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The OEO Lawyers Fail to Constitutionalize a Right to Welfare: A Study in the Uses and Limits of the Judicial Process

Samuel Krislov*

I. INTRODUCTION

Keynes once suggested that economic theories often play a decisive role in human affairs even though those theories have been discredited by theorists.1 Decision makers learn such theories before they have been scrutinized and rejected by theorists and thus shape the course of future events with decisions which are based upon dated and erroneous assumptions. Similarly, one's view of what can be accomplished in the future may be distorted when it springs from a diagnosis of past events which has not yet been reshaped or refined by critical study. This distortion is particularly marked where a reconstruction of the past is buttressed by the results of empirical study and/or is draped in abstruse sociological terms. Philosophers, sociologists and historians busily retell the past where all too often the need is to recast the past in order to liberate our perception of what is possible in the future.

Perhaps no federal program has been more draped in abstruse sociology than has the "war on poverty," and perhaps no federal program has been less effectively buttressed by empirical study. A sense of total failure runs through the standard evaluations of the "war"; the critics of the program are legion, and the teeming poor are still with us. The consensual verdict on the Johnson Administration's effort to attack poverty is that the overall strategy was nonexistent, the necessary social information was lacking and the theories of social change were so primitive and naive as to approach the absurd. Moreover, the OEO founders and operators perennially oversold the poverty program and thereby frustrated the setting of reasonable goals.

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and aggravated the disillusionment when the goals were not met. These criticisms extend to virtually the entire range of the Office of Economic Opportunity (OEO) programs, and those programs which have withstood the test of time are only slightly less disparaged and in danger of abandonment than those which have not.

It is beyond the scope of this discussion to assess the criticisms of all OEO programs; perhaps it is enough to note that at least on the surface the criticism is warranted. Among the weaknesses common to all the basic OEO poverty programs was that every program featured a vague mystique of local diversity and creativity which was largely a cover for the lack of a coherent national program. Each program was premised upon an interconnection among all aspects of poverty, the assertion of which constantly shifted attention and effort from one social concern to another before the efficacy of any one effort could be measured, far less achieved. Every program, implicitly rejecting the existing power structure, embarked upon a redefinition of societal authority and responsibility with only the vaguest of substitutes in mind. The lack of data, direction and philosophy reinforced one another to frustrate each program's progress.

The purpose of this Article is threefold: (1) to tell the little known story of the poverty lawyers' efforts to constitutionalize a right to welfare by altering the traditional notions of equal protection; (2) to inquire into the nature of social change and particularly the degree to which a society can bring about such change through the work of its own paid agents; and (3) to suggest some characteristics and boundaries of the legal process as presently conceived.


3. "So fractured is the original OEO program that one recent evaluation (Ferman, 1969) examined the impact of the program upon nearly everything except poverty." Jones, Federal Efforts to Solve Contemporary Social Problems, in E. Smigel, Handbook on the Study of Social Problems 555 (1971). In one sense this was natural; as Ginsberg and Shiffman point out, the poverty program was originally an effort to reconceptualize a whole series of social failures mostly, though not exclusively, tangent to race: delinquency, crime, illegitimacy, school drop-outs, unemployment and slums. Ginsberg & Shiffman, Manpower and Training Problems in Combating Poverty, 31 Law and Contemporary Problems 159 (1966).

4. The effort to attack poverty valued both the end product of reform and the psycho-individualistic processes by which reform was to be sought.
II. THE THEORETICAL CONFLICT AND AMBIGUITY IN THE WAR ON POVERTY

A. THE OVERALL OEO PROGRAM

The concept of the "war on poverty" was based on an unsure theoretical footing which made difficult both the formulation of goals and the selection of programs. The overall poverty program drew its inspiration from the twin strands of the civil rights movement: the moral-ethical analysis of problem areas and the quasi-existentialist emphasis on action and personality transformation through effective individual action. However, few problem areas were more than cursorily analyzed, and the objective of self-worth enhancement was continually frustrated by a basic conflict between the theories of centralism and localism.

1. The Tension Between Centralism and Localism

In short, the welfare provisions of American society that now help the upper two-thirds must be extended to the poor. This can be done if the [poor] are motivated to take advantage of the opportunities before them, if they are invited into the society. It can be done if there is a comprehensive program that attacks the culture of poverty at every one of its strong points.

But who will carry out this campaign?

There is only one institution in the society capable of acting to abolish poverty. That is the Federal Government.\(^5\)

Thus Michael Harrington, while recognizing that centralism too often results in a massive, insensitive bureaucracy and that big money is not a cure-all for the psychology of poverty, recognized also that only the federal government had the political and economic power to wage a "war on poverty." The fact that Harrington even considered an attack on poverty established him with John Kenneth Galbraith as protagonists in the overall OEO program. Although skeptical about the popular support for any anti-poverty program,\(^6\) Galbraith too called for greater centralization of the planning of both production and distribu-

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6. [F]ew things are more evident in modern social history than the decline of interest in inequality as an economic issue. This has been particularly true in the United States. And it would appear, among western countries, to be the least true of the United Kingdom. While it continues to have a large ritualistic role in the conventional wisdom of conservatives and liberals, inequality has ceased to preoccupy men's minds. J.K. Galbraith, The Affluent Society 82 (1958).
tion. Both Harrington and Galbraith reasoned that to reject centralized financing, planning and control was to defeat any realistic hope of mobilizing the forces needed to strike at the roots of poverty.

In conflict with these exhortations of centralism, the OEO programs often developed as forms of localized self-help and behavior modification. Perhaps the key figure in this development was Saul Alinsky, whose community organizing followed the pattern of community control and localism suggested by the works of many influential writers of the period.\(^7\) The "localism" theorists saw Washington only as a source of funds and the promulgation of national standards; the actual implementation of an effective poverty program had to be the work of the locality involved.\(^8\) Alinsky's writings were indicative of the poverty program's theoretical clash. While emphasizing the failings of centralism and the virtues of volunteerism, Alinsky offered less a positive blueprint for action than a finding of fault with existing programs and trends. Thus, founded upon theories which were broad, ill-defined and oftentimes antithetic, the overall OEO program began on a note less hopeful than was perceived by its actors.

2. Consequences of the Tension and Ambiguity

The tenet that the poor primarily needed self-actualization was a godsend to the OEO designers. The tenet's language of "maximum feasible participation" and "community creativity" served both as a definition of goals and as a basis of choice among specific programs. In choosing the flexibility of ambiguity, the program framers were perhaps realistically reflecting our lack of knowledge of either the problem of poverty or its cure. The choice, however, avoided rather than resolved the problem. As a result, too often the overall OEO program resembled Stephen Leacock's hero who "flung himself from the room, flung himself on his horse and rode madly off in all directions."\(^9\) This tur-

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9. S. Leacock, Nonsense Novels 73 (1922).
moil was compounded by the abandonment of the follow-ups which had been planned to evaluate the validity and practicality of the various underlying theories. Budgetary and programmatic cutbacks starved the very research into and definition of the problem of poverty which were vital to any effective attack upon it.

B. THE LEGAL SERVICES PROGRAM

The legal services branch of the OEO suffered much the same pattern of development as did the overall poverty program. Numerous congressional committees and presidential commissions skirted the issue of legal aid for the poor, the original OEO legislation failed to mention legal services, and the renewal legislation merely assumed its existence. Nonetheless, the legal services program did develop as one of the most effective OEO programs, and its impetus flowed from many sources. In his criticisms of the legal profession, Ralph Nader suggested that a reassessment of the relationship of the law and the poor was long overdue. A dissatisfaction with this relationship also appeared in such diverse quarters as the Vera Institute and the Supreme Court, which subsequent to Brown v. Board of Education had made an extension of the equal protection clause that led Justice Fortas to comment, "we are witnessing the gradual reduction of the category of constitutional non-persons." The Court's criminal law decision requiring counsel for indigents not only reflected this dissatisfaction but also directed legislative reevaluation of and response to the legal plight of the poor. Thus, in reaction to these forces, the legal program emerged as much as it was created.

1. The Theoretical Influence of the Mobilization for Youth

The Mobilization for Youth (MFY) had considerable influence.
fluence in the formulation of the legal services program as well as that of the overall OEO program. Largely funded by the Ford Foundation in one of its more daring phases, the MFY operated in the Lower East Side with wide ranging community participation and with considerable panache. The original community action proposal for the MFY had no legal program, but in 1963 the Vera Foundation was asked to devise a community legal aid service. The apparent success of the resulting MFY legal program encouraged the OEO principals to develop a legal services counterpart in the OEO.

In looking to the operation of the MFY's legal program, the OEO legal services directors borrowed also from the Mobilization's theoretical bent. Prominent in the theory of the legal program were Edward Sparer of the Center on Social Welfare Policy and Law at Columbia University, and Edgar and Jean Camper Cahn. Under their influence the MFY purported to base its efforts on sociological theory, the so-called "opportunity theory" of Cloward and Ohlin. If nothing else, the emphasis on the provision of individual opportunity permitted the MFY's


16. As early as 1964 their discussion focused attention on the potential of legal services as a participatory experience for the client. See generally Cahn & Cahn, The War on Poverty: A Civilian Perspective, 73 Yale L.J. 1317 (1964). Over the years, the Cahns have been both active participants—at first in OEO and later in more activist legal services groups—and theorists. Their discussions emphasize the need for new social structures and new sets of loyalties. However, they have explicitly recognized that their hypostatized state of affairs would create new problems for professional relationships and group loyalties. They have also warned that lawyer definition of social need is a serious undertaking and that control by the client should be the order of the day. See generally Cahn & Cahn, Power to the People or the Profession?—The Public Interest in Public Interest Law, 79 Yale L.J. 1005 (1970).

But to recognize difficulties, however in extenso, is not to meet them. The Cahns exhorted lawyers to be responsive in ways not easy, perhaps even impossible, for professionals. Moreover, the Cahns' new subgroup identities are not as easily created as discussed. From Mary Parker Follett to Granville Hicks to the Cahns themselves, the recreation of a sense of intimate community has been a literaturist's dream rather than a reality. The Cahns' continuous monitoring of the legal services program and their ability to borrow theoretic insight from any field gave a sense of intellectual excitement to the venture. But it afforded little of the stable unfolding of answers and the systematic examination of alternatives which the legal services program needed.

leaders to write elegant proposals which promised, inter alia, hypothesis testing and theory refinement. Although the "opportunity theory" was unusually vague, even for social science theories, and the critical evidence for its confirmation was hardly science, it was nonetheless ahead of most efforts in the field.

2. The MFY's Theory in Action

The MFY's glamour and apparent success pushed the OEO in the direction of Community Action Programs in the legal services area. It has been suggested that this OEO activity appealed to the Democratic administration because it created a new political mechanism within the core of the city, an area where old political machines had decayed and where minorities had become increasingly unreachable and difficult to mobilize.\textsuperscript{18} Political suspicion was minimized because the mechanism came garbed in scholarly terms, had originally been set in motion by the Ford Foundation and could attract collaboration by prestigious policy scientists and professionals. The OEO legal program could, in Moynihan's words, "pass the Congress, help win the Presidential election, and eliminate poverty, in perhaps that order."\textsuperscript{19} However, even though the legal program was politically salable, it was plagued by the same lack of theoretical precision and direction which undermined the overall OEO anti-poverty effort. Just as the conflict and ambiguity of overall OEO theory avoided the problems of goal definition and program choice, so the vagueness of the legal program's theory impeded the systematic examination of alternatives and the stable unfolding of answers that the program needed. Moreover, the emphasis on constant action aggravated the lack of examination and analysis: "It is almost impossible to write in this area, because we are so busy litigating that no time is left."\textsuperscript{20}

III. THE DISPUTE OVER LEGAL STRATEGY

The effectiveness of the OEO legal program was from its inception frustrated not only by the ambiguity of its theory but also by a dispute over what legal strategy should be employed.


\textsuperscript{19} Moynihan, \textit{What is "Community Action?"}, 5 \textit{The Public Interest} 6 (1966).

A conflict existed between those who wanted to provide the legal services requested by the individual, in the older tradition of legal aid, and those who wanted to generate the "test cases" required to attack broad institutional practices. The question of strategy was important in shaping the structure of the OEO legal program and in deciding what direction that program would take.

A. THE TRADITIONAL LEGAL AID APPROACH

The defenders of the traditional legal aid approach emphasized that the legal needs of the poor, although "routine," stemmed from conditions often vital to the prosperity and the self-esteem of the individual. The legal aid advocates saw their approach as one of great social importance rather than as "band-aid" litigation or personal palliative. To litigate divorces, tenant complaints and other "routine" cases was to meet the threat to the fiscal and psychological well-being of those at or near the poverty level.21

However, a basic criticism of the traditional legal aid approach was that the attempt to react to every individual's legal needs generated a staggering case load. Gresham Sykes' study in Denver indicated that the poor have many legal needs which are either suppressed or overlooked both because of more pressing daily concerns and because of a lack of access to legal machinery.22 The demand for legal services is elastic and self-proliferating, and the publicized availability of free legal service for the poor could be expected to generate an overwhelming demand.23 More trenchant than the criticism that the mere presence of attorneys creates demand24 was that which said the legal

21. One lawyer commented:
[I] would like to dispel any impression that I believe it appropriate to ask for fair hearings only to embarrass caseworkers, to jam up the machinery of state and local agencies, and to build client morale. I will not deny a firm belief that assessment of these factors as well as the impact of legal action on welfare rights organizational activities, on publicity regarding welfare, and on other governmental and non-governmental bodies is a perfectly appropriate . . . . method of obtaining relief . . . . Fair hearings are not requested, and litigation is not instituted, for the purpose of obtaining decisions. These procedures are instituted to obtain relief.


aid approach resulted in mundane issues that would attract overloaded and mediocre lawyers. In due course these lawyers would be driven to bureaucratic, condescending attitudes toward their clients and would thus perpetuate rather than remedy the circle of poverty.

The shortcomings of the legal services programs as a way of dealing with the problems of the poor have become increasingly apparent over time. The ideal of service for all has led to extremely heavy caseloads, with a necessary effect on the quality and comprehensiveness of the representation given. In addition, legal services programs may fundamentally misconceive the plight of the poor and the relation of the law to that plight. A program focused upon services to individuals will fail to deal with the legal and institutional sources of the grievances of the poor. In the legal services office, overwhelmed by individual cases, reform of laws and institutions—reform that would affect the poor as a group and would deal with the depressed state of their day-to-day existence—is neglected in the rush of small, individual matters the office must handle.

B. THE TEST CASE APPROACH

Those who warned against the inherent limitations of the legal aid approach and called for a bolder strategy saw the “test case” as a more economical use of legal talent and resources. Earl Johnson often cited a California case involving medical services as an illustration of the utility of class action suits: the amount there saved for welfare recipients was $210 million, an amount greater than the total OEO legal services budget for a year. Even more than a vehicle in which large amounts of money were at stake, the test case was seen by its adherents as a focus for organization. A single test case could replace a strike or a revolution:

25. An oft quoted example of such a supercilious attitude is the statement of a Legal Aid director in Pittsburgh that:

People may say that poverty prevents (the poor) from having the same rights to get a divorce as a person with money, yet we must remember obtaining a divorce is not a right but a privilege. For most Legal Aid clients, a separation is just as useful and practical as a divorce.

Carlin, Howard & Messinger, Civil Justice and the Poor, 1 Law and Soc'ly Rev. 9, 59 n.178 (1967).


28. During the latter part of the 1960's an image of the "radical lawyer" was being formulated as antithesis to the conventional business mouthpiece. In the effort to transform the "system," there was an unresolved conflict between: (1) the notion of the detached legalist
Law suits can consciously be brought for the public discussion they generate, and for the express purpose of influencing middle class and lower class perspectives on the problems they illuminate. They can be vehicles for setting in motion other political processes and for building coalitions and alliances. For example, a suit against a public agency may be far more important for the discovery of the agency's practices and records which it affords than for the legal rule or court order it generates. An effective political challenge to the agency may be impossible without the type of detailed documentation that only systematic discovery techniques can provide. It is on this base that coalitions and publicity can be built, and that groups can be organized to limit previously invisible authority.

Although the test case approach arguably had the attributes mentioned above, it nonetheless met criticism commensurate with that of the legal aid position. Henry DiSuarō impugned the suggestion that the test case was an effective means of organization. Lawsuits creak along without any relation to the dynamics of a real movement and meet demoralizing defeats along the way, even though they may be ultimately successful. More importantly, it is a tactical mistake to organize around an issue the determination of which rests with the enemy. Harold Rothwax also recognized the frustrating delay in the courts and made the more telling point that a judge whose office is "political" would be quite reluctant to strike down the acts of elected legislators. Moreover, both Rothwax and Gary Bellow agreed who would survey the legal landscape and divine a strategy of test cases; and (2) the image of the counsel-comrade who would go shoulder to shoulder with all community members and abide by their mass decisions in pursuit of this transformation. However appealing, both characterizations of the role of the lawyer lack much substance. The detached legalists were nothing more than the elitist lawyer's version of Lenin's vanguard party; the counsel-comrade was really a romantic denial of professionalism. Only the Cahns, supra note 16, noted the need for some surrender of professional independence without indulging in such whimsical characterizations.

29. Comment, supra note 26, at 1087.
31. See Weissman, supra note 15, at 142-43.
32. The test case ran afoul of the related discovery that judges were influenced by social consequences. Essentially what is involved is Llewellyan's "Law of Leeways," the dictate that judges trade off legal consciousness and the freedom accorded by legal materials against social exigencies and social need. A "right" is to be seen as a conclusion of a complex argument, not a platonic entity on the one hand nor an empty ipse dixit on the other. Julius Stone has interpreted the concept of a "right" stated in A. Ross, ON LAW AND JUSTICE (1959):

[A] right is a "systematic" concept, that is to be understood as a symbol which represents the operation of certain rules in the legal order, that is, in a body of rules logically interrelated with each other. It is thus not an illusion, but a tool of legal
that a test case which successfully challenged a particular rule that embodies an injustice would be meaningless without a political base to support the court's decision. A rule change, "without a political base to support it, just doesn't produce any substantial result because rules are not self-executing: they require an enforcement mechanism." In support of this assertion, Bellow cited regulation of the working conditions of field workers in California, an elaborate scheme unenforced by a political structure which had no interest in prosecuting offenders, and concluded that "[i]t's nonsense to devote all available lawyer resources to changing rules." In short, Bellow saw the test case as a unique and soon to-be-forgotten event rather than as the culmination of a changing pattern of power and legal relationships.

C. SEQUENTIAL TEST CASES

Given the welfare lawyers' devotion to the social impact of a legal decision, their reaction to the broad social forces that worked against their own efforts was hostile and even naive. Their surprising reluctance to think in jurisprudentially practical terms was an invitation to disillusionment, and inevitably it came. However, a strategy of using a sequence of test cases reasoning, making argument less cumbrous and repetitive and allowing more complex problems to be more efficiently handled.


33. Comment, supra note 26, at 1077.
34. Id. at 1078. Bellow led up to this conclusion by stating:
California has the best laws governing working conditions of farm laborers in the United States. Under California law, workers are guaranteed toilets in the fields, clear, cool drinking water, covered with wire-mesh to keep flies away, regular rest periods, and a number of other "protections." But when you drive into the San Joaquin Valley, you'll find there are no toilets in field after field, and that the drinking water is neither cool, nor clean, nor covered. If it's provided at all, the containers will be rusty and decrepit. It doesn't matter that there's a law on the books. There's absolutely no enforcement mechanism. Enforcement decisions are dominated by a political structure which has no interest in prosecuting, disciplining or regulating the state's agricultural interests.

Id. at 1077-78.
35. So one lawyer lamented:
The D.C. District Court case . . . asks that the Secretary of HEW be enjoined from certifying payment of federal matching funds for welfare programs in thirty states, and that he be ordered to recoup funds improperly paid to those states. By the time the suit is finished, more than one billion dollars will be involved. I personally devised an iron-clad legal argument demonstrating that the money is being paid illegally and must
rather than one ultimate case directed at a broad "injustice" avoided much of this disillusionment and met much of the criticism by DiSuaroo, Rothwax and Bellow.

1. Flooding the System

The sequential test case strategy may be designed to mount a case-after-case attack upon a specific set of "rules" to reach a broad legal objective. In its constrained and concentrated attack on restrictive covenants, the NAACP's legal defense fund drive against the "separate but equal" doctrine in the 1940's was an example of such an approach. The sequential test case strategy may also utilize not only the attack upon specific "rules" but also the follow-up of political field organization to reach a broad political or social objective, for example, the "white primary" cases and follow-up.

In the welfare area, a further example of such an approach was the attempt to overload the welfare rolls in the belief that the resultant failure of the welfare system would bring about an improvement. To bring about this improvement in the welfare system, participants brought test cases to eliminate the legal obstacles to welfare eligibility and payment: the "man-in-the-house" and residency requirements. They then followed with political organization and street agitation to put pressure on welfare workers to enroll potential recipients. The participants further sought publicity to encourage a broad spectrum of people to seek welfare benefits and thereby escalate welfare costs. That spectrum even included people who were ineligible or who

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fraudulently received multiple benefits. As a result, a welfare crisis of sorts did develop, and a consciousness of the welfare problem did increase. However, any ultimate improvement in the welfare system was lost in a political backlash, a governmental overreaction to the results of the strategy. Thus, although some still cling to the dogma that out of repression will emerge ultimate relief, the test case "flooding-the-system" strategy has been a patent failure in welfare reform.

2. Sparer's Strategy

The most significant and constructive welfare test case strategy was developed largely by the Columbia University Center on Social Welfare, Policy, and Law and was implemented by at least one group of OEO consultant lawyers. The most prominent and outspoken of these was Edward Sparer, who outlined the strategy in a number of sources. Sparer's goal was to challenge one-by-one what he saw as the four major defects of the American welfare system:

(1) the innumerable tests for aid and exclusions from aid, most of which were unrelated to need; (2) procedures which reduced the welfare recipient to a "client," stripped of constitutional and other rights assumed by other citizens and forced into dependency upon the welfare agency's whim; (3) the state and local character of the welfare system, which, among other things, is responsible for the numerous welfare "residence" rules for the continuing major reliance on state and local funding; and (4) the inadequate and often shockingly low amount of the money grant.

A sequential test case assault on the criteria for granting aid, the "procedural" status of the recipient and the "residence" rules was really but a prelude to the assault on the inadequacy of the aid itself. The heart of the Sparer strategy was not to aim at procedural or classificatory inequality but to get at the jugular—the amount and nature of welfare—through judicial means. Sparer hoped that once the Supreme Court recognized the inadequacy of the welfare grant, it would read a "right to life" into the equal protection clause of the fourteenth amendment that would guarantee an adequate minimum payment for every needy individual in society. The welfare attorneys were vague as to the mechanics of its ultimate establishment, but they cer-

40. See Stern, supra note 38.
tainly did not exclude a judicial as opposed to a legislative determination of what actual dollar figure would constitute an "adequate" welfare grant minimum.

IV. THE OUTCOME OF THE SPARER STRATEGY

A. The General Setting

Sparer's grand strategy was quite compatible with the aims of those who were "flooding the system," but that approach was hardly at the core of the objectives of the "right to life" attorneys. More important than any strategical compatibility was the fact that the various phases of Sparer's plan coincided with developments in other areas of the law. The procedural and categorical emphases of the welfare system were methods of qualification whose time had come; as Justice Fortas suggested, the category of "non-person" was being washed away from American law.\(^\text{43}\) Similarly, the distinction between "rights" and "privileges" was being rejected as a conclusionary label rather than an analytic tool for decision-making.\(^\text{44}\) From Wieman v. Updegraff\(^\text{45}\) through NAACP v. Alabama\(^\text{46}\) to Thorpe v. Housing Authority of the City of Durham,\(^\text{47}\) the Supreme Court was recognizing that impermissible conditions may be attached by legislatures to an otherwise authorized grant of benefits. In testing such conditions against the requirements of due process, the Court established itself as the final arbiter and required that they be supported by either a rational basis or a compelling state need.

\(^{43}\) See text accompanying note 12 supra.

\(^{44}\) The erosion of the right-privilege distinction is perhaps best illustrated in the area of government employment. Many years ago, in McAuliffe v. Mayor and Bd. of Aldermen, 155 Mass. 216, 220, 29 N.E. 517 (1892), Judge Holmes was able to write, "The petitioner [a policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." However, that government employment is no longer merely a "privilege" and that due process now controls its termination is illustrated by a long line of cases. See, e.g., Whitehill v. Elkins, 389 U.S. 54 (1967).

\(^{45}\) 344 U.S. 183 (1952) (statute requiring a loyalty oath by state employees violates due process where there is no requirement that an employee "know" about a proscribed organization of which he is a member).

\(^{46}\) 357 U.S. 449 (1958) (state "doing business" statute which requires listing of all members of NAACP impedes freedom of association and therefore is unconstitutional absent showing of compelling state interest in requiring list).

\(^{47}\) 386 U.S. 670 (1967) (tenant of federally assisted housing project entitled to notice and opportunity to be heard prior to eviction).
Thus, the legal setting seemed ripe for an attack upon the inequities of welfare law, but the success of the attack seemed to lag behind the rapidity of change in other areas of the law. As late as 1966, Judge Holtzoff could sweepingly declare that payments of relief funds are grants and gratuities. Their disbursement does not constitute payment of legal obligations that the government owes. Being absolutely discretionary, there is no judicial review of the manner in which that discretion is exercised.48 It was perhaps the lag in the development of new welfare law which finally allowed the legal attack to rapidly and dramatically catch up. Indeed, as suggested later in this Article,49 it is likely that the very rapidity of change was self-defeating. Because the cases came upon one another's heels, they had less total impact and ultimate consequence than a less hectic, more gradual and hard won set of triumphs might have had.

B. Sparer's First Three Phases Rapidly Accomplished

The welfare lawyers successfully challenged in rapid succession Sparer's initial three characteristics of the American welfare system. In the space of less than half a decade the courts struck down the "man in the house" regulation,50 required reasonable grounds for the geographic differences in payments51 and held that the qualification of an individual whose eligibility had been previously established could not be terminated without a hearing.52 In Shapiro v. Thompson53 the Supreme Court invalidated a one year residency requirement as a condition to the receipt of welfare payments. These triumphs encouraged both the welfare attorneys and the Court minority which was apparently advocating a "right to life" doctrine.

1. Shapiro v. Thompson

Shapiro v. Thompson54 was a consolidation of three appeals each of which was from the decision of a three-judge District Court.55

49. See Part VIII infra and text following notes 104, 109, and 119 infra.
54. Id.
Court holding unconstitutional a statutory denial of welfare payments to applicants who were not one-year residents of the jurisdiction. In affirming these decisions, the Supreme Court found the statutory prohibition of benefits to residents of less than a year to constitute an invidious discrimination:

There is no dispute that the effect of the waiting-period requirement in each case is to create two classes of needy resident families indistinguishable from each other except that one is composed of residents who have resided a year or more, and the second of residents who have resided less than a year, in the jurisdiction. On the basis of this sole difference the first class is granted and the second class is denied 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.5

The Court closely examined each of the asserted justifications for the classification56 and concluded that none of them could withstand the special scrutiny required where there has been an infringement of a constitutionally protected right:57

We conclude therefore that appellants in these cases do not use and have no need to use the one-year requirement for the governmental purposes suggested. Thus, even under traditional equal protection tests a classification of welfare applicants according to whether they have lived in the State for one year would seem irrational and unconstitutional. But, of course, the traditional criteria do not apply in these cases. Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest.58

Although it was clear that the statutes in Shapiro were unconstitutional because they abridged a "fundamental right," it was not clear from the Court's opinion just which right formed

55. Id. at 627 (emphasis added).
56. The governmental justifications for the classification were that it:
(1) facilitate[d] the planning of the welfare budget; (2) provide[d] an objective test for residency; (3) minimize[d] the opportunity for recipients fraudulently to receive payments from more than one jurisdiction; and (4) encourage[d] early entry of new residents into the labor force.
Id. at 634. The Court dismissed the first justification because there was no factual showing that the waiting period was actually used to facilitate planning. The second and third justifications were rejected because in the investigation of any welfare application there arose information sufficient both to assure residency and to protect against fraud. The fourth justification would logically require a similar waiting period for long-term residents to encourage their early entry into the labor force.
57. The Court majority in Edwards v. California, 314 U.S. 160 (1941), rested the right to travel upon the commerce clause, and Justices Douglas and Jackson based the decision upon the privileges and immunities clause. See also United States v. Guest, 383 U.S. 745 (1966); In re Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1872).
58. 394 U.S. at 638 (emphasis in original).
the basis of the decision. In his dissent, Justice Harlan impugned the majority's expansion of the equal protection clause reflected in its use of the compelling interest standard to review the violation of a fundamental right, whether that right be the right to travel or the right to life. He suggested that a violation of the constitutional right to travel could be better dealt with under the due process clause than the equal protection clause and criticized "the Court's cryptic suggestion ante . . . 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'." Nonetheless, although the basis of the Shapiro decision was unclear, the "right to life" exponents hailed the mere implication that welfare legislation classifications would thereafter be subject to the compelling interest scrutiny of the Court.

2. The Extension of Shapiro

The arguable expansion of the equal protection doctrine in Shapiro seemed to foreshadow the complete success of the "right to life" approach. The argument that a family maximum welfare payment was unconstitutional seemed to be the final hurdle to the assertion of a personal constitutional right to adequate welfare payments. It would be argued that the statutory prohibition of benefits to additional children constituted an invidious discrimination between the class of children who fell within the family maximum and the class of those who did not. The Court, it was hoped, would examine the asserted justifications...
for the classification, the protection of limited fiscal resources or the promotion of efficiency in welfare administration, and conclude that they did not stand up under the special scrutiny dictated by the infringement of a "fundamental right." And finally, the further argument would be made that under the equal protection clause each child was entitled at birth to an amount of money which would insure that the child had food, shelter and the other necessities of life. Although the Court was not expected to automatically accept this final argument, it was recognized that such a final step was not possible without the rejection of the family maximum on Federal Aid to Families With Dependent Children (AFDC) payments.

C. THE COLLAPSE OF SPARER'S STRATEGY: DANDRIDGE V. WILLIAMS

It was the very issue of a family maximum, the bridge to a constitutional right to welfare, that arose in the case of Dandridge v. Williams. The outcome of the case, however, came as a cruel and unexpected blow to the "right to life" hopefuls. Not only did the Court refuse to strike down Maryland's family maximum as violative of equal protection, but it went out of its way to quash the Shapiro dicta that welfare legislation was subject to the compelling interest scrutiny of the Court. Perhaps Sparer best described the collapse of his own strategy:

[A] contrary result in Dandridge would have permitted wholesale challenges to the barriers created by state legislatures and Congress to deny welfare assistance to groups of needy people. Distinctions between grant levels of individuals in equal need, whether because of differences in categories or their state of residence, might have been brought down. Traditional divisions between state and federal authority, and between the three branches of government, would doubtless have been altered.

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63. The Court unequivocally stated:

[H]ere we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, and claimed to violate the Fourteenth Amendment only because the regulation results in some disparity in grants of welfare payments to the largest AFDC families. [C] Shapiro v. Thompson, 394 U.S. 618, where, by contrast, the Court found state interference with the constitutionally protected freedom of interstate travel. . . . To be sure, the cases [requiring only the "reasonable basis" test], and many others enunciating this fundamental standard under the Equal Protection Clause, have in the main involved state regulation of business or industry. The administration of public welfare assistance, by contrast, involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different constitutional standard.

Id. at 484, 485 n.16.
RIGHT TO WELFARE

The equal protection clause would have become the main vehicle for establishing a constitutional guarantee of human life. In these and other ways, affirmative judicial scrutiny to guarantee equal protection could have led to a different America. Although there is more than a bit of the "for want of a nail" grandiosity in Sparer's claim to a "different America," it is clear that Dandridge would have been the linchpin in his complex legal strategy. The remainder of this Article will attempt to explain the failure of the effort to constitutionalize the right to welfare and to suggest lessons for future programs.

V. THE "RIGHT TO LIFE" DOCTRINE

A. THE GENESIS OF THE DOCTRINE AND ITS IMPLEMENTATION

In pursuit of Sparer's grand design, the OEO lawyers sought to guarantee "cradle to grave" security for every citizen by establishing a constitutional mandate to eliminate poverty. They sought to extend the coverage of the equal protection clause and to imbed therein the substantive "right to life." The analytical groundwork for the extension of the equal protection clause had been provided in the work of Jacobus ten Broek and Joseph Tussman, and the "right to life" doctrine itself had been the inspiration of A. Delafield Smith.

As had Chief Justice Hughes, ten Broek and Tussman urged that the Court should halt the retreat from its due process excesses of the past and reassert its power to strike down grossly particularistic legislation as that which had survived judicial scrutiny in Goesart v. Cleary and Kotch v. Board of River Port Pilots Commissioners. They detected the theoretical

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64. Sparer, supra note 42, at 82.
66. A. SMITH, THE RIGHT TO LIFE (1955). Smith was at one time the Counsel General of the Federal Security Agency. It appears (to the best of this author's knowledge and research) that Smith's writing was not cited in any of the briefs or articles of the welfare attorneys; but since his logic and phraseology anticipated and were so similar to their writings, complete coincidence seems unlikely. Moreover, Smith was a frequent speaker in social work circles, and his ideas became well known and something of a common heritage among people working in the area.
68. 335 U.S. 464 (1948) (no denial of equal protection where a Michigan statute, denying bartender's licenses to females, except for "the wife or daughter of the male owner," in effect discriminates against women owners of bars).
69. 330 U.S. 552 (1947) (apprenticeship program of river pilots based on consanguinity not a violation of equal protection).
cal vehicle for this reassertion in the Court's seeming shift away from due process to substantive equal protection as the guardian of substantive rights:

Due process is, after all, a weapon blunted and scarred in the defense of property. The present Court, conscious of its destiny as the special guardian of human or civil rights may well wish to develop some alternative to due process as a sanctuary for these rights.

... It should be noted, of course, that shifting a right from the protection of due process to the protection of the equal protection clause neither clarifies or simplifies the problem of the "absolute" character of a right nor eases the problem of determining what particular rights are to be regarded as enjoying this absolute protection.

The transference of substantive rights to the equal protection clause by shifting the emphasis from equality to protection has implications for the Federal System. It undermines the doctrine that the Fourteenth Amendment forbids only state action. If the clause guarantees substantive rights, then it requires their protection by the state. The failure of the state to supply that protection is accordingly a violation of the clause.70

As ten Broek and Tussman noted, the Court's shift to the equal protection clause as the guardian of fundamental rights did not answer the question of what rights would be deemed "fundamental." It was the inspiration of Smith, and the ultimate task of the OEO lawyers, that the "right to life" be recognized by the Court as one of the "fundamental" rights guaranteed by the equal protection clause and therefore entitled to protection by the state. Smith's doctrinal contribution of the "right to life" was that of entitlement, that every individual in the society is entitled as of right to receive the minimum needs of life from that society. To buttress his assertion of entitlement, Smith argued that the receipt of a welfare payment as a gratuity rather than as a right degraded the recipient and was therefore self-defeating.71 Social Security legislation had estab-

70. Tussman & ten Broek, supra note 65, at 364-65 (emphasis added).

71. Thus Smith wrote:
As for psychology, you would do better, it seems to me, to rely on the prestige that accompanies any well implemented legal right than to keep harping on the idea that earned rights are better than other rights. ... For as you expand the social security system—I mean the so-called old-age and survivors insurance system as distinguished from public assistance—emphasizing with each expanded step that the individual is "earning" any benefits he receives, you are at the same time subjecting those without earning power to a more and more poignant self-condemnation as social parasites. The psychology thus induced will ultimately prove disastrous to society's attempts to rehabilitate the individual and reconstruct interpersonal relationships.

A. Smith, supra note 66, at 59-60.
lished some semblance of a legally enforceable entitlement in the requirement of a fair hearing prior to the entitlement's discontinuation, and the Court thus accepted the due process clause as applicable to benefit controversies. However, the legislation had stopped short of an outright declaration of a legal right to benefits; there was no language which required the application of the equal protection clause. Smith attributed this lack of fundamental right language to a legislative belief that basic constitutional principles were applicable to all such statutory entitlements.

B. The Repudiation of the Doctrine in Dandridge

As noted above, Dandridge was crucial to the poverty lawyers' attempt to establish the "right to life" as a "fundamental" right guaranteed by the equal protection clause; it was par excellence Fuller's conception of a "bridging case."

1. Lower Court Support for the OEO Lawyers' Position

As Dandridge moved toward decision many things seemed to favor the OEO attorneys' position. A series of federal district court decisions had consistently held various family maxima to be invalid either as violative of equal protection or as contrary to the purposes and provisions of the Social Security Act. In addition, the Iowa supreme court had relied on its state version of the equal protection clause to invalidate a family maximum which the legislature had attempted to superimpose upon an existing welfare program. The Iowa court found that the family maximum amendment was an economy measure which was extrinsic to the basic welfare-provision purpose of the legislation. However, whether the same logic could be applied to state action in implementing a federal grant-in-aid program was at least

73. Smith, Public Assistance as a Social Obligation, 63 Harv. L. Rev. 266, 268 (1949).
74. See notes 62-64 supra and accompanying text.
75. See Fuller, American Legal Realism, 82 U. Penn. L. Rev. 429, 441 (1934).
problematic, and the United States Supreme Court ultimately showed no interest in the Iowa precedent.

2. **The Three-Judge District Court Decision in Dandridge**

In the district court the *Dandridge* welfare recipients argued that Maryland's family maximum discriminated against them in violation of the equal protection clause merely because of the size of their families. They further argued that the maximum was incompatible with the purpose of the Social Security Act of 1935 and contrary to the Act's explicit provisions. In its original opinion the district court struck down the family maximum on both the constitutional and the statutory grounds urged by the recipients. In support of its conclusion that Congress intended the individual child rather than the family unit to be the beneficiary of welfare aid, the court relied primarily upon a 1950 amendment of the Act which provided:

A State plan for aid and services to needy families with children must . . . [provide] . . . that all 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.

The court looked to both the legislative purpose of appropriations under the Federal Aid to Families With Dependent Children program and the definition of "dependent child" contained in the Act to determine that the 1950 amendment mandated that aid be furnished to all dependent children.

In its articulate analysis of both the purpose and provisions of the Act, the court almost obscured the alternative basis for its decision. The purpose of the AFDC program was to provide support for dependent children, and the effect of the Maryland family maximum was to create a classification which denied that support to some of the intended recipients. Because the state had advanced no rational basis for drawing the classification, the court concluded "that the maximum grant regulation transgressed[d] the equal protection clause." Although the consti- 

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78. Williams v. Dandridge, 297 F. Supp. 450 (D. Md. 1968). Upon motion by the Maryland Board of Welfare, the court issued a supplemental opinion. Id. at 459.
83. Id. at 459.
tutional basis for the original opinion seemed unimportant relative to the statutory basis, the court ultimately founded its decision solely upon the equal protection clause.

Upon motion by the Maryland Board of Welfare, the court reopened consideration of the issues involved in its original opinion. It was brought to the attention of the court that Congress had arguably granted its approval to family maxima by providing that a state AFDC plan must:

provide by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted.84

This 1967 amendment to the Social Security Act had become an issue in another welfare case, Rosado v. Wyman,85 and thus could not easily have avoided attention. Although the district court in Dandridge expressed doubt that Congress had intended by this amendment to endorse every welfare maximum,86 it felt constrained to retreat from any reliance on the statutory basis for its original decision. As a result, the court restated its opinion, basing it on the constitutional ground of equal protection and thereby more clearly focused the constitutional issue for determination by the Supreme Court.

3. The Supreme Court Decision in Dandridge

In upholding the validity of the Maryland family maximum, the Supreme Court rejected both the district court’s interpretations of the Social Security Act and its analysis of equal protection guarantees. The Court declared that the necessary starting point of such statutory construction was a recognition of the state’s great latitude in dispensing its available funds. As a result of this latitude, the state was not prohibited from balancing the harm caused to all families by uniformly insufficient pay-

86. The court said: [W]e find it difficult to say that § 213(b) represented a considered judgment by Congress that it wished to validate all maximum grant regulations and that it wished to depart from the basic objectives of prior Congresses, reaffirmed by it, that benefits under AFDC be granted to all eligible individuals and that to the maximum extent feasible for their interests dependent children be kept in their own family units. 297 F. Supp. at 466 (emphasis in original).
ments against the ability of large families to better weather diminished per capita payments. The statutory requirement that aid "shall be furnished with reasonable promptness to all eligible individuals" meant only that every individual must receive some aid, and such receipt was effected by Maryland's grants to families. Thus the Court in *Dandridge* rejected the district court's conclusion that a specific grant must be made to every individual according to that individual's standard of need. In closing its discussion of the statutory provisions, the Court determined that by the Social Security Amendments of 1967 Congress had fully recognized that the Act permits family maxima:

This specific congressional recognition of the state maximum grant provisions is not, of course, an approval of any specific maximum. The structure of specific maximums Congress left to the States, and the validity of any such structure must meet constitutional tests.

As the Maryland grant system was not inimical to either the purpose or the provisions of the Act, the validity of the family maximum ultimately depended upon whether it satisfied the requirements of the equal protection clause. In a few laconic phrases, the Supreme Court put to rest any notion that the receipt of welfare payments was a "fundamental" right which could be abridged only in the "compelling" interests of the state.

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88. The Court determined that this interpretation of the specific provision comported with the purpose of the Act:
Nor does the maximum grant system necessitate the dissolution of family bonds. For even if a parent should be inclined to increase his per capita family income by sending a child away, the federal law requires that the child, to be eligible for AFDC payments, must live with one of several enumerated relatives. The kinship tie may be attenuated but it cannot be destroyed. 397 U.S. at 480. In his dissent Justice Douglas made a lengthy examination of the Act's legislative history and rejected the majority's interpretation of the provision in favor of that of the district court. Id. at 493-99 (dissenting opinion).
89. The Court said:
Although the appellees argue that the younger and more recently arrived children in such families are totally deprived of aid, a more realistic view is that the lot of the entire family is diminished because of the presence of additional children without any increase in payments. . . . It is no more accurate to say that the last child's grant is wholly taken away than to say that the grant of the first child is totally rescinded. In fact, it is the family grant that is affected.
Id. at 477-78 (emphasis in original).
91. 397 U.S. at 482.
92. See note 63 supra.
The state had advanced several tenable justifications for its family grant maximum and therefore had met the constitutional test imposed upon it by the equal protection clause:

If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." . . . "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." . . . "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

But 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 . . . It is enough that the State's action be rationally based and free from invidious discrimination. The regulation before us meets that test.

Thus, faced with a strange "right to life" doctrine that essentially involved an overnight "greening of America," the Court recoiled:

In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution.

With this epitaph the OEO strategy was buried.

VI. TOWARD AN UNDERSTANDING OF THE "RIGHT TO LIFE" FAILURE

Given the many advantages the OEO lawyers seemingly had, their failure in Dandridge to constitutionalize the right to welfare requires explanation. The ten Broek-Tussman critique of substantive law, the emergence in the Court of a growing reliance upon the equal protection clause, the development of the "right to life" doctrine, the activism of the Warren Court—all had promised a quite different result in Dandridge.

93. Maryland argued that the regulation was justified because it encouraged gainful employment, maintained an equitable balance in economic status as between welfare and non-welfare families, provided incentives for family planning and allocated available public funds in such a way as to fully meet the needs of the largest number of families. Perhaps recognizing the "fundamental" nature of the right involved, the district court had rejected these justifications because the regulation itself was invalid on its face for overreaching. In his dissent Justice Marshall recognized that the rights involved were not mere "business" interests and urged a closer scrutiny of the state's justifications. Dandridge v. Williams, 397 U.S. 471, 519-30 (1970) (dissenting opinion).

94. Id. at 485, 486-87 (citations omitted).

95. Id. at 485.
A. THE UNSUITABLE FORMULATION OF THE
"RIGHT TO LIFE" DOCTRINE

The suggestion here is that successful constitutional change
requires more than the vehicle of an acceptable constitutional
theory and the existence of a tenable new doctrine. Constitu-
tional change requires also that the Court have a reason for in-
tervention; thus, the proper tools as well as the desire to frame a
new constitutional precedent are essential to that end.

1. Doctrinal Language

Ideally a doctrine as a "tool" of constitutional change should
proceed logically from some articulated constitutional language
and should be stated in manageable terms which permit judicial
expansion or contraction. Far from the ideal, the "right to life"
doctrine proceeded from the vaguest of constitutional language,
and its broad, global terms did not easily permit judicial con-
traction. The doctrine's language tended toward the grandiose
and suggested social principles far beyond the specific economic and
welfare issues involved in Dandridge. Almost anything touching
upon "existence" wandered into the domain of the "right to life." This
Thus the issue of the prohibition of all abortions might have
been equally as appropriate to the "right to life" rubric as was
the far different issue of welfare benefits.

2. Doctrinal Consequences

However, even the doctrinal language was not the fatal flaw
in the OEO lawyers' presentation. The consequences of the adop-
tion of a successful doctrine are justified in terms of basic and
well supported social values. To paraphrase H.L.A. Hart,96 when
a doctrine has been accepted the judge has been urged to
translate societal rules into legal rules. While some strongly
felt social values were founded in the "right to life," the effort
to judicialize these values came at a time when popular and
political support for welfare was manifestly on the wane. Judi-
cial action is invoked as being in consonance with long range
principles that are temporarily forgotten by a fleeting major-
ity, or as being an unfolding of a rule that is based on esoteric
wisdom, or as being a product of a new consciousness of the social
situation. Judicial action is not, however, effectively invoked to
shore up an ebbing social tide. The OEO lawyers' attempt to

gain judicial acceptance of a doctrine for which the popular support was fading was really just another abortive attempt to retire "into the judiciary as a stronghold." 97

The Court generally sees that the problems ensuing from the acceptance of a new doctrine either have existing remedies or at least appear to be manageable. This rule of thumb, that a decision should not open a flood of new cases, has been overlooked in extreme cases, but only with grave judicial misgivings. In contrast, the acceptance of the "right to life" doctrine at best would have created a vague, general imperative the specific mechanics of which would have to be formulated by the legislatures. At worst, its acceptance would have created a generation of litigation in which courts would be called upon to assess particularized dollar allocations for welfare allowances. Thus, the problems emanating from the acceptance of the "right to life" doctrine were clear and stunning, the solutions vague and problematic.

Although the theory of substantive equal protection was an adequate vehicle for constitutional change, the doctrine of the "right to life" was not suited to rapid judicial acceptance. There were sympathetic ears on the Court who might have responded to a careful pace. A cautious approach over time might have provided the third prerequisite to constitutional change, the reasons and mood for judicial intervention. 98


98. The notion of "special scrutiny" by the Court can be traced most directly to Justice Stone's famous footnote in United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938):

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . .

The Carolene decision sustained a federal statute excluding "filled milk" from interstate commerce, but Stone's footnote had suggested a stricter standard of review where the legislation in question threatened the openness of the political process. Stone suggested two additional justifications for special scrutiny of legislative decisions: (1) where parochial interests had great influence with the determining governmental body the courts could bring to bear a national interest otherwise under-represented; (2) where discrete and insular minorities were excluded from political effectiveness the courts could intervene to restore a democratic balance.

Stone's further justification of judicial intervention on behalf of federalism was used with great effectiveness by welfare lawyers to eliminate waiting periods and other "procedural" measures which insulated a particular state from the national welfare problems. The welfare lawyers were effective in this area because they had pre-existing and ac-
B. The Model Of A Successful Doctrine: Absolutism

In contrast to the failure of the “right to life” effort is the history of the first amendment and the success of Meiklejohn's absolutism. The doctrine of absolutism was as strange and extreme at its first unveiling as the equal protection enshrinement of the welfare state was in the late 1960’s. As late as 1951, Justice Vinson said: “Nothing is more certain in modern society than the principle that there are no absolutes.” Yet as time passed, absolutism has become a barely submerged doctrine of great impact, implicit in a series of still vital decisions. An impetus to the development of due process theory came from the absolutist writings of Meiklejohn, and his doctrine made its way into actual decision. An impetus to the development of equal protection theory came from the writings of ten Broek and Tussman; yet the “right to life” doctrine was rejected in actual decision. An explanation of the difference between these doctrinal dispositions should emerge in positive terms from a delineation of the success of absolutism.

1. Doctrinal Language and Consequences

In contrast to the “right to life,” absolutism was bottomed in the most literal of constitutional readings. As the late Justice Black remarked, “I understand that it is rather old-fashioned and shows a slight naivete to say that 'no law' means 'no law'.” Moreover, the doctrine promised to solve rather than to create some very specific problems. At the time it appeared that the adoption of the doctrine would remove from the judicial arena the troublesome and time consuming issue of obscenity. The adoption of the doctrine also promised to open up the political process by providing sure guidelines for public criticism of political leadership, and in this respect, unlike the “right to life,” accepted reasons for judicial intervention. The lawyers failed in the overall attempt to establish the right to life within the fourteenth amendment because they could not offer such reasons nor quickly create a mood for judicial intervention.

99. Meiklejohn suggested that the right to political expression was “absolute” and unregulatable in MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948), which was republished in extended form in MEIKLEJOHN, POLITICAL FREEDOM (1960).


absolutism was already implicit in a wealth of common law decisions.103

2. **Doctrinal Evolution rather than Revolution**

In contrast to the gradual evolution of absolutism, the establishment of the “right to life” was attempted precipitously. The gradual evolution of absolutism benefited its development as much as the rapidity of the OEO lawyers’ efforts thwarted the development of the “right to life.” The first amendment absolutists were able to draw upon a great range of legal talents whose study and criticism of the doctrine honed and refined the Meiklejohn arguments. The courts themselves had decades in which both to refine and to accept the doctrine; even seminal first amendment cases are rarely cited in decisions because so many cases have intervened.104 In contrast the “right to life” doctrine was pushed onto the scene in public lectures and occasional law review articles, both of which were often products of OEO grants and thus obvious “packages” that were to be accepted by the courts. There simply was no time to analyze, let alone refine, the “right to life” doctrine, and the Court was asked in *Dandridge* to adopt a doctrine which was supported by the barest of precedent.

VII. **THE INSTRUMENTS OF CHANGE**

Arguably the “right to life” concept represented the single most dramatic policy change in American society since the abolition of slavery. Certainly its implications were more far-reaching than those of the various New Deal measures, the Federal Reserve Act or even the Social Security Act itself. Only the concepts of collective bargaining and desegregation affected the lives of as many Americans as would have the “right to life.” The comprehensive consequences of the adoption of a “right to life” raise questions about the instruments of such change—the OEO lawyers in the first instance and the courts in the final determination.

A. **The Government Lawyer**

There has often been postulated a fundamental contradiction between the welfare lawyers' working within the social

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103. See, e.g., Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908).
order and truly changing that same order. Stephen Wexler has suggested:

Several . . . factors . . . serve to shorten the time one can expect a lawyer to remain in poverty practice. It is usually the government which pays a poverty lawyer; it is also often the government that a poverty lawyer will oppose in his client's interests. Thus, the more effective a poor people's lawyer, the more problems he poses for those who pay him. Even the few poverty lawyers who do decide to make a career of poor people's law face the threat that the decision is not entirely in their hands; the better they are at their jobs, the more likely it becomes that the government will eliminate their jobs.

In an earlier analysis of the OEO legal services program, Geoffrey Hazard agreed with Wexler to the extent that the program was misconceived because it aimed at change rather than service:

The fact remains that in a constitutional regime partisan political activity is supposed to be a matter of private initiative. For such a regime to survive it has to stay pretty much that way in fact. However inconstantly the principle is fulfilled, it rests on a recognition that a government which creates agencies to formulate what shall be taken as the people's will is no longer a government by the people. The force of the point is suggested by asking what would be the consequences of generalizing the proposition that the poor should have lobbyists paid by the government. Should similar lobbyists be provided the near-poor, the middle-class, the affluent? How does one rationally allocate the political resources through which resource allocation is made? One comes uneasily to the conclusion that the idea simply does not have sustaining attraction.

The conclusion also suggests itself that the idea of "lobbyists for the poor" is both precious and irrelevant.

Hazard criticised the notion that the OEO lawyers could define a mission themselves and then pursue that mission to its ultimate, "letting justice be done though the heavens fall." The fight to help the poor should spring from private initiative, and

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105. A longtime court observer for the New York Times wrote: The real trouble is that Legal Aid lawyers are still lawyers, and as such they believe in the very system they must attack to be loyal to their clients. To attack it properly they should not hesitate to destroy it. But they cannot even consciously think of it in this manner. If they did, they might do something terrible. They might become unpopular. Zion, On the Limits of Litigation, 30 Antioch Rev. 185, 193-94 (1970). For some variants of this position see, e.g., Radical Lawyers (J. Black ed. 1971).


the government should react to the public rather than formulate that same public will.

Interestingly, the original advocates of the "lobbyists for the poor" are now among the most disillusioned and advocate abandonment of any ameliorative role for lawyers. The individual probably most identified with the reformist-through-law strategy, Edward Sparer, now dismisses the legal services program:

The welfare recipient's lawyer started his struggle in 1965 not merely as a technician whose function was to help the welfare system conform to what the elected representatives of the majority had decreed it should be. His mission was to utilize the legal process to help change the very nature of the welfare system and, thereby, to change the ground rules of American society. No mere legal technician, he was a grand strategist. No mere advocate of other people's yearnings, he yearned for the change with his clients. And for a brief moment in the 1960's when it appeared that a majority, or at least their elected representatives, were ready to accept some basic change, his mission appeared possible. In 1970, it does not. No more a significant participant in grand change, he appears reduced to what the revolutionist has often accused the lawyer of being—a technical aide who smooths the functioning of an inadequate system and thereby helps perpetuate it.\textsuperscript{108}

In an examination of the failure of the OEO lawyers' constitutional aspirations, an emphasis upon their inability to work "within the system" seems more theoretical than practical and is misplaced. The real explanations of the failure have been outlined in this Article—the conflict and ambiguity in the legal services theory, the confusion of the OEO legal strategy, the lack of suitability of the "right to life" doctrine and, ultimately, the destructive speed of the constitutional attack. If agonizing over the proper role of the government lawyer offers any insight into the failure, it is that insight which was implied in the statement by Sparer. Sparer was active in the fight to constitutionalize the right to welfare, and therefore his disappointment in the \textit{Dandridge} outcome is understandable. His resultant dismissal of the fight, however, is not. Rather, it is indicative of the very impatience which caused the failure in the end.

\textbf{B. The Limits Of The Judicial Process}

In general, attempts to differentiate the judicial from the legislative process on a broad conceptual level have not shown up

well in the light of what actually occurs.\textsuperscript{109} It is difficult in our American system to find a type of action which is ineluctably legislative, an action a court would never take. Even "legislative" matters such as war and peace,\textsuperscript{110} who may be seated in Congress\textsuperscript{111} and who may receive government funds\textsuperscript{112} have been found cognizable in court. The concept of a "political question," the judicial effort to give operant meaning to what is the proper role of the judiciary, seems today more elusive and imprecise and less a convincing product of judicial conviction than ever before.

Judge Friendly has pointed out that courts are both reluctant and unconvincing when they are put to a "legislative" choice from among several plausible decisions, for example, that between five and one-half percent and six percent as a proper interest rate and that between the first and second trimester as the basis for abortion policy.\textsuperscript{113} Although judges have made decisions on such matters, they have done so with the awareness that they are at the fringes of their judicial authority. The courts are especially reticent to "legislate" when the disposition of public funds is involved; the political and social reality is that people are more willing to pay taxes if they consider themselves able to determine by vote who will spend the revenue and how it will be spent. Thus, it is the lack of an identifiable constituency that most closely differentiates the courts from the other branches of government. The court's very amateur standing as a topical generalist permits little continuity in supportive groups and limits its effective ability and willingness to take on major social changes.

The OEO lawyers were sensitive to this judicial reluctance and thus stressed the moderate and sometimes fiscally trivial consequences of a favorable decision rather than the moral ad-

\textsuperscript{109} See, e.g., Horack, \textit{The Common Law of Legislation}, 23 \textit{Iowa L. Rev.} 41 (1937), for an iconoclastic view of similarities in the processes. It has been argued that judicialization and legislation were once commingled and that the more specialized processes of individual adjudication and broad policy-framing emerged indistinctly from their original union. Conversely it has been argued that policy-making is disjunctive from policy application, i.e., that courts were more aptly compared with the executive than with the legislature. \textit{Compare} C. McILWAIN, \textit{The High Court of Parliament and Its Supremacy} (1910) \textit{with} F. Goodnow, \textit{Policy and Administration} (1900).

\textsuperscript{110} See, e.g., Duncan v. Kahanamoku, 327 U.S. 304 (1946); \textit{Ex Parte} Milligan, 71 U.S. (4 Wall.) 2 (1875).


\textsuperscript{112} See, e.g., Flast v. Cohen, 392 U.S. 83 (1968).

\textsuperscript{113} H. Friendly, \textit{Benchmarks} 11-13 (1967).
vance represented by the decision's symbolic values. However, in Dandridge the subjective choices facing the Court were less "judicial" and the practical consequences of a favorable decision were less easily demonstrable than in many earlier welfare cases. The Maryland welfare authorities did present to the Court specific figures demonstrating the immediate shortage of funds which would result if constant amounts were extended to those who were otherwise excluded by the family maximum. Assuming a fixed overall state grant, these figures put the Court in the position of making a "legislative" choice between a lower amount for every individual and the higher per person amount assured in limiting the number of recipients by a family maximum. The state also argued on economic and political grounds that there was a need for a maximum set at less than the amount earned by workers at a reasonable level of skill so as not to discourage the labor market by the grant payments. However, the economic effect of welfare payments upon the labor supply was not amenable to empirical investigation nor was it easily demonstrable, and the judgment as to the political backing for a welfare program was preeminently one for the legislature to make. The Court concluded:

We do not decide today that the Maryland regulation is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised. Conflicting 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. The Constitution may impose certain procedural safeguards upon systems of welfare administration . . . . But the Constitution does not empower this Court to second-guess state officials charged with

114. E.g., Reynolds v. Smith, 394 U.S. 618 (1969), a durational requirement case in which the Pennsylvania department of the OEO presented precise cost estimates to demonstrate the minimal effects of a favorable decision.
116. Id. at 115.
117. An indication of the evidentiary problem facing the OEO lawyers appears in the Brief for Appellants at 26, Washington v. Harrell, 394 U.S. 618 (1969), a residence requirement case in which the state argued:

In these days of sociological sophistication it is surely somewhat presumptuous of plaintiffs to ask the Court to rely entirely on their mere speculations as to the actual effect of residence requirements on patterns of migration. If no complete study was at hand plaintiffs surely should have buttressed their contention with at least a limited study of their own.
the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.\textsuperscript{118}

In \textit{Dandridge} more than in earlier welfare cases, the OEO lawyers seemed to face issues which arguably fell outside judicial competence, if not authority. What seems on first impression to be clearly in the domain of the legislature, however, may become by familiarity or the passage of time assimilated to the judiciary. Such assimilation is defensible either in the questionable argument that the legislature has acquiesced or on the equally problematic grounds that societal acceptance of the norms involved makes judicial action an appropriate process. In any event, time can provide both the clear theorization which facilitates and sustains judicial policy-making and the “compelling” plaintiff who presents a precise legal claim requiring judicial action.

In a sense then, it was the speed of the OEO effort which led to its failure. Decisive strategy and rapid-fire attack are generally incompatible with, and at the very least create problems for, the normal judicial process. The development of “arbitrary” solutions from among the set of plausible rules which inhere in every situation is obscured and mollified by the flow of time and the succession of change it brings. In this sense the legislative process is a recapitulation of the judicial, or the judicial a slow-motion projection of the legislative. Major social change which is for temporary or permanent reasons unobtainable from the “popular” branches of government may be endowed with a greater legitimacy when made by the courts if the shift from majoritarian to normative judgment is spread out over time. The clash between the two modes of decision making and discourse is less evident when the intervention of events allows the evidence to go unnoticed.

\textbf{VIII. CONCLUSION}

In the attempt to constitutionalize a right to welfare by gaining Supreme Court acceptance of a “right to life” as a “fundamental” right guaranteed by the equal protection clause, the OEO lawyers both were faced with and created many problems which they could not surmount. Initially, the legal services program of the OEO was founded on theory so vague that it frustrated the formulation of goals and the selection of directions. Once it was in operation, the effectiveness of the program was

\textsuperscript{118} 397 U.S. at 487 (emphasis added).
consistently dampened by the strategical tension between the advocates of the legal aid-client need approach and those of the test case—institutional attack approach. Moreover, Smith's "right to life" doctrine itself was an over broad conception which was ill-suited to rapid acceptance by the Court.

In the end, however, it was not these problems which caused the ultimate failure of the OEO effort; but rather, it was the problem of time. There was not enough time for the necessary analysis, criticism and refinement of the "right to life" doctrine. There was not enough time to permit a judicial acceptance of a new constitutional doctrine nor was there time to obscure the fine line between judicial and legislative rulemaking authority. The OEO lawyers overenthusiastically used rather than totally misused that process. Their espousal of a strategy, their tactics and their sense of what was achievable in a short period of time all appear faulty. A more cautious approach, a more limited set of expectations and above all a patience might achieve much of what was originally aspired. There is no reason to believe that the ultimate goal cannot be achieved with realistic aims and expectations.