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Of perhaps greater significance is the court's treatment of the statutory claims. By broadly construing section 1115, the court has all but precluded future statutory attacks on "experimental programs" since the Secretary unquestionably can waive compliance with many of the federal requirements. When coupled with the narrow scope of judicial review used by the court it is apparent that a considerable barrier has been erected to those wishing to attack such programs.

GEOGRAPHICAL CLASSIFICATIONS OF WELFARE DISTRICTS ATTACKED

City of New York v. Richardson

Pursuant to the system for distribution of funds prescribed by the Social Security Act of 1935,¹ federal funds are made available to the states on a "matching-fund" basis. Those states choosing to participate in a program under the Act must submit a plan to the Secretary of Health, Education, and Welfare (HEW) for approval.² New York State's plan, as outlined in its Social Services Law,³ divides the state into a number of welfare districts on a geographic basis.⁴ According to the financing system provided in the statute, each local district is to pay 25 percent of its welfare costs, with an additional 25 percent contributed by the state. The remaining 50 percent is provided by the federal government.⁵

Under New York's Social Services Law, New York City is designated as a local welfare district.⁶ Unfortunately for New York City taxpayers, the number of welfare recipients in the City is disproportionately high in relation to its population. The City, therefore, bears a greater welfare burden than do other districts in the State.⁷

In *City of New York v. Richardson*,⁸ the City of New York and

¹ 42 U.S.C. §§ 301-06, 601-10, 1201-06, 1351-55 (1971).

² In order for a state plan to be approved, it must comply with the provisions of the Act and the rules and regulations promulgated by HEW. For example, the state plan must be in effect "on a statewide basis in accordance with equitable standards for assistance and administration that are mandatory throughout the state." 45 C.F.R. § 205.120(a) (1973).

³ N.Y. Soc. SERV. L. § 1 *et seq.* (McKinney 1966 & Supp. 1972).

⁴ See N.Y. Soc. SERV. L. § 61 (McKinney 1966).

⁵ See N.Y. Soc. SERV. L. § 153 (McKinney 1966).

⁶ See N.Y. Soc. SERV. L. § 61(1) (McKinney 1966).

⁷ Statistics for 1969 reveal that although the residents of New York City comprise only 45% of the state's population, 74% of the state's public assistance recipients live within the city. It is also noted that while 3.49% of the state's residents outside New York City receive public assistance, within the City, 12.52% of the population receive such aid. See *City of New York v. Richardson*, 473 F.2d 923, 930 (2d Cir. 1973).

⁸ 473 F.2d 923 (2d Cir.), *cert. denied*, 41 U.S.L.W. 3655 (U.S. June 18, 1973) (No. 72-1451).

three individual plaintiffs⁹ mounted a "broadside constitutional attack"¹⁰ upon the provisions of the federal Social Security Act and the New York Social Services Law, naming both federal¹¹ and state defendants.¹² The complaint alleged that the federal-state statutory scheme violated the equal protection clause and requested declaratory and injunctive relief. A motion to convene a three-judge district court was filed in the Southern District of New York. District Judge McLean denied the motion and dismissed the complaint for failure to state a claim upon which relief can be granted and for lack of jurisdiction over the subject matter.¹³

On appeal, the Second Circuit, in an opinion by Judge Kaufman,¹⁴ affirmed the lower court's dismissal of all complaints against the federal defendants¹⁵ and those claims asserted by the City against the state

⁹ The individual plaintiffs in the action were John V. Lindsay, Mayor of the City of New York, Jule Sugarman, Commissioner of Social Services of the City of New York, and Ola Bryant, a taxpayer and resident of New York City.

¹⁰ 473 F.2d at 925.

¹¹ Named as federal defendants were the Secretary of HEW, the Secretary of the Treasury, and two regional officers of HEW.

¹² Named as state defendant was the Commissioner of Social Services of the State of New York.

¹³ FED. R. CIV. P. 12(b)(1), (6). 473 F.2d at 926 (1973).

¹⁴ Judge Kaufman was joined on the panel, and in the decision, by Judges Lumbard and Mansfield.

¹⁵ 473 F.2d at 927-28. In affirming the district court's dismissal, the Second Circuit rejected the plaintiff's argument that welfare is a problem of national scope and that Congress, being obligated to provide for the general welfare, U.S. CONST. ART. 1, § 8, therefore must bear the burden of financing the program. The court commented that the Social Security Act was enacted out of a spirit of "cooperative federalism," 473 F.2d at 928. This phrase was first used in *King v. Smith*, 392 U.S. 309 (1968), where the Supreme Court invalidated an Alabama substitute father regulation which deprived children of aid under the Aid to Families with Dependent Children (AFDC) program if their mother "cohabitates" with a man who is not under a duty to support them.

Plaintiffs' contention that the federal government, having embarked upon a program of public assistance, was obligated to bear the entire burden of providing such a program was also rejected. 473 F.2d at 298. The court observed that the consequences of extending this argument, *i.e.*, demanding that the federal government, whenever it provided some funds for the implementation of state or local programs, take on the financing of the entire program, would be monumental because of the many areas in which there is some degree of federal aid. *Id.*

Judge Kaufman further pointed out that the present case presented questions somewhat similar to those raised when the Social Security Act was originally promulgated. At that time, the argument was made that the Act was unconstitutional in that it authorized federal involvement in an area believed to be the exclusive province of the states. *Id.* In *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 526 (1937), the Supreme Court rejected this argument, holding that:

[T]he two statutes [the Social Security Act and the Unemployment Compensation Act] . . . embody a cooperative legislative effort by state and national governments for carrying out a public purpose common to both, which neither could fully achieve without the cooperation of the other. The Constitution does not prohibit such cooperation.

See also *Helvering v. Davis*, 301 U.S. 619 (1937); *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937).

defendant.¹⁶ The court, however, remanded the actions of the individual plaintiffs against the state defendant to the district court, finding "that the [constitutional] question presented is sufficiently substantial to merit the convening of a three-judge court."¹⁷

The Second Circuit had heard an appeal only from the denial of the motion to convene a three-judge court. The *Richardson* court was, therefore, not called upon to decide the constitutional issue, but was required merely to determine whether the request to convene the three-judge court had been properly denied.¹⁸ In deciding the question, the court acknowledged that its inquiry was limited to a determination as to "whether the question raised is 'wholly' or 'clearly insubstantial.'"¹⁹

In making this determination, the *Richardson* court evaluated plaintiffs' claim that the New York Social Services Law violated the equal protection clause. Plaintiffs argued that the state's decision to distribute the financial burden of public assistance on a purely geographic basis, without regard for the number of welfare recipients in a given district, constituted a denial of equal protection to the residents of New York City. It was contended that an inequitable financial burden is placed on New York City residents, because of the disproportionately high number of welfare recipients within their district.²⁰

The Second Circuit agreed with Judge McLean's finding in the district court where it was held that: "[T]hese decisions are as good authority for sustaining the statute against the present attack as they were for rejecting the earlier one. Neither extreme position is justified." 473 F.2d at 928.

¹⁶ 473 F.2d at 929. The Second Circuit declared that the City of New York and the surrounding counties lacked standing to bring the action. As political subdivisions of the state, they cannot avail themselves of fourteenth amendment guarantees in order to attack a state statute.

Judge Kaufman relied on the Supreme Court's holding in *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 40 (1933), which stated: "A municipal corporation, created by the state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator."

The *Richardson* court acknowledged that this rule recently had been challenged in *Aguayo v. Richardson*, 473 F.2d 1090 (2d Cir. 1973). There congressional legislation was involved. Nevertheless, the *Richardson* court felt the *Williams* holding was controlling since the challenge before it was directed at a state statute. 473 F.2d at 929.

¹⁷ 473 F.2d at 931.

¹⁸ See 28 U.S.C. § 2281 (1971).

¹⁹ 473 F.2d at 930. See *Goosby v. Osser*, 409 U.S. 512, 518 (1973); *Ex parte Poresky*, 290 U.S. 30, 32 (1933); *Powell v. Workmen's Compensation Bd.*, 327 F.2d 131, 138 (2d Cir. 1964).

Judge Kaufman noted the failure of the state to offer "even a minimally rational explanation for the statutory discrimination" inherent in the New York statutes, and declared that this alone "suggests that the question presented is sufficiently substantial to merit the convening of a three-judge court." 473 F.2d at 931.

²⁰ *Id.*

The *Richardson* court found itself faced with the problem of selecting the proper standard for evaluating the merits of plaintiffs' claim, a difficult choice at best.²¹ Judge Kaufman, after reviewing the state of equal protection law, adopted the protean "sliding-scale" test. The court refused to sustain the New York statute although a "'state of facts reasonably may be conceived to justify it'"²² and held that the constitutional question involved was "sufficiently substantial to merit the convening of a three-judge court."²³ In so holding, the *Richardson* court noted the state's failure even to attempt to establish a rational justification for its statutory scheme, and observed that the state would have an opportunity to do so upon remand.²⁴

The "sliding-scale" test however seems to have lost favor in the Supreme Court's recent decision in *San Antonio Independent School District v. Rodriguez*.²⁵ There, the Court apparently reverted to the

²¹ The court noted that the present case involved neither fundamental interests, nor suspect classifications and that, therefore, the statute would not be subject to "strict scrutiny." 473 F.2d at 930-31. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969) (interstate travel held a fundamental right); *Loving v. Virginia*, 388 U.S. 1 (1967) (race deemed a suspect classification). Under the two-tiered equal protection doctrine, the remaining test would be the rational basis test whereby any hypothetical justification for the statute would suffice. However, Judge Kaufman emphasized that the traditional rational basis standard had been modified by recent Supreme Court decisions. 473 F.2d at 930-31, citing *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Reed v. Reed*, 404 U.S. 71 (1971). See generally Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Note, *Legislative Purpose, Rationality and Equal Protection*, 82 YALE L.J. 123 (1972); Comment, *Equal Protection in Transition: An Analysis and a Proposal*, 41 FORD. L. REV. 605 (1973). The court concluded that a third, intermediary test was evolving where the state had the burden of showing that the statute in fact accomplished the legitimate state objective. 473 F.2d at 931.

²² 473 F.2d at 931, quoting from the oft-cited decision of *McGowan v. Maryland*, 366 U.S. 420, 426 (1961), where the Supreme Court defined the standard to be used under the traditional "rational relationship" approach: "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

²³ 473 F.2d at 931. The court also declared that the individual plaintiffs who held official positions had standing to sue the state on constitutional grounds. 473 F.2d at 933. Its authority for so holding was *Board of Educ. v. Allen*, 392 U.S. 236 (1968). This action of the Second Circuit is consonant with a similar application of *Allen* in *Aguayo v. Richardson*, 473 F.2d 1090, 1100 (2d Cir. 1973).

²⁴ 473 F.2d at 932. This approach, placing an affirmative duty upon the state to justify its use of certain classifications, represents a substantial departure from the traditional "rational relationship" standard. However, the approach seems to be in line with the direction of recent Supreme Court cases. See note 19 *supra*. See also *Boraas v. Village of Belle Terre*, 476 F.2d 806 (2d Cir. 1973), *prob. juris. noted*, 42 U.S.L.W. 3213 (U.S. Oct. 15, 1973) (No. 73-191), discussed at p. 372 *supra*; *Aguayo v. Richardson*, 473 F.2d 1090 (2d Cir. 1973), *cert. denied*, 42 U.S.L.W. 3406 (U.S. Jan. 15, 1974) (No. 72-1416), discussed at p. 278 *supra*.

²⁵ 411 U.S. 1 (1973). The *San Antonio* case involved a challenge, on equal protection grounds, to the Texas system of school financing. Under the Texas system, a portion of each district's operating expenses was paid by an *ad valorem* tax on property within that district.

"rational relationship" test formerly applicable where neither fundamental rights nor suspect classifications were involved. As a result of the *San Antonio* decision, the future of the "sliding-scale" approach delineated in *Richardson* is in doubt.²⁶

Finally, the practical effects attending a decision of *Richardson* must be considered. Invalidation of a public assistance program like that outlined in the New York scheme is likely to wreak havoc on similar plans in other states. The majority of the *San Antonio* Court expressed an unwillingness to render a decision which would have such a devastating effect.²⁷

²⁶ Perhaps the crux of the Court's position is best summarized by the dissenting opinion of Justice Marshall. Justice Marshall chastized the majority for what he felt to be a regression from the Court's position in earlier equal protection cases, criticizing them for attempting

to establish today that the equal protection cases fall into one or two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality. But this Court's decisions in the field of equal protection defy such easy categorization.

411 U.S. at 98.

If indeed the *San Antonio* case has signaled a return to the so-called "two-tiered" approach, it is apparent that the New York Social Services Law challenged in *Richardson* would be subject merely to the "rational relationship" test. Under such a permissive standard of review, the statute cannot be said to be in violation of the equal protection clause.

On the other hand, if the district court persists in the application of a more stringent equal protection standard based on the Second Circuit's "sliding-scale" theory, a more formidable challenge to the statutes in question will result. While one can only speculate as to what justifications the state will offer in defense of its statutory scheme (since none were offered to the Second Circuit), the *Richardson* court did indicate that certain rationales would not be sufficient to sustain the statute. Among these, the court felt that the program could not be justified "on the ground that it is designed to promote efficiency of administration." 473 F.2d at 932.

The Second Circuit also seemed to foreclose any justification based on an attempt to place New York City in a position of "fault" for having a disproportionately high percentage of public assistance recipients located within its boundaries. The court emphasized that the City neither controls the welfare payment schedule throughout the state, nor is empowered to "interfere with the rights of welfare recipients to travel interstate and settle in New York City." 473 F.2d at 931-32, citing *Shapiro v. Thompson*, 394 U.S. 618 (1969).

²⁷ Mr. Justice Powell, writing for the five-man majority, observed that,

[i]t cannot be questioned that the constitutional judgment reached by the District Court and approved by our dissenting brothers today would occasion in Texas and elsewhere an unprecedented upheaval in public education.

411 U.S. at 56. The Court went on to uphold the validity of the Texas school financing system, applying the traditional "rational relationship" test, and declared that while, [t]hese practical considerations, of course, play no role in the adjudication of the constitutional issues presented . . . they serve to highlight the wisdom of the traditional limitations on this Court's function.

Id. at 58.

It should be noted that the district court will have no difficulty analogizing *Richardson* to *San Antonio* in that both cases involve questions of local taxation to raise funds for local expenditure. Therefore, the district court will have open to it the same argument employed by the majority in *San Antonio*, namely that such questions are particularly within the expertise of the state legislature and the courts should refrain from

On the other hand, however, one must not lose sight of the plight of the New York City resident. The Supreme Court has declared that durational residency requirements prerequisite to public assistance constitute an abridgement of the constitutionally protected right of freedom of interstate travel.²⁸ If, at the same time, the courts are willing to uphold public assistance financing programs which require geographic districts to pay a fixed percentage of their welfare expenses without regard to the number of recipients within the districts, the City's taxpayers, and all others in areas paying relatively high welfare benefits, will be caught in a financial squeeze.

Responsibility for solving this complex problem now lies with the three-judge district court and its decision promises to have far-reaching consequences. Despite the Second Circuit's decision in *Aguayo v. Richardson*,²⁹ wherein an attack on the state's experimental welfare programs was repulsed, *Richardson* is distinguishable on its facts.³⁰ In any event, the final resolution of this issue will lie with the Supreme Court.³¹

AFFIRMATIVE DUTY TO INTEGRATE APPLIED TO EXCLUDE NON-WHITES

Otero v. New York City Housing Authority

Municipal authorities have an affirmative duty to integrate their public housing. This responsibility derives from both the equal protection clause of the Constitution and the Fair Housing Act of 1968.¹

interfering with local attempts at solving the problem. *Id.* at 53-55. *But see* Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 97 Cal. Rptr. 601 (1971); Note, *Equal Educational Opportunity: A Case for the Children*, 46 ST. JOHN'S L. REV. 280 (1971).

²⁸ See *Shapiro v. Thompson*, 394 U.S. 618 (1969).

²⁹ 473 F.2d 1090 (2d Cir. 1973); see pages 278-87 *supra* for detailed treatment of *Aguayo*.

³⁰ In *Aguayo* the plaintiffs were attacking the implementation of two experimental programs, *id.*, while in *Richardson* the attack was aimed at the established and continuing scheme. 473 F.2d at 930. While some latitude might be given to the states where experimental programs are involved, such latitude seems inappropriate where an established state scheme is questioned. Moreover, the *Aguayo* court was able to find that the programs "suitably furthered" a legitimate state interest. 473 F.2d at 1109. In *Richardson*, Judge Kaufman noted that the state "has not offered any rational justification" for the scheme, nor was it perceivable "what justifying considerations may have motivated the State legislature to devise a system that appears on the surface discriminatory." 473 F.2d at 932.

³¹ Appeals from decisions of three-judge district courts are direct to the Supreme Court as of right. 28 U.S.C. § 1253 (1970).

¹ 42 U.S.C. § 3601 *et seq.* (1970). The Act contains a broad declaration stating: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601 (1970). The Act also requires the Secretary of Housing and Urban Development (HUD) to: "(5) administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter." 42 U.S.C. § 3608 (1970). Thus, the affirmative duty