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United States Department of Agriculture v. Moreno - The "Red Herring" of Social Welfare

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UNITED STATES DEPARTMENT OF AGRICULTURE v. MORENO—THE "RED HERRING" OF SOCIAL WELFARE

The Food Stamp Act[1] was enacted by Congress in 1964 as the Federal Government's principal step towards alleviating hunger in America. Congress had two purposes in mind: to raise the nutrition levels among low-income households, and to stabilize the agricultural economy.[2] At its inception, eligibility for participation in the program was determined on a household rather than on an individual basis.[3] "Household" at that time was defined as "[A] group of related or nonrelated individuals, who are not residents of an institution or boarding house, but are living as one economic unit sharing common cooking facilities and for whom food is customarily purchased in common."[4] In January, 1971, the Food Stamp Act was amended and household was redefined as:

> [A] group of related individuals (including legally adopted children and legally assigned foster children) or non-related individuals over age 60 who are not residents of an institution or boarding house, but are living as one

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1. 7 U.S.C. §§ 2011 *et seq.* (1970).

2. *Id.* § 2011. The Congressional Declaration of Policy reads:
> It is hereby declared to be the policy of Congress, in order to promote the general welfare, that the Nation's abundance of food should be utilized cooperatively by the States, the Federal Government, local governmental units, and other agencies to safeguard the health and well-being of the Nations [*sic*] population and raise levels of nutrition among low-income households. The Congress hereby finds that the limited food purchasing power of low-income households contributes to hunger and malnutrition among members of such households. The Congress further finds that increased utilization of food in establishing and maintaining adequate national levels of nutrition will promote the distribution in a beneficial manner of our agricultural abundances and will strengthen our agricultural economy, as well as result in more orderly marketing and distribution of food. To alleviate such hunger and malnutrition, a food stamp program is herein authorized which will permit low-income households to purchase a nutritionally adequate diet through normal channels of trade.

3. *Id.* § 2014.

4. 7 U.S.C. § 2012(e) (1964), *as amended* 7 U.S.C. § 2012(e) (Supp. II, 1972). The section went on to say that "[T]he term 'household' shall also mean (1) a single individual living alone who has cooking facilities and who purchases and prepares food for home consumption."

> economic unit sharing common cooking facilities and for whom food is customarily purchased in common.[5]

Thereupon the Secretary of Agriculture declared households in which all members were *not* related to each other as ineligible for food stamp assistance.[6] This amendment denied aid to groups who met the income eligibility requirements under the Act,[7] but were eliminated from the program because all group members were not related to each other.

The complainants included Jacinta Moreno, a fifty-six-year-old diabetic who lived with Ermina Sanchez and the three Sanchez children. The two women shared common living expenses and a monthly income of $208, making food stamps a necessity. Sheilah Ann Henjy, her husband, and three children, supported an unrelated twenty-year-old woman as a member of their household. The Henjys had been receiving $144 worth of food stamps per month but were denied this assistance under the new

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5. 7 U.S.C. § 2012(e) (Supp. II, 1972), *amending* 7 U.S.C. § 2012(e) (1964). This amendment was declared unconstitutional in United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973). The Act provided further that "[T]he term 'household' shall also mean (1) a single individual living alone who has cooking facilities and who purchases and prepares food for home consumption, or (2) an elderly person who meets the requirements of Sec. 2019(h) of this title."

6. 7 C.F.R. § 270.2(ii) (1973) states:

> (jj) "Household" means a group of persons, excluding roomers, boarders, and unrelated live-in attendants necessary for medical, housekeeping, or child care reasons, who are not residents of an institution or boarding house, and who are living as one economic unit sharing common cooking facilities and for whom food is customarily purchased in common: *Provided*, That: (1) When all persons in the group are under 60 years of age, they are all related to each other; and (2) When more than one of the persons in the group is under 60 years of age, and one or more other persons in the group is 60 years of age or older, each of the persons under 60 years of age is related to each other or to at least one of the persons who is 60 years of age or older.
>
> It shall also mean (i) a single individual living alone who purchases and prepares food for home consumption, or (ii) an elderly person as defined in this section, and his spouse.

7. 7 C.F.R. § 271.3(a) (1973) states:

> Eligibility for and participation in the program shall be on a household basis. All persons, excluding roomers, boarders, and unrelated live-in attendants necessary for medical, housekeeping, or child care reasons, residing in common living quarters shall be consolidated into a group prior to determining if such a group is a household as defined in § 270.2(jj) of this subchapter.

The Food Stamp Program operates in the following manner: An impoverished household, in exchange for a sum of money, is issued a coupon allotment of greater value than the charge paid for such food stamps. These coupons may be used to purchase food, excluding liquor and tobacco, at retail food stores approved by the Secretary of Agriculture for participation in the program. These stamps are then redeemable at face value. *See* 7 U.S.C. §§ 2013(a), 2016 (1970).

interpretation of "household." Victoria Keppler was a public welfare recipient whose daughter required instruction at a special school. Because the institution was located in a high rent district, Mrs. Keppler shared an apartment with an unrelated woman. The new Keppler household combination was ineligible for food stamp assistance under the 1971 amendment.

These three households and two other groups, claiming a denial of equal protection[8] and requesting declaratory and injunctive relief, instituted an action against the Department of Agriculture and two departmental officials. On April 16, 1972, a three-judge district court,[9] in granting a temporary restraining order, found the "unrelated person" provision to be an irrational classification in violation of the equal protection element of the due process clause of the fifth amendment,[10] and enjoined the operation of 7 U.S.C. § 2012(e). On appeal, the United States Supreme Court affirmed, seven to two, that "the classification here in issue is not only 'imprecise'; it is wholly without any rational basis." *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 538 (1973).

Prior to *Moreno*,[11] the Burger Court had consistently followed the *Dandridge v. Williams*[12] approach in sustaining challenged economic and social legislation classifications by applying the minimum rationality test.[13] In *Dandridge*, the Supreme Court held that a Maryland Department of Public Welfare regulation which placed an absolute upper limit on the amount of a grant under the Aid to Families with Dependent Children (AFDC) program regardless of family size and actual need did not violate equal protection. *Moreno*, however, using this same test of minimum rationality found that the food stamp provision's exclusion of un-

8. In Bolling v. Sharpe, 347 U.S. 78 (1954), the Supreme Court for the first time struck down a federal statute on the basis that it violated the due process clause of the fifth amendment as a denial of equal protection. The Court stated that discrimination may be so unjustifiable as to violate the constitutional right of equality guaranteed under due process. *See, e.g.*, Richardson v. Belcher, 404 U.S. 497 (1971); Flemming v. Nestor, 363 U.S. 603 (1960); Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968).

9. Pursuant to 28 U.S.C. §§ 2282, 2284 (1970).

10. Moreno v. United States Dep't of Agriculture, 345 F. Supp. 310 (D.D.C. 1972).

11. 413 U.S. 528 (1973). The seven affirming the decision were Justices Brennan, Douglas, Stewart, White, Marshall, Blackmun, and Powell. Justice Rehnquist and Chief Justice Burger were the dissenters.

12. 397 U.S. 471 (1970).

13. *See, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); Jefferson v. Hackney, 406 U.S. 535 (1972); Lindsey v. Normet, 405 U.S. 56 (1972); Richardson v. Belcher, 404 U.S. 78 (1971); James v. Valtierra, 402 U.S. 137 (1971).

related households denied equal protection of the laws. The break from the *Dandridge* pattern makes the decision unusual: *Moreno* does not repudiate the old *Dandridge* equal protection test, but instead refuses to mechanically rubber-stamp a challenged classification. The purpose of this note is to examine why the Court when faced with a "necessity" situation—such as one involving food or shelter—did not sustain the classification under any rational basis as the traditional test suggests, and to propose that *Moreno* is not a trend-setting case because its holding is limited to the particular fact pattern involved.

THE EQUAL PROTECTION METAMORPHOSIS

Any legislative program which applies only to certain defined classes is necessarily discriminatory. However, only the laws which provide unreasonable classifications or classifications that are unrelated to any proper governmental purpose have been held in violation of the equal protection provision of the fourteenth amendment.[14]

Equal protection has undergone a dramatic metamorphosis. For many years, the equal protection clause was limited in scope; it was substantive due process, and not equal protection, which prevailed during the years of intensive court interference with state economic regulation. In this period, the equal protection clause was termed "the last resort of constitutional arguments,"[15] and its initial application was limited to very narrow and precisely defined situations, such as racial discrimination. However, as substantive due process became an insufficient instrument to protect property and personal rights, the reliance upon equal protection as an alternative guardian[16] increased until equal protection supplanted substantive due process as the safeguard of personal liberties. Traditional equal protection hallmarks minimal scrutiny: any rational classification directed toward some permissible state objective is sustained.[17] Economic regula-

14. *See* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 357 (1949).

15. Buck v. Bell, 274 U.S. 200 (1927).

16. The policy of judicial intervention as represented by Lochner v. New York, 198 U.S. 45 (1905), succumbed to one of judicial restraint, the presumption being that the legislature knew best. This theory of presumed validity under substantive economic due process sought any reasonable basis for the legislation. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Nebbia v. New York, 291 U.S. 502 (1934). Since 1937, the Supreme Court has not struck down a law on the basis of substantive economic due process.

17. 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard,

tion remained as untouched under the traditional equal protection criteria as it had been under the deferential due process[18] approach.

The New Equal Protection of the Warren Court

New equal protection interventionism which employed a strict scrutiny approach was a trademark of the Warren Court. With the appointment of Earl Warren as Chief Justice, the Supreme Court developed a reputation for judicial activism,[19] due in large part not only to its increased use of the equal protection clause to countermand discriminatory legislation, but also because of its departure from the minimum rationality interpretation. This new strict scrutiny equal protection test involved a weighing process which concentrated upon two branches—suspect classes and "fundamental" interests.[20] Legislation within the pale of suspect class or fundamental right was overruled unless a compelling state interest could be shown. The minimal scrutiny standard, however, still applied to classifications outside of the two branches of new equal protection.[21]

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and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary.

2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality.

3. When the classification in such a law is called into question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911).

18. *But see* Morey v. Doud, 354 U.S. 457 (1957) where in a strictly economic matter the court found no rational basis under the old equal protection test.

19. *See also* Gunther, *The Supreme Court 1971 Term Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

20. Fundamental interests have included the right to travel, Shapiro v. Thompson, 394 U.S. 618 (1969); the right to privacy, Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); the right to vote, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); the right to a free transcript upon appeal, Griffin v. Illinois, 351 U.S. 12 (1956); and the right of procreation, Skinner v. Oklahoma, 316 U.S. 535 (1942). Race, Yick Wo v. Hopkins, 118 U.S. 356 (1886) and alienage, Schneider v. Rusk, 377 U.S. 163 (1964) have been traditionally suspect classes. Depending upon the circumstances, illegitimacy, Weber v. Aetna Cas. and Sur. Co., 406 U.S. 164 (1972) and wealth, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) have also been classified as suspect.

See generally Goodpaster, *The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 479 (1973).

21. *See generally Developments in the Law-Equal Protection*, 82 HARV. L. REV. 1065 (1969).

The Burger Court and Means-Oriented Equal Protection

As the Warren Court dissolved, so did the high expectations that fundamental rights would be extended to include welfare, housing, and education, for under the subsequent leadership of Warren Burger the Supreme Court evidenced a reluctance to expand new equal protection.[22] There was an increasing discontentment with the Warren Court's two-tiered formulation. Frequently, the Court, while purportedly relying on old equal protection, struck down challenged legislation for lack of any rational basis.[23] Hence, the Burger Court means-oriented equal protection[24] design does not examine the rationality underlying a classification, but rather seeks a substantial relationship between the reason for the classification and the statute's purpose.[25]

The Burger Court, although generally inconsistent in its application of the new *means-oriented* approach, has been uniformly unwilling to extend this approach to the field of necessities. The divided *Dandridge*[26] Court held the Maryland Department of Welfare's absolute upper limit on AFDC awards constitutional under the old rational basis standard[27] regardless of family size and actual need. This decision erased any hopes scholars may have had as to the extension of *Shapiro v. Thompson*[28] beyond the fundamental right of interstate travel to welfare legislation generally.[29] *James v. Valtierra*[30] held that article XXXIV of the California Constitution which subjected public housing provisions to state referendum approval was not a denial of equal protection.[31] *Richardson v.*

22. The Burger Court did continue to apply strict scrutiny in the traditional areas. *See, e.g.,* Dunn v. Blumstein, 405 U.S. 330 (1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

23. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971).

24. *See* Gunther, *The Supreme Court 1971 Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972).

25. *Id.* at 20-21.

26. 397 U.S. 471 (1970).

27. The Court went on to say that in areas of public welfare, there was no reason to apply a different constitutional standard than that utilized in the regulation of business or industry—any rational basis. *See* Goodpaster, *supra* note 20, at 497-500.

28. 394 U.S. 618 (1969).

29. The provision in *Shapiro* denied welfare rights to residents who had not resided in the jurisdiction for at least one year preceding the welfare assistance application.

30. 402 U.S. 137 (1971).

31. Although the classification of poverty seemed obvious, the long history of initiative and referendum appeared to have decided the case. *Id.* at 141-43.

Belcher[32] ruled a reduction of social security benefits constitutional.[33] In *Jefferson v. Hackney*[34] the Court stated:

> So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket. The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them.[35]

Lindsey v. Normet[36] rejected the argument that housing was a fundamental interest:

> We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement. Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions.[37]

This housing case was typical of the Burger Court sentiment towards necessities.

There were fewer equal protection cases in the Supreme Court's 1972-73 Term[38] and most of the laws were sustained under old equal protection. In *San Antonio Independent School District v. Rodriquez*,[39] the Texas system of financing public education through local property taxes was held not to operate to the disadvantage of some suspect class nor to impinge upon any fundamental right of education.[40] However, during the same term, *Moreno*,[41] in an unexpected departure from the traditional

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32. 404 U.S. 78 (1971).

33. The appellee argued that the classification was arbitrary because it discriminated between disabled employees who received workmen's compensation benefits and those who received compensation from private insurance or tort claims. *Id.* at 81.

34. 406 U.S. 535 (1972).

35. *Id.* at 546-47.

36. 405 U.S. 56 (1972). This case involved an attack on Oregon's judicial procedure for evicting tenants after non-payment of rent.

37. *Id.* at 74.

38. For a discussion of the 1972 Term's decisions, *see generally* Tribe, *The Supreme Court, 1972 Term: Foreward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973).

39. 411 U.S. 1 (1973).

40. Here, as in Lindsey v. Normet, the Court deferred to the legislature.

41. 413 U.S. 528 (1973).

approach to the field of necessities,[42] rejected the *Dandridge* test.[43]

MORENO AND THE RATIONAL BASIS

Purposes of the Food Stamp Act

Justice Brennan's majority opinion recognized that the practical effect of the food stamp provision was to produce two groups of persons: one class of individuals who lived in households in which all the members were related, and a second class of individuals who resided in households including at least one member who was unrelated to the rest. This second group was ineligible for food stamps.[44] The Court first determined that the challenged statutory classification bore no relation to the stated purposes of the Act which were to alleviate hunger and malnutrition and to stabilize the agricultural economy.

> [T]he relationships among persons constituting one economic unit and sharing cooking facilities have nothing to do with their abilities to stimulate the agricultural economy by purchasing farm surpluses, or with their personal nutritional requirements.[45]

The Court then proceeded to determine whether the challenged classification was rationally related to some other legitimate governmental interest.

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42. Decided the same day as *Moreno* was the companion case of United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973). A 1971 amendment to the Food Stamp Act, 7 U.S.C. § 2014(b) (1970), *amending* 7 U.S.C. § 2014 (1964), which stated that "[A]ny household which includes a member who has reached his eighteenth birthday and who is claimed as a dependent child for Federal income tax purposes by a taxpayer who is not a member of an eligible household, shall be ineligible to participate in any food stamp program . . . during the tax period such dependency is claimed and for a period of one year after expiration of such tax period" was found unconstitutional. The legislative history indicated a concern over the abuses of the program by college students. As in *Moreno*, those bringing the class action were far from being wealthy college students. The Court found the statute involved an irrebutable presumption that the deduction taken by the parent for the prior year was a rational indication of the status of a dependent household. As there was no provision for a hearing to rebut this presumption, the amendment was held a violation of procedural due process.

43. For an excellent discussion of the *Dandridge* decision *see* Dienes, *To Feed the Hungry: Judicial Retrenchment in Welfare Adjudication*, 58 CALIF. L. REV. 555 (1970).

44. 7 U.S.C. § 2012(e) (Supp. II, 1972), *amending* 7 U.S.C. § 2012 (1964). This amendment was declared unconstitutional in United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973).

45. Moreno v. United States Dep't of Agriculture, 345 F. Supp. 310, 313 (D.D.C. 1972).

Fraud as a Rational Basis

The Government advocated that the classification of public welfare beneficiaries must be sustained if there were any reasonable basis.[46] Appellants first argued that the provision was rationally related to the prevention of fraud.

> The food stamp program was subject to abuse in two ways by households of unrelated persons. There was first the problem of those who chose to remain voluntarily poor, adapting their lifestyle to the availability of food stamps . . . .
>
> . . . .
>
> A second form of abuse was the participation in the food stamp program by persons actually being provided ample financial assistance by relatives who themselves lived elsewhere; such persons would not be voluntarily poor, or even poor at all, but nevertheless might obtain food stamps by not revealing available sources of support.[47]

The Supreme Court rejected the Government's reasoning that the classification should be upheld as a fraud prevention device.

Although Justice Brennan agreed that under the traditional *Dandridge*[48] analysis, a classification did not have to be mathematically precise,[49] he nonetheless maintained that denying food stamp assistance to all unrelated households which were otherwise eligible was not a reasonable means of treating alleged abuses.[50] Supporting this conclusion, the opinion cited separate provisions of the Food Stamp Act designed to reach the very problems mentioned in the appellant's brief.[51] In addition, Jus-

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46. Brief for Appellants at 7, United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973).

47. *Id.* at 15-16.

48. 397 U.S. 471 (1970).

49. United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 538.

50. In equal protection cases the Court will sometimes declare a rational classification to be impermissible because there are other means available to the state to achieve its objective which "[W]ill have a less onerous effect upon interests protected by the Equal Protection Clause." This is the principle of the "least onerous alternative." *See* Karst & Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39, 58.

51. 7 U.S.C. § 2014(c) (1970) declares a household ineligible for assistance under the food stamp program "[I]f it includes an able-bodied adult person between the ages of eighteen and sixty-five" who either fails to register for or accept employment. 7 U.S.C. § 2023(b) (1970) states that:

> Whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization to purchase cards in any manner not authorized by this chapter or the regulations issued pursuant to this chapter shall, if such coupons or authorization to purchase cards are of the value of $100 or more, be guilty of a felony and shall, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years or both, or, if

tice Brennan found, as a practical effect, that the regulation excluded those individuals who were in actual need of assistance.[52]

It at first appears surprising that the Court did not sustain the provision on the basis of fraud[53] under the minimal scrutiny analysis customarily used in public welfare cases[54] for as Justice Douglas in his concurring opinion pointed out, if it were not for the constitutional elements involved, the "unrelated" persons provision could have been supported on this fraud basis.[55]

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such coupons or authorization, to purchase cards are of a value of less than $100, shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not more than $5,000 or imprisoned for not more than one year or both.

7 U.S.C. § 2023(c) (1970) provides:

Whoever presents, or causes to be presented, coupons for payment or redemption of the value of $100 or more, knowing the same to have been received, transferred, or used in any manner in violation of the provisions of this chapter or the regulations issued pursuant to this chapter shall be guilty of a felony and shall, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years, or both, or, if such coupons are of a value of less than $100, shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not more than $5,000 or imprisoned for not more than one year, or both.

52. The Court noted that two unrelated individuals could avoid the exclusion by altering their living arrangement so as not to meet the definition of household provided in section 3(e) of the Food Stamp Act. United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 537.

53. The Burger Court did not accept appellants' argument based on Knowles v. Butz, 358 F. Supp. 228 (N.D. Cal. 1973). This case held that the Food and Nutrition Service (FNS) Instruction 732-1, § III(D)(2)(b), which provided that all individuals who share common living quarters and expenses for such quarters constitute a household for food stamp purposes, was invalid. The district court concluded that 7 U.S.C. § 2012(e) (Supp. II, 1972) which defined household as a group of individuals "[L]iving as one economic unit sharing common cooking facilities and for whom food is customarily purchased in common" needed little interpretation. All persons sharing living quarters and expenses for such quarters are not per se a "household" or even an economic unit; nor is every economic unit per se a household. Appellants argued that many of the individuals adversely affected by the 1971 amendment, could, with slight adjustments, have qualified as separate households under the rationale in *Knowles*. *See* Reply Brief for Appellants at 10-11, United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973).

54. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); Jefferson v. Hackney, 406 U.S. 535 (1972); Lindsey v. Normet, 405 U.S. 56 (1972); Richardson v. Belcher, 404 U.S. 78 (1971); James v. Valtierra, 402 U.S. 137 (1971); Dandridge v. Williams, 397 U.S. 471 (1970).

55. Lawmakers in economic and social welfare legislation have been permitted to address a problem one step at a time although such a procedure could inflict a hardship upon some groups. *See* Justice Douglas' concurring opinion on the right of association under the first amendment, 413 U.S. 528, 538.

CONGRESS' TRUE PURPOSE—EXCLUSION OF A POLITICALLY UNPOPULAR GROUP

There is a temptation on first impression to conclude that the Court utilized a means-oriented approach in reaching its decision. If this were the case, the Justices would not have had to delve far beyond the Declaration of Policy of the Food Stamp Act[56] to strike down the provision. This enigma is answered in the legislative history of section 3(e). Congress' true purpose in enacting the legislation was a desire to harm a politically unpopular group—"hippies." Legislative categories normally have myriad purposes. Under a minimal scrutiny test, the Court attempts to devise a rational interpretation for a legislative scheme. Ordinarily the most probable purpose of a classification will sustain its constitutionality. When this is not the case, the category's legitimacy depends upon the extent to which the court wishes to carry the presumption of constitutionality.[57] The most probable purpose of the 1971 Food Stamp Amendment—preventing "hippies" and "hippy communes" from participation in the Food Stamp Program—was constitutionally impermissible.[58] The statements of both the Senate and House conferees to the amendment made obvious that such an exclusion was Congress' primary intention. Senator Holland, one of the Senate conferees, evidenced his sentiments:

> The next change was that the term 'household' was further defined so as to exclude households consisting of unrelated individuals under the age of 60, such as 'hippy' communes, which I think is a good provision of this bill.[59]

Agriculture Committee Chairman Ellender also made it apparent that the provision was designed to exclude "hippy communes." After indicating that households including unrelated individuals under sixty would be prohibited from participation in the program, he compared the provisions in the Senate, House, and Conference versions of the bill:

> 3. *Senate* (Section 1(3)) redefines 'household' to include an elderly person eligible for the 'meals on wheels' program.
>
> *House* does not do this (creating a question as to how elderly persons who do not have cooking facilities can obtain the coupons to be used by them to participate in the 'meals on wheels' program).

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56. 7 U.S.C. § 2011 (1970).

57. *Supra* note 21, at 1079.

58. The provision was not included in either the House—H.R. 18582, 91st Cong., 2nd Sess. (1970) or Senate—S. 2547, 91st Cong., 2nd Sess. (1970) bills but was the product of the Conference Committee. It was considered quickly just before the New Year's adjournment.

59. 116 CONG. REC. 44439 (1970).

> *Conference Substitute* adopts Senate provision, plus a provision designed to exclude households consisting of unrelated individuals under the age of 60 (such as hippy communes).[60]

The statements of the House conferees also give support to the invidious legislative intent:

> The House bill did not alter the definition of 'household' under section 3(e) of the Act. The conference substitute includes language which is designed to prohibit food stamp assistance to communal 'families' of unrelated individuals.
>
> The substitute, of course, contemplates that the term 'related' shall apply to the relationship between married spouses and to such degree of blood relation and other legal relation (such as adoption and foster children) that the Secretary by regulation may prescribe. The requirement for household members to be related does not apply to persons over 60 years of age.[61]

This brief legislative history clearly confirms that the provision was intended to exclude "hippies" and "hippy communes" from participation in the Food Stamp Program.[62]

Congress merely singled out a certain category of "offensive" individuals.[63] Although statutes normally contain a welter of purposes, the crucial equal protection question is "whether there is an appropriate govern-

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60. *Id.* at 44431. *See id.* for Explanation of Food Stamp Conference Report.

61. *Id.* at 43327. *See* United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 534.

62. Indeed, six Republican members of the Senate Select Committee on Nutrition and Human Needs in a letter to then Secretary of Agriculture, Clifford M. Hardin, identified the "anti-hippy commune" provision.

> 1. *Definition of Household.* Section 3(e) of the law provided a definition of 'household' which meant '. . . a group of related individuals . . . or non-related individuals over age 60 who are not residents of an institution or boarding house, but are living as one economic unit sharing common cooking facilities and for whom food is customarily purchased in common.' The intent of Congress in redefining household in this manner was already contained in the Conference Report (*Report* No. 91-1793, page 8). There the Conferees stated that 'the conference substitute includes languge which is designed to prohibit food stamp assistance to communal 'families' of unrelated individuals.' As Senator Ellender pointed out on the floor of the Senate (*Congressional Record,* 91st Cong., 2nd Sess., vol. 16, pt. 33, p. 44431), this definition of the provision was 'designated to exclude households consisting of unrelated individuals under the age of 60 (such as hippy communes).'

The Senators were concerned that the "anti-hippy commune" provision would penalize eligible families "who might happen to have 'taken in' a friend out of kindness." 117 CONG. REC. 14027 (1970).

63. *See* Jurisdictional Statement for the Appellants at 5 n.3, United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973).

mental interest suitably furthered by the differential treatment."[64] As the district court opinion[65] indicates, an intent to harm a politically unpopular group without reference to some public interest consideration cannot justify the 1971 amendment.[66] Since Congress' primary reason for the legislation was unconstitutional, the Court under traditional equal protection might have exercised its imagination to find fraud prevention as a rational basis to sustain the classification; however, the presence of such blatant "anti-hippy" intent, would have revealed the absurdity of that interpretation. Moreover, the amendment's effect denied assistance to those who most desperately needed it. Considering these elements, the Supreme Court did not have much room for discretion.

The *Moreno* Court, in considering the factor of social welfare, found the legislation of Congressional prejudices unconscionable under social justice. Despite the unjust and inequitable nature of the statutory enactment, the Court could not arbitrarily declare it a denial of equal protection. To remain consistent with previous decisions, the Burger Court strained *not* to find a rational basis for the 1971 Food Stamp Amendment. *Moreno*, an example of a case determined by public policy, is a decision which could not ignore the element of moral consciousness. The social interest in prohibiting Congress from legislating against a politically unpopular group outweighed the fraud prevention consideration.

Despite the Court's reasoned elaboration in support of its conclusion, a manifest element of morality was involved. Perhaps if the legislative history had not been so revealing, the Court would have upheld the measure as a fraud prevention device. But not even minimum rationality could ignore the unconstitutional purpose. *Moreno* provided the judicial thermidore against Congressional prejudice.

Most importantly, *Moreno* rejected the *Dandridge* shibboleth of minimal scrutiny. Previous necessity cases provide no indication of "emerging equal protection." Although this departure is significant and unusual in

64. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

65. United States Dep't of Agriculture v. Moreno, 345 F. Supp. 310, 314 n.11 (1972).

66. *See* Parr v. Municipal Court, 3 Cal. 3d 861, 479 P.2d 353, 92 Cal. Rptr. 153 (1971). This case involved an ordinance of the City Council of Carmel which prohibited climbing, walking, standing or sitting upon any public property not normally used for such purpose. Although the regulation was neutral on its face, the order was declared unconstitutional as a denial of equal protection because it was selectively enforced against "hippies". In striking down the city ordinance, the court concluded that "[L]aws are invalidated by the Court as discriminatory because they are expressions of hostility or antagonism to certain groups of individuals." *Id.* at 864, 479 P.2d at 355, 92 Cal. Rptr. at 155 *as cited in* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 358 (1949).

itself, the immediate concern is whether *Moreno* marks a trend. Subsequent cases have not confirmed the predictions that the Burger era would subject to strict scrutiny legislation concerning welfare, housing, and education.[67] *Moreno*, viewed in perspective, may not be a hallmark of means-oriented equal protection. Indeed, if Congress had been more subtle in its purpose, the classification would probably have been sustained. The *Moreno* Court strained not to find a rational basis while simultaneously restricting its decision to the confines of the traditional approach used in welfare cases.

Rather than indicating a change in Supreme Court equal protection posture, the decision is a reaction against legislation which blatantly discriminates against a particularly unpopular group of individuals.[68]

CONCLUSION

The *Moreno* decision should not cause social libertarians to unnecessarily rejoice over its impact as a victory for welfare rights. Furthermore, those who adhere to a strict rationality need not feel anxiety. The Court's opinion was based upon a concern over legislative motive rather than upon any infringement of the necessities of life. The case is significant because it employed a traditional equal protection approach, and it is not a suggestion that more than a mechanical scrutiny will be applied to future welfare problems. Consequently, *Moreno* may generate a good deal of undeserved controversy and may well be the "red-herring" of social welfare.[69]

Alice S. Perlin

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67. *See* text accompanying notes 26-43 *supra*.

68. *Moreno* is a sample of the Court's use of the equal protection clause as a ban against discriminatory legislation. *See* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 314, 357 (1949).

69. In Village of Belle Terre v. Boraas, 94 S. Ct. 1536 (1974), the Supreme Court in a seven to two decision held a New York village ordinance which restricted land use to one-family dwellings including lodging houses, boarding houses, or multiple dwellings constitutional. The word "family" was defined as one or more persons living as a single housekeeping unit and related by blood, adoption, or marriage or no more than two persons living as a single housekeeping unit and not related by blood, adoption, or marriage. The action, brought after owners of a house in the village were cited for violating the ordinance by leasing their home to six *unrelated* college students, charged the regulation was violative of equal protection, and the rights of association, travel, and privacy. The Supreme Court, in a majority opinion delivered by Justice Douglas, held that in areas of economic and social legislation where legislatures have used their judgment, a classification will be upheld if it is " 'reasonable, not arbitrary' (quoting Royster Guano Co. v. Virginia, 253

U.S. 412, 415) and bears 'a rational relationship to a [permissible] state objective.' Reed v. Reed, 404 U.S. 71, 76." 94 S. Ct. at 1540. The Court, after finding that the ordinance did not impose any procedural disparities upon any one group or infringe upon any "fundamental right" sustained the land-use regulation as rationally related to family needs under the constitutional standard of minimal scrutiny.

The majority opinion distinguished the case from *Moreno* by noting that the food stamp provision declared ineligible for participation a household containing anyone unrelated to the rest whereas the Belle Terre ordinance included within the definition of "family" two unrelated persons. Despite the Court's attempt to distinguish the two cases, *Belle Terre* demonstrates the return to minimal scrutiny in areas of economic and social legislation and the limited effect of the *Moreno* opinion.