Georgia rules of inheritance are subject to criticism regarding the position of grandparents. This writer argues that lines of consaniguinity and natural affection are stronger between children and grandparents than between children and their aunts, uncles and first cousins. This argument is based upon common sense observation rather than upon any known principles of law.

Although not law, the collective wisdom of the Model Probate Committee of the American Bar Association cannot be ignored in this connection.[29] In section 22 (b) of the rules of descent, the grandparents occupy a favored position within paragraph 5 and the aunts, uncles and first cousins are relegated to a lower status within paragraph 6, the canon law "catch-all" provision.[30] This writer recognizes that the Georgia Court of Appeals correctly interpreted the Georgia law which is supposedly the will of the people as spoken by the legislature. However, in view of the effect of the holding in the *Waters* case this writer thinks the legislature of Georgia should take a fresh look at the Georgia rules of inheritance. Because the rules have been in the Code for over a hundred years does not in and of itself make them the best rules possible.

LAWRENCE C. COLLINS

SOCIAL SECURITY AND PUBLIC WELFARE—SUBSTITUTE FATHER REGULATIONS—AN IMPROPER DEFINITION OF PARENT

In a recent decision[1] the United States Supreme Court declared invalid Alabama's "substitute father" regulation, which denied payments under the state's federally supported Aid to Families with Dependent Children Program[2] to children of a mother who cohabited with any able-bodied man. Mrs. Sylvester Smith and her four children, residents of Dallas County, Alabama, who had received aid under the AFDC Program for several years, brought a class action against officers and members of the Alabama Board of Pensions and Security in the district court under 42 U.S.C. section 1983[3] seeking declaratory and injunctive relief. They al-

29. ABA MODEL PROBATE CODE §22b (1946).
30. *Id.*
1. King v. Smith, 392 U.S. 309 (1968).
2. Originally known as "Aid to Dependent Children," Social Security Act §401, 42 U.S.C. §601 (1964), the name of the program was changed by amendment to "Aid and Services to Needy Families with Children," Social Security Act §104 (a) (1), 42 U.S.C. §601 (1968). Alabama's program still bears the former name.
3. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

leged they were being deprived of their rights under the Social Security Act and the equal protection and due process clauses of the fourteenth amendment in that they had been removed from the list of eligible recipients of AFDC aid pursuant to the substitute rather regulation because a Mr. Williams visited the home on weekends and engaged in sexual activity with Mrs. Smith. The three-judge district court[4] adjudicated the merits of the case without requiring plaintiffs to exhaust their administrative remedies[5] and found the regulation inconsistent with both the Social Security Act[6] and the equal protection clause of the fourteenth amendment.[7] The Supreme Court affirmed without reaching the constitutional question,[8] holding the regulation invalid on statutory grounds because it defined "parent" in a manner inconsistent with subchapter IV of the Social Security Act.[9]

The AFDC Program, established under the Social Security Act of 1935,[10] is financed largely by the federal government on a matching fund basis,[11] and is administered by the states. States are not required to participate in

4. A three-judge court is properly convened pursuant to 28 U.S.C. §2281 (1965) when, as here, injunctive relief is sought to restrain state officials from the enforcement, operation and execution of a statewide regulation on the ground of its unconstitutionality. *See* Florida Lime and Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73 (1960); AFL v. Watson, 327 U.S. 582 (1946); Levering & Garrigues Co. v. Morrin, 289 U.S. 103 (1933). Jurisdiction was conferred on the court by 28 U.S.C. §§1343 (3) and (4) (1962).
5. 42 U.S.C. §602 (a) (4) (1968) requires that states must grant AFDC applicants who are denied aid "[A]n opportunity for a fair hearing before the State agency . . . ." and Alabama provides for administrative review of such denials in Part I, §II, Parts V-5 to V-12 of the Alabama Manual for Administration of Public Assistance. However, the Court rejected appellants' argument that appellees were required to exhaust their administrative remedies before bringing this action, in view of their decisions in Damico v. California, 389 U.S. 416 (1967); McNeese v. Bd. of Education, 373 U.S. 668 (1963); Monroe v. Pape, 365 U.S. 167 (1961); that a plaintiff in an action brought under the Civil Rights Act, 42 U.S.C. §1983 (1964), 28 U.S.C. §1343 (1962), is not required to exhaust administrative remedies where the constitutional challenge is sufficiently substantial and the state remedy, though adequate in theory, is not available in practice. *See* also City of Miami v. Prymus, 288 F.2d 465 (5th Cir. 1961); McCoy v. Greensboro, 283 F.2d 667 (4th Cir. 1960); Holmes v. Danner, 191 F. Supp. 394 (M.D. Ga. 1961). *Contra,* Smith v. Bd. of Comm., 259 F. Supp. 423 (D.C. Cir. 1966). For a general discussion of this problem see Note, *Federal Judicial Review of State Welfare Practices,* 67 COL. L. REV. 84 (1967).
6. 42 U.S.C. §§301-1394 (1964).
7. "This Court concludes that the Alabama 'substitute father' regulation is an arbitrary and discriminatory classificiation which results in the denial of financial benefits to needy children who are clearly eligible and entitled to receive such benefits under both the federal and State statutes and constitutional regulations and that said children are denied for reasons unrelated to and in conflict with the purposes of these statutes. For this reason, on its face and as the evidence reflects it has been applied in this case, the Alabama 'substitute father' regulation deprives those children of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States." Smith v. King, 277 F. Supp. 31, 41 (1967).
8. King v. Smith, 392 U.S. 309 (1968). In his concurring opinion, Mr. Justice Douglas explained this by noting that their disposition of cases has traditionally been on statutory rather than constitutional grounds, unless the problems of statutory construction are insurmountable.
9. 42 U.S.C. §601-609 (1968).
10. 42 U.S.C. §§301-1394 (1964).
11. The formula for federal grants is found in 42 U.S.C. §603 (1964). The level of benefits is decided by the state, but contributions of the federal government are varying percentages of such expenditures with each state.

the program,[12] but those desiring to take advantage of the substantial federal funds available for distribution to needy children are required to submit a plan for approval by the Secretary of Health, Education and Welfare which must conform with the requirements of the Social Security Act and with the rules and regulations promulgated by HEW.[13]

One of the statutory requirements is that "[A]id to families with dependent children shall be furnished with reasonable promptness to all eligible individuals. . . ."[14] A "dependent child" is defined as "[A] needy child . . . who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent. . . ."[15] Read together, the Court reasoned, these two provisions clearly compel a participating state to furnish aid to families with children who have a parent absent from the home, if they are in other respects eligible. Under the Alabama regulation, however, an "[A]ble-bodied man, married or single, is considered a substitute father of all the children of the applicant . . . mother" in any one of three different situations: (1) if he lives in the home with the mother for the purpose of cohabitation; (2) if he visits the home frequently for the purpose of cohabiting with the mother; or (3) f he does not frequent the home but cohabits with the mother elsewhere,[16] thus qualifying the "substitute father" as a non-absent parent within the meaning of the federal statute, and permitting the state to deny aid to an otherwise eligible child on the basis that his substitute parent is not absent from the home. However, as the Court points out in its criticism of the regulation, Alabama is thus making the determining factor whether the substitute father "cohabits" with the mother and not whether he is legally obligated to support the children or does in fact contribute to their support.[17]

Holding that the term "parent" as used in the Act includes only those

12. Actually, all fifty states, Puerto Rico, the Virgin Islands, the District of Columbia, and Guam participate in the AFDC Program.
13. 42 U.S.C. §§601-604 (1964). *See also* HEW HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, Pt. IV, §§2200, 2300 (1967). Unless HEW approves a plan, federal funds will not be made available for its implementation, and HEW may terminate federal payments in whole or in part if there is substantial failure to comply with any required provision in the administration of the state plan. Applicable Alabama statute provides that the standards set by the state department for allocation of such funds "[S]hall in no case contravene the Social Security Act and the rules and regulations promulgated thereunder." 49 ALA. CODE §17 (35) (1958).
14. 42 U.S.C. §602 (a) (9) (1964).
15. 42 U.S.C. §606 (a) (1) (1964).
16. Alabama Manual for Administration of Public Assistance, Pt. I, Chap. II, §VI.
17. Regular and actual contributions to a child may be taken into consideration in determining whether a child is needy. In fact, 42 U.S.C. §602 (a) (7) (1964) requires that in determining need, the state agency "[S]hall . . . . take into consideration any other income resources of any child or relative claiming aid to families with dependent children . . . ." Regulations of the HEW restrict the resources to be taken into account to those "[T]hat are, in fact, available to an applicant or recipient for current use on a regular basis . . . ." HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, Pt. IV, §3131 (7) (1967).

persons with a legal duty of support,[18] and pointing out that the substitute father in this case (a married man who lives with and supports his wife and nine children) is not legally obligated under Alabama law to support plaintiff-children,[19] the Court rejected Alabama's argument that, since needy children of married couples in the state are not eligible for AFDC aid as long as their father is at home, fairness requires that the children of a mother who cohabits with a man not her husband or their father be treated similarly.

Noting that federal public welfare policy now rests on a more "sophisticated" and "enlightened" basis than before,[20] the Court traced the development of public welfare programs in the United States from the end of the 19th century, when the "worthy person" concept[21] characterized mothers' pension welfare programs, to the present day determination by Congress "[T]hat immorality and illegitimacy should be dealt with through rehabilitative measures rather than measures that punish dependent children. . . ."[22] The Court mentioned several methods by which a state may discourage immorality and illegitimacy under the Social Security Act,[23]

18. In this regard, the Court said: "The pattern of this legislation could not be clearer. Every effort is to be made to locate and secure support payments from persons legally obligated to support a deserted child. The underlying policy and consistency in statutory interpretation dictate that the 'parent' referred to in these statutory provisions is the same parent as that in §406 (a). The provisions seek to secure parental support in lieu of AFDC support for dependent children. Such parental support can be secured only where the parent is under a state-imposed legal duty to support the child. Children with alleged-substitute parents who owe them no duty of support are entirely unprotected by these provisions. We think that these provisions corroborate the intent of Congress that the only kind of "parent" under §406 (a), whose presence in the home would provide adequate economic protection for a dependent child is one who is legally obligated to support him. Consequently, if Alabama believes it necessary that it be able to disqualify a child on the basis of a man who is not under such a duty of support, its arguments should be addressed to Congress and not this Court." King v. Smith, 392 U.S. 309, 332, 333 (1968).

19. Under applicable Alabama statutes, the legal duty of support is imposed only on a "parent" defined as the natural legal parent, one who has legally acquired custody of such child, and the father of such child, even though it is born out of lawful wedlock. 34 ALA. CODE §§89-90 (1958); 27 ALA. CODE §§12 (1), 12 (4) (Supp. 1967). However, in Law v. State, 238 Ala. 428, 191 So. 803 (1939), the court held that a man would also be subject to the non-support statutes if he had "[P]ublicly treated the child as his own, in a manner to indicate his voluntary assumption of parenthood" even though the child were not his own. *But see* Englehardt v. Yung's Heirs, 76 Ala. 534, 540 (1884), where the court states that "[S]uch intention should not be slightly or hastily inferred."

20. King v. Smith, 392 U.S. 309, 324, 325 (1968).

21. Some poor persons were thought "worthy" of public assistance because their poverty was no fault of their own, or because they seemed to evidence the capacity for moral regeneration. This idea was a holdover from the old State Poor Laws in effect prior to enactment of the Social Security Act in 1935. See in this regard LEYENDECKER, PROBLEMS AND POLICY IN PUBLIC ASSISTANCE, 45-47 (1955); Wedemeyer and Moore, *The American Welfare System*, 54 CALIF. L. REV. 326, 327-28 (1966). Benefits under the mothers' pension programs which were the forerunners of AFDC were generally restricted to widows considered morally fit. For a general discussion of these programs, see J. BROWN, PUBLIC RELIEF *1929-1939*, 26-32 (1940).

22. King v. Smith, 392 U.S. 309, 325 (1968).

23. The court notes here that recent amendments to the Social Security Act require that state plans for administering AFDC funds provide for a rehabilitative program of improving and correcting unsuitable homes, Social Security Act §201 (a) (1) (B) (14)

but unequivocally stated that the method Alabama had chosen was not an acceptable one, since it flatly denied federally funded assistance to destitute children who are legally fatherless "[O]n the transparent fiction that they have a substitute father."[24] The Court further stated that, "Insofar as this or any similar regulation is based on the state's asserted interests in discouraging illicit sexual behavior and illegitimacy, it plainly conflicts with federal law and policy."[25]

In what was perhaps the first of many decisions based on the instant case,[26] a three-judge district court convened in Macon to hear the case of *Roussaw v. Burson*[27] challenging the substitute father regulation of the State Department of Family and Children Services in Georgia. This court deferred ruling thereon until the Supreme Court had decided the Alabama case, but predictably found that the Alabama and Georgia regulations were similar in content and declared the Georgia substitute father regulation[28] "[T]o be inconsistent with the Constitution of the United States and for that reason to be of no force or effect" since it "[I]n essence, defines the term 'father' . . . so as to include one who actually, under Georgia law, has no legal duty to support certain children."[29]

This decision of the Supreme Court is an important one which will necessarily have an impact on many people. However, by limiting their decision to the statutory question, the Supreme Court has only partially resolved the dilemma, since, theoretically at least, Alabama would still be free to enforce its substitute father regulation if it chose to reject federal funds. Another question raised, but only partially answered, is one which thoughtful people have long concerned themselves with: How can

81 Stat. 877 (1968); provide a program for establishing the paternity of illegitimate children and securing support for them, Social Security Act §201 (a) (1) (C) (17) 81 Stat. 878 (1968); and provide voluntary family planning services for the purpose of reducing illegitimate births, Social Security Act §201 (a) (1) (C) (15) 81 Stat. 878 (1968). These amendments specifically provide, however, that the acceptance of these family planning services shall not be a prerequisite to eligibility under the state plan.

24. King v. Smith, 392 U.S. 309, 334 (1968).
25. *Id.* at 320.
26. According to HEW, 18 states still have "man-in-the-home" policies in their plans for the AFDC program. This does not include Alabama and Georgia, whose regulations have been struck down. Theoretically, all could be challenged and disqualified under the decision in King v. Smith, on either statutory or constitutional grounds.
27. Roussaw v. Burson, Civil No. 2323 (D.C.M.D. Ga. Oct. 2, 1968).
28. Set out in the Georgia Manual of Public Welfare Administration, Part III, Sec. V.C. 3a(5), which provides: "A man living in common-law relationship with a woman is considered a substitute father of any child had by that woman, or any child that that woman has had by another man. Further, a man living in common-law relationship with a woman is responsible for the support and care of his and her children, regardless of whether or not he is married to another woman." The regulation also provides that a common-law relationship exists as follows: "A common-law relationship is considered to exist when a man, married or single, lives in the home with the A/R (Applicant or Recipient of AFDC) for the purpose of cohabitation or, if not living in the home regularly, he visits frequently for the purpose of living with or cohabitating [sic] with the applicant."
29. Roussaw v. Burson, Civil No. 2323 (D.C.M.D. Ga., Oct. 2, 1968).

a state—bearing in mind that the paramount goals of the AFDC program are the protection and care of helpless children[30]—effectively deal with the very real problem of rising illegitimacy and increasing applications for aid?

Mr. Justice Fortas, in a speech at the New York University School of Law, stated what the Supreme Court implied, but left unsaid, in the principal case:

> We must, finally and totally, relinquish the notion that recipients of public assistance are constitutional non-persons. . . . We need not go so far as to embrace the argument that the state has a constitutional duty to provide its indigent citizens with support; but if the state chooses to do so, it must proceed with careful regard to the rights of the recipients, for they, too, are persons within our constitutional scheme.[31]

What remains now for the individual states is the weighty task of finding a solution consistent with this view.

HELEN BERENTHIEN

TAXATION—INTANGIBLE PROPERTY TAX—AS APPLIED TO "LONG TERM NOTES" OF FEDERAL SAVINGS & LOAN AND GEORGIA BUILDING & LOAN ASSOCIATIONS

Appellee refused to accept, file, index and record a deed to secure debt conveying to Atlanta Federal Savings & Loan Association improved property in Fulton County without payment of an intangible tax customarily paid on such notes. An action of mandamus was brought by Atlanta Federal and several other institutions[1] against J. W. Simmons, the appellee, in his official capacity of Clerk, Superior Court of Fulton County, to require him to accept, file, index and record the association's deed to secure debt. The Superior Court, Fulton County, denied the association's prayer and dismissed the complaint.

On appeal, the Supreme Court of Georgia *reversed*[2] the trial court and

30. See H.R. REP. No. 615, 74th Cong., 1st Sess. 9-19 (1935) where children are characterized as "[T]he most tragic victims of the depression." S. REP. No. 628, 74th Cong., 1st Sess., 16-17 (1935) states that "[T]he heart of any program for social security must be the child."

31. 8th Annual James Madison Lecture, New York University School of Law, Mar. 29, 1967, published in 42 N.Y. U. L. REV. 401, 414 (1967).

1. Plaintiffs are federal savings and loan associations, incorporated under the laws of the United States and having their principal offices or places of business in the State of Georgia, with the exception of Home Savings & Loan which is a building and loan association, incorporated under the Georgia Building and Loan Act, GA. CODE ANN. §16-401 et. seq. (Supp. 1967).

2. Atlanta Federal Savings & Loan Ass'n v. Simmons, 224 Ga. 483, 162 S.E.2d 342 (1968).