UNITED STATES DEPARTMENT OF AGRICULTURE v. MORENO: REINVIGORATED EQUAL PROTECTION FOR WELFARE RECIPIENTS

Congress passed the Food Stamp Act of 1964[1] in order "to safeguard the health and well-being of the Nations [*sic*] population and raise levels of nutrition among low-income households" and to "promote the distribution in a beneficial manner of our agricultural abundances . . . ."[2] At the time of passage, section 3 (e) of the Act defined "household," the unit of eligibility, as "a group of *related or non-related* individuals, who are not residents of an institution or boarding house, but are living as one economic unit sharing common cooking facilities and for whom food is customarily purchased in common."[3] The Act was amended in January 1971 to define "household" as "a group of *related* individuals (including legally adopted children and legally assigned foster children) or non-related individuals over age 60 . . . ."[4]

Five groups of plaintiffs brought a class action against the Department of Agriculture challenging the relationship requirement, alleging that they met all the other eligibility requirements and were excluded from the Food Stamp Program because they either lived with, or were sharing their home with, persons to whom they were not related. In *United States Department of Agriculture v. Moreno*[5] the United States Supreme Court affirmed a three-judge district court ruling[6] that the classification was in violation of the equal protection component of the due process clause of the fifth amendment.[7]

1. 7 U.S.C. §§ 2011-25 (1970), *as amended,* 7 U.S.C. §§ 2012(e), (h), 2019(c), (e), 2023(e) (Supp. II, 1972).

2. 7 U.S.C. § 2011 (1970).

3. Food Stamp Act of 1964, Pub. L. No. 88-525, § 3(e), 78 Stat. 703 (emphasis added).

4. 7 U.S.C. § 2012(e) (Supp. II, 1972), *amending* 7 U.S.C. § 2012(e) (1970) (emphasis added).

5. 413 U.S. 528 (1973).

6. Moreno v. United States Dep't of Agriculture, 345 F. Supp. 310 (D.D.C. 1972). For a discussion of the district court opinion see 41 GEO. WASH. L. REV. 135 (1972).

7. The equal protection clause of the fourteenth amendment does not apply to the federal government. The due process clause of the fifth amendment, however,

The Supreme Court, applying "traditional" equal protection analysis, found that no legitimate governmental purpose was furthered by the classification. Specifically, the Court held that the relatedness or unrelatedness of the members of eligible households was irrelevant to the Food Stamp Act's express purposes, *i.e.*, the improvement of nutrition among poor people and the distribution of agricultural surpluses. The Court also found that an unstated congressional intent to discriminate against "hippies," reflected in the legislative history, was not a legitimate governmental interest.[8] The Government had argued that the classification should be upheld as an attempt to prevent fraud, since Congress might have found unrelated households more likely to abuse the program and more unstable so that abuses would be harder to detect. Surprisingly, the Supreme Court rejected this argument.[9]

The test under traditional equal protection is whether a legislative classification is rationally related to a legitimate governmental interest.[10] The classification's reasonableness is determined by the degree to which it similarly treats persons similarly situated in relation

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is the vehicle for applying equal protection standards to federal actions. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

8. The legislative history on § 3(e) of the Act was sparse. The amendment was first added by the Conference Committee, having appeared in neither the House nor the Senate version of the bill. The Conference Report stated: "The House Bill did not alter the definition of 'household' under section 3(e) of the Act. The conference substitute contains language which is designed to prohibit food stamp assistance to communal 'families' of unrelated individuals." H.R. REP. No. 91-1793, 91st Cong., 2d Sess. 8 (1970). All of the available references to the amendment supported this interpretation. *See* 116 CONG. REC. 43325-27, 44430-32 (1970).

A general principle of equal protection is that if the purpose of a statute is discriminatory, the statute will be invalidated. Parr v. Municipal Court, 3 Cal. 3d 861, ..., 479 P.2d 353, 355, 92 Cal. Rptr. 153, ... (1971); Tussman & tenBroek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341, 342, 358 (1949); *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065, 1081 (1969); Comment, *The Evolution of Equal Protection—Education, Municipal Services, and Wealth,* 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 103, 141 (1972). The *Moreno* Court found that an intent to bar a politically unpopular group from participation in the Food Stamp Program is not a legitimate governmental interest. 413 U.S. at 534.

9. 413 U.S. at 535-36.

10. *See, e.g.,* Reed v. Reed, 404 U.S. 71, 75-76 (1971); Dandridge v. Williams, 397 U.S. 471, 485 (1970); McGowan v. Maryland, 366 U.S. 420, 425 (1961); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

to the purpose of the classification.[11] Courts have traditionally searched for "any state of facts which would sustain the classification's rationality [that] can be reasonably conceived."[12] If such an interest can be found, the court is obligated to sustain the classification,[13] and this tendency has been especially evident in the social and economic area.[14] The result has been a traditional equal protection analysis that is "minimal scrutiny in theory and virtually none in fact."[15]

The leading welfare case applying this traditional approach is *Dandridge v. Williams*,[16] which held that the imposition of a state maximum grant system, beyond which benefits would not be increased regardless of family size, did not unconstitutionally discriminate between children in large and small families. The *Dandridge* Court found the classification in issue to be justified by the possible state interest in maintaining the balance between welfare families and the working poor and in encouraging recipients to seek gainful employment.[17] This denial of benefits to otherwise eligible individuals was upheld through an explicit judicial search for possible legislative purposes,[18] an endeavor typical of traditional equal protection analysis.[19]

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11. Tussman & tenBroek, *supra* note 8, at 344.

12. *Developments in the Law, supra* note 8, at 1083.

13. Dienes, *To Feed the Hungry: Judicial Retrenchment in Welfare Adjudication*, 58 CALIF. L. REV. 555, 605 (1970); *Developments in the Law, supra* note 8, at 1083.

14. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970); Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 23 (1972) [hereinafter cited as Gunther]; *Developments in the Law, supra* note 8, at 1080-81.

15. Gunther 8.

16. 397 U.S. 471 (1970).

17. *Id.* at 486.

18. *Id.* at 485, *citing* McGowan v. Maryland, 366 U.S. 420, 426 (1961).

19. It is possible to interpret *Dandridge* as a case permitting a reduction in, not elimination of, family benefits. This is clearly within the power of a state. Rosado v. Wyman, 397 U.S. 397, 413 (1970). Under this interpretation, *Dandridge* could then be distinguished from *Moreno*, in which the challenged statute denied *any* benefits to otherwise eligible individuals. *Dandridge* would, under this view, no longer be precedent for *Moreno*, and the cases would merely stand for the proposition that as long as the government is not totally denying benefits, it has wide leeway to consider factors other than need in its determination of benefit levels.

This interpretation of *Dandridge*, however, would be erroneous. Certainly, the *effect* of the denial was to reduce the overall family benefit because payments to

The governmental interest suggested in *Moreno*—the prevention of fraud—is as reasonable as were the interests found sufficient in *Dandridge*. Given the continued vitality of *Dandridge*, the result in *Moreno* seems to be a departure from the usual equal protection outcome. There are two possible alternatives that explain the instant case: either the Court is moving toward strict scrutiny in the welfare area or an evolution of equal protection doctrine is in progress.[20]

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the other children and the caretaker are stretched to provide for the children who are rendered ineligible by the maximum grant provision. Dandridge v. Williams, 397 U.S. 471, 477-78 (1970). But this effect does not reflect the actual theory under which benefits are calculated—the total *denial* of aid to later-born children, ineligible solely because of order of birth. Both *Dandridge* and *Moreno* are denial cases.

20. There is a third possibility, found decisive by the district court and Justice Douglas, who concurred with the Supreme Court majority. Both Justice Douglas and the district court emphasized first amendment problems raised by § 3(e) of the Act.

In the district court *Moreno* decision, the Government argued that Congress may have been trying to discourage communal living popularly associated with hippies and that *Dandridge* required the court to uphold the statute on the basis of any reasonable purpose. 345 F. Supp. at 312. The court declined to do so, finding that a congressional "attempt to regulate morality would raise serious constitutional questions." *Id.* at 314. The court found a possible first amendment problem: "Recent Supreme Court decisions make it clear that even the states, which possess a general police power not granted to Congress, cannot in the name of morality infringe the rights to privacy and freedom of association *in the home*." *Id.* (emphasis in original).

As pointed out by the Supreme Court majority, 413 U.S. at 535 n.7, the morality argument was abandoned by the Government and not presented to the Court. Nevertheless, Justice Douglas found the first amendment impact of § 3(e) to be significant: "But for the constitutional aspects of the problem, the 'unrelated' person provision of the Act might well be sustained as a means to prevent fraud. . . . I could not say that this 'unrelated' person provision has no 'rational' relation to control of fraud. We deal here, however, with the right of association, protected by the First Amendment." *Id.* at 543.

It is apparent that Justice Douglas is concerned with *Dandridge*, as indicated by his explicit attempt to distinguish the case, and with the established rule that any reasonable purpose will be sufficient to protect a statute in the economic and social area against constitutional challenge. *Id.* at 544. He felt that the prevention of fraud might be such a purpose. This conclusion was also reached by Justice Rehnquist, joined by Chief Justice Burger, who dissented on the ground that prevention of fraud is a rational basis for the statute and that once such a basis is found, the Court's function is over. *Id.* at 546.

Neither the district court nor Justice Douglas dealt with the contention that, while government cannot dictate associations between people, it is not required to subsidize any and all relationships. *Cf.* Wyman v. James, 400 U.S. 309 (1971); Flemming v. Nestor, 363 U.S. 603 (1960).

In the last decade, there has been short-lived speculation that categories based on wealth would become suspect classifications, giving rise to strict scrutiny.[21] This hope (or fear) was based on a series of cases containing dicta suggesting that classifications involving the poor would automatically invoke the higher equal protection test.[22] Each of these cases, however, involved some protected interest,[23] and it was the combination of these protected interests with the wealth factor that resulted in the application of strict scrutiny.[24] The effect of this combination was reiterated by the Court in the recent case of *San Antonio Independent School District v. Rodriguez:*[25]

> The individuals, or groups of individuals, who constituted the class discriminated against in our prior [wealth] cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a

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21. Bendich, *Privacy, Poverty, and the Constitution,* in THE LAW OF THE POOR 83, 97 (J. tenBroek ed. 1966); Gunther 8-9; Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment,* 83 HARV. L. REV. 7, 19, 22 (1969).

22. McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807 (1969) ("And a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, . . . two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny."); Shapiro v. Thompson, 394 U.S. 618, 661 (1969) (Harlan, J., dissenting) ("[The majority suggests] that the 'compelling interest' test is applicable merely because the result of the classification may be to deny the appellees 'food, shelter, and other necessities of life' . . . ."); Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 668 (1966) ("Lines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored."); Douglas v. California, 372 U.S. 353, 355 (1963) ("In either case [denial of free transcript or counsel on appeal] the evil is the same: discrimination against the indigent. For there can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has.' "); Griffin v. Illinois, 351 U.S. 12, 17 (1956) ("In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color.").

23. McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969) (voting); Shapiro v. Thompson, 394 U.S. 618 (1969) (travel); Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) (voting); Douglas v. California, 372 U.S. 353 (1963) (criminal appeals); Griffin v. Illinois, 351 U.S. 12 (1956) (criminal appeals).

24. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); Michelman, *supra* note 21, at 22, 24; Comment, *The Evolution of Equal Protection, supra* note 8, at 106.

25. 411 U.S. 1 (1973).

> consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit. . . .
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> [T]his Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny . . . .[26]

Clearly, then, *Moreno* does not represent a rekindling of the wealth-is-suspect theory. The case must be interpreted in some other fashion.

The second, alternative explanation of *Moreno* is that an evolution of equal protection doctrine is in progress. Professor Gerald Gunther has analyzed the 1971 term of the Supreme Court and found that in five out of fifteen basic equal protection cases the Court either upheld the constitutional challenge or remanded after explicitly voicing traditional equal protection doctrines,[27] a development he found "truly startling and intriguing."[28] In these cases[29] Gunther sees significant evidence of a move by the Court toward a new, "rational basis" equal protection model that would replace the two-tier approach developed and refined by the Warren Court:

> The model suggested by the recent developments would view equal protection as a means-focused, relatively narrow, preferred ground of decision in a broad range of cases. Stated most simply, it would have the Court take seriously a constitutional requirement that has never been formally abandoned: that legislative means must substantially further legislative ends.
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> The intensified means scrutiny would, in short, close the wide gap between the strict scrutiny of the new equal protection and the minimal scrutiny of the old not by abandoning the strict but by raising the level of the minimal from virtual abdication to genuine judicial inquiry.[30]

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26. *Id.* at 20, 29.

27. Gunther 11 n.48.

28. *Id.* at 19.

29. Gunther bases his model on seven cases, sustaining or remanding equal protection claims, in which strict scrutiny was *not* mentioned. Only five of those cases, however, explicitly adopted the traditional equal protection test. Stanley v. Illinois, 405 U.S. 645 (1972), "proves on analysis to be only marginally an equal protection case," having focused its discussion on procedural due process. Gunther 25. That ground was not argued in the lower court and, therefore, was not available to the Supreme Court as a ground for decision. In Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972), the Court did not clearly specify the equal protection standard being applied. For discussion of the balance of the cases see notes 34-38 and accompanying text *infra.*

30. Gunther 20, 24.

One of the major elements of the "rational basis" model is the Court's reluctance to invent any reasonable governmental purpose[31] or to defer automatically to such a purpose when offered.[32] Rather, the Court appears more willing to question the actual relationship between the classification and the ends sought to be achieved. In *Reed v. Reed*,[33] for example, the Court found that "the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy."[34] Yet the Utah Probate Code's mandatory selection of a man over a woman in the same preference category of prospective estate administrators was not allowed to stand. Similarly, in *Eisenstadt v. Baird*[35] the state's interests in health and morality were found insufficient to justify a statute discriminating between marrieds and unmarrieds in their access to contraceptives. Again, in *Humphrey v. Cady*[36] the Court found that denial of a hearing for recommitment to state prison under the Wisconsin Sex Crimes Act, when a hearing was provided under the Mental Health Act for commitment to a mental hospital, raised an equal protection claim substantial enough to warrant remand. The state's arguments that commitment was imposed in lieu of sentence and that the special characteristics of sex offenders made a jury determination inappropriate were rejected.[37]

Despite his suggestion of a new equal protection approach, two other cases led Gunther to doubt that the Court will apply the "rational basis" model to areas of legislation, such as welfare, in which

31. *See* notes 12-13 and accompanying text *supra*.

32. Gunther 21.

33. 404 U.S. 71 (1971).

34. *Id.* at 76.

35. 405 U.S. 438 (1972).

36. 405 U.S. 504 (1972).

37. *Id.* at 510-12. The other cases are James v. Strange, 407 U.S. 128 (1972) (Kansas recoupment statute denying to indigent defendants the exemptions, except the homestead exemption, available to other judgment debtors discriminated against one class of judgment debtors for no rational reason) and Jackson v. Indiana, 406 U.S. 715 (1972) (procedures for commitment of incompetent defendant violated equal protection because he was subjected to more lenient commitment and more stringent release standards than persons not charged with offenses, and violated due process because he was indefinitely committed solely on account of incompetency to stand trial).

it has customarily shown restraint.[38] In both *Jefferson v. Hackney*[39] and *Richardson v. Belcher*,[40] the welfare/equal protection cases decided in the 1971 term, the Court cited *Dandridge* with approval and applied the traditional equal protection approach of searching out, and giving deference to, possible and reasonable legislative purposes.[41]

Moreno is significant not only because its substantive examination of the government's proffered purpose[42] supports the rational basis model,[43] but also because the case suggests use of rational basis analysis even in welfare cases. If the Court is moving toward an "invigorated" rationality scrutiny in the welfare area, the hopes of welfare litigants, disappointed when benefits were not accorded the status of

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38. Gunther 32. There is, however, evidence to the contrary, suggesting that the Court may expand the use of heightened scrutiny into unaccustomed areas. In Eisenstadt v. Baird, 405 U.S. 438 (1972), the Court dismissed an argument based on the state's interest in protecting public health. Health, like social and economic regulation, has been an area of judicial deference. Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955). Reed v. Reed, 404 U.S. 71 (1971), involved estates, another area that is not standard Supreme Court fare. Gunther 32.

39. 406 U.S. 535 (1972).

40. 404 U.S. 78 (1971).

41. Jefferson v. Hackney, 406 U.S. 535, 546 (1972); Richardson v. Belcher, 404 U.S. 78, 81-83 (1971).

42. *See* text at note 9 *supra.*

43. Another major element of Gunther's model is its potential as an avoidance technique, useful in permitting the Court to avoid thornier constitutional problems. Gunther 26-30. *Moreno* may also support this element of the model. Gunther points out that reliance on equal protection in Jackson v. Indiana, 406 U.S. 715 (1972), permitted the Court to avoid the issue of "what constitutional justifications permit detention of an ill individual," which Gunther considers "a venture into that uncertain realm of ultimate constitutional values." Gunther 28. And in Eisenstadt v. Baird, 405 U.S. 438 (1972), "the core of the challenge . . . was an effort to expand the boundaries of the amorphous right of privacy of Griswold v. Connecticut [381 U.S. 479 (1965)]." Gunther 29.

Arguably, *Moreno* also involved the issue of privacy. The Supreme Court majority's footnote 7, 413 U.S. at 535, can be interpreted as a relieved dismissal of the complex first amendment problems, much as Gunther interprets *Eisenstadt.* It is not altogether clear, however, that the failure to present the morality argument before the Court eliminated the first amendment considerations. The Brief for Appellees at 33-61, United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973), was devoted, in large part, to a first amendment argument. As previously noted, Justice Douglas also considered the rights of privacy and association to be deeply involved in the case. *See* note 20 *supra.*

a "right"[44] and when wealth was not deemed a suspect classification,[45] may be rekindled. These developments, solidified by *Dandridge,* resulted in the virtual impotence of equal protection as a tool for challenging classifications in the welfare field.[46] Yet the *actual* examination of proffered purposes, the process used in *Moreno,* may signal a new trend that will be significant for future welfare cases. The constraint of *Dandridge,* representing the "emasculation of the Equal Protection Clause as a constitutional principle applicable to the area of social welfare administration,"[47] may have been broken.

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44. *See, e.g.,* Flemming v. Nestor, 363 U.S. 603 (1960).

45. *See* notes 21-26 and accompanying text *supra.*

46. Dienes, *supra* note 13, at 605.

47. Dandridge v. Williams, 397 U.S. 471, 508 (1970) (Marshall, J., dissenting).