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Allen v. Graham,
 Ariz.App. 1968.

Court of Appeals of Arizona.
 William Daniel ALLEN, Appellant,
 v.

John O. GRAHAM, Commissioner for the Department of Public Welfare, State of Arizona, Appellee.
No. 2 CA-CIV 517.

Oct. 23, 1968.
 Rehearing Denied Nov. 27, 1968.
 Review Denied Dec. 24, 1968.

Action seeking review of Welfare Department decision denying applicant old-age assistance and seeking a judgment declaring statute which precluded judicial review of the department's decision to be unconstitutional. The Superior Court of Pima County, Cause No. 104207, Alice Truman, J., dismissed the action and appeal was taken. The Court of Appeals, Krucker, J., held that provision of the Judicial Review Act precluding judicial review of department of welfare decision was constitutional, that there is no constitutional right of appeal and that since no other statute allowed judicial review of the welfare department's decision, applicant was precluded from judicial review.

Affirmed.

West Headnotes

[1] Administrative Law and Procedure 15A 651

15A Administrative Law and Procedure
 15AV Judicial Review of Administrative Decisions
 15AV(A) In General
 15Ak651 k. In General. Most Cited Cases
 Judicial review of administrative decisions is not a matter of right except when authorized by law.

[2] Social Security and Public Welfare 356A 178

356A Social Security and Public Welfare
 356AIV Assistance for Needy Aged, Blind, and Disabled Persons
 356Ak176 State Old Age Assistance
 356Ak178 k. Proceedings and Review.
 Most Cited Cases
 Since State Department of Public Welfare was excepted from act providing for judicial review of a final decision of an administrative agency, applicant for old-age assistance had no right to review under that act. A.R.S. §§ 12-901 et seq., 12-902, subsec. A.

[3] Social Security and Public Welfare 356A 178

356A Social Security and Public Welfare
 356AIV Assistance for Needy Aged, Blind, and Disabled Persons
 356Ak176 State Old Age Assistance
 356Ak178 k. Proceedings and Review.
 Most Cited Cases
 (Formerly 356Ak81)
 Where neither act creating State Department of Public Welfare, nor any other act, provided for judicial review of department's decision, applicant denied old-age assistance had no right to judicial review. A.R.S. §§ 46-205, 46-251 et seq.

[4] Appeal and Error 30 172(3)

30 Appeal and Error
 30V Presentation and Reservation in Lower Court of Grounds of Review
 30V(A) Issues and Questions in Lower Court
 30k172 Grounds of Action or Relief
 30k172(3) k. Relief Not Asked Below.
 Most Cited Cases
 Where extraordinary relief was not sought below, reviewing court would not consider its availability on appeal.

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[5] Appeal and Error 30 ↪169

30 Appeal and Error
 30V Presentation and Reservation in Lower Court of Grounds of Review
 30V(A) Issues and Questions in Lower Court
 30k169 k. Necessity of Presentation in General. Most Cited Cases
 Appellate review is circumscribed by the posture of the case in the lower court.

[6] Constitutional Law 92 ↪2600

92 Constitutional Law
 92XX Separation of Powers
 92XX(C) Judicial Powers and Functions
 92XX(C)6 Advisory Opinions
 92k2600 k. In General. Most Cited Cases
 (Formerly 92k69)
 Neither an appellate court, nor a trial court can act as a fountain of legal advice.

[7] Constitutional Law 92 ↪2625(1)

92 Constitutional Law
 92XX Separation of Powers
 92XX(D) Executive Powers and Functions
 92k2622 Encroachment on Judiciary
 92k2625 Executive Exercise of Statutory Authority as Encroaching on Judiciary
 92k2625(1) k. In General. Most Cited Cases
 (Formerly 92k80(2), 15Ak222)

Social Security and Public Welfare 356A ↪1.1

356A Social Security and Public Welfare
 356AI In General
 356Ak1 Constitutional and Statutory Provisions
 356Ak1.1 k. In General. Most Cited Cases
 (Formerly 356Ak1)
 Separation of powers principle was not violated by statute precluding judicial review of decisions of State Department of Public Welfare. A.R.S. §§ 12-901 et seq., 12-902, subsec. A, 46-205, 46-251

et seq.; A.R.S.Const. art. 6, § 1.

[8] Social Security and Public Welfare 356A ↪3

356A Social Security and Public Welfare
 356AI In General
 356Ak3 k. Obligation to Support Indigents in General. Most Cited Cases
 The state has no common law or constitutional duty to support its poor.

[9] Social Security and Public Welfare 356A ↪3

356A Social Security and Public Welfare
 356AI In General
 356Ak3 k. Obligation to Support Indigents in General. Most Cited Cases
 Aid to needy persons is solely a matter of statutory enactment.

[10] Constitutional Law 92 ↪2646

92 Constitutional Law
 92XXI Vested Rights
 92k2646 k. Public Funds and Assistance. Most Cited Cases
 (Formerly 92k103)

Social Security and Public Welfare 356A ↪3

356A Social Security and Public Welfare
 356AI In General
 356Ak3 k. Obligation to Support Indigents in General. Most Cited Cases
 (Formerly 356Ak22)

Social Security and Public Welfare 356A ↪174

356A Social Security and Public Welfare
 356AIV Assistance for Needy Aged, Blind, and Disabled Persons
 356Ak174 k. In General. Most Cited Cases
 Pension and relief programs not involving contributions to specific funds by the actual or prospective

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beneficiaries provide only a voluntary bounty and there is no inherent or vested right in the public assistance that beneficiaries are receiving or desire to receive.

[11] Constitutional Law 92 🔑 3874(1)

92 Constitutional Law
 92XXVII Due Process
 92XXVII(B) Protections Provided and Deprivations Prohibited in General
 92k3868 Rights, Interests, Benefits, or Privileges Involved in General
 92k3874 Property Rights and Interests
 92k3874(1) k. In General. Most Cited Cases
 (Formerly 92k277(1))
 Term “property”, as used in the due process clause, refers to vested rights and has no reference to mere concessions or privileges which a state may control and bestow or withhold at will. U.S.C.A.Const. Amend. 5.

[12] Constitutional Law 92 🔑 3865

92 Constitutional Law
 92XXVII Due Process
 92XXVII(B) Protections Provided and Deprivations Prohibited in General
 92k3865 k. In General. Most Cited Cases
 (Formerly 92k251.5, 92k251)
 Due process is not necessarily judicial process.

[13] Constitutional Law 92 🔑 3888

92 Constitutional Law
 92XXVII Due Process
 92XXVII(B) Protections Provided and Deprivations Prohibited in General
 92k3878 Notice and Hearing
 92k3888 k. Review. Most Cited Cases
 (Formerly 92k251.5, 92k251)
 A right of appeal is not essential to due process of law.

[14] States 360 🔑 193

360 States
 360VI Actions
 360k193 k. Rights of Action Against State or State Officers. Most Cited Cases
 (Formerly 360k1)
 When the state creates rights in individuals against itself, it is not bound to provide a remedy in the courts and may withhold all remedy or provide an administrative remedy and make it exclusive, however mistaken its exercise.

[15] Constitutional Law 92 🔑 3473

92 Constitutional Law
 92XXVI Equal Protection
 92XXVI(D) Administrative Agencies and Proceedings in General
 92k3473 k. Judicial Review. Most Cited Cases
 (Formerly 92k250.4, 92k249)

Social Security and Public Welfare 356A 🔑 1.1

356A Social Security and Public Welfare
 356AI In General
 356Ak1 Constitutional and Statutory Provisions
 356Ak1.1 k. In General. Most Cited Cases
 (Formerly 356Ak1)
 State's exclusion of decisions of its Welfare Department from the Judicial Review Act did not constitute the “invidious discrimination” proscribed by the Equal Protection Clause of the Fourteenth Amendment. U.S.C.A.Const. Amend. 14.

[16] Constitutional Law 92 🔑 3035

92 Constitutional Law
 92XXVI Equal Protection
 92XXVI(A) In General
 92XXVI(A)5 Scope of Doctrine in General
 92k3031 Limits of Doctrine
 92k3035 k. Perfect, Exact, or Complete Equality or Uniformity. Most Cited Cases
 (Formerly 92k209, 92k211)

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Equal protection does not require absolute equality.
 U.S.C.A.Const. Amend. 14.

[17] Social Security and Public Welfare 356A
 🔑174

356A Social Security and Public Welfare
 356AIV Assistance for Needy Aged, Blind, and
 Disabled Persons

356Ak174 k. In General. Most Cited Cases
 (Formerly 356Ak74)

When the State Department of Public Welfare
 grants assistance to an applicant, award is binding
 until changed, modified, suspended, discontinued,
 or until applicant dies. A.R.S. § 46-204, subsec. C.

[18] Social Security and Public Welfare 356A
 🔑178

356A Social Security and Public Welfare
 356AIV Assistance for Needy Aged, Blind, and
 Disabled Persons

356Ak176 State Old Age Assistance
 356Ak178 k. Proceedings and Review.
 Most Cited Cases

(Formerly 356Ak81)

Since applicant who was denied old-age assistance
 was afforded a right of review within the adminis-
 trative hierarchy of the State Department of Public
 Welfare, action of the state, in withholding, under
 the Judicial Review Act, an absolute review, was
 not arbitrary and unreasonable. A.R.S. §§ 46-205,
 46-251 et seq., 12-901 et seq., 12-902, subsec. A.

***337 **241** Anthony B. Ching, Tucson for appel-
 lant.

Darrell F. Smith, Atty. Gen., by Peter Sownie, Asst.
 Atty. Gen., Phoenix, for appellee.
 KRUCKER, Judge.

The appellant, plaintiff in the trial court, made ap-
 plication for Old Age Assistance under A.R.S. s
 46-251 et seq., to the Department of Public Welfare
 in Pima County, Arizona, in June, 1967. The ap-
 plication was denied whereupon the plaintiff ap-
 pealed to the State Department of Public Welfare in
 accordance with the provisions of A.R.S. s 46-205,

as amended. A hearing thereon was duly held, and
 the State Department denied the application.

The plaintiff thereafter commenced an action in su-
 perior court, Pima County, seeking (1) review of
 the Welfare Department decision, and (2) a judg-
 ment declaring A.R.S. s 12-902, subsec. A to be un-
 constitutional because of exclusion of the Depart-
 ment of Public Welfare from its operation. The
 Welfare Department responded by a motion to dis-
 miss challenging the court's jurisdiction to review
 the welfare decision and asserting additionally that
 the complaint failed to state a claim for relief. The
 motion to dismiss was granted, judgment of dis-
 missal duly entered thereon, and this appeal fol-
 lowed.

The appellant poses the following questions: (1)
 Does the superior court have jurisdiction to review
 an administrative decision of the Department of
 Public Welfare? (2) Are extraordinary writs avail-
 able to review such administrative decisions? (3)
 Is A.R.S. s 12-902, subsec. A unconstitutional?

[1][2][3]A.R.S. s 12-901 et seq., provide for judi-
 cial review of 'a final decision of an administrative
 agency.' However, decisions of the State Depart-
 ment of Public Welfare are specifically expected
 therefrom. A.R.S. s 12-902, subsec. A. Judicial re-
 view of administrative decisions is not a matter of
 right except when authorized by law. *Roer v. Super-
 ior Court*, 4 Ariz.App. 46, 417 P.2d 559 (1966) and
 cases cited therein. In view of the exception of the
 State Department of Public Welfare from the Judi-
 cial Review Act, the appellant had no Right of re-
 view thereunder. *Bennett v. Arizona State Board of
 Public Welfare*, 95 Ariz. 170, 172, 388 P.2d 166
 (1963). Nor does the Act creating that administ-
 rative agency or any other Act provide for judicial re-
 view of its decisions. There being ***338 **242** no
 'positive enactment of law', *Roer, supra*, the appel-
 lant had no Right to judicial review of the welfare
 agency's denial of Old Age Assistance. The trial
 court apparently concluded, and correctly so, that
 judicial review was foreclosed.

[4][5][6] Appellant appears to question the availability of extraordinary remedies as a means of judicial review of welfare agency decisions and then argues that even if available, he is not afforded the same scope of review as provided in the Judicial Review Act. That a remedy by certiorari proceedings may be available is indicated by *Bennett v. Arizona State Board of Public Welfare*, supra. One Law Review writer has opined that the provisions of the Judicial Review Act are 'complementary to prerogative writs and equitable remedies (when those methods of review are not specifically made applicable to any agency's decisions)'. [FN1] The same author has recently indicated that 'mandamus and certiorari are the twin pillars of the common law of judicial control of administrative agencies.' [FN2] We need not, however, address ourselves to the availability of extraordinary relief since such relief was not sought below in this case. Appellate review is circumscribed by the posture of the case in the lower court. In *re Taylor's Estate*, 5 Ariz.App. 144, 424 P.2d 186 (1967). An appellate court, no more than a trial court, can act as a 'fountain of legal advice.' See, *Connolly v. Great Basin Insurance Co.*, 6 Ariz.App. 280, 431 P.2d 921 (1967).

FN1. Davis, *An Administrative Procedure Act for Arizona*, 2 Ariz.L.Rev. 17, 30 (1960).

FN2. Davis, *Arizona Administrative Mandamus*, 9 Ariz.L.Rev. 1 (1967), quoting from L. Jaffe, *Judicial Control of Administrative Action* 176 (1965).

The appellant additionally sought a declaration that A.R.S. s 12-902, subsec. A is unconstitutional, as being an contravention of Art. 2 s 4, and Art. 6 s 1 of the Arizona Constitution, A.R.S. and the due process and equal protection clauses of the 14th Amendment to the United States Constitution. By granting the motion to dismiss, the trial court in effect decided the claim of unconstitutionality adversely to the appellant. See, *Roberts v. Spray*, 71 Ariz. 60, 223 P.2d 808 (1950); *Iman v. Southern*

Pacific Co., 7 Ariz.App. 16, 435 P.2d 851 (1968).

[7] The appellant contends that if A.R.S. s 12-902, subsec. A is construed, as we have done, to bar judicial review, then such is an infringement on the constitutional principle of separation of powers and unlawfully delegates judicial powers to the Welfare Board. This contention is best answered by the following language of our Supreme Court in *Batty v. Arizona State Dental Board*, 57 Ariz. 239, 112 P.2d 870 (1941):

'Courts frequently use the phrases 'judicial' power and 'quasi-judicial' power indiscriminately and inaccurately. We think that the vital difference between the two is that 'judicial' power, strictly speaking, is vested only in a court. (Citations omitted) When, however, the power to hear and determine whether a certain state of facts which requires the application of a law exists is committed to an administrative or executive officer, although the particular power may be identical with one which is also exercised by a court, it is, strictly speaking, not 'judicial' but 'quasi-judicial' power. (Citations omitted)

We think the term 'judicial' powers as used in constitutional provisions like sec. 1, art. 6 of our Constitution, on both reason and authority, includes only those powers which as a matter of law can be conferred only upon courts as such, and does not include the power to hear and determine facts and apply the law thereto which has been conferred on administrative or executive officers acting in the proper exercise of the duties imposed upon them by law. * * * 57 Ariz. at 245-246, 112 P.2d at 873.

The court held that the conferring upon an administrative body of quasi-judicial *339 **243 powers is not violative of Art. 6 s 1, Arizona Constitution, and that the question of whether the administrative body had exceeded its jurisdiction in applying such powers was reviewable by certiorari. We find no violation of the separation of powers principle.

[8][9] The State has no common law or constitutional duty to support its poor. *Division of Aid for the Aged, etc., v. Hogan*, 143 Ohio St. 186, 54

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N.E.2d 781 (1944); *Beck v. Buena Park Hotel Corp.*, 30 Ill.2d 343, 196 N.E.2d 686 (1964). Aid to needy persons is solely a matter of statutory enactment. *In re O'Donnell's Estate*, 253 Iowa 607, 113 N.W.2d 246 (1962); *Williams v. Shapiro*, 4 Conn.Cir. 449, 234 A.2d 376 (1967).

[10][11] Pension and relief programs not involving contributions to specific funds by the actual or prospective beneficiaries provide only a voluntary bounty. *Senior Citizens League v. Dept. of Social Security*, 38 Wash.2d 142, 228 P.2d 478 (1951). Recipients or applicants have no inherent or vested right in the public assistance they are receiving or desire to receive. 16 C.J.S. Constitutional Law s 245; *Senior Citizens League v. Dept. of Social Security*, supra; *Smith v. King*, 277 F.Supp. 31 (M.D.Ala.1967), probable jurisdiction noted, 390 U.S. 903, 88 S.Ct. 821, 19 L.Ed.2d 869; see also, *Flemming v. Nestor*, 363 U.S. 603, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960). The term 'property' as used in the due process clause refers to vested rights. It has no reference to mere concessions or privileges which a State may control and bestow or withhold at will. *Senior Citizens League v. Dept. of Social Security*, supra; 16A C.J.S. Constitutional Law s 599 c.[FN3]

FN3. In the case of *Flemming v. Nestor*, 363 U.S. 603, 80 S.Ct. 1367 (1960), the Supreme Court of the United States declined to engraft upon the Social Security system a concept of 'accrued property rights'. A person covered by the Social Security Act was not considered to have such a 'right' in benefit payments as would make every defeasance of 'accrued' interest violative of the due process clause of the Fifth Amendment.

[12][13] Appellant appears to take the position that a Right of appeal is essential to due process of law. Due process is not necessarily judicial process, *Reetz v. People of State of Michigan*, 188 U.S. 505, 23 S.Ct. 390, 47 L.Ed. 563 (1903), and a Right of appeal is not essential to due process of law. *Inland*

Navigation Co. v. Chambers, 202 Or. 339, 274 P.2d 104 (1954); *Board of Education, etc. v. County Board of School Trustees*, 28 Ill.2d 15, 191 N.E.2d 65 (1963); *In re Durant Community School District*, 252 Iowa 237, 106 N.W.2d 670 (1960); *Commonwealth, Dept. of Highways v. Fister*, 376 S.W.2d 543 (Ky. 1964); *Weiner v. State Dept. of Roads*, 179 Neb. 297, 137 N.W.2d 852 (1965); *Real Estate Commission v. McLemore*, 202 Tenn. 540, 306 S.W.2d 683 (1957); *Beck v. Missouri Valley Drainage District of Holt County*, 46 F.2d 632, 84 A.L.R. 1089 (8th Cir. 1931); *Reetz v. People of State of Michigan*, supra.

[14] Appellant argues that, notwithstanding welfare benefits are more gratuities, access to the courts via a Right of appeal is a constitutional requisite. We do not agree. Welfare benefits are grants by the legislature which has delegated to the Department of Public Welfare the power to determine the recipients of such grants. Under such circumstances, i.e., when the state creates rights in individuals against itself, it is not bound to provide a remedy in the courts and may withhold all remedy or it may provide an administrative remedy and make it exclusive, however mistaken its exercise. *Dismuke v. United States*, 297 U.S. 167, 56 S.Ct. 400, 80 L.Ed. 561 (1936); *United States v. Babcock*, 250 U.S. 328, 39 S.Ct. 464, 63 L.Ed. 1011 (1919); *Blanc v. United States*, 140 F.Supp. 481 (E.D.N.Y.1956).

We are cognizant of the recent decisions which require that a state, having undertaken to provide a statutory program of assistance, must do so in conformity with constitutional mandates. See, *Thompson *340 **244 v. Shapiro*, 270 F.Supp. 331 (Conn.1967); *Green v. Dept. of Public Welfare of the State of Delaware*, 270 F.Supp. 173 (Del.1967); *Smith v. Reynolds*, 277 F.Supp. 65 (E.D.Pa.1967), probable jurisdiction noted, 390 U.S. 940, 88 S.Ct. 1054, 19 L.Ed.2d 1129; *Smith v. King*, supra; *Harrell v. Tobriner*, 279 F.Supp. 22 (D.C.1967), probable jurisdiction noted, 390 U.S. 940, 88 S.Ct. 1053, 19 L.Ed.2d 1129. However, in each of these cases, a constitutional infirmity was

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found to exist because the statutory scheme for determining eligibility for benefits was predicated upon an arbitrary classification. These decisions are therefore inapposite here where no attack is directed to the constitutionality of the statutory program of assistance.

END OF DOCUMENT

[15][16][17][18] We cannot agree with appellant that the State, in excluding decisions of the Welfare Department from the Judicial Review Act, has indulged in the 'invidious discrimination' proscribed by the Equal Protection Clause of the 14th Amendment. Equal protection does not require absolute equality. *State v. Superior Court*, 2 Ariz.App. 458, 409 P.2d 742 (1966). In addition to funds granted to this State by the federal government for welfare purposes, a sum amounting to almost fifteen million dollars has been appropriated by the state legislature this year for the Department of Public Welfare.[FN4] Apart from the sums expended for administration, these monies are expended for Aid to the Blind, Direct Relief, Aid to Dependent Children, Foster Home Care, Old Age Assistance, Public Assistance Services, Medical Assistance for the Aged, and Unallocated Assistance. When assistance is granted to an applicant, the award is binding until changed, modified, suspended, discontinued, or until the death of the recipient. A.R.S. s 46-204, subsec. C, 15 A.R.S., as amended. An applicant for assistance is afforded a 'right' of review within the administrative hierarchy. A.R.S. s 46-205, 15 A.R.S., as amended. Under such circumstances, we fail to see how the action of the State, in withholding an absolute review from the objects of its bounty, is arbitrary and unreasonable.

FN4. General Appropriation Act, Laws 1968, Ch. 206, subdivision 44.

Finding no error in the trial court's refusal to grant the requested relief, the judgment is affirmed.

HATHAWAY, C.J., and MOLLOY, J., concur.
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History

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