

## "SUITABLE HOME" TESTS UNDER SOCIAL SECURITY: A FUNCTIONAL APPROACH TO EQUAL PROTECTION

LEGISLATIVE proposals now being considered<sup>1</sup> by Congress to overrule a recent decision by the Secretary of Health, Education and Welfare<sup>2</sup> to withhold federal funds from states imposing certain eligibility requirements upon the receipt of benefits under the Social Security Act<sup>3</sup> may compel reexamination of the scope and meaning of the equal protection clause of the fourteenth amendment. Title IV of the Act provides financial assistance to children who have lost, through death, incapacity or desertion, one or both parents, if the children are living with the remaining parent or another relative.<sup>4</sup> Furthermore, to insure adequate home care for the child, the Act also authorizes payments for the sustenance and medical expenses of the parent or relative.<sup>5</sup> Federal payments do not go directly to the children. Rather, appropriated funds are paid by the Social Security Administration to states; the states through their welfare agencies then distribute the funds to families qualifying under state-established criteria.<sup>6</sup> To be eligible for federal funds, a state must submit a plan for aid to dependent children;<sup>7</sup> the statute provides thirteen specific requirements which state plans must meet;<sup>8</sup> if the Secretary is satisfied that these conditions are fulfilled, he is required to approve the plan.<sup>9</sup> Currently, all states plus three territories and the District of Columbia are receiving funds under a wide variety of local schemes.<sup>10</sup>

---

1. Shortly before publication time, several amendments to Title IV were enacted. Among these is a provision that the effective date of the Secretary's decision be postponed until September, 1962, in order to give the states an opportunity to modify the State statutes involved. *N.Y. Times*, May 9, 1961, § 1, p. 19, col. 4. Should any of the states affected refuse to modify their programs, Congress would again be faced with the problems and alternatives discussed in this Note.

2. For the official directive resulting from this decision, see State Letter No. 452, Department of Health, Education and Welfare, Bureau of Public Assistance (Jan. 17, 1961).

3. Social Security Act, Title IV, 49 Stat. 627-29 (1935), as amended, 42 U.S.C. §§ 601-06 (1958).

4. 49 Stat. 629 (1935), as amended, 42 U.S.C. § 606(a) (1958).

5. 49 Stat. 629 (1935), as amended, 42 U.S.C. § 606(b) (1958).

6. 49 Stat. 628 (1935), as amended, 42 U.S.C. § 603 (1958).

7. 49 Stat. 627 (1935), as amended, 42 U.S.C. § 601 (1958).

8. Twelve of these are set out in 49 Stat. 627 (1935), as amended, 42 U.S.C. § 602(a) (1958). They include requirements that a plan must "(1) provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them," and "(5) provide such methods of administration . . . as are found by the Secretary to be necessary for the proper and efficient operation of the plan," and "(9) provide . . . that all individuals wishing to make application for aid . . . shall have opportunity to do so, and that aid . . . shall be furnished with reasonable promptness to all eligible individuals."

9. 49 Stat. 627 (1935), as amended, 42 U.S.C. § 602(b) (1958).

10. See 23 SOCIAL SECURITY BULL. No. 8, p. 87 (August, 1960).

So called "suitable home" provisions, concerned primarily with the conduct of the parent or guardian, are significant features of twenty five state plans.<sup>11</sup> Under these plans, a home may be declared "unsuitable" for a variety of reasons; the consequences of such a designation take one of two general forms. Under the majority of these plans, a finding by a state welfare agency that a home is "unsuitable" results either in provision of additional welfare services and assistance,<sup>12</sup> or in removal of the child from the home through legal proceedings.<sup>13</sup> In seven states, however, while classification of a home as "unsuitable" requires termination of all benefits to the child, no alternative provision for its care or support is made.<sup>14</sup> Though both types of plan have existed for several years, enactment of Louisiana's "suitable home" tests last year occasioned an investigation culminating in action by the Secretary.<sup>15</sup> The Louisiana statutes go beyond most of the earlier enactments in their specific focus on illegitimacy and the moral conduct of the relative.<sup>16</sup> Thus all aid is denied where the relative with whom the child lives is engaging in illicit cohabitation. Further, no aid may be given to any child living with its mother, if she has had an illegitimate child after having received assistance, or to any child, itself illegitimate, whose mother has had two previous illegitimate children.<sup>17</sup> Since

11. Twenty-four of these provisions are summarized in DEP'T OF HEALTH, EDUCATION AND WELFARE, ILLEGITIMACY AND ITS IMPACT ON THE AID TO DEPENDENT CHILDREN PROGRAM 72-76 (April, 1960) [hereinafter cited as DEPT. OF H., E. & W. REP.]. The twenty-fifth state is Louisiana, where "suitable home" provisions were enacted last year. See note 16 *infra*. In some of these states, "suitable home" tests are prescribed at the administrative level, and do not appear in the statutes. See, *e.g.*, VA. CODE ANN. §§ 63-141 (Supp. 1960).

12. See, *e.g.*, discussion of recently enacted Tennessee "suitable home" provisions. Note, 36 NOTRE DAME LAW. 56, 60 (1960). Eighteen of the twenty-five plans are of this general type. See DEPT. OF H., E. & W. REP. 72-75.

13. Note, 36 NOTRE DAME LAW. 56, 60 (1960).

14. See, *e.g.*, MISS. CODE ANN. § 7171 (Supp. 1958); LA. REV. STAT. ANN. § 46:233 (Supp. 1960). In the other five states this result is apparently achieved through administration rather than explicit statutory directive. See DEPT. OF H., E. & W. REP. 75-76.

15. See note 2 *supra*. See also Decision of Commissioner of Social Security, *The Conformity of the Louisiana Plan for Aid to Dependent Children Under Title IV of the Social Security Act*, Dep't of Health, Education and Welfare (Jan. 16, 1961).

16. LA. REV. STAT. ANN. § 46:233 (Supp. 1960):

A. Assistance may be granted to any dependent child:

(1) Who is living in a suitable family home . . . provided, however, that a home will not be considered suitable in which the parents or other relatives . . . are living together and are not husband and wife by virtue of a marriage recognized as valid under the laws of this state. . . .

C. In no instance shall assistance be granted to an illegitimate child if the mother . . . is the mother of two or more older illegitimate children unless it should be determined that the conception and birth of such child was due to extenuating circumstances over which the mother had no control. . . .

D. . . . [no] assistance shall be granted to any person who is living with his or her mother, if the mother has had an illegitimate child after a check has been received from the welfare department unless and until proof satisfactory . . . has been presented showing that the mother has ceased illicit relationships. . . .

17. *Ibid.*

the last requirement applies even if the child is not living with its mother, all aid may be denied solely on the basis of the mother's past conduct. The enactment of these provisions reduced the number of qualifying children in Louisiana by almost one-third of the previous total; of those disqualified, nearly all were non-white.<sup>18</sup>

The Secretary decided that state plans which deny assistance to a child on the basis of the suitability of its home without removing the child from such home will no longer qualify for federal assistance. This decision was based on the ground that such plans impose "a condition of eligibility that bears no just relationship to the Aid to Dependent Children program."<sup>19</sup> While noting that his discretion in passing on state plans is limited, and that "reasonable" conditions of eligibility could not be rejected, the Secretary indicated that his function included interpretation and enforcement of congressional purpose, and concluded that the "suitable home" plans involved not only failed to serve that purpose, but in fact subverted it.<sup>20</sup>

It is doubtful whether a state can successfully challenge the Secretary's order under existing law. The purpose clause<sup>21</sup> and legislative history of Title IV,<sup>22</sup> as well as the construction given the Act in court decisions,<sup>23</sup> all demonstrate that Congress' overriding goal is to provide financial assistance to dependent children.<sup>24</sup> Taking the Louisiana "suitable home" statutes as a focal

18. Ninety-three per cent of the cases closed, and nearly 95% of the children excluded, were non-white. DEP'T OF HEALTH, EDUCATION AND WELFARE, REVIEW OF PRACTICE UNDER THE SUITABILITY OF HOME POLICY IN AID TO DEPENDENT CHILDREN IN LOUISIANA JUNE-OCTOBER 10, 77, 84 (1960).

19. Press Release of the Secretary of Health, Education and Welfare, Jan. 17, 1961, p. 2.

20. *Id.* at 1-3.

21. 49 Stat. 627 (1935), as amended, 42 U.S.C. § 601 (1958):

For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter.

22. S. REP. No. 628, 74th Cong., 1st Sess. 2-3, 35 (1935).

23. *E.g.*, State *ex rel.* Williams v. Kamp, 106 Mont. 444, 78 P.2d 585 (1938); Lietz v. Flemming, 264 F.2d 311 (6th Cir. 1959); Ewing v. Black, 172 F.2d 331 (6th Cir. 1949); General Wayne Inn v. Rothensies, 47 F. Supp. 391 (E.D. Pa. 1942); Sparks v. United States, 153 F. Supp. 909 (D. Vt. 1957); Gonzales v. Hobby, 110 F. Supp. 893 (D. Puerto Rico 1953).

24. The recent report of the Senate Finance Committee urges that wherever the words "aid to dependent children" currently appear in the Act, including the title, the words "aid to families with dependent children" be substituted. S. REP. No. 165, 87th Cong., 1st Sess. 8 (1961). The reason given is the expanded scope of the program's coverage. Conceivably, however, this could be a first step in a movement to shift the emphasis from the child to the parent, thus making the conduct of the latter relevant in terms of eligibility.

point for discussion, since they include all the elements found, individually or collectively, in the provisions of the other affected states,<sup>25</sup> it is difficult to see how this purpose—financial assistance to children—is promoted by such enactments. The designated beneficiaries of Title IV are children; yet "suitable home" provisions deny a child benefits which it would otherwise receive solely because of the actions of persons other than itself. Such statutes do not distinguish between children on the basis of need—common sense would indicate that the need of those in "unsuitable" homes may in fact be greater than that of others<sup>26</sup>—and while Congress has not included *all* needy dependent children in its program, the distinctions it has made can at least be defended on grounds of administrative expediency and a desire to preserve the family unit,<sup>27</sup> a claim which cannot be made on behalf of the state enactments. Where congressional legislation has designated a broad class of recipients, courts have construed specific clauses in such enactments so as to include as many of that class as possible.<sup>28</sup> Certainly Congress intended state plans to be sufficiently flexible to meet local needs and conditions;<sup>29</sup> certainly federal social security legislation does not in terms oppose the pursuance by states of their own interests, such as economy and regulation of immorality;<sup>30</sup> nevertheless, such a policy of congressional deference could not have been intended to encompass state programs which directly contravene the central purpose of federal legislation by excluding a considerable segment of the class intended to be favored, while leaving them in "unsuitable" homes. The Secretary's denial of funds to states operating under such programs would thus appear to be a proper area for discretionary action. Further, such action would probably not be regarded by a court as an abuse of this discretion.

Though his discretion under Title IV has never been tested, federal courts construing structurally similar titles of the Social Security Act have required only "a rational basis" for the Secretary's action in order to sustain withdrawal of approval from state plans.<sup>31</sup> One of these cases held that the state must show either that the Secretary relied on an unconstitutional statute, or that the Act affirmatively required his approval of that type of plan.<sup>32</sup> It would appear un-

---

25. See note 16 *supra* and statutes cited at note 11 *supra*.

26. DEPT. OF H., E. & W. REP. 34.

27. The Act requires that the child be living with one of a designated class of relatives, 49 Stat. 629 (1935), as amended, 42 U.S.C. § 606(a) (1958), and also permits states to impose a residency requirement of up to one year, 49 Stat. 627 (1935), as amended, 42 U.S.C. § 602(b) (1958). See *Meredith v. Ray*, 292 Ky. 326, 166 S.W.2d 437 (1942) (upholding the reasonableness of the former).

28. See cases cited at note 23 *supra*.

29. S. REP. No. 628, 74th Cong., 1st Sess. 35-36 (1935).

30. It has been held, however, that a state may not justify discrimination between members of a class on the basis of economy. *Collins v. State Bd. of Social Welfare*, 248 Iowa 369, 377-78, 81 N.W.2d 4, 9 (1957).

31. *Indiana ex rel. Bd. of Pub. Welfare v. Ewing*, 99 F. Supp. 734 (D.D.C. 1951); *cf. Arizona ex rel. Bd. of Pub. Welfare v. Hobby*, 221 F.2d 498 (D.C. Cir. 1954).

32. *Arizona ex rel. Bd. of Pub. Welfare v. Hobby*, *supra* note 31.

likely that such a burden could be met here, in view of the courts' deference to the Secretary's interpretation of his own function, and consequent refusal to interfere with that interpretation "if there is a rational basis for it." Consequently, though no aspect of the "suitable home" provisions is mentioned in the Act as either a necessary or prohibited criterion, the numerous standards which *are* specifically required<sup>33</sup> together with the grant of authority to the Secretary to reject plans which fail to meet those standards,<sup>34</sup> should be sufficient to provide a "rational basis" for the present ruling. While the Secretary's decision thus appears insulated from successful challenge, the widespread controversy over the grant of Title IV benefits to illegitimate children<sup>35</sup> suggests that Congress may well wish to enact legislation reversing the result of that ruling.

Perhaps the simplest method by which Congress could attempt to reverse the effect of the recent ruling would be to declare that the Secretary's discretion is not to extend to the rejection of state plans on the ground that they contain eligibility requirements repugnant to the purposes of Title IV, except where those requirements violate some specific prohibition contained in the Act. A claimant barred by a state "suitable home" provision would, after passage of such a congressional declaration, seek review of the denial in either state or federal court. A first line of attack on state eligibility requirements would be a charge that the state statutes violate the purposes of the federal act and are therefore inoperative as a matter of statutory construction. Such an attack presupposes that state plans must conform to the purposes contained in the federal legislation. The states might argue, however, that in light of the broad responsibility given them for the administration of Title IV funds, together with their complete control over the receipt and processing of applications,<sup>36</sup> the only federal statutory requirements which state plans must meet are those specifically set out in the federal act. But such an argument is unlikely to succeed. The entire program grows out of an act of Congress, and the Supreme Court has validated congressional grants to states conditioned upon compliance with federal standards.<sup>37</sup> Furthermore, extensive supervisory powers have been placed in the hands of a federal agency<sup>38</sup> and the statute itself is introduced by a "purposes" section pursuant to which the courts must evaluate claimants' rights.<sup>39</sup> Thus, though no court has squarely passed on the

---

33. See note 8 *supra*.

34. 49 Stat. 628 (1935), as amended, 42 U.S.C. § 604 (1958) (authority to stop payments upon a finding of non-compliance, even though "plan" previously approved).

35. See, e.g., Roney, *Report of the Advisory Council on Public Assistance*, S. Doc. No. 93, 86th Cong., 2d Sess. 101-05 (1960); Carlson, *Illegitimacy . . . Who Pays?* (collection of articles which appeared in the Hartford Courant, beginning April 3, 1960).

36. The Act provides that when a state plan has "approved" status, payments are made on the basis of estimated need; thereafter states need only keep and file records concerning actual expenditures. 49 Stat. 628 (1935), as amended, 42 U.S.C. § 603(b) (1958).

37. See, e.g., *Steward Machine Co. v. Davis*, 301 U.S. 548, 593-98 (1937).

38. See note 3 *supra*.

39. See note 21 *supra*.

issue, it appears correct to say that since the states are administering federal funds, they are operating within the framework of a federal act, and must therefore conform to its purposes.

Should a court, however, accept the state's position that the federal purpose, as a result of the congressional declaration, no longer prevents constitutional "suitable home" provisions, it would be compelled to measure the state provisions against the requirements of the equal protection clause of the fourteenth amendment. At the time of its passage, some doubt was expressed as to whether the equal protection clause invalidated all statutory classification.<sup>40</sup> But Supreme Court holdings soon made clear that states remained free to treat different things differently; the equal protection clause required only that classifications made by states be "reasonable."<sup>41</sup> That reasonableness may be measured by a variety of standards is apparent from subsequent judicial applications of the clause. One group of cases clearly indicates that distinctions based on race, national origin, and similar conditions of birth or status are at best highly "suspect."<sup>42</sup> Characterized as "constitutionally irrelevant," they have been upheld only where the governmental interest involved is shown to be of the highest order.<sup>43</sup> Furthermore, where a statute, unobjectionable on its face, in fact discriminates in terms of one of the "suspect" classifications—either through its necessarily discriminatory effect or through arbitrary administration—the court will find a denial of equal protection.<sup>44</sup> Finally, as the long line of decisions invalidating state statutes which single out Negroes for special treatment demonstrates, some classifications are regarded by the court as *per se* violations of the equal protection clause.<sup>45</sup>

40. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 343-44 (1949) (citing cases) [hereinafter cited as Tussman & tenBroek].

41. *Ibid.*

42. *E.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (dictum); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943); *Ex parte Endo*, 323 U.S. 283, 303-04 (1944); *id.* at 307-08 (concurring opinion); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 420 (1948); *Ohio ex rel. Clarke v. Deckerbach*, 274 U.S. 392 (1927) (dictum).

43. See, *e.g.*, *Korematsu v. United States*, 323 U.S. 214, 216 (1945); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943); *cf.* *Edwards v. California*, 314 U.S. 160 (1941) (concurring opinion); *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552 (1947) (dissenting opinion); Tussman & tenBroek 353-65.

44. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (rezoning operated so as to exclude Negroes from voting status); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (broad statute administered discriminatorily against Chinese subjects); *cf.* *Lane v. Wilson*, 307 U.S. 268 (1939); *Guinn v. United States*, 238 U.S. 347 (1915); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 422 (1948) (concurring opinion of Mr. Justice Murphy).

45. The suggestion here is not simply that prejudice against Negroes cannot itself be the legislative purpose, but that even where such a classification bears some relationship to a valid state objective it is inherently violative of equal protection and hence unconstitutional. For a similar analysis with respect to classifications founded on blood relationship, see the dissent of Mr. Justice Rutledge in *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552, 565-66 (1947). Such a view seems implicit in the recent rejection by the Supreme Court of the "separate but equal" provisions of state education statutes, *Brown v. Board of Educ.*, 347 U.S. 483 (1954), and is made explicit by several commentators

A second line of cases has applied a test verbalized in terms of the requirement that those similarly situated must be similarly treated.<sup>46</sup> "Similarly situated" cannot, of course, mean only that everyone within the statutory class possess the trait on the basis of which the classification is made; such a tautological requirement would render all challenged legislation, if effectively administered, self-validating.<sup>47</sup> In these cases, rather, reasonableness is evaluated in terms of purpose; classification is reasonable if it treats alike all those similarly situated with regard to the *purposes* of the statute.<sup>48</sup> Unlike cases involving "suspect" classifications, therefore, the issue is not whether the legislature could *ever* segregate a particular class, but only whether it is reasonable to do so for purposes of the legislation in question. In *Smith v. Cahoon*<sup>49</sup> the Florida legislature exempted carriers of farm products and certain seafoods from a statute requiring security from carriers for hire to cover injuries caused by their negligence. A claim that the equal protection clause had been violated was upheld, not on the basis that carriers of farm produce could never be given special treatment by the legislature, not because the classification was an inherently suspect one, but on the ground that such special treatment could not be afforded in the context of a statute purporting to protect the public against negligent carriers.<sup>50</sup>

Perhaps because the equal protection clause has been invoked in more than one type of case,<sup>51</sup> there have been few attempts explicitly to provide a rationale

---

following that decision. See, e.g., Wechsler, *Toward Neutral Principles of Constitutional Law*, in *PRINCIPLES, POLITICS, & FUNDAMENTAL LAW* 3 (1961); Black, *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421 (1960). The development of the doctrine of the *Brown* case, traced in 2 *EMERSON & HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 1321-29 (2d ed. 1958), plus judicial treatment of later attempts to avoid that decision, see *James v. Almond*, 170 *F. Supp.* 331, 337-38 (E.D. Va. 1959); *Bush v. Orleans Parish School Bd.*, 187 *F. Supp.* 42 (E.D. La. 1960), seem to provide support for the commentators, as do decisions in the federal courts concerning segregation in areas other than education. See, e.g., *City of Greensboro v. Simkins*, 246 *F.2d* 425 (4th Cir. 1957); *City of St. Petersburg v. Alsup*, 238 *F.2d* 830 (5th Cir. 1956). The Supreme Court's affirmation of classification of persons of Japanese ancestry during World War II, *Korematsu v. United States*, 323 *U.S.* 214 (1944); *Hirabayashi v. United States*, 320 *U.S.* 81 (1943), raises the question whether similar indulgence would be exercised should classification of Negroes become related to some compelling national or state interest (e.g., war with Africa).

46. *E.g.*, *Barbier v. Connolly*, 113 *U.S.* 27, 31-32 (1885); *Smith v. Cahoon*, 283 *U.S.* 553 (1931); *cf.* *Tussman & tenBroek* 344-46; as applied to the Aid to Dependent Children Act, see *Collins v. State Bd. of Social Welfare*, 248 *Iowa* 369, 81 *N.W.2d* 4 (1957). *But cf.* *Missouri, K. & T. Ry. v. May*, 194 *U.S.* 267 (1904).

47. See *Tussman & tenBroek* 345.

48. *Id.* at 346.

49. 283 *U.S.* 553 (1931).

50. *Id.* at 567. The only Supreme Court case involving invalidation of an economic regulation on equal protection grounds in more recent years is *Morey v. Doud*, 354 *U.S.* 457 (1957), in which the Court reiterates the requirement that classification be related to purpose. It is at least arguable, however, that the classification in that case was so related.

51. For discussion of an instance where the Supreme Court appears to have confused the two types, see *Tussman & tenBroek* 374-75.

for its use. One such attempt, enunciated by Mr. Justice Jackson, concurring in *Railway Express v. New York*,<sup>52</sup> treats equal protection as a more flexible judicial tool than the due process clause—a tool which may be used to invalidate a statute while avoiding a holding that the area is one in which the state is entirely without power to legislate. Thus, the effect of a finding of equal protection denial can always be avoided by expanding the challenged classification, or by altering the purpose of the act so as to make the original classification reasonable. In either event, the result of such a change would be to subject the legislature to greater political pressure, either because more people would be affected or because a hitherto concealed purpose would then become evident.<sup>53</sup> Jackson's rationale for use of the equal protection clause, therefore, seems based on its prophylactic potentialities; it is a means by which the Court can invoke the pressures of the political processes in cases where it is hesitant to use the more nearly absolute prohibitions of the due process clause.

Where categories based on "constitutional irrelevancies" are involved, however, the *Railway Express* rationale seems inappropriate. For even if the legislation in question were to be approved by political processes, such groupings, as well as classifications which courts find so arbitrary as to rest on no rational foundation,<sup>54</sup> not only represent a denial of equal protection but also contravene due process requirements. Such categories are found to deny equal protection, in other words, because they reflect a discriminatory legislative purpose which itself contravenes the due process clause—a constitutional judgment of lack of legislative power which no degree of political approval can alter. Consequently, Mr. Justice Jackson's rationale is applicable only where a widening of the challenged category operates to remove the suspect classification entirely from the statute.

In cases where the constitutional objection is framed in terms of the failure of classification to relate to purpose, on the other hand, the *Railway Express* rationale is more clearly applicable. What Jackson's analysis illumines are the policy objectives served by the apparently fruitless procedure of voiding a legislative classification, in cases where the state legislature can effectively achieve an identical discrimination simply by amending the purpose clause of the statute. Barring the possibility of oversight,<sup>55</sup> the most plausible explanation for a legislature's use of classifications unrelated to purpose would appear to be an attempt to utilize a statute having one set of purposes as a vehicle for

---

52. 336 U.S. 106, 111-17 (1949).

53. *Id.* at 113-15.

54. See, e.g., *American Communication Ass'n v. Douds*, 339 U.S. 382, 417 (1950) (concurring opinion); *Nebbia v. New York*, 291 U.S. 502, 525 (1934); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Edwards v. California*, 314 U.S. 160, 184-85 (1941) (concurring opinion).

55. See, e.g., *Ronson Patents Corp. v. Sparklets Devices, Inc.*, 102 F. Supp. 123 (E.D. Mo. 1951); *Johnson v. United States Gypsum Co.*, 217 Ark. 264, 229 S.W.2d 671 (1950); *Pressman v. State Tax Comm'n*, 204 Md. 78, 102 A.2d 821 (1954); *State v. Louisville & N.R.R.*, 97 Miss. 35, 53 So. 454 (1910).



achieving discriminations based on wholly different criteria—an attempt which strongly suggests that the concealed purpose is either unpopular or of dubious legality. Thus, even where such concealed purposes are clearly within the sphere of legislative powers, Mr. Justice Jackson seems correct in expecting invocation of the political processes to result in at least sober reconsideration and very possibly a failure to re-enact the challenged legislation.<sup>56</sup> Democratic politics, furthermore, presupposes the framing of policy issues in terms sufficiently clear to enable the electorate intelligently to judge them, and such clarity is impossible of achievement unless statutory classifications accurately reflect the purposes of the legislation in which they are embodied.

Judicial awareness of political realities will, of course, limit this use of the equal protection clause. State legislatures are not permanent bodies,<sup>57</sup> and the pressures of time are such that they can give only intermittent attention to any specific problem.<sup>58</sup> Many problems, furthermore, can effectively be dealt with only on an *ad hoc* basis. As a result, a considerable amount of legislative discretion has been recognized by the courts as necessary for effective government.<sup>59</sup> Deference to such considerations is especially appropriate where the legislature is embarking upon an experimental economic or social policy.<sup>60</sup> But such arguments seem less persuasive when a statute is challenged on the ground that it infringes civil liberties, an area in which courts have a particular expertise, not necessarily shared by the legislature. Especially in such cases, therefore, *Railway Express* provides a rationale justifying invocation of the equal protection clause in terms which ultimately rest on the basic requirement of democratic political ideology that important questions of policy be decided by the political processes.

An evaluation of the Louisiana "suitable home" provisions serves to illustrate both applications of the equal protection clause. Since the group excluded by the new eligibility tests is overwhelmingly non-white,<sup>61</sup> a court might well conclude that the statute operates in a discriminatory fashion. Unlike analogous cases, however, in which the Supreme Court could find no valid state interest being served by the legislation in question,<sup>62</sup> it is possible that such purposes as economy and an increase in the general level of morality would prove suffi-

56. *Railway Express v. New York*, 336 U.S. 106, 112-13 (1949).

57. See ZELLER, *AMERICAN STATE LEGISLATURES* 65-66 (1954).

58. See HART & SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 742-43 (Tent. ed. 1958).

59. Cf. Comment, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 89 n.112 (1960).

60. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Tussman & tenBroek* 372-73; Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. U.L. REV. 13 (1958); Comment, 18 OHIO ST. L.J. 384 (1957); *but cf.* *Morey v. Doud*, 354 U.S. 457 (1957).

61. See note 18 *supra*.

62. *Gomillion v. Lightfoot*, 364 U.S. 339, 342 (1960). Cf. *Lane v. Wilson*, 307 U.S. 268 (1939); *Guinn v. United States*, 238 U.S. 347 (1915). The view has on occasion been expressed that even where a valid interest is shown, the Supreme Court should look to the

cient in this instance to survive the scrutiny necessitated by the operational effects of the statute. In such event, the fact that the excluded group was predominantly non-white would not alone appear sufficient to provide a basis on which to hold the provisions violative of equal protection. But the statute also classifies children on the basis of illegitimacy. Legitimacy is a condition of birth wholly beyond the individual's control, and at least one former justice of the Supreme Court declared himself unable to differentiate between discrimination based on race and that based on blood relationship.<sup>63</sup> On the other hand, given the long history of discrimination against bastards, as in inheritance statutes,<sup>64</sup> it seems unlikely that the Court will adopt as rigid an approach to classifications based on legitimacy as that which has characterized its position with regard to legislation directed against Negroes. Nevertheless, the nature of the illegitimacy classification strongly suggests that it might be considered "suspect" by the Court, thus compelling "the most rigid scrutiny" to insure that its use in a statute is not only related to but in a significant sense is required by a pressing public purpose.<sup>65</sup>

Even if a court failed to invalidate "suitable home" provisions on the ground that "suspect" classifications are involved, it is doubtful that the Louisiana statutes could survive an equal protection attack based on the requirement that classifications be related to declared legislative purpose. Children in both "suitable" and "unsuitable" homes would appear to be similarly situated with regard to the congressional purpose of providing economic aid for dependent children.<sup>66</sup> Consequently, suitability of home criteria in *any* state statutes may be regarded as establishing classifications unrelated to purpose, whether or not the laws single out illegitimates or operate harshly against one race. Since the purpose being contravened is contained in federal legislation rather than in a state enactment, a judicial determination that the equal protection clause had been violated could not be avoided except by conforming the purposes of state eligibility requirements to those contained in the federal act.

If a court wished to avoid the drastic remedy of constitutional invalidation, but regarded the case as one calling for an exercise of the judicial function described above—that of subjecting "hidden" purposes to political processes—it might apply an alternative theory under which the same result could be achieved. In *Kent v. Dulles*<sup>67</sup> and *Greene v. McElroy*,<sup>68</sup> plaintiffs challenged federal administrative action taken under broad grants of power from Congress.

---

underlying discrimination and strike it down. *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552, 565-66 (1947) (Rutledge, J., dissenting); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948) (*semble*) (see Tussman & tenBroek 374-75).

63. *Kotch v. Board of River Port Pilot Comm'rs*, *supra* note 62.

64. The conditions under which an illegitimate child can inherit in each of the fifty states are set out in DEPT. OF H., E. & W. REP. 67-71.

65. See, *e.g.*, *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Ohio ex rel. Clarke v. Deckebach*, 274 U.S. 392 (1927).

66. See text at note 33 *supra*.

67. 357 U.S. 116 (1958).

68. 360 U.S. 474 (1959).

The State Department had denied Kent a passport on the ground of suspected Communist affiliation;<sup>69</sup> Greene was deprived of security clearance—and consequently lost his job—following a Defense Department hearing at which he was denied the right to cross-examine his accusers.<sup>70</sup> In both cases, the Supreme Court refused to consider the serious due process questions which were presented, stating that the issue of congressional *power* to adopt such procedures would be reached only after it had been made clear that Congress had in fact *exercised* such power.<sup>71</sup> The questioned administrative practices were of long standing, and well within the scope of the legislative and executive authorizations under which they had been promulgated.<sup>72</sup> Congress, furthermore, not only made no attempt to interfere with them, but had even indicated approval through continued appropriations.<sup>73</sup> The Court nevertheless held that passive congressional acquiescence was insufficient to validate the challenged procedures;<sup>74</sup> these holdings were not couched in terms of *power*, nor even of legislative *intent*, but rather were based on the ground that in cases involving administrative procedures of questionable constitutionality, authority must explicitly have been delegated by a body responsible to the electorate:

Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them.<sup>75</sup>

In imposing a requirement that policy decisions potentially involving constitutional violations must explicitly be made by a body directly responsible to the electorate, the Court, though it clothes its decision in the garments of "delegation," is in fact adopting a rationale closely analogous to that which underlies the equal protection cases discussed in connection with *Railway Express*.<sup>76</sup>

Extension of this "delegation" doctrine to comprehend the situation presented by "suitable home" provisions might be possible owing to certain structural similarities between the exercise of state authority under Title IV and the federal administrative actions challenged in *Greene* and *Kent*. The Aid to Dependent Children program was created by Congress. It involves the expenditure of federal funds, which are turned over to the states with only general in-

69. 357 U.S. at 117-18.

70. 360 U.S. at 478-82.

71. *Id.* at 507-08; 357 U.S. at 129-30. Cf. *Ex parte Endo*, 323 U.S. 283, 303 (1944). *But see* *Barenblatt v. United States*, 360 U.S. 109, 121 (1959).

72. For a full discussion of the administrative practices involved, and their foundations in legislation and executive orders, see the dissents by Mr. Justice Clark, in *Greene v. McElroy*, 360 U.S. 474, 516-23 (1959), and in *Kent v. Dulles*, 357 U.S. 116, 130-41 (1958).

73. *Ibid.*

74. 360 U.S. at 506-07; 357 U.S. at 124-25.

75. 360 U.S. at 507.

76. Cf. Jaffe, *An Essay on Delegation of Legislative Power: I*, 47 COLUM. L. REV. 359, 360-61, 369-71 (1947); Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 31-34 (1957); Comment, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

dications as to the purposes to be served and means to be used in administration,<sup>77</sup> and certain states have propounded regulations governing distribution which raise serious constitutional questions. Within the context of this program, therefore, the states—given their role as administrators—could be viewed as "agencies" of the federal government. But a "delegation" approach might nevertheless appear inappropriate, since "suitable home" provisions themselves are the product of legislative action, and thus directly traceable to elected officials. On the other hand, the fact that the funds involved are federal might be sufficient to persuade a court that it is only Congress—representative of the entire electorate from which the funds are procured—which is competent to delegate authority concerning eligibility requirements.<sup>78</sup> On this basis, since constitutionally questionable requirements are involved, use of the *Greene* and *Kent* approach would be proper.

In light of the statutory and constitutional problems discussed above, removal of the Secretary's discretion by Congress would appear insufficient to permit judicial validation of "suitable home" provisions such as those adopted by Louisiana. Congress might therefore wish to amend the present Act by specifically incorporating such eligibility tests.<sup>79</sup> In such event, neither statutory construction nor "delegation" challenges would be appropriate, since Congress would explicitly have spoken. Further, though the classifications would be no more related to purpose when enacted by Congress, the literal constitutional context would be different owing to the lack of an equal protection clause in the fifth amendment. In cases involving "suspect" classifications, federal regulations can be overturned on due process grounds.<sup>80</sup> Thus, if illegitimacy is regarded as a "suspect" classification, even a federal enactment would at least be subjected to "rigid scrutiny." And dicta in several cases seem to suggest that the due process clause of the fifth amendment may incorporate the full range of equal protection constraints<sup>81</sup>—a doctrine which would permit courts to impose on Congress the requirement of relationship between classification and legislative purpose.

Assuming *arguendo* that a congressional "suitable home" test would be unconstitutional within the framework of the present Social Security Act, Congress might nevertheless attempt to achieve the same result by passing a new act, not having as its purpose aid to dependent children, but specifically directed

---

77. See 49 Stat. 628 (1935), as amended, 42 U.S.C. § 603 (1958); 49 Stat. 627 (1935), as amended, 42 U.S.C. § 602 (1958).

78. For a case involving a similar argument with respect to the relationship between members of a congressional subcommittee and Congress as a whole, see *Watkins v. United States*, 354 U.S. 178, 201-02 (1957).

79. It may well be, of course, that political pressures would prevent such an enactment by Congress. But it is precisely this type of pressure which the *Railway Express* rationale seeks to invoke.

80. See, *e.g.*, *Bolling v. Sharp*, 347 U.S. 497 (1954).

81. *Ibid.* See *United States v. Petrillo*, 332 U.S. 1, 8 (1947); *Tussman & tenBroek* 363. *But see* *Detroit Bank v. United States*, 317 U.S. 329, 337-38 (1943); *Currin v. Wallace*, 306 U.S. 1, 14 (1939).

towards the regulation of morality.<sup>82</sup> Such an enactment might present a new set of constitutional questions concerning the proper limits of federal legislative power,<sup>83</sup> but it would at least explicitly reveal the motivating legislative purpose, and could thus be subjected to effective public scrutiny. Hopefully, furthermore, both state and federal legislatures might be persuaded to confine future attempts to regulate morality to programs which more clearly avoid potential equal protection violations. Accommodation—so necessary in a government containing three co-ordinate powers—would in that event have replaced the necessity for an ultimate test of strength between the judicial and legislative branches. That the *Railway Express* rationale for invocation of the equal protection clause promises to contribute to such a development seems a compelling argument in favor of its acceptance.

---

82. A first step in this direction may already have been taken. See note 32 *supra*.

83. See generally Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 525-28 (1954); Huard, *State Sovereignty and Federal Subsidies*, 46 GEO. L.J. 459, 467 (1958); Note, 55 COLUM. L. REV. 83 (1955).