although the Act does include compulsory work provisions. See N.Y. Times, Aug. 9, 1969, at 10, col. 1; American Enterprise Institute, The Bill to Revamp the Welfare System, Analysis No. 4, April 6, 1970.

The House Ways and Means Committee favorably reported the Family Assistance Act of 1970 (H.R. 16311) on March 11, 1970 [H.R. REP. No. 91-904, 91st Cong., 2d Sess. (1967)]. The bill passed the House on April 16, 1970 and Senate hearings began on April 29, 1970. 2 CCH CONG. INDEX 4924 (1970).

26. FAS makes no provision for added benefits after the seventh child. Further, the Nixon proposal is designed to assure that no recipient family will receive less under the FAS program than is presently provided through AFDC or AFDC-UP, or both. See note 265 *infra* on AFDC-UP. This is achieved by requiring each state to supplement the federal basic family allowance. In so far as the state's future expenditures are determined by its present AFDC effort, existing limitations on state expeuditures, such as the AFDC maximum grant, would continue to affect the state funds available to FAS recipients, aud hence, the benefit levels.

For further critical commentary on the FAS proposal, see Albert & Katz, *The Nixon Welfare Proposals: An Exercise in Poverty*, 3 CLEARINGHOUSE REV. 125 (1969); May, *Administration Unveils Welfare Reform Package—Recipients Must Work for Increased Benefits*, 3 CLEARINGHOUSE REV. 89 (1969).

Given the importance of the *Williams* decision for the poverty sector—even aside from its implications for constitutional law doctrine—it is essential to consider the nature and breadth of the Court's holding, the argument and the philosophy underlying its decision, and the potential bases on which its impact might be revised, modified, or circumvented. Initially, the inquiry will be directed to the Court's treatment of the statutory argument, the conformity of the state maximum grant policy with the requirements imposed by the Social Security Act and the regulations interpreting the Act issued by the Department of Health, Education and Welfare (HEW). This inquiry will involve consideration of the binding effect of the statute and regulations on the states, the nature of the "entitlement" afforded by the Act, the consistency of the maximum grant with various standards delineated in the statutory and regulatory provisions, and the reaction of HEW and Congress to the maximum grant.

The discussion will then turn to the constitutional mandate of equal protection, where the *Williams* opinion portends to have its most serious consequences. How did the Court treat the classification effectuated by the maximum grant and what standards did it apply in determining its validity? How did the Court determine whether the classification conformed to, or operated in derogation of these standards? How did the Court evaluate the nature and validity of the competing interests vying for judicial recognition? These questions and others will be considered in probing the equal protection dimensions of the issue.

Finally, attention will be afforded the constitutional demand of substantive due process, an issue that was not argued in the case, nor directly considered by the Court in its opinion. The focus will be on the standards utilized in due process adjudication and their application to the maximum grant controversy. Special attention will be directed to the mandates of privacy and freedom of religion and the doctrine of unconstitutional conditions which limits the power of the state to coerce the surrender of constitutional guarantees through its power over welfare benefits.

It must be noted, however, that this is not an impartial evaluation; it is admittedly a biased presentation premised on the belief, vindicated by consistent judicial judgment on the maximum grant in the lower courts, that the Supreme Court in *Dandridge v. Williams* erred in holding that state maximum grant policy does not violate fundamental statutory and constitutional guarantees.

I

STATUTORY CONSIDERATIONS

In *King v. Smith*,[27] a landmark case in the field of welfare law, an AFDC recipient challenged an Alabama AFDC regulation that denied assistance to children, otherwise eligible, whose mother was found to be cohabiting, in or outside her home, with any single or married able-bodied man. Under the regulation, the man was assumed to be providing support to the family, and hence, was a "substitute father" of all the children of the mother.[28] It was deemed irrelevant whether such support was actually provided or whether a legal duty to support existed. Although afforded a wide range of options for constitutional decisionmaking, the Supreme Court chose to rest its decision solely on statutory grounds, finding the Alabama interpretation of the term "parent" in the Social Security Act inconsistent "with the Federal law and policy."[29] Only the income of individuals subject to a legal obligation to support may be considered in determining AFDC eligibility; "destitute children who are legally fatherless cannot be flatly denied federally-funded assistance on the transparent fiction that they have a substitute father."[30] While the decision has been of great importance in providing assistance to thousands of needy children, perhaps the greater import of *King v. Smith* lies in its allowance of private remedial action and its recognition of the binding effect of the federal welfare requirements on state policies and practices.

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27. 392 U.S. 309 (1968). *See* Note, *Welfare Law—Standing to Challenge State Welfare Practices on the Grounds That They Violate Federal Requirements*, 4 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 167 (1968).

28. Alabama Manual for Administration of Public Assistance, pt. I, ch. II, § VI.

29. 392 U.S. at 320, 326-27, 332-33. Justice Douglas, concurring, argued that administrative acceptance of the "substitute parent" policy and the possibility that Alabama might refuse federal funding and reinstate its program [the district court had issued an unconditional injunction based on its finding of an equal protection violation, Smith v. King, 277 F. Supp. 31 (M.D. Ala., 1967)], required a constitutional determination. He felt that the state policy was violative of the equal protection guarantee. 392 U.S. at 334-36.

30. 392 U.S. at 334. Under extensive pressure from the Columbia Center on Social Welfare Policy and Law, the National Welfare Rights Organization and others, HEW published a regulation which went well beyond *King v. Smith* in attacking "assumed income" policies. "Only such net income as is actually available for current use on a regular basis" and in the absence of actual proof of contribution, only the income of specified individuals is to be considered in determining income. 45 C.F.R. § 203.1 (1968). See the letter of Lee A. Albert, director of the Columbia Center, to Legal Services Projects, July 10, 1968, reprinted in the NATIONAL INSTITUTE FOR EDUCATION IN LAW AND POVERTY, HANDBOOK ON WELFARE LAW § 33.2 (1968); Comment, *Man-in-the-House Rules After King v. Smith: New HEW Regulations*, 14 WELF. L. BULL. 19 (1968).

A. Private Remedial Action

The Social Security Act provides an administrative procedure for compelling compliance with its provisions.[31] While such an explicit statutory provision arguably precludes the availability of private judicial remedial action, the Court in *Rosado v. Wyman*[32] and in *Williams* followed *King v. Smith* and accepted the right of the individual claimant to challenge statutory abuses in the federal courts. The issue, however, does not appear to be completely closed. It was this vestiture of power in HEW that led Justice Black and Chief Justice Burger to dissent in *Wyman*[33] and concur in *Williams*.[34] They would hold ". . . that all judicial examinations of alleged conflicts between state and federal AFDC programs prior to a final HEW decision approving or disapproving the state plan are fundamentally inconsistent with the enforcement scheme created by Congress and hence such suits should be completely precluded."[35] Primary jurisdiction being vested in the administrative agency, failure of welfare recipients to exhaust administrative remedies would defeat their claim. Initial recourse to court adjudication, argued Justice Black, tends to induce HEW to ignore its statutory mandate and rely on the judiciary to correct state abuses as well as to defeat the public interest in judicial economy and the avoidance of premature lawsuits.[36] The former argument is reminiscent of Thayer's critique on the proper use of the power of judicial review—it must be used sparingly lest the people, who bear the primary obligation to deter governmental abuse, over-rely on judicial safeguards and become complacent in the exercise of the democratic processes of control.[37] The latter two arguments reflect the concern of many judges today with the swelling tide of litigation burdening the courts. The *Wyman* Court itself specifically noted "with concern"

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31. 42 U.S.C. § 604 (a) (1964), *as amended* (Supp. V, 1970), authorizes the Secretary of HEW to withhold payments to the state or withhold payments for affected categories when "in the administration of the plan there is a failure to comply substantially" with the state plan requirements set out in Social Security Act, § 402, 42 U.S.C. § 602 (1964), *as amended* (Supp. V, 1970). The state must be afforded reasonable notice and an opportunity for a conformity hearing. Only 16 such hearings have been held during the history of the Act. W. BELL, AID TO DEPENDENT CHILDREN 233 (1965).

32. 397 U.S. 397, 408 (1970).

33. 397 U.S. 397, 430 (1970).

34. 397 U.S. 471, 489 (1970). The Justices merely note their concurrence, citing to Justice Black's opinion in Rosado v. Wyman, 397 U.S. 397, 430 (1970).

35. 397 U.S. at 435. *See* Lewis v. Martin, 397 U.S. 552, 560 (1970) (Burger, C.J., dissenting); *id.* (Black, J., dissenting), where both Justices dissented on the basis of HEW's primary jurisdiction in determining statutory conformity.

36. 397 U.S. at 435.

37. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

the recent increase in welfare cases.[38]

But the answer to all of the reasons given by Justice Black lies in the vital interest of welfare recipients in correcting abuses of the welfare system and the absence of any effective remedy. The record of HEW in utilizing its power to conduct conformity hearings denigrates any suggestion of the efficacy of an administrative remedy.[39] The fact that the only available sanction following a finding of nonconformity is the cutting off of federal assistance[40] when coupled with the potential political consequences of involvement, provides a natural impediment to active agency intervention on behalf of the relatively politically inarticulate welfare recipients. Agency heads feel compelled to rely heavily on negotiation and compromise.[41]

Equally as important, HEW has specifically rejected the right of a recipient or claimant for assistance to initiate conformity hearings through a complaint to the agency.[42] Denied the ability to force administrative action, it is difficult to see how a petitioner can be defeated for the failure to exhaust a remedy that isn't there. Nor does Justice Black suggest any guidelines as to the point at which it is reasonable to assume that the agency has no intention to act.[43] On the other hand, HEW can intervene in a lawsuit and the courts can invite such intervention if the role of the agency as an authoritative source of information concerning statutory interpretation is of concern. But to defeat welfare claimants on the usually illusory hope of meaningful agency action seems completely unwarranted.

For the present, however, the views expressed by Justice Black and Chief Justice Burger serve only to predict their votes in future welfare cases and as an implicit warning to claimants and their attorneys for the future. Should HEW initiate grievance mechanisms, it may well be that the courts will recognize the agency's primary jurisdiction on statutory questions and employ the exhaustion doctrine.[44]

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38. *See* 397 U.S. at 422.

39. See note 31 *supra*.

40. See note 31 *supra*.

41. See the letter of Robert C. Mardean, General Counsel of HEW, contained in the appendix to Justice Douglas' concurring opinion in *Wyman* [397 U.S. at 429-30] as well as the text of the Douglas opinion. 397 U.S. at 423.

42. Letter of Robert C. Mardean, 397 U.S. at 429-30. Attempts to induce HEW to conduct conformity hearings have not been successful. *See* Note, *Federal Judicial Review of State Welfare Practices*, 67 COLUM. L. REV. 84, 91 (1967). The author of this Note suggests the introduction of processes in HEW whereby claims of nonconformity might be processed. *Id.* at 91-92. Consideration might also be given to the possibility of compelling HEW to hold conformity hearings through litigation. *See id.* at 117-29.

43. 397 U.S. at 434-35.

44. The *Wyman* Court, expressing concern with the "escalating involvement of federal courts," specifically recognized that HEW should have primary jurisdiction "in this highly complicated area of welfare benefits." 397 U.S. at 422.

B. *Challenges Based on Nonconformity*

While *King v. Smith* recognized the supremacy of federal welfare requirements, it did not define the appropriate use of the federal statute and regulations as criteria for judging the validity of state policies and practices. Issued pursuant to statutory authorization, HEW regulations declare that the "requirements" therein set forth are "essential under law,"[45] and several state court decisions suggest the need for considering the federal rules and regulations in fashioning state welfare policy.[46] On the other hand, an HEW policy statement, popularly referred to as "Condition X," clearly envisions state criteria of eligibility narrower than those used in the Social Security Act, with the vital stipulation that such limitations must be "rational . . . in light of public assistance programs."[47] Thus in the absence of an explicit state provision recognizing the supremacy of the federal requirements,[48] the binding power of the federal statute and regulations might be challenged.

It can be argued, however, that state conditions on AFDC eligibility cannot be more restrictive than those imposed by the federal government. In *King v. Smith*, the Court stated that a participating state "must conform with several requirements of the Social Security Act and with rules and regulations promulgated by HEW."[49] "Conformity" could be interpreted to mandate full implementation of the federal objectives. Under that interpretation any limitation of the class

45. U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, pt. 1, § 4210 [hereinafter cited as HEW HANDBOOK]. The power to issue regulations is conferred by 42 U.S.C. § 1302 (1964).

46. *See* State, *ex rel.* Dean v. Bandjord, 108 Mont. 447, 458, 92 P.2d 273, 278 (1939). *See also* Pearson v. State Social Welfare Bd., 54 Cal. 2d 184, 189, 194, 353 P.2d 33, 35, 39, 5 Cal. Rptr. 553, 555, 559 (1960); Fenton v. Department of Pub. Welfare, 344 Mass. 343, 346, 182 N.E.2d 528, 530 (1962); Multnomah County v. Luihn, 180 Ore. 528, 535, 178 P.2d 159, 163 (1947); Morgan v. Department of Social Security, 14 Wash. 2d 156, 173-74, 127 P.2d 686, 693-94 (1942). It has been suggested that these cases establish the proposition that a participating state implicitly accepts the binding character of the federal statutes and regulations. *See* Glick, *Welfare Problems*, in LEGAL REPRESENTATION OF THE POOR 32 (Jarmel ed. 1968). However, this would seem to be an extremely broad interpretation of the decisions.

47. Alanson Wilcox, General Counsel, HEW, Memorandum Concerning Authority of the Secretary, Under Title IV of the Social Security Act, to Disapprove Michigan House Bill 145 on the Ground of its Limitations on Eligibility, March 25, 1963. *See* HEW HANDBOOK, *supra* note 45, pt. IV, § 220(a); *id.* pt. II, § 4300; Note, *Welfare's Condition X*, 76 YALE L.J. 1222 (1967).

48. For an example of such a mandate of conformity see MD. ANN. CODE, art. 88 A, § 15 (1964 Supp.), wherein the state welfare department is empowered ". . . to accept any and all allotments of federal funds and commodities and to manage and dispose of same in whatever manner may be required by federal law. . . ."

49. 392 U.S. 309, 317 (1968).

designated by Congress as beneficiaries under the Act would necessarily be a breach of "conformity," since imposition of any further conditions on eligibility by a state could seriously impair the objective of the AFDC statutory plan to provide "for the economic security and protection of *all* [eligible needy dependent] children."[50] In examining the provisions of the Social Security Act, the district court in *Williams v. Dandridge*[51] noted that neither "the definitions [nor] any other portion of the Act vest in any state authority to embroider upon the definition of 'dependent child' so as to insert conditions and limitations beyond those imposed by Congress."[52] This suggests that the Social Security Act provisions regarding eligibility negate more restrictive state conditions. If so, all authorized HEW regulatory "requirements" interpreting and implementing the statutory provisions would have a similar binding effect. Justice Marshall, dissenting in *Dandridge v. Williams*,[53] suggests such an approach when he notes the absence in the Social Security Act of any authority for the state "to alter" the statutory definitions of the beneficiaries of AFDC assistance.[54] Whether he in fact means any alteration or only any inconsistent alteration, however, remains problematical.

Whatever the merits of this broad interpretation of the conformity requirement, there is no doubt that the state is at least theoretically barred from imposing requirements and conditions *inconsistent* with federal requirements and policy. As the Court stated in *King v. Smith*, "any state law or regulation inconsistent with such federal terms and conditions is to that extent invalid."[55]

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50. *Id.* at 330.

51. 297 F. Supp. 450 (D. Md. 1968, *modified* Feb. 25, 1969), *rev'd.*, 397 U.S. 471 (1970).

52. 247 F. Supp. at 455. The court also reiterated the mandate that "[t]he plan, to be valid, must conform to the requirements of the Act and applicable regulations of the Secretary." *Id.* at 454. The language of the *Dandridge* court was cited with approval in Dews v. Henry, 297 F. Supp. 587, 591 (D. Ariz., 1969). It should be noted, however, that both courts stressed the conflict between the maximum grant provision and the Social Security Act rather than the broad approach suggested in the text.

53. 397 U.S. 471, 508 (1970).

54. *Id.* at 510-11.

55. 392 U.S. at 333 n.34. The Court also stated that HEW could not approve a state policy or practice "inconsistent with the controlling statute." *Id.* *See* Williams v. Dandridge, 297 F. Supp. at 454-55; Dews v. Henry, 297 F. Supp. at 591. Although the *Dandridge* court later modified its opinion to withdraw its holding on the Social Security Act, 297 F. Supp. at 459-70, the modification related solely to the issue of whether there was an inconsistency and not to the necessity of conformity. See text accompanying notes 143-46 *infra.* *See* Lewis v. Martin, 397 U.S. 552 (1970), invalidating California's MARS regulation that provided for reduction of an AFDC recipient's need by the income of a stepfather or "adult male person assuming the role of spouse to the mother although not legally married to her." The Court held that the conclusive presumption of support is inconsistent with the Social Security Act.

While the majority in *Williams* appears to accept this operative principle, they immediately begin to retreat from its implications by stressing the "latitude" provided the states under the Act.[56] It is enlightening that the Court accepts as its initial premise an emphasis on the "latitude" afforded by the Act, rather than the limitations the statute imposes on the exercise of state power. But the Court is constructing an argument designed to reach a conclusion of statutory conformity and can hardly be expected to begin by emphasizing principles antagonistic to such a result. In any event, the Court's utilization of "latitude" seems misdirected.

Initially, the Court cites language from *King v. Smith,* affirming the "considerable latitude" afforded the state in allocating its resources *"by the amount of funds it devotes to the program"*[57] and stresses the language in section 401 of the Act limiting the furnishing of state financial assistance and services by inserting "as far as practicable under the conditions in such state."[58] Then, in what appears to be a totally unwarranted inferential leap, the Court concludes that this includes "great latitude in *dispensing* its available funds."[59] Whatever may be said for the conclusion that the state may limit its level of participation in the AFDC Program by limiting its financial contribution, it by no means automatically follows that it possesses the same latitude in determining the disposition of those funds.[60] In fact, the language in *King v. Smith* cited above,[61] specifically refers to state power effectuated through the level of its contribution.

The very fact that a federal contribution appropriated for defined purposes is involved suggests that a state is limited in its ability to distribute AFDC funds as it chooses. Whatever a state's power over its own share of the funds—and even this is limited by its voluntary participation in the program and acceptance of federal moneys—it is subject to statutory limitations in the distribution of federal moneys. As Justice Douglas notes, HEW itself had clearly differentiated between maximum grant ceilings, which arbitrarily differentiate among recipients in the disbursement of funds, and percentage reductions, which affect the level of state participation, with the suggestion that "Congress might wish . . . at least inferentially, to disfavor the former."[62] For the majority, then, to initiate its statutory analysis with the blithe and apparently unfounded assumption that the states possess wide lati-

56. 397 U.S. at 478.
57. *Id.*
58. *Id. quoting* 42 U.S.C. § 601 (1964), *as amended,* (Supp. V, 1970).
59. *Id.* (emphasis added).
60. *See id.* at 491 (Douglas, J., dissenting).
61. See text at note 57 *supra.*
62. 397 U.S. at 493.

tude in determining how funds are to be distributed is a misconstruction of the Act and ignores prior decisions in which the Court itself had recognized substantial statutory and regulatory limitations on the disbursement of AFDC funds.

But this was only the *Williams* Court's first excursion from the course of rigorous analysis. Having accepted (albeit qualifiedly) the premise that a state practice could be invalid if it is inconsistent with the statutory and regnlatory requirements, the Court then turned to the question of whether Maryland's maximum grant policy was in fact out of harmony with the federal scheme.

1. *Statutory Entitlement*

A primary thrust of the welfare claimants' argument in *Dandridge v. Williams* involved section 402(a)(10) of the Social Security Act, sometimes referred to as "statutory entitlement." It provides that:

> [A]ll individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness *to all eligible individuals. . . .*[63]

In *King v. Smith,* the Supreme Court characterized entitlement as a "federally imposed obligation"[64] which, combined with the statutory definition of dependent child, "[r]equired participating states to furnish aid to families with children who have a parent absent from the home, if such families are in other respects eligible."[65] And in *Goldberg v. Kelly,*[66] decided only two weeks prior to *Williams,* the Court

63. 42 U.S.C. § 602(a)(10) (1964), *as amended* (Supp. V, 1970) (emphasis added). HEW regulations require that "assistance *will be provided* promptly and will continue regularly to *all* eligible persons until they are found to be ineligible." HEW HANDBOOK, *supra* note 45, pt. IV, § 2200(b)(4) (emphasis added). The district court in *Dandridge,* 297 F. Supp. at 462-64, specifically rejected an attempt by the state to narrow the meaning of entitlement to the individual applicant ignoring the actual needs of the children in the family. The entitlement section, the court stated, "requires that the amount of aid granted be commensurate with the needs of all of those on behalf of whom an application is made." *Id.* at 462. A study of the purpose of the clause established that it was intended to protect the benefits of the children. *Id.* at 462-64. Indeed, the focus of the Act on "needy children" stands in marked contrast to the State's argument. See notes 86-87, 89-94, 111-15 *infra* and accompanying text. While the Douglas dissent in *Williams* fully accepted the lower court's decision in this regard, 397 U.S. at 493-94, the majority, although not relying on the State's argument, did note that there was considerable support in the legislative history for the view. 397 U.S. at 481 n.12.

64. 392 U.S. at 333.

65. *Id.* at 317. The statutory definition of "dependent child" is contained in 42 U.S.C. § 606(a) (1964). *King v. Smith*'s stress on the requirements of entitlement was reiterated by the lower court in *Dandridge,* 297 F. Supp. at 454, 455, 462-64, and Dews v. Henry, 297 F. Supp. at 591.

66. 397 U.S. 254 (1970).

recognized that "[s]uch benefits are a matter of statutory entitlement for persons qualified to receive them."[67]

Conceptually, the maximum grant provision may operate to defeat a person's statutory entitlement in either of two ways: it denies AFDC benefits to children born into an AFDC family after the state of maximum has been reached; or, it decreases the benefits to which an eligible individual would normally be entitled—the pie is divided into smaller slices.[68] The *Williams* majority, in a vital premise of its argument, accepted the latter characterization of the maximum grant as "a more realistic view"—"the lot of the entire family is diminished because of the presence of additional children without any increase in payments."[69] It is the *family* grant that is diminished rather than any particular individual being totally denied. Having accepted this premise, the Court then simply turned to the literal words of section 402(a)(10), and found that as long as some aid was provided to all eligible families, and hence, all eligible children, the statutory mandate was satisfied.[70] The statute does not prevent the state from arbitrarily varying benefits among recipients as long as all are aided in some way.

The dissenting opinions of Justices Douglas and Marshall (Justice Brennan joining in the Marshall opinion) both begin from the alternative position—the maximum grant does not merely reduce the entitlement of each recipient in the family; it totally denies the entitlement of the later born children.[71] Unlike the majority opinion, which is almost devoid of any analysis of legislative intent and merely looks to the actual usage of the money, the dissent, reflecting its concern with the legal rights generated by section 402(a)(10)—with the way in which the state, not the parent, administers AFDC funds[72]—turned to the history and purpose of the Act.

Whereas, the majority blithely characterizes AFDC as a *family* grant, the dissent places emphasis on the individual as the beneficiary of the Act—it is the "dependent child," as defined in section 406, that is

67. *Id.* at 262. *See* Christensen, *Of Prior Hearings and Welfare as "New Property,"* 3 CLEARINGHOUSE REV. 321 (1970).

68. The court in Westberry v. Fisher, 297 F. Supp. 1109, 1112 n.6 (D. Me. 1969), recognized this distinction and commented that "it is obvious that the effect of the discrimination worked by the regulations is borne by the entire family."

69. 397 U.S. at 477.

70. *Id.* at 481.

71. *See id.* at 490 (Douglas, J., dissenting); *id.* at 509 (Marshall, J., dissenting). Judge Winter's opinion in the lower court also characterized the operation of the maximum grant as a denial of entitlement, arguing "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 child living with one parent, does not count as a 'dependent child.'" 297 F. Supp. at 455.

72. 397 U.S. at 502 (Douglas, J., dissenting).

to be protected under the Act.[73] As specifically noted in the Act and as confirmed by legislative and administrative history, the individual need of the dependent child and his caretaker(s) is the established standard for computing benefits.[74] In 1962, the Act was amended to provide a program of services *"for each child"* receiving AFDC benefits[75] and, in 1967, when Congress provided for a program of family services, the emphasis was again on the benefits accruing to "each appropriate individual."[76] The requirement that states adjust their computation schedules to account for changes in the cost of living, also inserted in the Act in 1967, again refers to "the amounts used by the state to determine the needs of individuals. . . ."[77] And in its letter to state administrators on the implementation of this provision, HEW stressed the need for recomputing "individual payments" to "individual recipients."[78] While family needs may be a crucial consideration in administering the Act, the beneficiary, the focus of concern, remains the individual recipient.

Acceptance of this premise is fortified by the manner in which the federal share is computed. It is unnecessary to examine the complex formulations here; suffice it to note that federal funds are provided for *each* eligible recipient on the AFDC rolls and no maximum is imposed.[79] The federal government, then, continues to contribute for every child born, even when the state does not provide any additional benefits. Justice Marshall rejected this result:

> [T]he State passes *none* of this subsidy on to the large families for the use of additional dependent children.
>
> . . . The effect is to shift a greater proportion of the support of large families from the State to the Federal Government as the family size increases. . . . It is impossible to conclude that Congress intended so incongruous a result. On the contrary, when Congress undertook to subsidize payments on behalf of *each recipient*—including each dependent child—it seems clear that Congress intended

73. 42 U.S.C. § 606(a) (1964), *as amended* (Supp. V, 1970).

74. The Act specifically refers to "individuals wishing to make application" and provides for the furnishing of aid "to all eligible individuals." 42 U.S.C. § 602(a)(10) (1964), *as amended* (Supp. V, 1970). When it became clear in 1950 that the individual need of the dependent child was not being fully met because of the needs of the child's caretaker, the Act was revised to include caretakers as eligible individuals. H.R. REP. No. 1300, 81st Cong., 1st Sess. 46 (1949).

75. 42 U.S.C. § 602(a)(13) (1964), *as amended* (Supp. V, 1970).

76. 42 U.S.C. §§ 602(a)(14) & (15), *as amended* (Supp. V, 1970). *See* S. REP. No. 744, 90th Cong., 1st Sess., 155 (1967), which also refers to "each child" and "the individual child."

77. 42 U.S.C. § 602(a)(23), *as amended* (Supp. V, 1970).

78. HEW, Plan Reqnirement 402(a)(23)—Updating AFDC Assistance Standards—Further Classification, State Letter No. 1074, January 8, 1970 (Copy on file with *California Law Review*).

79. 42 U.S.C. § 603 (Supp. V, 1970).

> each needy dependent child to receive the use and benefit of at least the incremental amount of the federal subsidy paid on his account.[80]

Even if we were to accept the majority premise as to the operation of the maximum grant, however, its conclusion regarding the meaning of the entitlement section does not follow. The purpose and history of section 402(a)(10) indicates that the state is barred from denying *or diminishing* the entitlement of an eligible recipient.

Prior to the development of the modern public assistance system, almost absolute discretion was vested in the administrators of poverty programs to decide not only who would receive assistance but also the amount to be provided.[81] One of the primary revisions effectuated by the enactment of the Social Security Act of 1935 was the elimination of this arbitrary system in favor of the policy of statutory entitlement. Thus, the original administering agency for the new program established that the Act:

> [removed] from the discretion of the state and local administration the right to exclude persons falling within the scope of the program, because all persons meeting the eligibility qualifications are equal before the law and have a right to receive assistance under uniform application of the law.[82]

It was an essential purpose of the entitlement section to remove from the administering authorities the powers now conferred on them by the *Williams* majority—excessive discretion in the dissemination of public assistance. If the states can arbitrarily diminish the benefits received by a recipient to a minimum, they can effectively exclude him from the operation of the program. If the state were to decide that AFDC families whose last names began with the letters A through M would hereafter receive a maximum of only $1, while other AFDC families would receive their full need, it is difficult to conceive of any statutory impediment under the majority interpretation "in spite of the fact that the needs of none or very few dependent children would thereby be taken into account in the actual assistance granted."[83] In fact, since

80. Dandridge v. Williams, 397 U.S. 471, 513 (Marshall, J., dissenting). *See id.* at 499-500 (Douglas, J., dissenting).

81. *See* BELL, *supra* note 32, at 3-19; H. LEYENDECKER, PROBLEMS AND POLICY IN PUBLIC ASSISTANCE 45-57 (1955); Wedemeyer & Moore, *The American Welfare System*, 54 CALIF. L. REV. 326, 327-28 (1966).

82. HEW HANDBOOK, *supra* note 45, pt. IV, § 2321.

83. Dandridge v. Williams, 397 U.S. 471, 512 (1970) (Marshall, J., dissenting). In Dews v. Henry, 297 F. Supp. at 591, the court explicitly rejected the prerogative of the state to condition the federal entitlement:

> The definitious in the Act contain no limitation on eligibility by reason of the fact that one who is otherwise a "dependent child" resides in a household with or without one or more other siblings or other persons.

Such a capability would permit the state to avoid the entitlement mandate, and hence, was impermissible.

AFDC assistance also includes services, it would seem to follow that all monetary aid to some arbitrarily selected group of recipient families could be eliminated without violating the Act. The House Committee on Ways and Means provided a simple response while considering section 402(a)(10) in 1950: "[T]his difference in treatment accorded to eligible people results in undue hardship on needy persons and is inappropriate in a program financed from Federal funds."[84]

Under the majority reading of section 402(a)(10), each member of the large AFDC family unit is entitled to something from the program but not on the same basis as an individual in a small family. With the imposition of the maximum grant, no pretense is made that diminution of the individual benefit level reflects any assessment of actual need (although the *Williams* majority erroneously makes such a claim);[85] it is an arbitrary conditioning of the eligibility of an otherwise fully qualified individual. As the Court noted in *King v. Smith*, Congress "intended to provide programs for the economic security and protection of all children" and cannot have intended "arbitrarily to leave one class of destitute children entirely without meaningful protection."[86] If Alabama had reduced entitlements to a bare minimum—still giving the dependent child "some" aid as required by the *Williams* majority—it is doubtful that the Court's emphasis on "meaningful protection" for all children would have been satisfied. Alabama violated the statutory mandate of section 402(a)(10) by denying meaningful protection to dependent children because of the behavior of their parents;[87] Maryland violates the Act by denying meaningful protection to dependent children because of the behavior of their parents in having additional children through the imposition of the maximum grant.

The Court's legitimization of a state power to condition the scope of the individual statutory right on the basis of the number of children in the family conflicts with the very essence of the principle of statutory entitlement established in the Social Security Act and renders any right-duty relationship created by the statutory scheme meaningless. It establishes a concept of entitlement that varies from one assistance unit to the next within the same state. HEW, pursuant to the Act, has specifically provided that "the benefits of the program will be equally available to all eligible persons; and that state policies, standards and methods will apply equally."[88] The inequalities in entitlement intro-

84. H.R. REP. No. 1300, 81st Cong., 1st Sess. 48 (1949).

85. 397 U.S. at 479-80. Economies of scale in large families are reflected in the need standards. The maximum grant operates without regard to individual need.

86. 392 U.S. 309, 330 (1967).

87. *Id.* at 325-26.

88. HEW HANDBOOK, *supra* note 45, pt. II, § 4300. The HEW HANDBOOK, pt. II, § 4200(1), requires "equitable" standards of administration throughout the state.

duced by the maximum grant policy and accepted by the *Williams* majority directly contravene this mandate for uniformity of treatment.

As a direct consequence of its narrow concept of statutory entitlement, the Court has also denigrated the statutory mandate that welfare benefits be determined on the basis of need and that the state cannot use factors which bear no reasonable relation to need.[89] Whether or not the state retains the power to determine the extent of need that must be met and the manner in which need is to be determined—as *Rosado v. Wyman*[90] clearly indicates—it must use need as the governing criterion. In *Anderson v. Schaefer*,[91] a district court held that the Georgia employable mother rule violated the equal protection clause in that it classified individuals on a basis that bore no reasonable relation to the Social Security Act's purpose—to aid those otherwise eligible individuals who are in need of financial assistance. Similarly, in *King v. Smith*,[92] the Supreme Court, while citing numerous regulatory provisions relating to individual need, critically noted that the state regulation under which the child was ineligible for assistance was "unrelated to need."[93] The crucial factor was the absence of any legal obligation on the part of the substitute father to provide support for the needs of the child. Since provision for the child's

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The statutory guarantee of uniformity is contained in 42 U.S.C. § 602(a)(1) (1964), *as amended* (Supp. V, 1970).

As will be noted below, since family size is an impermissible basis for distinguishing among needy children and their caretakers, they must all be viewed as being "in like situation" and not subject to differential treatment. See accompanying notes 175-293 *infra*.

89. The Act constantly stresses that the object of Congress' concern is "needy dependent children." *See, e.g.*, the purpose clause of the Act, 42 U.S.C. § 601 (1964), *as amended*, 42 U.S.C. § 601 (Supp. V, 1970). The definition of dependent children in Section 406(a) of the Act, 42 U.S.C. § 606(a) (Supp. V, 1970), at the outset notes that it is referring to a "needy" child. The definitional section goes on to indicate that payments are made to meet the "needs" of the recipients. A 1967 amendment to the Social Security Act required the states, by July 1, 1969, to adjust their standards for determining "the needs of *individuals*" to reflect changes in living costs. 42 U.S.C. § 602(a)(23) (Supp. V, 1970) (emphasis added). An excellent compilation of the legislative history on this subject is provided in a supplementary memorandum filed in the lower court in *Williams v. Dandridge*.

HEW regulations state that "the determination of need and amount of assistance for all applicants and recipients will be made on an objective and equitable basis." 45 C.F.R. § 233.20(a)(1) (1970). The regulations delineate the income that may properly be considered in determining need. State plans must indicate "the method used in determining needs," which are required to be one of the three approaches described in HEW's Simplified Methods for Determining Need or a comparable method approved by HEW. 45 C.F.R. at § 233.20(a)(2)(iii).

90. 397 U.S. 397 (1970).

91. Civil Nos. 10443, 10882, 10991 (N.D. Ga., April 5, 1968).

92. 392 U.S. 309 (1968).

93. *Id.* at 320.

financial needs was the impetus for the AFDC program, the Alabama regulation could not prevail.[94]

The maximum grant provision, however, directly contravenes the requirements of the federal statute and regulations. In determining the benefits of the members of the Williams family, for example, the Maryland Department of Public Welfare computed the monthly need of the family to be $296. It provided only $250,[95] however, apparently ignoring the need criteria otherwise utilized once the $250 maximum was reached. Welfare administrators determined the amount available to each individual recipient thereafter solely by the number of children in the family—a standard based on family size rather than on individual needs—and maintained it at a level below that admittedly essential for the basic necessities of life. The only difference between a child in the Williams family and a child in a family of three children is the presence of brothers and sisters—a circumstance for which the recipient child is certainly not responsible and for which he should not be punished.[96] As the district court noted in *Williams v. Dandridge*:

> 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 is 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.[97]

Further, the disparity between actual individual need and the amount of AFDC assistance established by the use of a differential standard, and the hardships thus occasioned, become even more severe in larger family units. Dependent children who are members of

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94. *Id.* at 325, 329. *See generally id.* at 318, where the Court discusses the central position of individual need in the statutory scheme.

95. Memorandum for Plaintiff at 2-4, Williams v. Dandridge, 297 F. Supp. 450 (D. Md. 1968, *modified* Feb. 25, 1969) *rev'd* 397 U.S. 471 (1970).

96. As the Court noted in Levy v. Louisiana, 391 U.S. 68, 72 (1968), "it is invidious to discriminate against [the children] when no action, conduct, or demeanor of theirs is possibly relevant. . . ." See text accompanying note 228 *infra.*

97. 297 F. Supp. at 458. The Arizona court in *Dews*, 297 F. Supp. at 592, also rejected this result:

> The Arizona Statutes assume that for example, either the fourth child in a family receiving such aid whose grant would bring the aggregate amount above $220 per month is not in need, or his need must go unsatisfied. Experience and common sense do not support this conclusion.

families under the onus of the maximum grant provision will receive proportionately less toward satisfaction of their needs as the number of children in the family increases. A member of a family of twelve, for example, will receive only one-half as much as a person in a family of eight; and the amount given the family of eight is admittedly inadequate to satisfy their substantive needs. Again, this does not reflect a revised computation of need; rather, the grant is arbitrarily diminished without regard to need. Neither the United States Congress nor the legislatures of the states upon enacting AFDC legislation intended to consign children in large families to a life of privation, while other children, otherwise similarly situated, but living in smaller family units, are at least provided with funds more closely approximating subsistence demands.

2. *"To Help Maintain and Strengthen Family Life"*[98]

Another major argument presented by those opposing the maximum grant was the inconsistency of the provision with section 401 of the Social Security Act, which declares that the purpose of the Act is to encourage:

> [T]he 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 each 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 parent or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection . . .*"[99]

State AFDC enabling statutes also frequently express this statutory purpose.[100]

The appellees in *Williams* argued, however, that rather than strengthening the family unit, the maximum grant provision directly impairs it. Since children living with certain relatives remain eligible for AFDC,[101] parents may avoid the impact of the grant ceiling by "farming out" some offspring to relatives and friends. In the *Williams* case, for example, if Linda Williams sent two of her eight children to live with relatives, each of the two children would be entitled to receive $79 per month as an individual assistance unit, while the remaining family unit would still receive the $250 maximum grant. Thus, dissolution of the family unit would make available a total of $408. This

98. 42 U.S.C. § 601 (Supp. V, 1970).

99. *Id.* (emphasis added).

100. *See, e.g.*, MD. ANN. CODE, art. 88A, § 44A (1969 Replacement Volume), which closely mirrors the federal declaration of purpose.

101. 42 U.S.C. § 606(a) (Supp. V, 1970).

circumvention of the impact of the maximum grant provision would be achieved, however, only by impairing a fundamental purpose of the AFDC program—to help maintain and strengthen family life and to provide for children to be raised in their own homes.[102] Since the framers of the Social Security Act did not intend to encourage the separation of children from the home as a means of securing the funds required for subsistence,[103] and the precise effect of the maximum grant provision is to encourage the surrender of parental rights as the cost of sustaining the material well-being of the members of the family, the state policy is inconsistent with the statutory purpose.

But for the *Williams* majority, the mandate of section 401 to strengthen family life refers not only to the nuclear family, but also encompasses the extended family. While the children may not be living with their parents, they are with relatives—"the kinship time may be attenuated but it cannot be destroyed."[104] This response is so disarmingly simple that it is practically overwhelming. Practically, but not completely. Once one recovers from the initial shock and considers the absence of any documented support for the Court's assertion, the question is raised whether this could possibly be the interpretation that Congress intended.

In fact, the Court might well have argued that the congressional support for familial life was intended as an alternative to institutional care. If that were the case, reading "family" to include the extended family might be a viable interpretation. However, consideration of section 401 and the legislative history of this clause suggests that it was more probably intended to refer only to the nuclear family.

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102. In Dews v. Henry, 297 F. Supp. 587 (D. Ariz. 1969), the court stated:

> Actually, the maximum grant statutes as now enacted provide an economic club aimed at breaking up the family unit and thus frustrating and defeating the stated purpose of Congress in enacting the legislation designed to aid needy, dependent children and families with such dependent children. . . . Under such provisions, the obvious pressures would be to split the family into units . . . in order to gain the fullest amount of assistance under the maximum grant and statutes. This would be contrary to the federal statutes and therefore invalid.

Id. at 592.

The *Dandridge* court accepted this statutory argument in its original opinion but later modified its holding to rest solely on constitutional grounds, without deciding the statutory issue. 297 F. Supp. at 469. See text accompanying notes 143-46 *infra*. *See also* Memorandum for Plaintiff, at 10, Williams v. Dandridge, 297 F. Supp. 450 (D. Md. 1968); Note, *supra* note 42, at 1233, discussing this frustration of the statutory purposes. Westberry v. Fisher, 297 F. Supp. 1109 (D. Me. 1969), also followed this unusual approach of deciding the constitutional grounds first to avoid the necessity of deciding the statutory issue. In dictum, the court commented that it had "substantial doubt" whether the regulation was in conflict with the Social Security Act but admitted it lacked the data requisite for decision. *Id.* at 1111 n.2.

103. See notes 105-06 *infra* and accompanying text.

104. 397 U.S. at 480.

Section 401 itself, while continually noting the role of relatives as caretakers, stresses that a primary objective is to assure "the maintenance of continual *parental* care and protection."[105] Both at the time of passage of the Act and later, congressional documents refer to the need to care for dependent children "with their mother in their own home."[106] HEW, while recognizing the contribution of relatives to a child's development, nevertheless stresses the primary importance of parental supervision.

> Financial inability to meet a child's needs . . . should not be allowed to force a *parent* to surrender responsibility for bringing up the child.[107]

> Strengthening family life means sustaining and increasing the ability of *parents* to carry out their *parental responsibilities* in the care, protection, and support of their children. . . .[108]

Given this policy and the commitment of our society to care for children in the nuclear family, whenever possible, it is not surprising that the lower federal courts considering maximums never considered interpreting "family" in the majority's sense. Rather, they placed great weight on the negative impact of the state policy on the maintenance of a viable parent-child relationship.[109]

3. *"To Provide For the Care of Dependent Children"*[110]

While the preceding discussion indicates the basic inconsistencies of the maximum grant policy with the statutory provisions that the Court considered, there are two additional lines of argument, not presented by the appellees, which appear relevant. The first considers the implications of the mandate of section 401 that the AFDC program

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105. 42 U.S.C. § 601, *as amended*, (Supp. V, 1970) (emphasis added).

106. The following excerpts from the legislative history of the Act attest to the congressional interest in maintaining a strong family life:

> Through cash grants adjusted to the needs of the family it is possible to keep the young children with their mother in their own home, thus preventing the necessity of placing the children in institutions. This is recognized by everyone to be the least expensive and altogether the most desirable method for meeting the needs of these families that has yet been devised.

S. REP. No. 628, 74th Cong., 1st Sess. 17 (1935).

> It has long been recognized in this country that the best provision that can be made for families [without a potential breadwinner] is public aid with respect to dependent children in their own homes.

H.R. REP. No. 615, 74th Cong., 1st Sess. 10 (1935). An excellent statement of the support for the attack on maximum grants via legislative history is provided in a supplementary memorandum filed in the *Dandridge* case. 297 F. Supp. at 459.

107. HEW HANDBOOK, *supra* note 45, pt. IV, § 3401 (emphasis added).

108. HEW HANDBOOK, *supra* note 45, pt. IV, § 422.3 (emphasis added).

109. See note 102 *supra*.

110. 42 U.S.C. § 601 (Supp. V, 1970), declares AFDC seeks to encourage "the care of dependent children. . . ."

is designed to provide for the *care* of dependent children.[111]

HEW regulations recognize the necessity of assuring children an opportunity to "have the economic support and services they need for health and development";[112] to "receive an education that will help them to realize their capacities";[113] to "share in the life of neighborhood and community";[114] and that "[a]dequate care of the health of both parents and children is an essential factor in attaining the objectives of the program."[115] The maximum grant provision, however, by reducing the benefits available to a level below that admittedly needed for subsistence, diminishes the ability to properly care for the children in larger families.

Poverty occurs most frequently in large families. Mothers in the upper income group have two to three children; in the lowest socio-economic classes, a mother has between five and six children.[116] There are fifteen million indigent children in the United States. Six and one-half million, or 43 percent, are from families with at least five members under 18 years of age.[117] Nine per cent of families with one child are poor, while 42 per cent of families with six or more children have incomes below the poverty level.[118] By denying adequate financial assistance to families with the greatest need, the maximum grant provision most severely affects those who can least afford to cope with the resulting hardship.

The care of a dependent child is directly related to the financial ability of the family to provide for its physical and emotional needs. The effects of deprivation on physical well-being are well documented.[119] Concomitant with hunger and malnutrition are higher in-

111. *Id.*

112. HEW HANDBOOK, *supra* note 45, pt. IV, § 3401.

113. *Id.*

114. *Id.*

115. *Id.* Similarly the United States Supreme Court in King v. Smith, 392 U.S. 309, 325 (1968), recognized "that protection of such [needy dependent] children is the paramount goal of AFDC."

116. Planned Parenthood, World Population, the Poverty of Abundance 29-30 (no date).

117. Orshansky, *Who's Who Among the Poor: A Demographic View of Poverty*, SOCIAL SECURITY BULL., July, 1965, 14, 15.

118. J. Tydings, Family Planning: A Basic Human Right 2 (reprint of a speech delivered before the United States Senate, May 8, 1969). Over one-fourth of all families with three or more children were living in poverty in 1966, and forty percent were poor or near poor. Orshansky, *The Shape of Poverty in 1966*, SOCIAL SECURITY BULL., March, 1968, table 4. See NATIONAL ACADEMY OF SCIENCES, THE GROWTH OF THE U.S. POPULATION (1965); testimony of Philip M. Hauser, *Hearings on S. 1676 Before the Subcomm. on Foreign Aid Expenditures of the Senate Comm. on Government Operations*, 89th Cong., 2d Sess., ser. 2, pt. 1, at 110 (1966).

119. For comprehensive documentation of the physical, mental, social, and educational deprivation suffered by children in families having below-subsistence incomes,

fant and maternal mortality rates, organic brain damage to the child, retarded growth and learning rates, greater susceptibility to disease, and numerous psychic damages.[120] Denying parents an adequate income severely impairs their ability to provide an adequate diet, decent housing, educational opportunity, psychic well-being, recreational advantages, physical and mental care, and the countless other elements essential to a decent living standard. Congress and HEW regulations have mandated a program for the care of dependent children. The maximum grant provision introduces a restriction directly limiting the ability to provide that care.

Consider the life style and the treatment of the children in one of

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see C.S. CHILMAN, GROWING UP POOR (1966); CITIZENS' BOARD OF INQUIRY INTO HUNGER AND MALNUTRITION IN THE UNITED STATES, HUNGER, U.S.A. 16-38 (1968); POVERTY IN AMERICA (rev. ed. L.A. Ferman, J.L. Kornbluth & A. Haber eds. 1965); POVERTY IN AMERICA (M.S. Gordon ed. 1965); M. HARRINGTON, THE OTHER AMERICA (1962); LOW-INCOME LIFE STYLES (L.M. Irelan ed. no date); MENTAL HEALTH OF THE POOR (F. Reissman, J. Cohen & A. Pearl eds. 1964); F. REISSMAN, THE CULTURALLY DEPRIVED CHILD (1962).

120. The 1955 and 1965 nationwide household consumption studies conducted by the Department of Agriculture documented the direct relationship between the adequacy of a child's dietary intake and the amount of income available. U.S. DEP'T. OF AGRICULTURE, HOUSEHOLD FOOD CONSUMPTION SURVEY, 1955 AND 1965, FOOD CONSUMPTION OF HOUSEHOLDS IN THE UNITED STATES, REPORT NO. 1. The following commentary from the 1964 Annual Report of the Council of Economic Advisers summarizes the consequences of an inadequate income:

> *The vicious circle.* Poverty breeds poverty. A poor individual or family has a high probability of staying poor. Low incomes carry with them high risks of illness; limitations on mobility; limited access to education, information, and training. Poor parents cannot give their children the opportunities for better health and education needed to improve their lot. Lack of motivation, hope, and incentive is a more subtle but no less powerful barrier than lack of financial means. Thus the cruel legacy of poverty is passed from parents to children.
>
> Escape from poverty is not easy for American children raised in families accustomed to living on relief. A recent sample study of AFDC recipients found that more than 40 percent of the parents were themselves raised in homes where public assistance had been received. It is difficult for children to find and follow avenues leading out of poverty in environments where education is deprecated and hope is smothered. This is particularly true when discrimination appears as an insurmountable barrier. Education may be seen as a waste of time if even the well-trained are forced to accept menial labor because of their color or nationality.

ECONOMIC REPORT OF THE PRESIDENT 69 (1964).

A graphic description of the "culture of poverty" is presented in President Johnson's message on poverty, March 16, 1964:

> The young man or woman who grows up without a decent education, in a broken home, in a hostile and squalid environment, in ill health, or in the face of racial injustice—that young man or woman is often trapped in a life of poverty.
>
> He does not have the skills demanded by a complex society. He does not know how to acquire those skills. He faces a mounting sense of despair which drains initiative and ambition and energy.

H.R. MISC. DOC. NO. 243, 88th Cong., 2d Sess. 2 (1964).

the recent maximum grant cases.[121] The house in which the family lives does not comply with minimum standards of decency and health. The children are forced to sleep two and three to a bed or cot. None of them have more than one change of clothing and all need shoes. There are inadequate funds to pay school expenses, including the cost of lunches, often forcing the children to skip this meal. One child missed approximately 22 days of school last semester because of illness and hunger, producing trouble with the truant authorities. Another child, three years old, weighs only 20 pounds because of worms and a deficient diet. All of the children require dental care, but there is no money available for such "extras." Refrigeration equipment is in poor condition, resulting in food spoilage. The state directly contributed to the maintenance of such inhuman conditions through the imposition of a maximum monthly grant of only $123, thereby inhibiting the effectuation of the AFDC program to care for the dependent child.[122]

Maximum grant rules denigrate the AFDC child care program in still another way. As noted previously, the practical effect of the regulation is to encourage the dissolution of the nuclear family unit. Both the federal statute[123] and HEW regulations[124] explicitly recognize that a homogeneous nuclear family and home care are vital elements of the child's well-being. In encouraging the disruption of this homogeneity, the maximum grant provision directly impairs the parent's ability to properly care for the dependent child.[125]

The *Williams* majority, in the process of arguing that the state retains discretion to arbitrarily vary benefits provided each AFDC family, blandly dismisses the impact of its decision by noting that "*only*" one-thirteenth of AFDC families in Maryland received less than their state-determined need because of the imposition of the maximum grant,

121. The facts are derived from the Memorandum for Plaintiff at 5-6, Robinson v. Hackney, Civil No. 68-4-294 (S.D. Tex., filed April 2, 1968).

122. Texas previously provided $135 per month maximum. However, the decision in *King v. Smith* added substantially to the assistance rolls. Since a constitutional provision limited the state contribution for assistance to sixty million dollars, the state welfare department decreased the maximum for all AFDC recipients. The department then attempted to eliminate its maximum grant, which was the subject of the litigation in Robinson v. Hackney, Civil No. 68-4-294 (S.D. Tex., filed Apr. 2, 1968), and to introduce an even more restrictive standard. Although the *Robinson* litigation was held to be moot because of the change, the new regulations have subsequently been held to violate the Social Security Act. Jefferson v. Hackney, 304 F. Supp. 1332 (N.D. Tex. 1969).

123. 42 U.S.C. § 601 (Supp. V, 1970).

124. HEW HANDBOOK, *supra* note 45, pt. IV, § 3401.

125. On the functions performed by the family, see A MODERN INTRODUCTION TO THE FAMILY (N.W. Bell & E.F. Vogel eds. 1960); K. Young, *What Strong Family Life Means to Our Society*, in MARRIAGE AND FAMILY LIFE IN THE MODERN WORLD 2 (R.S. Cavan ed. 1960); W.J. GOODE, THE FAMILY (1964).

only 2,537 families.[126] It is difficult to understand the Court's insensitive dismissal of the consequences of forcing the thousands of children in these 2,537 families to survive on a below-subsistence income, particularly in light of the congressional concern for their proper care. It is equally difficult to understand how the Court can ignore the serious impact on the thousands of other children in AFDC families in states having maximums or which might utilize maximums as a result of the Court's legitimization of the practice.[127] That these dependent children should be singled out and denied adequate care because their parents had additional children, while dependent children in smaller families otherwise similarly situated are provided care more consistent with their needs, seems grossly out of conformity with the statutory purpose of AFDC.

4. *Coerced Family Planning*

There is one final line of argument based on the non-conformity of the maximum grant with the Social Security Act which, while not directly argued or considered by the Court, deserves consideration—the coerced use of family planning.

The 1967 amendments to the Social Security Act established a clear federal policy of family planning assistance to recipient families.[128] Congress, however, guaranteed that the services would be completely voluntary and that benefit eligibility or assistance levels would not be conditioned on the acceptance of such services.[129] This approach is in complete harmony with the policy established by both HEW and the Office of Economic Opportunity which specifically "guarantees freedom from coercion or pressure of mind or conscience"[130] in publicly supported family services.

Maryland, in *Williams*, suggested the desire to induce family limitation as one of its justifications for imposing a maximum grant policy.[131] This approach, however, introduces a strong coercive

126. 397 U.S. at 480 n.10.

127. See note 9 *supra*. Texas, for example, abolished its maximum grant under threat of pending litigation. See note 122 *supra*.

128. 42 U.S.C. §§ 602(a)(14) & (15) (Supp. V, 1970).

129. Congress provided "that the acceptance by such child, relative, or individual of family planning services provided under the plan shall be voluntary . . . and shall not be a prerequisite to eligibility for or the receipt of any other service or aid under the plan . . . ." 42 U.S.C. § 602(a)(15)(c) (Supp. V, 1970).

130. HEW, REPORT ON FAMILY PLANNING 1 (1966). *See* HEW, THE ROLE OF PUBLIC WELFARE IN FAMILY PLANNING (no date). Both HEW and OEO issued statements reiterating their policy of free choice and non-compulsion following an attack on tax-supported family planning programs by the Catholic Bishops of the United States. *See* Dienes, *Moral Beliefs and Legal Norms: Perspectives on Birth Control*, 11 ST. LOUIS L.J. 536, 564 (1967).

131. Dandridge v. Williams, 397 U.S. 471, 484 (1970).

element into a service offered to promote freedom of choice in family size. The birth of a child after the benefit ceiling is reached results in increased hardships exceeding those normally resulting from the birth of a child to a poverty family. Coupled with the minimal effectiveness of the "natural" means of family limitation accepted by certain religious groups,[132] the threat of limitation of benefits induces the welfare recipient to accept and utilize family planning services which he may view as morally illicit; his conscientious determinations and freedom of choice are impaired by the threat of financial reprisals. This potential for coercion is intensified by the necessarily precarious relation between the welfare system and the indigent client. The ability of welfare administrators and case workers to make determinations seriously affecting the life style of the recipient and the recipient's dependence on public aid necessitate extreme caution. The threat of hardship produced by the operation of grant ceilings adds increased severity to the coercion implicit in an offer of birth control assistance.[133]

In introducing this coercive element, the maximum grant provision directly contravenes the principle of voluntarism clearly acknowledged in the Social Security Act,[134] carefully safeguarded in the policies adopted by the federal agencies,[135] and firmly enunciated by Presidents Johnson[136] and Nixon.[137]

B. HEW and Congressional Authorizations

While the above analysis indicates numerous bases on which the Court should have found the maximum grant in conflict with the purposes and policies mandated by the federal statutes and regulations, of vital importance in the *Williams* majority's rationale was its assertion that HEW had, in fact, authoritatively interpreted the Act to condone maximum grants and the Congress had implicitly given its approval to

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132. Studies indicate that the "rhythm" method, approved for use by Roman Catholics under certain limited conditions, is only 58 percent effective in controlling births. Brief for Planned Parenthood Federation of America, Inc., at 49b, Griswold v. Connecticut, 381 U.S. 479 (1965); see text at note 349 *infra*.

133. *See* Dienes, *supra* note 130, at 563-64, where the author notes the need for extreme caution to prevent coercion "to assure that the individual recipient's decision is as free as to acceptance or rejection and as to choice of method as possible". 11 St. Louis L.J. at 564.

134. See note 129 *supra*.

135. See note 130 *supra*.

136. In his 1966 Health and Welfare message, President Johnson stated:

> We have a growing concern to foster the integrity of the family and the opportunity of each child. It is essential that all families have access to the information and services that will allow freedom to choose the number and spacing of their children within the dictates of individual conscience.

137. President Nixon in his July 21, 1969, Message on Population Growth said:

> Clearly, in no circumstances will the activities associated with our pursuit of

the state policy.[138] But again, the Court's opinion lacks adequate historical support.

Following the passage of a 1967 amendment to the Social Security Act[139] mandating a state adjustment in AFDC cost of living standards and a proportional adjustment in any state imposed maximums,[140] HEW issued implementing regulations which declared that a state plan must "[p]rovide 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."[141] The regulations specifically used the term "dollar maximum."[142] Reference to maximums in this and other HEW publications arguably constituted a recognition of their validity. Further, HEW had previously approved the Maryland state plan, which contained the maximum grant provision, as well as those of some twenty other states which have utilized maximums.

The State presented this argument in the lower federal court in *Williams v. Dandridge.* In its first opinion,[143] the district court held the maximum grant regulation both unconstitutional and invalid as in conflict with the Social Security Act. In its supplemental opinion,[144] however, the court, for the first time considered the effect of the 1967 amendments and withdrew its holdings based on the Act, while reiterating its prior decision regarding the unconstitutionality of the provisions. In fact, the federal court accepted the premise that HEW "implicitly considered maximum grant regulations not to be violative of the Act."[145] However, in the absence of any considered treatment by the agency of the maximum grant factor, the court was unwilling to infer that HEW had authoritatively interpreted the Act to legitimatize the policy.[146]

But the United States Supreme Court was not as reluctant. The Court noted that the "Secretary has not disapproved any state plan because of its maximum grant provision," and concluded that HEW

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this goal [extending family planning to the five million women needing subsidized services within five years] be allowed to infringe upon the religious convictions or personal wishes and freedom of any individual, nor will they be allowed to impair the absolute right of all individuals to have such matters of conscience respected by public authoritics.

138. *See* 397 U.S. at 480.

139. Act of Jan. 2, 1968, Pub. L. No. 90-248, § 213(b), 81 Stat. 896, *amending* 42 U.S.C. § 602(a) (1964) (codified at 42 U.S.C. § 602(a)(23) (Supp. V, 1970)).

140. 42 U.S.C. § 602(a)(23) (Supp. V, 1970).

141. 45 C.F.R. § 233.20(a)(3)(viii) (1970).

142. 45 C.F.R. § 233.20(a)(2)(ii) (1970).

143. 297 F. Supp. at 450-59.

144. *Id.* at 459.

145. *Id.* at 460.

146. *Id.*

therefore had approved the maximum grant provision.[147] More specifically, HEW had "explicitly recognized state maximum grant systems,"[148] a fact which the majority, through one of its frequent inferential leaps, transformed into HEW approval.

But, as Justice Marshall concisely stated in his dissent: ". . . if anything at all is completely clear in this area of the law it is that the failure of HEW to cut off funds from the state program has no meaning at all."[149] Since HEW is very much a political animal with a natural reluctance to engage in a jousting match with the state government through conformity hearings, and is severely restricted in its freedom of action by reason of its limited sanction of cut-off of funds, any inference from its failure to take action regarding the maximum grant practice is highly questionable. It is notable that although HEW had also approved state plans that incorporated a substitute father or man in the house theory, such approval did not prevent the Court in *King v. Smith* from finding nonconformity with the Social Security Act. In spite of the numerous maximum grant cases which have been filed, HEW has thus far given no definitive indication of its position.[150] In fact, as Justice Marshall noted in his *Williams* dissent, in briefs submitted in other cases, HEW and the Solicitor General referred to family maximum grants as arbitrary, oppressive of large families, resulting in patently different treatment of individuals, and possibly being in disfavor with Congress.[151] Given the inconsistencies between the Act and the maximum grant provisions, the numerous instances in which the administrative regulations conflict with the use of the maximum grant, and the failure of the agency to definitively articulate its position, it is doubtful that HEW's nonaction can be given the meaning attributed to it by the majority in *Williams*.

But assuming, *arguendo*, that HEW, without full-scale investigation, had implicitly legitimatized state maximum grants, as Justice Douglas, dissenting, noted: ". . . whatever may be said for its constituting an affirmative determination of the compliance of a state plan with the Social Security Act, [it] is not such a determination as is entitled to decisive weight in the judicial determination of this ques-

147. 397 U.S. at 480.

148. *Id.*

149. 397 U.S. at 516 (Marshall, J., dissenting). See Justice Douglas, concurring, in Rosado v. Wyman, 397 U.S. 397, 425-27 (1970), on the factors inhibiting effective administrative action.

150. See note 10 *supra*.

151. 397 U.S. at 515 n.8 (Marshall, J., dissenting), *citing* Memorandum for the United States as Amicus Curiae, Rosado v. Wyman, 397 U.S. 397 (1970); Brief of Robert H. Finch, Secretary of Health, Education and Welfare as Amicus Curiae, Lampton v. Bonin, 299 F. Supp. 336, 304 F. Supp. 1384 (E.D. La. 1969); Brief of Robert H. Finch, Jefferson v. Hackney, 304 F. Supp. 1332 (N.D. Tex. 1969).

tion."[152] While administrative decisions regarding the Act's interpretation should be given great weight,[153] the courts retain ultimate authority to reject an agency's interpretation if found to be erroneous.[154] The ultimate question then is the conformity of the Act with the congressional intent and it is essential to grapple with the *Williams* Court's assertion that Congress had implicitly legitimatized the state maximum grant.

The Court placed principal reliance on the 1967 cost of living amendment to the Social Security Act, section 402(a)(23) which specifically referred to maximums. It requires that state plans:

> provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to refleet 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.*[155]

While other congressional references to the maximum grant were cited by the state and discussed by the dissent,[156] it was this provision which provided the primary point of reference for the majority. Therefore, an analysis of the extent to which section 402(a)(23) supports state utilization of the family maximum grant is necessary.

It is highly questionable to construe the mere reference to an existing state policy or practice in a highly complex revision of the statutory requirements in a section of the bill designed to be ameliorative,[157] enacted without any significant debate,[158] as congressional legit-

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152. 397 U.S. at 507-08 (Douglas, J., dissenting).

153. See Williams v. Dandridge, 297 F. Supp. at 460-61; 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 326-28 (1958).

154. Volkswagenwerk v. FMC, 390 U.S. 261, 272 (1968); Udall v. Tallman, 380 U.S. 1, 16 (1965); United States v. American Trucking Ass'ns., 310 U.S. 534, 543 (1940); Haggar Co. v. Helvering, 308 U.S. 389, 394 (1940). The *Dandridge* opinion provides an extensive citation of authority regarding the weight to be given to the interpretations by administrative agencies. 297 F. Supp. at 460-61.

155. 42 U.S.C. § 602(a)(23) (Supp. V, 1970) (emphasis added).

156. See notes 167-68 *infra* and accompanying text.

157. The remedial purpose of the provision is clearly revealed by its legislative history. The AFDC cost of living provision was introduced in § 213(a)(5) of H.R. 12080 by the Senate Finance Committee. The initial four subsections of § 213 provided for a $7.50 increase in OAA, AB and APTD. This provision, then, was a companion to the benefit increases provided in the other categories. *See* STAFF OF SENATE COMM. ON FINANCE AND HOUSE COMM. ON WAYS AND MEANS, 90TH CONG., 1st SESS., BRIEF DESCRIPTION OF SENATE AMENDMENTS 26-27 (1967); S. REP. No. 744, 90th Cong., 1st Sess. 170, 293 (1967). The legislative hearings also suggest the benign purpose of this provision. In fact, HEW proposed that states be required to meet full need and included a cost of living provision in its proposed legislation. *Hearings on H.R. 12080 Before the Senate Comm. on Finance,* 90th Cong., 1st Sess., pt. 1, at 716. *See generally id.*, pt. 1, at 255, 256-57, 259, 332-33, 334; *id.*, pt. 2, at 941, 1112-13, 1304; *id.*, pt. 3, at 1765, 1813, A187; 113 CONG. REC. 33559-60 (1967).

Although the Court, in Rosado v. Wyman, 397 U.S. 397 (1970), did not find

imization. Congress probably gave no thought to the legitimacy of maximum grants but merely acted within the confines of the *de facto* situation.[159] As Justice Douglas indicated:

> [E]very congressional reference to an existing practice does not automatically imply approval of that practice. The task of statutory construction requires more. It requires courts to look to the context of that reference, and to the history of relevant legislation.[160]

As the Court made clear in *Rosado v. Wyman*, section 402(a)(23) is a remedial provision[161] which seeks to afford protection to the welfare beneficiary and to realize more fully the purpose of the AFDC program by imposing requirements on state welfare plans. Such provisions should be construed with the remedial purpose in mind[162] rather than read to legitimatize restrictive or punitive measures. Moreover, any reading that would directly contravene the objectives of the AFDC program should be avoided[163]—"we must not be guided

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in section 402(a)(23) a congressional mandate to provide increased welfare benefits, its remedial purpose was nevertheless completely accepted.

> We think two broad purposes may be ascribed to § 402(a)(23): First, to require States to face up realistically to the magnitude of the public assistance requirement and lay bare the extent to which their programs fall short of fulfilling actual need; second, to prod the States to apportion their payments on a more equitable basis.

Id. at 412-13. States are barred from rendering section 402(a)(23) "a futile, hollow, and, indeed, a deceptive gesture." *Id.* at 415.

Judge Cassiby in his dissent in Lampton v. Bonin, 304 F. Supp. 1384, 1390-401 (E.D. La. 1969) and Judge Weinstein in the district court opinion in Rosado v. Wyman, 304 F. Supp. 1356 (E.D.N.Y. 1969), *rev'd*, 414 F.2d 170 (2d Cir. 1969), *rev'd*, 397 U.S. 397 (1970), after carefully analyzing the legislative history of section 402(a)(23), had both found the amendment to be remedial, designed more fully to achieve the objectives of the Act.

158. In its amicus brief submitted in Lampton v. Bonin, 304 F. Supp. 1384 (E.D. La. 1969), HEW commented that "the Congress could hardly have paid less attention to it." Quoted in the Court of Appeals decision in Rosado v. Wyman, 414 F.2d 170, 179 (2d Cir. 1969). Similarly, Judge Winter in *Dandridge* noted the brevity of legislative discussion of the provision. 297 F. Supp. at 466. The reports cited in note 157 *supra* provided no indication that section 402(a)(23) produced any controversy.

159. *See* Williams v. Dandridge, 297 F. Supp. at 466-67.

160. 397 U.S. at 504.

161. See note 157 *supra*.

162. *See* II J.G. SUTHERLAND, STATUTORY CONSTRUCTION §§ 3302, 4510 (1943, Supp. 1969).

163. There is ample judicial authority for the proposition that the interpretation of a clause must proceed "with reference to the leading idea or purpose of the whole instrument." *Id.* at § 4703. The "intention of the whole controls interpretation of the parts." *Id.* at § 4704.

> The presumption is that the lawmaker has a definite purpose in every enactment and has adopted and formulated the subsidiary provisions in harmony with that purpose; that these are needful to accomplish it; and that, if that is the intended effect, they will, at least, conduce to effectuate it. That purpose is an implied limitation on the sense of general terms, and a touchstone for the expansion of narrower terms. This intention affords the key to the sense and scope of minor provisions.

by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy."[164]

Indeed, the refusal to read section 402(a)(23) as a congressional sanction of state maximum grants would be fully consistent with the Supreme Court's recent interpretation[165] of Congress' reference to residency requirements in the Social Security Act. Even though the statutory references to residency were far more pronounced than the single mention of "maximum," the Court recognized that "the statute does not approve, much less prescribe, . . . [the] requirement."[166] In the present instance, section 402(a)(23) is a congressional directive that state dollar maximums must be adjusted to reflect changes in the cost of living—it is not a congressional approval of the state grant ceilings.

Similarly, the other enactments forwarded by the state as signifying congressional authorization of the maximum grant,[167] were, in reality, attempts by Congress to avoid the policy's negative impact. Rather than implying approval of the maximum grant, if anything, they suggest disapproval.[168] The failure of the Congress to act to remedy a perceived wrong cannot properly be transformed into congressional approval of the wrong given the motivational and institutional impediments to congressional action. But this seems to be the intendment of the *Williams* majority. In another inferential leap, they find in congressional "recognition"[169] of the maximum grant and in the fact that "Congress itself has acknowledged a full awareness of state maximum grant limitations,"[170] a basis for concluding that Congress placed its imprimatur on the state policy, while leaving ". . . [t]he structure of specific maximums . . . to the States . . . ."[171] In light of all the disparaties between the maximum grant policy and the Social Security

Id. In fact, the intention and spirit of the statute are said to prevail over the letter and the letter must be read, if possible, so as to conform to the former. *Id.* at § 4706. Numerous authorities are cited by Sutherland in support of these norms.

The doctrine of interpreting a statute "on the basis of the equity or spirit of the statute" would appear directly relevant to this argument. See III *id.* §§ 6006-07 and the numerous authorities cited therein. Such a determination involves consideration of the statutory policy and social justice. *Id.* at § 6007.

164. Dandridge v. Williams, 397 U.S. at 517 (Marshall, J., dissenting).

165. Shapiro v. Thompson, 394 U.S. 618 (1969).

166. *Id.* at 639. *See* 42 U.S.C. § 602(b) (Supp. V, 1970), for the statutory reference to residency requirements.

167. 42 U.S.C. § 606(b), *as amended,* (Supp. V, 1970) and 42 U.S.C. § 1396 b(f), *as amended,* (Supp. V, 1970).

168. As Justice Douglas indicates, while both provisions cited in note 167 *supra* refer to state maxima, neither suggests approval of the practice. Both appear to be designed to avoid the negative effects of the grant ceiling. 397 U.S. at 506 (Douglas, J., dissenting). See Amici Brief, *supra* note 9, at 56-60.

169. 397 U.S. at 482.

170. *Id.*

171. *Id.*

Act, the welfare claimants were entitled to a more careful analysis of their claims than was afforded by the *Williams* majority.

While it might have been possible, prior to *Williams,* to argue that congressional references to maximums must not be interpreted to constitute authorization in order to avoid a finding of unconstitutionality—since Congress lacks the power to legitimatize a policy which is itself unconstitutional[172] and Congress should be presumed to be acting in conformity with the Constitution[173]—the decision effectively precludes such an approach. The Court also legitimatized the maximum grant provision on constitutional grounds,[174] and it is this phase of the Court's opinion that will be considered next.

II

EQUAL PROTECTION CONSIDERATIONS

Early in his dissent in *Dandridge v. Williams,* Justice Marshall states:

> More important in the long run than this misreading of a federal statute . . . is the Court's emasculation of the Equal Protection Clause as a constitutional principle applicable to the area of social welfare administration.
>
> . . . the Court's decision today is wholly without precedent.[175]

Justice Marshall's evaluation may actually be an understatement of the potential implications of the Court's emasculation of equal protection—the consequences may go well beyond the confines of welfare administration. The character of the Court's approach to equal protection adjudication, especially when contrasted with its benign treatment of procedural due process in welfare cases in *Goldberg v. Kelly,*[176] decided only two weeks earlier, coupled with the bloc identity of the

172. The Supreme Court, in Shapiro v. Thompson, 394 U.S. 618 (1969), specifically declared that "Congress may not authorize the States to violate the Equal Protection Clause", *id.* at 651, and again, "Congress is without power to enlist state cooperation in a joint federal-state program by legislation which authorizes the States to violate the Equal Protection Clause." *Id.*

173. United States v. National Dairy Corp., 372 U.S. 29, 32 (1963); Scales v. United States, 367 U.S. 203, 211 (1961); United States v. Butler, 297 U.S. 1, 67 (1936); Brown v. Maryland, 12 Wheat. 419, 436 (1827).

174. As the Court indicated in Shapiro v. Thompson, 394 U.S. 618 (1969), ". . . it is the responsive state legislation which infringes constitutional rights. By itself, . . . [the statutory section] has absolutely no restrictive effect. It is therefore not the statute but only the state requirements which pose the constitutional question." *Id.* at 641.

175. 397 U.S. at 508-09 (Marshall, J., dissenting).

176. 397 U.S. 254 (1970). The Court held that welfare recipients have a due process right to an evidentiary hearing before the termination of benefits. Justice Brennan, writing for the Court, adopted a very benign orientation to the interests of welfare recipients and tended to confine the range of discretion afforded state welfare administrators.

Justices in the majority and dissent,[177] portends evil days for those who see in the equal protection clause the tool for refashioning American society to more fully realize that vaguely-defined value, equality.[178] The revolutionary dimensions of the Court's decision are further suggested by the fact that in holding the maximum grant policy consistent with the equal protection guarantee of the fourteenth amendment, *Williams* overruled *sub silentio* every lower court that had considered the question.[179]

The majority does not challenge the fact that the Maryland maximum grant regulation classified AFDC recipients on the basis of family size and treated the classes differently. The basic purpose of the AFDC program is to assist in the care of needy dependent children in their own family unit.[180] In order to effectuate that objective, the Social Security Act recognizes a single class: needy dependent children and their caretakers. The maximum grant provision, however, creates two subclasses of beneficiaries: needy dependent children and other beneficiaries who are members of a family whose collective benefits would exceed the grant ceiling, and needy dependent children and their caretakers in smaller families. The only difference between the two subclasses is the number of members in the family unit; they are otherwise similarly situated. Nevertheless, one subclass is judged by the standard of need and receives the normal benefits provided for the care of needy dependent children; their statutory entitlement is recognized and implemented. The other subclass, however, solely because of the number of children in the family, receives benefits computed without consideration of need standards.[181] The maximum grant—utilizing the ma-

177. Only Justices Marshall and Brennan dissented on the equal protection issue. Justice Douglas would have invalidated the maximum grant provision on statutory grounds and, therefore, felt it unnecessary to reach the constitutional issues. All three Justices are usually identified with a "liberal," "loose-construction," or "activist" orientation to constitutional adjudication manifested by the decisionmaking of the Warren Court.

Justice Stewart wrote the opinion for the Court, joined by Justice White. Justice Black and Chief Justice Burger concurred but fully accepted the Stewart opinion on the merits. Justice Harlan concurred, stressing his constant rejection of any more stringent test for classifications involving "fundamental" interests. See notes 190 & 235 *infra* and accompanying text. None of these Justices can really be identified with the orientation to constitutional questions associated with the dissenting Justices.

While such labeling is necessarily dangerous and often proves inaccurate, the dissenting Justices would appear to form a fairly cohesive bloc on civil liberties cases. The Justices in the majority, on the other hand, would appear far less cohesive.

178. See: Kurland, *Egalitarianism and the Warren Court*, 68 MICH. L. REV. 629 (1970), for a critical commentary on such an orientation; Goldberg, *Equality and Governmental Action*, 39 N.Y.U.L. REV. 205 (1964), for a more favorable treatment.

179. See note 10 *supra*.

180. 42 U.S.C. § 601 (Supp. V, 1970). See notes 98-103, 110-25 *supra* and accompanying text.

181. The creation and effect of such a classification was "readily apparent" to

jority's characterization of the effect of the provision—reduces the entitlement of members of this group and denies them the equivalent support for the care of children and the maintenance of a viable nuclear family relation.

Not every legislative classification occasioning differential treatment is a violation of equal protection, however, and the fourteenth amendment guarantees are violated only "[w]hen the existence of a distinct class is demonstrated and when it is further shown that the different treatment is not based on some reasonable classification . . . ."[182] The task for the Court, then, was to determine if the maximum grant classification was *reasonable.*

A. Fundamental Personal Interests

In developing their argument, Appellees and Amici relied on a line of equal protection cases in which courts had utilized an especially stringent standard in assessing the viability of the state interest offered to justify the classification.[183] While recognizing a broad range of legislative discretion in fashioning social and economic classifications,[184] these cases had recognized that "when it is a critical personal right which the classification invades, that law . . . must be remitted to the gauntlet of a judicial review searching for adequate justification."[185] In such

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the court in Westberry v. Fisher, 297 F. Supp. 1109, 1112 (D. Me. 1969). In analyzing the state maximum grant rule, the court noted that:

> [T]he maximum grant regulation thus creates two classes of persons—families with six or less dependent children and families with seven or more dependent children—and subjects the larger families to different treatment than the smaller families. For the small families the amount of their grant will more likely approximate their actual budgeted requirements. But the larger the family, the greater the inevitable gap between their budgeted need and the flat maximum grant . . . .

Id.

182. Hernandez v. Texas, 347 U.S. 475, 478 (1953).

183. Brief for Appellees at 11-13, Amici Brief, *supra* note 9, at 16-26, Dandridge v. Williams, 397 U.S. 471 (1970).

184. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); Morey v. Doud, 354 U.S. 457, 465-66 (1957); Williamson v. Lee Optical Inc., 348 U.S. 483 (1955). As was stated in Levy v. Louisiana, 391 U.S. 68, 71 (1968): "In applying the Equal Protection Clause to social and economic legislation, we give great latitude to the legislature in making classifications".

185. Hobson v. Hansen, 269 F. Supp. 401, 507 (D.D.C. 1967), *aff'd sub nom.*, Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969). The United States Supreme Court, in Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966), stated: "We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." *See* Williams v. Rhodes, 393 U.S. 23 (1968); Levy v. Louisiana, 391 U.S. 68 (1968); Baxtrom v. Herold, 383 U.S. 107 (1966); Carrington v. Rash, 380 U.S. 89 (1965); Cox v. Louisiana, 379 U.S. 536 (1965); Reynolds v. Sims, 377 U.S. 533, 561-62 (1964); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). *See generally* Horowitz, *Unseparate But Unequal—The Emerg-*

cases, showing some merely tenable, rational justification for the classification does not suffice; substantial justification is required to demonstrate reasonableness. In *Shapiro v. Thompson*, for example, the Court found that state welfare residency requirements created a classification which "touches on the *fundamental right* of interstate movement . . . ."[186] The Court specifically rejected as inadequate "a mere showing of a rational relationship"[187] between the classification and a state interest, since, in such a case, "traditional criteria do not apply"[188] and "constitutionality must be judged by the stricter standard of whether [the classification] promotes a *compelling* state interest."[189]

While the *Williams* majority—with the exception of Justice Harlan concurring[190]—purported to acknowledge the principle thus fashioned, it denied its applicability in the case under consideration. Ac-

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ing Fourteenth Amendment Issue in Public School Education, 13 U.C.L.A.L. REV. 1147, 1155-58 (1966); Michelman, *Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Van Alstyne, *Student Academic Freedom and the Rule-Making Powers of Public Universities: Some Constitutional Considerations*, 2 LAW IN TRANS. Q. 1, 28 (1965); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1067, 1120-23, 1127-31 (1969) [this 125 page article is one of the most exhaustive treatments of equal protection doctrine since Tussman and tenBroek's classic, *Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949)]; Note, *Hobson v. Hansen: Judicial Supervision of the Color-Blind School Board*, 81 HARV. L. REV. 1511, 1511-12 (1968).

186. 394 U.S. 618, 638 (1969) (emphasis added). For suggestions regarding considerations applicable in determining if a right is "fundamental", see D. Kirp, *The Poor, the Schools, and Equal Protection*, 38 HARV. EDUC. REV. 635, 641 (1968); *Developments supra* note 2, at 1127-31. As the Harvard *Developments* suggests: "The Court seems to have treated the cases on an ad hoc basis, occasionally pointing out reasons for regarding particular interests as important, but not formulating a comprehensive theory." *Id.* at 1130. It should be noted, however, that the courts applying "strict scrutiny" have usually characterized the "interest" involved as a "right". Whether they would accept a personal interest as sufficiently vital to demand protection without so labeling it is doubtful after *Williams*. But perhaps any "interest" sufficiently vital to invoke this special form of judicial protection could also find a constitutional nexus. See text accompanying notes 211-14 *infra*.

187. 394 U.S. 618, 634.

188. *Id.* at 638.

189. *Id.*

190. Justice Harlan found the standard of rationality, which he views as the governing standard in all equal protection adjudication, to be satisfied by the maximum grant regulation. This was the basis of his concurrence "and not because this case involves only interests in 'the area of economics and social welfare' . . . ." 397 U.S. at 490.

Justice Harlan's rejection of "fundamental interest" is another manifestation of his insistence on judicial restraint lest the Court become a "super-legislature". Shapiro v. Thompson, 394 U.S. 618, 661 (1969). When the right is grounded in the Constitution, Justice Harlan argues, the infringement can be dealt with under the Due Process Clause. *See* Griswold v. Connecticut, 381 U.S. 479 (1965). If the interest is not constitutionally based, there is "nothing which entitles this Court to pick out particular human activities, characterize them as 'fundamental,' and give them added protection under an unusually stringent equal protection test." *Id.* at 662.

cording to the Court, the maximum grant regulation does not affect freedoms guaranteed by the Bill of Rights, which require the more stringent test, but rather is a social and economic regulation to be judged by the traditional standards used in *business* regulation cases.[191] Recognizing the evils of the New Deal era when the Court sat in judgment on the wisdom rather than legality of legislative policy, the Court, in a manifestation of deference to state authorities and of judicial restraint,[192] relied on cases and language fashioned for different problems in different times.

> For this Court to approve the invalidation of state economic or social regulation as 'overreaching' would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought.' . . . That era long ago passed into history.[193]

While the Court admitted that, unlike the business cases, "the administration of public welfare assistance . . . involves the most basic economic needs of impoverished human beings,"[194] this distinction was accorded no constitutional significance. Although purporting to recognize "the dramatically real factual difference between the cited cases and this one, [the Court could] find no basis for applying a different constitutional standard."[195]

Initially, it must be noted that the Court simply assumed that no fundamental constitutional guarantees were infringed. The mere fact that economic regulations are involved, however, does not preclude the possibility that constitutionally-based rights are impinged by the state law. Indeed, this was the very rationale underlying the Court's clearest delineation of the "compelling interest" standard in *Shapiro v. Thompson*.[196] While the residency requirements were embodied in the welfare law, the classification thus fashioned infringed on the fundamental right of interstate movement, thus requiring more stringent judicial scrutiny. Nor does characterizing welfare as a "privilege" rather than a "right" permit a state to circumvent the constitutional guarantees through its welfare regulations.[197] As the Court stated in *Goldberg v. Kelly*: "Their [welfare benefits] termination involves state

191. *See* 397 U.S. 485-86.

192. Justice Stewart expresses the view that the Court's use of the traditional business standard ". . . is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy." *Id.* at 486.

193. *Id.* at 484-85 (citations omitted).

194. *Id.* at 485.

195. *Id.*

196. 394 U.S. 618, 638 (1969).

197. See text accompanying notes 211-14 *infra.*

action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are a 'privilege' and not a 'right.'"[198] But the *Williams* Court, citing *Flemming v. Nestor*[199] where the Court had utilized such a right-privilege dichotomy, apparently did not even consider the possibility that basic constitutional guarantees might be infringed by the maximum grant provision.

There are a number of precedents which suggest that basic guarantees were at stake. For example, courts have recognized the maintenance of a viable marital and familial relationship as derivative of basic constitutional guarantees requiring judicial protection.[200] As will be discussed below, the *Williams* Court might have considered the impact of the maximum grant on such interests as the right to privacy in the marital relationship (where a viable marriage exists), the freedom to choose family size, and the interest in maintaining a harmonious marital union.[201] Similarly, the effect of the provision to induce the dissolution of the parent-child relationship as the price of adequate funds for subsistence and to place further strains on familial stability in the family already struggling to maintain itself against the disruptive effects of poverty also deserved judicial cognizance.[202] If the state cannot interfere with these guarantees directly, it should not be permitted to do so through indirect means.

Nor is it appropriate to dismiss the other interests involved in public assistance by the summary characterization of welfare regulations as social and economic controls demanding judicial deference to the state's legislative authority. Consideration of the factors underlying the Court's prior use of the "compelling interest" standard, suggests a very different conceptualization of the interests at stake in welfare administration.

The approach previously utilized by the courts in cases involving individual liberties reflected judicial sensitivity to the importance of the interests involved. It is highly questionable for a political system which purports to exalt human values to treat alleged violations of these interests in the same manner as challenges to the validity of ordi-

198. 397 U.S. 254, 262 (1970), *citing* Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969). See Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

199. 363 U.S. 603 (1960), cited in *Williams* at 397 U.S. 471, 485.

200. *See* Levy v. Louisiana, 391 U.S. 68, 71 (1968); Loving v. Virginia, 388 U.S. 1, 12 (1966); Griswold v. Connecticut, 381 U.S. 479 (1965); McLaughlin v. Florida, 379 U.S. 184 (1964); Prince v. Massachusetts, 321 U.S. 158 (1944); Skinner v. Oklahoma, 316 U.S. 535 (1942); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925). See text accompanying notes 326-32 *infra*.

201. See text accompanying notes 333-40 *infra*.

202. See text accompanying notes 341-44 *infra*.

nary economic controls. If we as a nation do purport to follow a hierarchy of values, our legal policy must be fashioned to reflect it. The elevation of human values over economic values in constitutional adjudication is a logical manifestation of this principle. To blandly throw basic human needs and aspirations into the same mix as business and industrial concerns goes far to vindicate the accusations of those critics of our system who claim we have distorted value priorities. For the Court to abdicate its responsibility to protect *scrupulously* these basic human needs, while other institutions of government are increasingly perceived as being closed to reform, is to invite chaos.

Closely related to this justification for special treatment of "human rights" cases is the special need of inarticulate, disadvantaged minorities for political representation. As Michael Harrington noted: "it is one of the cruelest ironies of social life in advanced countries that the dispossessed at the bottom of society are unable to speak for themselves . . . . [A]s a group, they are atomized. They have no face; they have no voice."[203] Whereas regular access to the system can be secured by aggregated, articulate groupings, the poor and minorities generally are especially dependent on a meaningful judicial response. It is precisely this dependency that has moved the courts to extend special protection to "insular minorities"[204] such as those dependent on public assistance. As stated by Judge Skelly Wright in *Hobson v. Hansen*:

> [T]hese groups are not always assured of a full and fair hearing through the ordinary political processes, not so much because of the chance of outright bias, but because of the abiding danger that the power structure—a term which need carry no disparaging or abusive overtones—may incline to pay little heed to even the deserving interests of a politically voiceless and invisible minority. These considerations impel a closer judicial surveillance and review of administrative judgments adversely affecting racial minorities, and the poor, than would otherwise be necessary.[205]

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203. M. HARRINGTON, THE OTHER AMERICA 14 (1962). *See* L. DAY & A. DAY, TOO MANY AMERICANS 71 (1964). On the requisites for "access" to the legal system, see A. DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957); D. TRUMAN, THE GOVERNMENTAL PROCESS (1957).

204. The need for special judicial protection of "insular minorities" was suggested by Justice Stone in United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). See Pollack, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 27, 29-30 (1959).

205. 269 F. Supp. at 507-08. The frequently quoted statement in Lee Optical Co. v. Williamson, 348 U.S. 483 (1955), quoting Munn v. Illinois, 94 U.S. 113, 134 (1876), stressed the importance of the availability of political access to the legislature as a justification for a narrow standard of review:

> The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and indnstrial conditions, because they may be unwise, improvident, or out of

Finally, the special scrutiny employed for classifications affecting personal human liberties has reflected an assessment by the courts of their competence vis-à-vis the legislatures to decide issues involving basic human freedoms guaranteed by the Constitution as opposed to complex social, economic, and technical issues. Whereas legislatures usually have the capability for marshalling the intelligence necessary for effective policy formulation in the latter area, the courts generally possess a greater insulation and the capacity for commitment to long-range principles vital to the preservation of personal guarantees. As has been noted: "Knowledge about civil and individual rights, unlike some economic data, is neither so technical nor so esoteric as to lie beyond the legitimate cognizance of the court."[206]

Consideration of the character of the individual interests arguably infringed by the maximum grant provision indicates the error of the *Williams* majority in refusing to utilize a compelling interest standard. It is difficult, for example, to conceive of any interest of greater importance to the individual and to the viability of a free and democratic society than access to the basic requisites of subsistence.[207] Deprived of the food, clothing, and other essentials necessary to the maintenance of life and family stability and unable to adequately articulate their needs to those in authority, individuals condemned to below-subsistence living by the grant ceiling are denied full, free, and meaningful participation in the democratic system.[208] Indeed, Justice Brennan, speak-

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harmony with a particular school of thought. . . . 'For protection against abuses by legislatures the people must resort to the polls, not to the courts.' 348 U.S. at 488. It is precisely the lack of political power of insular minorities, such as welfare recipients, to vindicate their rights that has provided the impetus for a more stringent standard of review.

206. Tussman & tenBroek, *supra* note 185, at 373. On the capabilities of the judicial actor vis-a-vis the legislature, see K. LLEWELLYN, THE BRAMBLE BUSH (1930); Dienes, *Artifical Donor Insemination: Perspectives on Legal and Social Change*, 54 IOWA L. REV. 253 (1968). For a discussion of the judiciary's capacity for principled decision-making, see A. BICKEL, THE LEAST DANGEROUS BRANCH 23-28, 49-65 (1962); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

207. The Court in Shapiro v. Thompson, 394 U.S. 618 (1970), took cognizance of the effect of the denial of welfare aid "upon which may depend the ability of the families to obtain the very means to subsist—food, shelter, and other necessities of life". *Id.* at 627. Justice Harlan, dissenting, suggested that the Court might be willing to accept such an interest as sufficient to make the "compelling interest" doctrine applicable. *Id.* at 661. It should be stressed, however, that the *Shapiro* holding clearly is based on the fundamental interest in freedom of interstate movement and the language concerning the importance of the subsistence interest is, at best, only dictum.

208. The poor tend to be politically inactive, are more susceptible to promises of quick and easy solutions, and experience feelings of powerlessness and frustration (alienation) inhibiting the development of community identity and political involvement. *See generally* R. LANE, POLITICAL LIFE (1959); S.M. LIPSET, POLITICAL MAN

ing for the Court in *Goldberg v. Kelly*, deemed the recipient's interest in assistance so vital that he analogized it to "property" rather than a "gratuity."[209] He added:

> Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the social malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to 'promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.'[210]

It is perhaps not surprising, given this orientation, to find Justice Brennan dissenting in *Williams*.

Whether or not we recognize that a citizen has a constitutional "right" to subsistence, his interest in such subsistence for the effectuation of all other constitutional guarantees is so fundamental as to demand greater judicial protection than pure economic interests. For the segment of the populace subject to welfare restrictions, the interest in subsistence cannot realistically be analogized to economic rights. As Judge Mansfield noted:

> We believe that with the stakes so high in terms of human misery the equal protection standard to be applied should be stricter than that used upon review of commercial legislation and more nearly approximate that applied to laws affecting fundamental constitutional rights.[211]

This is also the approach taken by Justice Marshall in his *Williams*

(1963); L. MILBRATH, POLITICAL PARTICIPATION (1965); Bendich, *Privacy, Poverty, and the Constitution*, in THE LAW OF THE POOR 83 (J. tenBroek ed. 1966); Haggerstrom, *The Power of the Poor*, in POVERTY IN AMERICA 315 (L.A. Ferman, J.L. Kornbluth & A. Haber, eds., 1965).

209. 397 U.S. at 262 n.8.

210. *Id.* at 265.

211. Rothstein v. Wyman, 303 F. Supp. 339, 347 (S.D.N.Y. 1969). Judge Mansfield strongly endorsed affording welfare recipients' interest in welfare benefits maximum constitutional protection.

> Receipt of welfare benefits may not at the present time constitute the exercise of a constitutional right. But among our Constitution's expressed purposes was the desire to "insure domestic tranquility" and "promote the general Welfare." Implicit in those phrases are certain basic concepts of humanity and decency. One of these, voiced as a goal in recent years by most responsible governmental leaders, both federal and state, is the desire to insure that indigent, unemployable citizens will at least have the bare minimums required for existence, without which our expressed fundamental constitutional rights and liberties frequently cannot be exercised and therefore become meaningless. Legislation with respect to welfare assistance, therefore, like that dealing with public education, access to public parks or playgrounds, or use of the mails, deals with a critical aspect of the personal lives of our citizens, whether such assistance be labelled a "right," "privilege" or "benefit."

Id. at 346-47.

dissent. Rejecting any "*a priori* definition of a 'right', fundamental or otherwise," he believes that the concern should be with balancing the interests at stake.[212] The person whose survival is at stake is not likely to be comforted by the knowledge that his "fundamental rights" are not at issue;[213] when governmental benefits essential to life are involved, "stricter constitutional standards" must be applied.[214]

The *Williams* Court, however, appears to have rejected any expansion of the subjects requiring use of the compelling interest standard. Not only does the opinion suggest the need to clearly demonstrate that the classification infringes a constitutionally-based right, but it suggests that the class of rights so protected might be narrowly circumscribed. Whereas Justice Stewart concurring in *Shapiro v. Thompson* had suggested that the more stringent standard was applicable to any constitutional right,[215] in *Williams* his focus was solely on the Bill of Rights and, more particularly, the first amendment.[216] This emphasis, coupled with the Court's failure to even consider the possibility that other "rights" might be affected by the maximum grant, may portend a narrow construction of "fundamental rights," at least in welfare administration, and possibly in equal protection adjudication generally. Whereas the Court took a benign approach to procedural guarantees in welfare—procedural due process seems to be a favored area for lawyers—the status of substantive protection seems to have been seriously impaired.[217]

B. Suspect Classifications

There is, however, another approach for requiring more stringent constitutional standards which involves considering the nature of the trait on which the classification is based. Classifications which in-

212. 397 U.S. at 520 (Marshall, J., dissenting).

213. *Id.* at 520-21 n.14. Judge Mansfield in Rothstein v. Wyman, 303 F. Supp. 339 (S.D.N.Y. 1969), also stressed the need for *meaningful* equal protection for the poor.

> Poverty is a bitter enough brew. It should not be made even less palatable by the addition of unjustifiable inequalities or discriminations. It must not be forgotten that in most cases public assistance represents the last resource of those bereft of any alternative. Equity (the state or quality of being equal, derived from the latin *acquitas*), should least of all be denied the poor.

Id. at 347.

214. 397 U.S. at 522.

215. 394 U.S. 518, 644 (1969) (Stewart, J. concurring). In fact, Justice Stewart suggests the doctrine would even be applicable to economic regulation cases. *Id.* See also *Shapiro v. Thompson* where reference is made to the "*compelling* governmental interest" doctrine in the context of a classification penalizing the exercise of "a constitutional right." *Id.* at 634. Justice Harlan, dissenting, cited this language to suggest that the doctrine is "perhaps [applicable to] those [classifications] based upon the exercise of any constitutional right." *Id.* at 659.

216. 397 U.S. at 484.

217. See note 176 *supra*.

volve differential treatment of a disadvantaged minority—such as classifications based on wealth,[218] alienage and nationality,[219] status,[220] race,[221] and perhaps, political allegiance[222] and residence[223]—are arguably "constitutionally suspect"[224] and therefore subject "to the most rigid scrutiny."[225] Thus, just as the nature of the interest involved may require special judicial scrutiny of the classification scheme, so also the use of a "suspect classification" may demand an extra degree of judicial protection. Although such a classification may be determined to be reasonable via a balancing test, its legitimization would require a substantial state interest.[226] While the *Williams* majority noted the existence of this approach to equal protection adjudication,[227] its possible relevance to the maximum grant was not discussed. However, careful consideration of the character and effects of the maximum grant provision suggests that suspect classifying traits are involved.

The most pronounced classifying trait in the case of maximum grants is the number of children in the family unit. Children in the subclass subject to the operation of the grant ceiling are discriminated against not because of any wrong-doing on their part, but merely because of their *status* as members of a large family.[228] When the size

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218. *See* Shapiro v. Thompson, 394 U.S. 618, 655 (1969) (Harlan J., dissenting); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956); Note, *Discrimination Against the Poor and the Fourteenth Amendment,* 81 HARV. L. REV. 435 (1967).

219. Takahashi v. Fish and Game Comm'n., 334 U.S. 410 (1948); Oyama v. California, 332 U.S. 633 (1948).

220. Levy v. Louisiana, 391 U.S. 68 (1968); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

221. Monroe v. Board of Comm'rs, 391 U.S. 450 (1968); Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964); Bolling v. Sharpe, 347 U.S. 497 (1954); Brown v. Board of Educ., 347 U.S. 483 (1954).

222. Williams v. Rhodes, 393 U.S. 23 (1968).

223. Shapiro v. Thompson, 394 U.S. 618 (1969). Justice Harlan, in dissent, appears correct in noting that a case will often involve both branches of the "compelling interest" doctrine. *Id.* at 660 n.9. *Shapiro,* for example, clearly was based on the fundamental interest approach but it could be argued that it also makes the use of "residency" a suspect criterion.

224. Bolling v. Sharpe, 347 U.S. 497, 499 (1954). *See* Tussman & tenBroek, *supra* note 185, at 353-61.

225. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

226. See *Developments, supra* note 2, at 1088 and the cases cited in notes 218-25 *supra.*

227. *See* 397 U.S. at 485 n.17.

228. "Status" has thus far been used against classifications based on legitimacy. Levy v. Louisiana, 391 U.S. 68 (1968), involved the right of illegitimates to recover as surviving children under a Louisiana wrongful death statute for the death of their mother. Denial of death benefits to children because of their status was held to violate equal protection. Since the status of illegitimacy bore no reasonable relationship to the wrong done the mother, argued the Court, it was an impermissible basis for the discriminatory treatment. *See* Glona v. American Guar. & Liab. Ins. Co., 391

of the family unit is utilized as a basis for classifying among disadvantaged minority groups, the courts must place an added burden of justification on the state if the intimate familial relationship which the courts have so carefully safeguarded is to be maintained. When discriminatory burdens are placed on the marital and familial life of segments of the poverty class whose special reliance on judicial protection has been continually acknowledged, the necessity for close judicial surveillance becomes imperative. Justice Marshall, dissenting, noted the resemblance of the maximum grant classification's "discrimination between children on the basis of a factor over which they have no control—the number of brothers and sisters"[229]—to the status classification of illegitimacy which was condemned in *Levy v. Louisiana*.[230]

The maximum grant may also produce other discriminatory effects which in turn would involve a suspect classification. Although such discrimination would not be intended, it arguably is sufficient if the regulation has the *effect* of imposing a discriminatory classification. It is not a discriminatory plan, intent, or motive that is vital, but whether the classification itself meets constitutional standards.[231]

One such discriminatory effect arises from the fact that poverty tends to increase as the number of children in a family increases.[232] The subclassification created by maximum grants, however, encompasses precisely this group. Thus, the *effect* of the provision is to place a burden on the poorest members of the class; and discrimination reflecting differences in wealth, whether intended or merely an innocent result, appears to have invoked the strict scrutiny and stern disapproval of the courts.[233]

U.S. 73 (1968). Again, these cases could be interpreted as applications of the judicial protection afforded the familial relation. See text at notes 337, 341-44 *infra*.

229. Dandridge v. Williams, 397 U.S. 471, 523 (1970).

230. 391 U.S. 68 (1968), cited by dissenting Justice Marshall in *Williams*, 397 U.S. at 523. See note 228 *supra*.

231. As Justice Brennan noted in Baker v. Carr, 369 U.S. 186, 266 (1962): "discrimination is equally bad when it reflects *no* policy, but simply arbitrary and capricious action" (emphasis added). Similarly, Judge Skelly Wright in Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967) noted that:

> The complaint that analytically no violation of equal protection vests unless the inequalities stem from a deliberate discriminatory plan is simply false. Whatever the law was once, it is a testament to our maturing concept of equality that, with the help of Supreme Court decisions in the last decade, we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and public interest as the perversity of willful scheme.

Id. at 497. Horowitz, *supra* note 185, at 1155, argues that the issue involved is whether "the classification . . . utilized, regardless of intent or motive [is] one which meets the standards of equal protection of the laws?" *See* Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 930, 931-32 (2d Cir. 1968); Horowitz, note 185 *supra*, at 1150-55.

232. See text accompanying notes 116-18 *supra*.

233. See note 218 *supra*. It should be noted, however, that numerous govern-

Another discriminatory effect may be produced by the racial composition of the welfare rolls. Racial classifications have produced the most consistent utilization of strict scrutiny.[234] Even Justice Harlan, who rejects the "compelling state interest" standard, interposes a caveat for racial classifications, "for historically the Equal Protection Clause was largely a product of the desire to eradicate legal distinctions founded upon race."[235]

The *Williams* Court noted "that there is no contention that the Maryland regulation is infected with a racially discriminatory purpose *or effect* such as to make it inherently suspect," but fact situations might be found which support such an argument. It is a well-documented fact that birth rates among non-white Americans are still 40% higher than those among white citizens.[236] Births of the fifth order or higher total nearly one-third of all non-white births—almost twice the proportion among white women.[237] Given the number of non-whites on the AFDC rolls,[238] the maximum grant provision's potential impact on the non-white population becomes apparent. Further, the fact that this discrimination is effectuated against AFDC recipients vis-à-vis other public assistance categories which frequently include a greater proportion of white citizens enhances the possibility of developing an argument based on discriminatory racial effects of the maximum grant.[239] The fact context, however, would be crucial.

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mental programs have an unintended effect of increasing the economic gap between members of our society. The potential impact of the principle is likely to evoke a hostile response regardless of its theoretical merits.

234. 397 U.S. at 485 n.17. See note 221 *supra*. The Civil Rights Act of 1964, § 601, 42 U.S.C. § 2000(d) (1964), provides that:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

235. Shapiro v. Thompson, 394 U.S. 618, 659 (1969). See Justice Harlan's concurring opinion in *Williams*, where he again inserts a caveat regarding racial classifications. 397 U.S. at 489.

236. Hill & Jaffe, *Negro Fertility and Family Size Preferences: Implications for Programming of Health and Social Services*, in THE NEGRO AMERICAN 205, 206-07 (T. Parsons & K. Clarke eds. 1966). It is the Negro poor, living in the rural South, who are least knowledgeable in the means to effectively control the incidence of birth. See P. WHELPTON, A. CAMPBELL & J. PATTERSON, FERTILITY AND FAMILY PLANNING IN THE UNITED STATES 239-43 (1966); *cf.* GREENLEIGH ASSOCIATES, FACTS, FALLACIES AND FUTURE 19 (1960); Browning & Parks, *Child Bearing Aspirations of Public Health Maternity Patients*, 54 AMER. J. PUB. HEALTH, 1831 (1964).

237. Hill & Jaffe, *supra* note 236, at 209.

238. In 1967, 46 percent of AFDC recipients were black and 51 percent were white [HEW, PRELIMINARY REPORT OF FINDINGS—1967 AFDC STUDY, NCSS REPORT AFDC-1(67), October, 1968, p. 7, table 3], in spite of the fact that the population generally is 87 percent white (1969 figure). U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, SER. P-20, No. 197, March 6, 1970.

239. This argument was rejected in Jefferson v. Hackney, 304 F. Supp. 1332,

Indeed, this problem pervades all governmental spending. Any program which is *de facto* unavailable to a segment of the society involves differential effects, and the disadvantaged segment is frequently the poor or racial minorities. Not every classification produced by public programs, even if it involves a "suspect trait," is necessarily invidious but the courts must carefully scrutinize such classifications and the state interests involved in order adequately to safeguard the vital values at stake.

C. *Traditional Equal Protection Applied.*

Given the Court's rejection of the compelling state interest standard, it becomes necessary to consider the demands imposed by traditional equal protection doctrine derived from business regulation cases, and their application to the maximum grant provision. More particularly, it is necessary to evaluate the conclusion of Justice Marshall, dissenting, that the state grant ceiling should not have been sustained even under the traditional standard.[240]

Under traditional equal protection, a classification is invalid only "when it is without any reasonable basis and therefore is purely arbitrary."[241] Mere inequality or lack of exactitude in defining the classes is insufficient. If any state of facts at the time the classification is fashioned can be conceived that would sustain the classification, such facts are assumed. The burden of proof—which seems to be on the state under the compelling state interest standard—is on the one challenging the classification. Nor do the courts necessarily limit their analysis to the primary purpose of the classification scheme. If there is any reasonable purpose which the classification reasonably implements—regardless of whether the provision embodying the classification was, in fact, passed for this purpose[242]—and the classification is reasonably related to this purpose,[243] the provision will be sustained.

1338-40 (N.D. Tex. 1969) and Lampton v. Bonin, 299 F. Supp. 336, 343-44 (E.D. La. 1969), on the basis, among others, that there was a substantial number of non-whites in the adult categories. *See* Miller, *Race, Poverty, and the Law*, in THE LAW OF THE POOR, 62-82 (J. tenBroek ed. 1966).

240. 397 U.S. at 529 (Marshall, J., dissenting).

241. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

242. *See, e.g.*, Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961); McGowan v. Maryland, 366 U.S. 420 (1961); Goesaert v. Cleary, 335 U.S. 464 (1948); Kotch v. Board of River Port Pilot Comm'rs., 330 U.S. 552 (1947); *Developments, supra* note 2, at 1077-81.

243. In Gulf, C. & S.F. Ry. v. Ellis, 165 U.S. 150, 155 (1896), the Court stated: "[T]he attempted classification . . . must always rest upon some difference which bears a reasonable and just relation to the act in which the classification is proposed, and can never be made arbitrarily and without any such basis." And in McLaughlin v. Florida, 379 U.S. 184, 191 (1964), it was recognized that "courts must reach and determine the question of whether the classifications drawn in a statute are reasonable

It does not require any mental gymnastics to appreciate the exacting burden this places on the challenging party or the extreme judicial restraint which such a standard represents. There are always a myriad of purposes which might be conjured up to sustain a classification scheme, regardless of the propriety of the principal purpose. To prove that all of these possible purposes are "totally arbitrary" borders on the impossible. On the other hand, evaluating the reasonableness of the relation of the classificatory scheme to the effectuation of the defined purpose, would appear to offer some leeway for challenge.[244] Even that, however, is fraught with difficulty; if there is *any* reasonable basis by which the legislature—not the Court—could conclude that a classification reasonably implements a permissible state purpose, that is deemed conclusive.[245] It is not very surprising, then, that equal protection has fallen into almost total disuse as a viable instrument for challenging state economic regulations.[246]

Turning first to the *purpose* of the maximum grant provision, the initial focus must be on its use as a means of protecting the public purse. In the trial court in *Williams v. Dandridge*, Maryland at first relied almost totally on an economic justification for the classification and the district court had noted that the clear purpose of the grant ceiling was "to conserve state funds."[247] The economic justification,

in light of its purpose." Similarly, Tussman & tenBroek, *supra* note 185, at 346, noted that "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *See Developments, supra* note 2, at 1077-87.

244. The court in Westberry v. Fisher, 297 F. Supp. 1109 (D. Me. 1969), utilized the traditional equal protection standard when it found the maximum grant violative of the fourteenth amendment:

> Under established constitutional principles, [the state] cannot, consistent with the Equal Protection Clause, discriminate in this manner against a specially selected class of persons unless it does so pursuant to some legitimate state interest, and unless the basis for the classification is reasonably relevant to this legitimate interest.

Id. at 1113.

In the welfare residency cases [Green v. Department of Pub. Welfare, 270 F. Supp. 173 (D. Del. 1967); Thompson v. Shapiro, 270 F. Supp. 331 (D. Conn. 1967), *aff'd*, 394 U.S. 618 (1969); Harrell v. Tobriner, 279 F. Supp. 22 (D.D.C. 1967)] and again in the district court opinion in Smith v. King, 277 F. Snpp. 31 (M.D. Ala. 1967), the courts spoke in terms of rationality in invalidating state classifications on equal protection grounds.

245. International Harvester Co. of America v. Missouri, 234 U.S. 199, 215 (1914); Metropolis Theater Co. v. Chicago, 228 U.S. 61, 70 (1913); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

246. The only recent "business" regulation case in which traditional equal protection was utilized against a state provision is Morey v. Doud, 354 U.S. 457 (1957), *See* Tussman & tenBroek, *supra* note 185, at 810-11; *Developments, supra* note 2, at 1087.

247. As the district court noted in *Dandridge*, 297 F. Supp. at 458:

> We have searched the record in vain for any state purpose to be served by

however, has come upon hard times as the courts have consistently rejected its viability as a permissible basis for classifying persons otherwise similarly situated.[248] In the maximum grant cases decided prior to *Williams*,[249] as well as in the welfare residency cases,[250] the district courts rejected this explanation for differential treatment. The Supreme Court itself in *Shapiro v. Thompson* stated: "The saving of welfare costs cannot be an independent ground for an invidious classification."[251] And in *King v. Smith*, the Court, in rejecting the economie justification offered for Alabama's "substitute father" rule, also cited the availability of less onerous alternatives for protecting the state interests.[252] Since state governments are rather consistently short of funds, recognition of the validity of such a justification would encourage the states to erect arbitrary differences among otherwise similarly situated persons under almost any state enactment.

The majority opinion in *Williams* is replete with references to the "finite resources" of the state for meeting welfare demands.[253] And at one point, the Court refers to the state interest "in allocating available public funds in such a way as fully to meet the needs of the largest possible number of families."[254] In spite of the fact that this interest is clearly the real reason for state utilization of maximum grant, the public purse rationale was not to be the vehicle for legitimatizing the classification scheme.

> 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.

248. *E.g.*, Green v. Department of Pub. Welfare, 270 F. Supp. 173, 177 (D. Del. 1967), where the court noted that the economic interest of the state, "no matter how worthy in the abstract, is not a permissible basis for differentiating between persons who otherwise possess the same status in their relationship to the State. . . ." See notes 249-52 *infra*; Edwards v. California, 314 U.S. 160 (1941).

249. Dews v. Henry, 297 F. Supp. 587, 592 (D. Ariz. 1969); Westberry v. Fisher, 297 F. Supp. 1109, 1114-15 (D. Me. 1969); Williams v. Dandridge, 297 F. Supp. 450, 458 (D. Md. 1968) *modified* Feb. 25, 1969, *rev'd* 397 U.S. 471 (1970); Collins v. State Bd. of Social Welfare, 248 Iowa 369, 377, 81 N.W.2d 4, 9 (1957).

250. Harrell v. Tobriner, 279 F. Supp. 22 (D.D.C. 1967); Thompson v. Shapiro, 270 F. Supp. 331 (D. Conn. 1967), *aff'd* 394 U.S. 618 (1969); Green v. Department of Pub. Welfare, 270 F. Supp. 173 (D. Del. 1967).

251. 394 U.S. 618, 633 (1969).

252. 392 U.S. 309, 334 (1968). *See id.* at 326-27; Rinaldi v. Yeager, 384 U.S. 305 (1966); Smith v. Reynolds, 277 F. Supp. 65 (E.D. Pa. 1967). As the Court stated in Shelton v. Tucker, 364 U.S. 479 (1960):

> In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.

Id. at 488.

253. *E.g.*, 397 U.S. at 472, 479.

254. *Id.* at 484.

Instead, the Court turned to a series of justifications offered by the State of Maryland in an amended pleading in the lower court grouped under the title "the principle of less benefit."[255] The state had contended that the maximum grant reasonably furthered legitimate state interests in inducing welfare recipients to secure gainful employment, in assuring that welfare recipients would not be receiving more than those working at the minimum wage, in encouraging wider use of family planning, and in discouraging desertion as a means of qualifying the family for AFDC. Underlying all of these alleged interests appears to be the questionable assumption that people *want* to be on welfare and *prefer* receiving government assistance rather than working,[256] an assumption characterizing the history of welfare administration under the poor laws.[257] The district court in *Williams v. Dandridge*, rejected the state's argument,[258] but the principle of less benefit was to gain a more favorable reception from the United States Supreme Court.

The *Williams* majority concentrates on the work incentive and minimum wage segments of the state argument to provide the basis for the maximum grant classification. Even accepting *arguendo* that these are proper state purposes, however, it remains necessary to determine whether the state classification scheme is reasonably designed to effectuate the interest. And it is here that the majority demonstrates its deference to the legislative judgment.[259]

No attempt is made by the Court to determine if the classification is, in fact, logically related to the admitted interests. The Court assumes that a legislature could conclude that the classification is "ra-

255. *Id.* at 484-85. The principle of less benefit, apparently originating with the English Poor Laws, was pressed by the State following the initial *Dandridge* decision and was considered by the district court in its supplementary opinion. The present analysis relies extensively on this opinion and the arguments of the attorneys for the welfare recipients and the amici. 297 F. Supp. at 467-69. See Appellees' Brief, 13-26; Appellees' Motion to Affirm, 5-10; Amici Brief, 35-50; Dandridge v. Williams, 397 U.S. 471 (1970); Defendant's Motion to Amend Findings of Fact and Judgment or in the Alternative to take Additional Testimony, or For a New Trial, or In the Alternative to Alter or Amend the Judgment; and, Plaintiff's Memorandum in Opposition to Defendant's Motion, Williams v. Dandridge, 297 F. Supp. 450 (D. Md., 1968).

256. *See* Briar, *Welfare from Below: Recipients' View of the Public Welfare System*, 54 CALIF. L. REV. 370 (1966).

257. Jacobs, *America's Schizophrenic View of the Poor*, in POVERTY: VIEWS FROM THE LEFT, 59 (J. Larner & I. Howe eds. 1969).

258. 297 F. Supp. at 467-69.

259. The Court noted that "[c]onflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court." 397 U.S. at 487.

tionally based" and "free from invidious discrimination," therefore, the classification scheme is deemed constitutional.[260] While it is true that the burden of proof is on the challenging party under the traditional equal protection standard,[261] the absence of any analysis by the Court of the relation of the classification to the asserted justification raises serious doubt whether the majority applied even its minimal reasonableness test. In fact, there are strong arguments for holding the classification scheme effectuated by maximum grants to be totally arbitrary, without any reasonable relation even to the Court's designated purposes.

The classification effectuated by maximum grant perceived as a work incentive, for example, is unreasonable as both underinclusive and overinclusive. Admitting a state interest in encouraging welfare recipients to work, there is no justification for arbitrarily singling out this group of AFDC recipients to bear the total burden of the state regulation. The interest would be equally applicable to welfare recipients in other categories and to AFDC recipients in smaller families. The classification is thus underinclusive in that it arbitrarily discriminates among those to whom the state interest applies. The *Williams* Court, recognizing this impediment, argued that "the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all."[262] While it appears reasonable that a state need not deal with an entire problem at one time, it is doubtful that a legislature can arbitrarily pick and choose individuals on a basis totally unrelated to the evil or problem the state seeks to combat.[263] The size of the family in this instance bear no relation whatsoever to the desire of the state to encourage welfare recipients to seek work.[264]

But an even more damning indictment of the maximum grant as a work incentive is the overinclusiveness of the classification scheme.

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260. *Id.*

261. Lindsley v. National Carbonic Gas Co., 220 U.S. 61, 78 (1911).

262. 397 U.S. at 486-87.

263. The need for administrative flexibility to experiment with varying solutions to problems is perhaps the clearest basis for under-inclusive regulations. Tussman & tenBroek, *supra* note 185, at 794-96. *Developments, supra* note 2, at 1086, however, notes:

> Despite these justifications, under-inclusion, by definition, exempts some persons from a classification to which they logically belong. Therefore, when the statute burdens the under-inclusive group, the political decision to implement the particular purpose is democratically less trustworthy since if those who should logically have been included in the classification had in fact been affected, they might not have approved the state's action.

264. As was said in Missouri, K. & T. Ry. v. May, 194 U.S. 267 (1904), a court must be satisfied that there is "no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched." *Id.* at 269.

Initially, it is important to delineate the subcategory of AFDC recipients that might be affected by inducements to work. Less than a majority of states presently fund programs providing benefits to families when the working parent is unemployed (AFDC-UP).[265] Thus, in most states if the handicapped and children below working age are excluded, the class of employables consists of working age children, the sole available parent, or a relative caretaker, since the designated beneficiary of AFDC is defined as a "needy child . . . 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. . . ."[266] Even assuming that some of these children and caretakers, frequently AFDC mothers, should be coerced into working—a questionable premise given the purpose of AFDC to care for children in their own home and strengthen family life—there is no assurance that employment will provide the needed funds denied through the imposition of the maximum grant,[267] that decent employment will be available, or that adequate child care facilities can be provided.[268] It is difficult to conceive of a justification for imposing a grant ceiling on all AFDC members in large families without consideration of actual capacity to work. As the district court in *Williams v. Dandridge* noted: "It is simply irrelevant to apply the 'less benefit' principle of encouraging employment to individuals who could not, in any event, be gainfully employed."[269] Even in states participating in AFDC-UP,[270] the purported justification sweeps too broadly. Again, the dollar ceiling is not placed only on families eligible for benefits solely because the breadwinner is unemployed, but encompasses all the members of large families. Further, it ignores the fact that the family is eligible precisely because the parent was unemployed through no fault of his own. Indeed, failure to actively pursue and accept available work results in disqualification under AFDC-UP.[271]

Even admitting, *arguendo*, to some state justification, less onerous alternatives already in use can achieve the state's purpose without the

265. 42 U.S.C. § 607 (Supp. V, 1970), expanded the concept of dependent child to include children deprived of parental support by reason of the unemployment of the father. *See* 45 C.F.R. § 233.100 (1969); 2 CCH Pov. L. Rep., ¶ 9335 (1969).

266. 42 U.S.C. § 606(a) (Supp. V, 1970).

267. In fact, 1,470,000 of the segment of the population designated as poor are employed on a regular basis and 471,000 are employed for at least part of the year. Dodyk, *supra* note 4, at 2.

268. See HEW, Child Care Arrangements of AFDC Recipients Under the Work Incentive Program, NCSS Report E-4 2 (1969) on the lack of adequate child care facilities.

269. 297 F. Supp. at 468. *See* Carter, *The Employment Potential of AFDC Mothers*, 6 Welfare in Review 4 (1968).

270. See note 265 *supra*.

271. 42 U.S.C. §§ 602(a)(19)(F), 607(b)(1)(B) (Supp. V, 1970).

use of the maximum grant. Disregard of income provisions, mandatory on the states, are specifically designed to encourage welfare recipients who are able to work, to do so.[272] The Work Incentive Program (WIN) initiated by the 1967 amendments requires that AFDC recipients, found to be employable, work. Further, the program provides training and incentive payments capable of making a work inducement scheme practical.[273] The uncontrolled state inducement to work, even to the extent that it reaches the limited number of employables on the AFDC rolls, would seem more likely to assure continued dependence on public relief rather than rehabilitation. If the state seeks to force those found unemployable under the WIN program to work via the maximum grant, the purpose would directly conflict with the Social Security Act and be impermissible. Just as the state purpose to encourage employment was inadequate to support the classification in the welfare residency cases,[274] so also it appears inadequate in the present instance. The classification scheme works its hardships not only on the small group which is possibly employable, but also on thousands of children and adults who could not or should not be induced to seek employment.

While the *Williams* Court cited the same language used to justify underinclusiveness to avoid the implications of the classification's overinclusiveness,[275] the rationale appears totally inappropriate in this instance. The burdens imposed by the maximum grant are visited on individuals who are not, and cannot be, in the class that may be regulated in effectuating the state interest. The state cannot justify regulation of arbitrarily selected individuals, not members of the "offending" class, because it has a valid interest in regulating other individuals who are members of the "offending" class.

Closely related to the work incentive justification is the assertion that maximum grants are needed so that welfare benefits can be brought into closer harmony with the prevailing minimum wage. Aside from

272. 42 U.S.C. §§ 602(a)(7) & (8) (Supp. V, 1970). *See* 45 C.F.R. § 233.20 (1970); CCH Pov. L. Rep. ¶ 9350, (1969).

273. 42 U.S.C. §§ 632-639 (Supp. V, 1970). See U.S. Dep't of Labor, Work Incentive Handbook (1968); 45 C.F.R. § 220.1-.65 (1970); CCH Pov. L. Rep. ¶ 9347 (1969). Unemployed fathers are referred to a WIN program, if one exists, within 30 days from the date welfare begins. U.S. Dep't of Labor *supra*, at § 405(c). But see Comment, *Compulsory Work for Welfare Recipients Under the Social Security Amendments of 1967*, 4 Colum. J. Law & Soc. Prob. 197 (1968), which is critical of the employment programs thus far devised. While there is much criticism of the Work Incentive Program (WIN or WIP, depending on one's value system), it does appear preferable to the type of coercive, uncontrolled program suggested by the principle of least benefit.

274. Shapiro v. Thompson, 394 U.S. 618, 637-38 (1969).

275. See text accompanying note 262 *supra*. See *Developments*, *supra* note 2, at 1086-87, on the problem of over-inclusion.

the absence of any indication that the maximum grant in fact bears any meaningful relation to the minimum wage,[276] other than citing the state and federal minimum wage, there is also little indication in the majority opinion of why this is deemed a viable state interest. The assertion may be that it would make the welfare program politically more acceptable to the tax-paying public. It is difficult to believe, however, that equal protection justification can be found in what is deemed politically safe or what makes voters happy. The majority may favor some of the most invidious classifications, but this cannot make the classification reasonable even in the business area. A mere belief on the part of a majority of voters that a particular business enterprise should be subjected to discriminatory treatment, without more, would provide a questionable basis for legal imposition of special burdens.[277] Alternatively, the purpose may be to prevent individuals from choosing welfare instead of lower paying jobs. However, this ignores the fact that a person cannot receive welfare merely because he desires it; he must also satisfy the eligibility requirements associated with the program. If the person is eligible and earning a wage below subsistence levels, the fact that he is partially subsidized so that family needs can be met hardly seems to be an evil providing a basis for state intervention. If the state objective is to get people off of welfare by making it less attractive than working at the minimum wage, the argument seems to be reduced to that associated with the work incentive and the same critique is applicable.[278] Further, given the Court's holding in *Rosado v. Wyman*,[279]—that the state can achieve its purpose by lowering the percentage of need met by welfare—there is no basis for differential treatment of children and caretakers in large families.

The latter argument dramatizes again the underinclusive character of the maximum grant classification considered as a means of assuring harmony with the state minimum wage. There is no basis for singling out children and adults in larger AFDC families to bear the burden of the state interest. If the interest is valid, it applies to welfare recipients generally. Even considered as a partial response, there is no

276. Justice Marshall, dissenting, noted the absence of any relationship of the maximum grant to the minimum wage in many states. 397 U.S. at 524. It might be possible to develop a test case in such a state in order to have the Court reconsider the maximum grant.

277. Justice Marshall, dissenting, rejected the validity of such a political purpose for the maximum grant. *Id.* at 525.

278. See text accompanying notes 262-75 *supra*.

279. 397 U.S. 397 (1970). It should be noted again, however, that the state is not bound to utilize the "less onerous alternative" in traditional equal protection adjudication. The absence of an alternative not burdened by the impediments associated with the maximum grant regulation would nevertheless seem relevant in determining if the state classification is reasonably related to the identified purpose.

logical basis to arbitrarily single out this segment of the "offending" class to assume the disadvantages effectuated by the maximum grant classification. Indeed, this lack of logical relation between the classification and the asserted purpose can be expected when the conjured-up purpose was not, in fact, the motivating force for the fashioning of the classification.

These were the only two purposes relied on by the majority in *Williams*. The absence of any analysis of the asserted purposes and the relation of the classification to the identified purposes in the Court's opinion suggest their deficiencies. Traditional equal protection does not merely involve asserting possible purposes; it envisions some judgment regarding their reasonableness and the reasonableness of the classification in light of the purpose.[280] Each of the components of the principle of less benefit was challenged in the appellee's and amici's briefs,[281] but the Court does not even consider their merit; thus, the *Williams* Court does not apply even traditional equal protection standards.

The state did offer two additional justifications; the first argument —that the maximum grant prevents welfare from becoming so attractive that potential wage-earners will desert the home to make the family eligible for relief—again suffers from under- and overinclusion. The dollar ceiling is not limited to children in need because of the absence of a parent but encompasses all AFDC recipients, including children denied parental support because of the death or disability of the parent.[282] Nor is such an interest adequate to justify the different treatment accorded recipients in large AFDC families as compared to those in smaller AFDC families. If parents in larger families are amenable to desertion as a vehicle for securing added income, it is doubtful that parents of smaller families are any less inclined. Only the former, however, are subject to the maximum grant ceiling. Further, even with the maximum grant, the family can qualify for added funds by splitting the nuclear family unit.[283]

The final premise of the principle of less benefit—that parents will procreate to gain added AFDC benefits—is equally untenable. Given the established disparity between the level of benefits in AFDC and actual living costs,[284] the argument appears almost patently ludicrous. It might also be dismissed as being overinclusive since the state failed to distinguish between AFDC children born before the

280. See note 243 *supra*.

281. Amici Brief at 33-50; Brief for Appellees at 13-24, Dandridge v. Williams, 397 U.S. 471 (1970).

282. 42 U.S.C. § 606(a) (Supp. V, 1970).

283. See note 101 *supra*.

284. See note 20 *supra*.

family became eligible for AFDC and those subsequently born and ignores the actual need for or feasibility of deterrence.[285]

There is, however, a further and more substantial challenge to this asserted state interest. The right of individuals to marry and raise a family free from unreasonable state interference is a "basic civil right of man,"[286] and "a right basic and fundamental and . . . deep-rooted in our society."[287] It is impermissible for the state to coerce indigents to surrender these rights exercised by the rest of society; the right of free choice regarding procreation cannot be made to depend on a person's financial status.[288] When the state asserts an interest in coercing individuals in the exercise of their freedom to procreate and intrudes into the intimacy of sexual relationships, the need for close surveillance is essential.

Further, there is ample evidence that the poor do not, in fact, want additional children—especially where one spouse is absent—but generally lack the capacity to effectively control births.[289] If the state does desire to assist the poverty family in limiting births, it could more profitably seek to encourage voluntary planned parenthood. In fact, Con-

285. There is no consideration, for example, of the age of the parents or the possible reasons for non-support.

286. Loving v. Virginia, 388 U.S. 1, 12 (1967); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1941). In addition to characterizing marriage and procreation as involving one of the basic civil rights of man, the Court in *Skinner* noted that they are "fundamental to the very existence and survival of the race." *Id. See* Foster, *Marriage: A 'Basic Civil Right of Man'*, 37 FORDHAM L. REV. 51 (1968). See notes 326-44 *infra* and accompanying text.

287. Griswold v. Connecticut, 381 U.S. 479, 491 (1965) (Goldberg, J., concurring). See text accompanying notes 200-02 *supra* and 326-44 *infra*, for a further discussion of the importance of marital and familial rights. The problem posed when there is no viable marital relation is discussed in the text accompanying notes 336-40 *infra*.

As the district court in *Williams v. Dandridge* noted: "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 [that the provision is invalid]. In effect, Maryland impermissibly conditions his eligibility for benefits upon the relinquishment of the parent-child relationship." 297 F. Supp. at 459. For a discussion of the constitutional prohibition against the state's conditioning receipt of welfare benefits on the surrender of constitutional rights, see text accompanying notes 351-57 *infra*.

288. *Cf.* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956); Hobson v. Hansen, 269 F. Supp. 401, 507-08 (D.D.C. 1967).

To the extent that eligibility is premised on the death or absenee of a parent the assertion of a freedom of choice to procreate will probably not win the sympathy of the courts. But an attempt by the state to control the extra-marital behavior of welfare recipients while other citizens are not similarly constrained is quite another matter. Even if there is no "right to procreate" for the unmarried, the state may not exert its power against a segment of the populace merely because they are financially dependent. *See* McLaughlin v. Florida, 379 U.S. 184 (1964). See notes 336-40 *infra* and accompauying text.

289. See note 236 *supra*.

gress has specifically provided for public support of *voluntary* family planning services to all appropriate persons.[290]

The most damning indictment of the less benefit principle, however, is that it embodies a misconception of the AFDC program's purpose. AFDC was designed and has been maintained for the benefit of needy dependent children.[291] The principle of less benefit, however, seeks to utilize it as a vehicle for achieving other desired ends notwithstanding the negative impact on the children, the immediate beneficiaries of the program. These innocent children have no control over the behavior of their parents and "it is invidious to discriminate against them when no action, conduct or demeanor of theirs is possibly relevant to the harm . . . ."[292] The principle that innocent children should not be deprived of welfare because of the "sins" of their parents has been recognized in HEW policy statements and congressional legislation preventing state termination of AFDC benefits to children because of the immorality of their parents.[293] These imposed objectives of the maximum grant are unrelated to the care of needy children or to the strengthening of the family unit. Further, the less benefit principle is employed without any substantial evidence that it is efficacious even to the ends that it purports to achieve.

Neither considerations of economy, nor the various components of the principle of less benefit, then, justify either the severe hardships imposed on welfare recipients or the denial of their constitutional rights which is thus occasioned. The conclusion seems inescapable that the *Williams* majority's abject deference to the legislative judgment seriously impaired the protection afforded by the equal protection guarantee of the fourteenth amendment.

III

SUBSTANTIVE DUE PROCESS

Appellees in *Williams* never argued, and hence the Court never considered, whether the Maryland maximum grant provision comports with the guarantee of substantive due process afforded by the fourteenth amendment. Perhaps this reflected a reaction to the scathing attacks

290. See notes 128-29 *supra* and accompanying text.

291. See notes 86-87, 89-94, 111-15 *supra* and accompanying text.

292. Levy v. Louisiana, 391 U.S. 68, 72 (1968). *See* King v. Smith, 392 U.S. 390, 336 n.5 (1968) (Douglas, J., concurring), analogizing such punitive treatment to the ancient corruption of the blood. See note 228 *supra*.

293. *See* 42 U.S.C. § 604 (b) (Supp. V, 1970); *Hearings on H.R. 10032 Before the House Comm. on Ways and Means*, 87th Cong., 2d Sess. 294-97, 305-07 (1962). A discussion of the Flemming rule disapproving a Louisiana state plan which denied assistance to children in "unsuitable" homes and the subsequent legislative activity is provided in King v. Smith, 392 U.S. at 321-27.

which have been directed against the provision as a source of substantive limitations on state action and the judicial reluctance to utilize it for this purpose during the post-New Deal era.[294] Nevertheless, in spite of such attacks and judicial hesitancy, substantive due process does appear to offer a viable route for challenging arbitrary and unreasonable state acts and, at least for Justice Harlan,[295] a far more palatable route than expansion of the equal protection guarantee. While there is marked disagreement regarding the proper use and scope of the clause,[296] there remains the possibility that substantive due proc-

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294. Justice Black, for example, has beeu extremely concerned with the proper institutional role of the Court in the legal system. In order to safeguard against transgressions on the prerogatives of the other legal actors, he argues, the judicial decisionmaker must limit himself to the specifics of the Constitution.

> While I completely subscribe to the holdmg of Marbury v. Madison, 1 Crauch 137, and subsequent cases, that our Court has constitutional power to strike down statutes, state or federal, that violate commands of the Federal constitution, I do not believe that we are granted power by the Due Process Clause or any other constitutional provision or provisions to measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our notions of civilized standards of conduct. Such an appraisal of the wisdom of legislation is an attribute of the power to make laws, not of the power to interpret them.

Griswold v. Connecticut, 381 U.S. 479, 513 (1965) (Black, J., dissenting).

295. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969), where Justice Harlan, in dissent, stated:

> When the right affected is one assured by the Federal Constitution, any infringement can be dealt with under the due process clause. Bnt when a statute affects only matters not mentioned in the federal constitution and is not arbitrary or irrational, I must reiterate that I know of nothing which entitles this court to pick out particular human activities, characterize them as 'fundamental,' and give them added protection under an unusually stringent equal protection text.

Id. at 663.

296. The Court has generally approached due process as involving selective incorporation of the Bill of Rights of those liberties "so rooted in the traditions and conscience of our people as to be ranked as fundamental." Palko v. Connecticut, 302 U.S. 311, 325 (1937). It is the basic values, those "implicit in the concept of ordered liberty," which are secured by the due process guarantee. Hurtado v. California, 110 U.S. 516, 532 (1884).

For Justice Harlan, due process "stands . . . on its own bottom." Griswold v. Connecticut, 381 U.S. 479, 500 (1965). Its content is derived by a case by case weighing of the importance of the interest involved. Poe v. Ullman, 367 U.S. 479, 542 (1961). *See* Pointer v. Texas, 380 U.S. 400, 408-09 (1965); Gideon v. Wainwright, 372 U.S. 335, 352 (1963).

Justice Douglas' opinion in *Griswold, supra*, at 484, speaks of the "penumbras" and "emanations" of the constitutional guarantees. *See also* Poe v. Ullman, *supra*, at 516-17 (1960) (Douglas, J., dissenting) and Griswold v. Connecticut, *supra* at 493 (Goldberg, J., concurring). *See generally*, W. DOUGLAS, THE RIGHT OF THE PEOPLE (1958); W. DOUGLAS, A LIVING BILL OF RIGHTS (1961); Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 241 (1965).

Justice Black rejects such formulations, at least partially for the reason that he believes they do not provide an operational standard—the Court lacks a Gallup poll to determine the "fundamental" character of a right. Griswold v. Connecticut, *supra*,

ess challenges will be entertained by the Court.[297]

As in equal protection litigation, where the courts have distinguished between cases involving economic legislation and those involving legislation affecting the fundamental personal liberties guaranteed by the Constitution, the courts have treated these two classes of legislative regulation differently when challenged on due process grounds.[298] When an infringement of vital personal rights, and perhaps, interests,[299] is alleged, the state cannot succeed merely by demonstrating a rational relationship between the statute and a state interest. The state must also demonstrate "a subordinating interest which is compelling"[300] and the regulation must be subjected to "closer scrutiny", to determine if it is necessary to achieve this compelling state objective.[301]

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at 519. Due process, according to him, is not a catch-all but receives its meaning solely through the Bill of Rights (total incorporation) and only in those guarantees specifically provided.

> My point is that there is no provision of the Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of a duly constituted legislative body and set aside their laws because of a court's belief that the legislative policies are unreasonable, unwise, arbitrary, capricious, or irrational. The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is achieved, will amount to a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the community.

Griswold, *supra*, at 520-21. *See generally* Kadish, *Methodology and Criteria in Due Process Adjudication: A Survey and a Criticism*, 66 YALE L.J. 319 (1958); Ratner, *The Function of the Due Process Clause*, 109 U. PA. L. REV. 1048 (1968).

297. Justice Marshall, dissenting in *Williams*, notes the possibility of a due process challenge to the maximum grant. 397 U.S. at 522-23 n.18.

298. In Griswold v. Connecticut, 381 U.S. 479 (1965), Justice Douglas utilized this differential standard when he declared: "We do not sit as a super legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on the intimate relation of husband and wife. . . ." *Id.* at 482. He therefore rejected any inhibiting influence from cases such as Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Giboney v. Empire Storage Co., 336 U.S. 490 (1949); Lincoln Union v. Northwestern Co., 335 U.S. 525 (1949); Olsen v. Nebraska, 313 U.S. 236 (1941). *See* Aptheker v. Secretary of State, 378 U.S. 500 (1964); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1955). *See also* Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. U.L. REV. 13 (1958). See note 30 *infra*.

299. See, e.g., note 301 *infra*, where Justices Goldberg and Harlan speak in terms of "liberties" and "interests."

300. Bates v. Little Rock, 361 U.S. 516, 524 (1960). As Justice White stated in *Griswold*, 381 U.S. at 503, the state "bears a substantial burden of justification when burdened under the Fourteenth Amendment." The state interest must be "necessary, and not merely rationally related, to the accomplishment of a permissible state policy." McLaughlin v. Florida, 379 U.S. 184, 196 (1964). *See* Poe v. Ullman, 367 U.S. 497, 554 (1961) (Harlan, J., dissenting).

301. As Justice Goldberg stated this doctrine in his concurring opinion in *Griswold*, 381 U.S. at 497:

> Where fundamental personal liberties are involved, they may not be abridged by the states simply on a showing that a regulatory statute has some rational

In view of this distinction, the *Williams* Court's characterization of the maximum grant as a social and economic regulation looms large.[302] Nevertheless, as noted previously, the *Williams* Court never really confronts the possibility that fundamental rights are infringed by the maximum grant and cannot, therefore, be said to have foreclosed the use of the due process clause to protect rights infringed by the maximum grant or other arbitrary state welfare regulations. Nor is there any assurance that the "fundamentalness" demanded for invocation of the compelling state interest standard in equal protection cases will be identical to the standards employed for differential treatment in due process adjudication. In any case, many of the factors cited above, relative to the inequities of the maximum grant and the minimal or nonexistent state interest, would again be relevant in the balancing involved to determine if due process has been violated.[303]

The maximum grant either excludes children from their AFDC entitlement or reduces the entitlement of all AFDC recipients solely because of status—the size of the family;[304] coerces the parents dependent on AFDC to dissolve the nuclear family unit by sending their children to live outside the home;[305] makes it impossible for these parents to *care* for their dependent children[306] in violation of "fundamental" marital and familial rights;[307] ignores the need standard established by the Social Security Act and HEW regulations solely for parents and dependent children in larger families;[308] coerces some parents to violate their religious convictions regarding family limitation, thereby impinging on basic first amendment freedoms;[309] imposes burdens which produce their primary negative effects on the poorest economic members of our society and on non-white Americans;[310] limits the freedom of these

relationship to the effectuation of a proper state purpose.

In Poe v. Ullman, 367 U.S. 497, 543 (1960), Justice Harlan, dissenting, characterized the due process guarantee as:

> a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny. . . .

302. See text accompanying notes 190-95 *supra.*

303. See Griffin v. Illinois, 351 U.S. 12, 17 (1955), on the close relationship between the considerations relevant to due process and equal protection adjudication. *See also* Michaelman, *supra* note 185, at 436-40; Van Alstyne, *supra* note 185, at 20-33; Note, *supra* note 218, at 436-40.

The considerations relevant to a balancing text are suggested by Van Alstyne, *supra* note 185, at 28-29. *See Developments, supra* note 2, at 1122-23.

304. See text accompanying notes 63-88 *supra.*

305. See text accompanying notes 98-109 *supra.*

306. See text accompanying notes 110-27 *supra.*

307. See text accompanying notes 200-02, 228-30 *supra* and 326-44 *infra.*

308. See text accompanying notes 89-97 *supra.*

309. See text accompanying notes 345-58 *infra.*

310. See text accompanying notes 232-39 *supra.*

AFDC parents to freely choose their family size and to freely procreate;[311] and, perhaps most important, punishes innocent children through reduced grants solely because their parents choose to exercise their ability to procreate.[312] In imposing the maximum grant ceiling with these impermissible effects, the state arguably impinges on the due process guarantee.

Due process adjudication, however, is essentially a balancing process. Regardless of the serious detriments effectuated by the maximum grant and the vital character of the rights infringed, it remains necessary to consider the weight to be given the state interest. As has already been indicated, however, the state lacks anything remotely approaching a meaningful justification. While the *Williams* Court's determination that the state interest was sufficiently "rational" to satisfy the limited guarantees of traditional equal protection (a conclusion which is itself dubious)[313] provides a severe impediment, it is to be hoped that a reexamination of the state interests in economy,[314] work incentives,[315] harmonizing welfare benefits with the minimum wage,[316] discouraging desertion,[317] and encouraging family planning[318] in light of due process requirements would yield a different result. Even if one were to admit, *arguendo*, the existence of some state interest, alternative methods exist which are less destructive of substantive due process values.[319] Further, there are explicit constitutional rights, previously recognized in due process adjudication, that might be vital in reconsideration of the maximum grant or in litigating other substantive welfare abuses.

A. The Right of Privacy

In addition to this general due process evaluation, the maximum grant provision could also be attacked more specifically as a violation of the right to privacy recognized by the Supreme Court in *Griswold v. Connecticut*.[320] Whether the constitutional guarantee of privacy is perceived as a "fundamental personal right emanating 'from the totality

311. See text accompanying notes 333-40 *infra*.
312. See text accompanying note 228 *supra*.
313. See text accompanying notes 333-40 *infra*.
314. See text accompanying notes 247-54 *supra*.
315. See text accompanying notes 262-75 *supra*.
316. See text accompanying notes 276-79 *supra*.
317. See text accompanying notes 282-83 *supra*.
318. See text accompanying notes 284-85 *supra*.
319. See, *e.g.*, text accompanying notes 272-74, 279 *supra*. On the "less onerous" alternative requirement, see Elfbrandt v. Russell, 384 U.S. 11, 18 (1966); Shelton v. Tucker, 364 U.S. 479, 488 (1960); James v. Goldberg, 303 F. Supp. 935, 943 (S.D.N.Y. 1969).
320. 381 U.S. 479 (1965).

of the constitutional scheme under which we live';"[321] or, as a basic value, "implicit in the concept of ordered liberty" guaranteed by the due process clause of the fourteenth amendment,[322] the protection afforded is the same.

The right to privacy has been receiving increased attention from legal commentators as of late although its constitutional dimensions and even its constitutional base have not yet been firmly established.[323] In our highly urbanized, technocratic, and extensively regulated society, privacy appears as a fundamental value for social living; the need of the individual to "be let alone" is not anti-social, but is vital for effective social interaction.[324] It is a recognition of the importance of privacy that permeates recent Court delineation of privacy rights. Mr. Justice Douglas, in delivering the opinion of the Court in *Griswold*, relied on our society's reverence for the right of privacy.[325]

Although *Griswold* provides the strongest Supreme Court recognition of the constitutional protection afforded the values secured by marital as well as familial privacy,[326] it was not the first case in which

321. *Id.* at 486. Mr. Justice Douglas based the right to "privacy surrounding the marriage relationship" on "the zone of privacy created by several fundamental constitutional guarantees". *Id.* at 485-86. Mr. Justice Goldberg, concurring, accepted the essence of the penumbral approach to privacy, noting "[t]he entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that . . . the right to marry and *raise a family* are of similar order and magnitude as the fundamental rights specifically protected". *Id.* at 495 (emphasis added). He also suggested the ninth amendment as support for the recognition of a privacy right. For a discussion of the ninth amendment, see B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT (1955); Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309 (1936); Redlich, *Are There "Certain Rights . . . Retained by the People"?*, 37 N.Y.U.L. REV. 787 (1962).

322. Mr. Justice Harlan rejects the "selective incorporation" of the Bill of Rights approach of Justice Goldberg, the "total incorporation" of Justice Black and the "total incorporation plus" of Justice Douglas, in favor of an independent determination of the values "implicit in the concept of ordered liberty." Privacy is part of the guarantee of due process which "stands . . . on its own bottom." 381 U.S. at 500.

323. *See, e.g.*, A. WESTIN, PRIVACY AND FREEDOM (1967); Beaney, *The Griswold Case and the Expanding Right to Privacy*, 1966 WIS. L. REV. 978; Beaney, *The Constitutional Right to Privacy in the Supreme Court*, 1962 SUP. CT. REV. 212; Fried, *Privacy*, 77 YALE L.J. 475 (1968); Griswold, *The Right to be Let Alone*, 55 NW. U.L. REV. 216 (1960); *Symposium—The Griswold Case and the Right of Privacy*, 64 MICH. L. REV. 197 (1965).

324. *See, e.g.*, Lanza v. New York, 370 U.S. 139 (1962); Monroe v. Pape, 365 U.S. 167 (1961); Frank v. Maryland, 359 U.S. 360, 362-66 (1959); Public Util. Comm'n v. Pollak, 343 U.S. 451, 464 (1952); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942).

325. 381 U.S. at 484-86.

326. Justice Douglas, 381 U.S. at 486, spoke of the privacy interest arising from the marital and familial relationship in the following manner:

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being

the Court affirmed the fundamental character of the rights arising from marriage and the maintenance of family life.[327] It has consistently acknowledged that there is a "realm of family life which the state cannot enter, without substantial justification,"[328] and that the rights "to marry, establish a home, and bring up children"[329] are among "the basic civil rights of man."[330] On the basis of *Griswold* and these earlier cases, former Justice Tom C. Clark commented:

> The result of these decisions is the evolution of the concept that there is a certain zone of individual privacy which is protected by the Constitution. Unless the State has a compelling subordinating interest that outweighs the individual rights of human beings, it may not interfere with a person's marriage, home, children and day-to-day living habits. This is one of the most fundamental concepts that the Founding Fathers had in mind when they drafted the Constitution.[331]

While the ambit of the privacy guarantee surrounding marriage and family life remains ambiguous, there is increasing acceptance that this is a fundamental guarantee of society and can be restricted only by a showing of substantial state interest which cannot be satisfied by any

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> sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet is it an association for as noble a purpose as any involved in our prior decisions.

Justice White, concurring, *id.* at 502-03, spoke of the "right" invoked, "to be free of regulation of the intimacies of the marriage relationship," as coming "to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." Justice Goldberg, concurring, *id.* at 495, emphasized that the case dealt "with a particularly important and sensitive area of privacy—that of the marital relation and the marital home." He added:

> The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.

Id.

327. The term "family" is used herein to encompass a nuclear family unit with either one or two parents.

328. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

329. Meyer v. Nebraska, 262 U.S. 390, 399 (1923). *See* Levy v. Louisiana, 391 U.S. 68 (1968); Loving v. Virginia, 388 U.S. 1, 12 (1966); McLaughlin v. Florida, 379 U.S. 184 (1964); Skinner v. Oklahoma, 316 U.S. 535, 536, 541 (1942); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925). Mr. Justice Harlan, dissenting in Poe v. Ullman, 367 U.S. at 551, commented:

> Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life. And the integrity of that life is so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right . . . .

330. See note 286 *supra.*

331. Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal,* 2 LOYOLA U.L. REV. 1, 8 (1969).

less restrictive regulation.[332] It is necessary, then, to consider the applicability, first, of the marital and, second, of the familial right of privacy to the maximum grant provision.

Whenever a viable marital relationship exists in the AFDC family,[333] the effect of the maximum grant is to inject the state into that most intimate aspect of the marital relation, the decision to bear children.[334] The state is, in effect, saying, "you may exercise your constitutional right freely only so long as you keep your family size below the designated limit. Thereafter, we will penalize you for bearing children, by reducing the funds available to your family to a level below that required to provide for your children's needs." The coercive impact of the maximum grant on the vital and private decision of the married couple cannot be ignored. This intrusion is even more serious

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332. The International Covenant on Civil and Political Rights, article 17, reprinted in 61 AM. J. INT'L L. 870, 876 (1967), recognizes the importance of this guarantee by declaring that "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home . . ." and that "Everyone has the right to the protection of the law against such interference or attacks."

333. In many AFDC families, eligibility is based on " death [or] continued absence from the home . . . of a parent." 42 U.S.C. § 606(a) (Supp. V, 1970). In such cases, the argument based on maintenance of the marital relationship and marital privacy would not appear to be applicable. The maximum grant, however, is not limited in applicability to this class. It also affects families where a viable marital relationship could persist. AFDC eligibility may be based on the incapacity (42 U.S.C. § 606(a) (Supp. V, 1970)), or the unemployment of a parent in the twenty-four states participating in the unemployed parent program (AFDC-UP) (42 U.S.C. § 607 (Supp. V, 1970)). Further, the maximum grant apparently would apply even when the caretaker is a relative rather than a parent. *See* 42 U.S.C. § 606(a) (Supp. V, 1970) (providing for assistance to needy dependent children and relatives acting as caretakers). Such a caretaker relative might well be married and suffer strains similar to those affecting natural parents. It would be difficult, for example, to bear additional children when you are attempting to support children on welfare benefits made totally inadequate by the imposition of a maximum grant. Nor is there any reason to believe that such caretakers would be any less susceptible to the strain of supporting a family on below subsistence income.

334. In Poe v. Ullman, 367 U.S. at 552, Justice Harlan, dissenting, commented that "of this whole private realm of family life it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations".

Recent cases invalidating state abortion laws have placed heavy emphasis on the protection afforded by the constitutional privacy guarantee for the decision whether to bear children. In United States v. Vuitch, 305 F. Supp. 1032, 1035 (D.D.C. 1969), the court recognized that

> There has been . . . an increasing indication in decisions of the Supreme Court of the United States that as a secular matter a woman's liberty and right of privacy extends to family, marriage and sex matters . . . .

Similarly, in People v. Belous, 71 Adv. Cal. 996, 1005-06, 458 P.2d 194, 199, 80 Cal. Rptr. 354, 359 (1969), the California supreme court stated:

> The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a "right of privacy" or "liberty" in matters related to marriage, family, and sex.

See Babbitz v. McCann, 310 F. Supp. 293, 298-300 (E.D. Wis. 1970).

given the limited ability of the poor to effectively control fertility.[335]

When there is no viable marital relation,[336] the protection afforded by the privacy guarantee to the parent's sexual activity admittedly becomes far more tenuous. In fact, given the public policy against extramarital activity and births out of wedlock, it seems most difficult to argue for a right of privacy in such cases. However, if the state were to impose the maximum grant only on families where a child is born out of wedlock, it would be discriminating against the family members because of the birth of an illegitimate child. Discriminatory treatment of children because of their *status* as illegitimate was treated as a suspect classification in *Levy v. Louisiana*[337] and, in that instance, was condemned. Given the absence, or at least the minimal character, of any state interest in the maximum grant,[338] such a state policy would deserve the same fate. Punishing the mother and her children, even indirectly through the diminution of benefits, because of the birth of an illegitimate child is of dubious constitutional propriety.[339] Indeed, this problem demonstrates again the arbitrary and unreasonable character of any policy which punishes innocent children for the sexual activity of their parents.[340]

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335. See note 236 *supra.*

336. See note 333 *supra.*

337. 391 U.S. 68 (1968). *See* Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968). See note 228 *supra*; Amici Brief, *supra* note 9, at 25-26. Similarly, in King v. Smith, 392 U.S. 309, 324 (1967), the Court rejected the right of a state to condition AFDC benefits to children "on the basis of their mother's alleged immorality or to discourage illegitimate births."

In fact, the evidence suggests that reduction of benefits probably does not have any significant inhibiting effect. In one instance, the incidence of illegitimacy increased after termination of AFDC benefits. Bell, *supra* note 32, at 69, 101. The Greenleigh Association Study of Cook County indicated that benefit reduction or termination, when combined with loneliness and rejection, increased the desire for male companions and the funds they could provide. Brief for Appellees, at 71-72 n.58, King v. Smith, 392 U.S. 309 (1968).

338. See text accompanying notes 247-93 *supra.*

339. *See In re* Barbara Jean Cager, 251 Md. 473, 248 A.2d 384 (1968); see note 336 *supra.* In Kaiser v. Montgomery, Civil No. 44613 (N.D. Cal., decided August 28, 1969), *vacated,* 397 U.S. 595 (1970), on the basis of *Williams,* the court, in an unreported opinion, emphasized this deficiency of the maximum grant:

> The present scheme penalizes some recipients but not others on the basis of circumstances which are beyond the control of the recipients and have no rational relationship to the purpose of the AFDC program.

340. The inconsistency of punitive actions against needy children for the behavior of their parents with the statutory purpose of AFDC is noted in HEW HANDBOOK, *supra* note 45, Pt. IV, § 8120.

> The public assistance job is seen as that of providing eligible children with the assistance they need; and it is not the intent of the legislation to deprive needy children of assistance in order to punish their parents for neglect of their duties.

The Work Incentive Program, 42 U.S.C. § 602(a)(19) (Supp. V, 1970), also provides for continued assistance to children even if the parent is declared ineligible for refusal

Regardless of the maximum grant's impact on marital privacy, the state policy adversely affects the privacy surrounding the familial life or the parent-child relationship of AFDC recipients.[341] It coerces the parent or parents to dissolve the parent-child relationship and send the children to live outside the home.[342] Those parents who exercise their freedom to raise their children in their own homes are denied the means afforded parents in smaller AFDC families to provide the food and shelter necessary for the care of their children.[343] It threatens the already tenuous stability of the poverty family by imposing increased hardships thereby encouraging disintegration.[344] The absence of a meaningful state interest justifying such treatment establishes the arbitrary and unreasonable character of the maximum grant's infringement on the privacy protecting the family and the parent-child relationship.

B. The Freedom of Religion

The maximum grant provision could also be challenged as a violation of the first amendment guarantee of freedom of religion.[345] Given the fundamental character of the right to the free exercise of religion,[346] it is essential that the courts afford the closest scrutiny to any actions of the state which allegedly infringe upon the guarantee and require the showing of a compelling interest before the state can succeed. As the Court noted in *Sherbert v. Verner*,

> It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area [of religious liberty], '[o]nly the gravest of abuses, endangering paramount interest, give occasion for permissible limitation'.[347]

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to participate. *See* Doe v. Shapiro, 302 F. Supp. 761, 766-67 (D. Conn. 1969), *appeal dismissed* per curiam 396 U.S. 488 (1970).

341. See note 327 *supra*, on the definition of "family."

342. See text accompanying notes 98-109 *supra*.

343. See text accompanying notes 110-27 *supra*.

344. *See* C.S. CHILMAN, GROWING UP POOR ch. 8 (1966); A. BESNER, ECONOMIC DEPRIVATION AND FAMILY PATTERNS, IN LOW INCOME LIFE STYLES (L.M. Irelan ed. no date) for citations and commentary on studies of the familial life of the poor.

345. U.S. Const. amend. I. The freedom of religion guarantee has been made applicable to the states through the fourteenth amendment. *See, e.g.*, School Dist. of Abington Township v. Schempp, 374 U.S. 203, 215 (1963).

346. It has been clearly and consistently recognized that the guarantee of freedom of religion can be infringed only under the most extreme conditions—"[t]he place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind." School Dist. of Abington Township v. Schempp, 374 U.S. 203, 226 (1963). *See also id.* at 231 (concurring opinion).

347. 374 U.S. 398, 406 (1963).

This guarantee protects against both direct infringements and indirect coercive enactments.[348]

In the instant case, the grant ceiling is a coercive enactment operating against those individuals in the class who have religious scruples against limitation of family size. For example, because of the unreliability of the "natural" means of birth prevention, even communicants of the Roman Catholic church, which recognizes the permissibility of the rhythm method of birth limitation under certain limited circumstances, are coerced into using the more effective birth control methods prohibited by their church.[349] Similarly Orthodox Jews who have religious scruples limiting the use of birth control mechanisms are subjected to coercive pressures. The only way that these two groups can assure that they will not produce additional children—which they cannot support given the arbitrary assistance ceilings imposed by the maximum grant provision—is to surrender their religious scruples and utilize the more effective means of birth control.

For those welfare recipients who have religious scruples against any limitation on the procreation of children, the unconstitutional effects of the maximum grant provision are even more severe. The maximum grant ceiling directly forces them to choose between acting contrary to their religious beliefs or adhering to these beliefs and risking further children and the consequent further diminution of their ability to support themselves and their family with the basic essentials for subsistence. The individual cannot constitutionally be put to such a choice; one does not surrender his constitutional right to the free exercise of religion by applying for welfare assistance.[350]

348. As noted in the plurality opinion in Braunfeld v. Brown, 366 U.S. 599, 607 (1961): "[i]f the purpose *or effect* of a law is to impede the observance of one or all religions. . . that law is constitutionally invalid *even though the burden may be characterized as being only indirect*" (emphasis added.) *See* School Dist. of Abington Township v. Schempp, 374 U.S. 203, 233 (1962).

In Sherbert v. Verner, 374 U.S. 398 (1963), the Court employed this principle to invalidate South Carolina's attempt to condition receipt of unemployment benefits on surrender of religious freedom:

> It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege. . . . [T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.

Id. at 404;

> The ruling [of the welfare department] forces her to choose between violating precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden on the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Id. at 406.

349. *See* POPE PAUL VI, HUMANAE VITAE (ON THE REGULATION OF BIRTH) (1968).

350. See note 348 *supra.*

An individual cannot be coerced into sacrificing such constitutionally guaranteed rights as those of privacy and the free exercise of religion as a condition of receiving governmental benefits.[351] Regardless of whether the governmental benefits are viewed as "privileges," the state cannot utilize the individual's dependence on them to coerce the recipient to relinquish constitutional rights.[352] In *Sherbert v. Verner*[353] the Court specifically recognized the state's incapacity to require the surrender of constitutional rights as a condition precedent to receiving welfare benefits. South Carolina had terminated Appellant's unemployment compensation for failure, without good cause, to accept suitable work when offered because she refused to work on Saturday, the holy day of her faith. The Court held that such termination constituted a violation of appellant's constitutional right to free exercise of her religion.[354] And in numerous other factual contexts the courts have recognized the state's disability to arbitrarily condition the granting of benefits on the abandonment of constitutional guarantees, even though the individual may not have had a "right" to the benefit.[355]

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351. *See* O'Neal, *Unconstitutional Conditions: Welfare Benefits With Strings Attached*, in THE LAW OF THE POOR 119 (J. tenBroek ed. 1966); Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV 321 (1935); Merrill, *Unconstitutional Conditions*, 77 U. PA. L. REV. 879 (1929); Van Alstyne, *supra* note 185, at 20-27; Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1959 (1960).

352. The Court has been increasingly unreceptive to the right-privilege dichotomy as a basis for differing treatment. Goldberg v. Kelly, 397 U.S. 254, 262 (1970); Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969); Sherbert v. Verner, 374 U.S. 398, 404 (1963); Van Alstyne, *The Decline of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); text accompanying notes 197-98, 211-14 *supra*. In Schware v. Board of Bar Examiners, 353 U.S. 232 (1957), for example, the Court held that the state's arbitrary withholding of a license to practice law constituted a due process violation regardless of the characterization of the appellant's interests:

> We need not enter into a discussion whether the practice of law is a "right" or a "privilege". Regardless of how the state's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons. Certainly the practice of law is not a matter of the State's grace.

Id. at 239 n.5.

353. 374 U.S. 398 (1963).

354. The Conrt, *id.* at 404, stated

> Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's "right" but merely the "privilege". It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.

355. The Court has, for example, rejected the right of the state to condition the Constitutional guarantees afforded public employees—"the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." Keyishian v. Board of Regents, 385 U.S. 589 (1967). *See* Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961); Baggett v. Bullitt, 377 U.S. 513 (1964); Shelton v. Tucker, 364 U.S. 479 (1960); Speiser v. Randall, 357 U.S. 513 (1958); Slochower v. Board of Higher Educ., 350

As the California supreme court summarized the constitutional principle thus fashioned: "[T]he power of government to decline to extend to its citizens the enjoyment of a particular set of benefits does not embrace the supposedly 'lesser' power to condition the receipt of those benefits upon any and all terms."[356]

To condition the receipt of AFDC benefits on the surrender of vital constitutional guarantees constitutes a direct violation of the requirements of due process. Further, the availability of alternative mechanisms of control,[357] adds force to the conclusion that the state lacks the substantial interest required for abridging the individual's constitutionally protected right.[358] It would therefore appear that the state should be constitutionally barred from utilizing the restrictive device of a maximum grant provision.

CONCLUSION

The decision of the United States Supreme Court in *Dandridge v. Williams* is necessarily a severe blow to those who believe that the administration of the welfare system can approximate the social purposes which are its goal only if it is made to operate in close conformity to the benign provisions of the Social Security Act and the United States Constitution. In its strained statutory interpretation, devoid of meaningful inquiry into legislative purpose, the Supreme Court severely diluted the efficacy of statutory entitlement to welfare benefits, not only for AFDC, but for all the other public assistance categories which contain a similar entitlement guarantee. In its twisting of the statutory mandate to strengthen family life, the Court struck at the very purpose of the Act to provide for the care of needy dependent

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U.S. 551 (1956).

For other applications of the doctrine, see Gonzales v. Freeman, 334 F.2d 570 (D. C. Cir. 1964) [disbarment from participation in government contracts]; Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961) [school suspension]; Homer v. Richman, 292 F.2d 719 (D.C. Cir. 1961) [denial of radio-telegraph license]; Rudder v. United States, 226 F.2d 511 (D.C. Cir. 1955) [public housing]; Fleenor v. Hammond, 116 F.2d 982 (6th Cir. 1941) [revocation of conditional pardon]; Reed v. Gardner, 261 F. Supp. 87 (C.D. Cal. 1966) [medicare benefits]; Lawson v. Housing Authority of the City of Milwaukee, 270 Wisc. 269, 70 N.W.2d 605 (1955), *cert. denied*, 350 U.S. 882 (1955) [public housing]. *See also*, Garrity v. New Jersey, 385 U.S. 493 (1967); Spevack v. Klein, 385 U.S. 511 (1967).

356. Parrish v. Civil Service Comm'n of the County of Alameda, 66 Cal. 2d 260, 271, 425 P.2d 223, 230, 57 Cal. Rptr. 623, 630 (1967).

357. See text accompanying notes 272-74, 279 *supra*, on the less onerous alternatives available. *See* Braunfeld v. Brown, 366 U.S. 599 (1961); Follett v. McCormick, 321 U.S. 573 (1944); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940), on the applicability of the doctrine to the religious freedom guarantee.

358. See text accompanying notes 247-93 *supra*.

children in their own home by their mother. While other protections afforded by the statute were not directly considered by the Court and remain available for future use, its approach to the task of statutory interpretation should be a cause of serious concern. In straining the statutory fabric, the Court manifested little concern for the objectives of the Act or the interests of welfare recipients.

Nor was the Court's treatment of the constitutional challenges any less discouraging. In blandly characterizing welfare regulations as social and economic controls demanding the equal protection standards used in business regulation cases, the Court failed to even consider the possibility that fundamental rights or suspect traits might be involved and ignored the basic purposes underlying judicial development of the "compelling state interest" doctrine. Whereas only two weeks earlier, the Court had spoken in glowing terms of the procedural due process protection to be accorded the receipt of welfare benefits, in *Williams* it denied meaningful constitutional protection to the substantive interests of the recipients.[359] It is doubtful that it will be of great moment to AFDC recipients that the state is using fair processes in cutting their welfare benefits far below subsistence levels. While the due process clause may offer a viable route for challenging arbitrary state regulations, the tenor of the *Williams* opinion, the majority's unwillinguess to consider the importance of the individual rights and interests involved, and its failure to determine the reasonableness of the relation of the classifications to the defined state interests, cannot engender optimism.

Nevertheless, the demand for substantive reform in the laws relating to disadvantaged minorities must continue to be pressed. While the focus of this Article has been on the conformity of the state maximum grant policy with statutory and constitutional standards, welfare practices and policies generally afford a myriad of viable opportunities for law reform. Public assistance has been relatively free of sustained external scrutiny and challenge for so long that questionable practices pervade the system. The challenge to the maximum grant restrictions on welfare payments to large families is only one small step toward the overall reform of our present approach in meeting the problems of the poor. It is to be hoped that the *Williams* decision represents only a temporary setback in this endeavor.

359. Goldberg v. Kelly, 397 U.S. 254 (1970). The *Williams* Court, while noting *Kelly's* mandate of procedural fairness, distinguisbed the cases, stating: "But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients." 397 U.S. at 487.