

Eliminating the Per-Child Allotment in the AFDC Program

Marion Buckley*

I. Introduction

What we actually do for particular children depends upon what we think of their parents.¹

[I]t is a simple fact of human experience. . . that not until we see the face of poverty do we react to it.²

In the seemingly endless process of welfare reform,³ one of the latest proposals is legislation eliminating the incremental benefit for children born to individuals enrolled in Aid to Families with Dependent Children (AFDC).⁴ This type of reform is frequently re-

* J.D. 1994, DePaul University College of Law; B.A. 1981, The University of Michigan. The author is a freelance writer in addition to running a legal research company in Chicago. The author would like to thank Alicia Alvarez and Linda DiCostanzo for encouraging her to pursue this topic; her husband, Bill, for his love and support; and her father for being always willing to listen though he may not agree.

1. Peter B. Edelman, *Toward a Comprehensive Antipoverty Strategy: Getting Beyond the Silver Bullet*, 81 GEO. L.J. 1697, 1707 (1993).

2. In the Matter of Petitioner for Rulemaking, 117 N.J. 311, 322 (1989) [hereinafter "Rulemaking"].

3. Some of the more recent amendments to AFDC have included the following: requiring AFDC applicants to assign to the state any rights to receive child support payments, 42 U.S.C. § 602(a)(26)(A) (Supp. III 1982); requiring maternal AFDC recipients to cooperate with the state in determining the paternity of nonmarital children, 42 U.S.C. § 602(a)(26)(B) (Supp. III 1982); allowing the AFDC family to keep the first \$50 of child support collected by the state and prohibiting the state from including that amount as income, 42 U.S.C. §§ 602(a)(8)(A)(vi), 657(b)(1)(Supp. III 1982); implementing mandatory income withholding, 42 U.S.C.A. § 666(a)(1)(West 1988); requiring the Internal Revenue Service to withhold income tax refunds to persons in arrears on child support payments, 42 U.S.C.A. § 664 (a)(2)(A)(West 1988); and implementing expedited procedures for obtaining and enforcing child support, 42 U.S.C.A. § 666(a)(3), (4), (6), (7), (8), and (9) (West 1988); denying benefits to families headed by a parent under 18 years of age who has never married, unless that family resides with an adult relative or in a supervised supportive service living arrangement, 42 U.S.C. § 602(a)(43)(1990). See also *Bowen v. Gilliard*, 483 U.S. 587 (1987) (involving a challenge to AFDC amendments resulting from the Deficit Reduction Act of 1984), *infra* note 138 and accompanying text; Christa Anders, *State Intervention into the Lives of Single Mothers and Their Children*, 8 BERKELEY WOMEN'S L.J. 567, 583-85 (1990) (discussing changes in the AFDC program since 1975).

4. Such legislation has already been adopted and is currently in force in New Jersey. See N.J. STAT. ANN. § 44:10-3.5 (West 1993) ("[t]he Commissioner of Human Services shall revise the schedule of benefits to be paid to [an AFDC family] . . . by

ferred to as "family cap" legislation,⁵ which implies that the amount of funding allowed under the AFDC program is based on the size of the family. In fact, laws eliminating the per-child allotment call for eliminating the benefits only for children born to families already enrolled in the AFDC program.⁶ These laws do not eliminate the per-child allotments of benefits to families whose children were born *prior* to enrollment in AFDC.⁷ Since this legislation is based not on family size but on the timing of childbirth, I refer to it as elimination of the per-child allotment.

eliminating the increment in benefits under the program for which that family would otherwise be eligible as a result of the birth of a child . . ."). A pilot program implementing reduction or elimination of the per-child allotment to some AFDC families began in Wisconsin in July 1994. Telephone Interviews with Jean Sheil, Project Director, Bureau of Welfare Initiatives, State of Wisconsin Dep't of Health and Social Serv. (Nov. 17, 1993), Sandra Parr, administrative assistant (Oct. 13, 1994). Under the Wisconsin measure, which is part of a program known as the Parental and Family Responsibility Initiative (PFR), the AFDC benefit received by teen parents will be reduced by about half for the second child, and will be eliminated for the third child. *Id.*; WISCONSIN WELFARE REFORM, THE PARENTAL AND FAM. RESP. INITIATIVE, EXECUTIVE SUMMARY, at 2, 4 (April 1992) [hereinafter WISCONSIN EXECUTIVE SUMMARY]; REPORT ACCOMPANYING APPLICATION FOR FEDERAL WAIVER, GRANT APPLICATION NO. 87-3-WR-WI-004, at 2, 17-19 (Mar. 13, 1992) [hereinafter WISCONSIN GRANT APPLICATION]. That is, families targeted by the Parental and Family Responsibility Initiative ("PFR families") would receive about \$38 less than non-PFR families when a second child is born, and the PFR families would receive no additional benefits when a third or subsequent child is born. *Id.* at 19. Single-parent non-PFR families currently receive an additional \$100 when a third child is born, while two-parent non-PFR families currently receive an additional \$91 when a third child is born. *Id.* The Wisconsin program is targeted at teens who are newly enrolled in the AFDC program and who are first-time parents. *Id.* at 2. See also, WISC. STAT. ANN. 49.25 (1992) (setting forth the parameters of the PFR pilot program). Lucy Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719, 736 n.109 (1992) (discussing the Wisconsin pilot program). The Clinton Administration also has approved demonstration plans to implement laws similar to New Jersey's in Georgia and in Arkansas. David A. Price, *Activist Lawyers Fight Welfare Reform in New Jersey* (Apr. 8, 1994) (unpublished legal opinion letter, on file with the Washington Legal Foundation); *Arkansas Reduction in AFDC Birth Rates Project*, CLEARINGHOUSE REV., 585 (1994). Applications for similar demonstration projects in California and Maryland reportedly are pending. William Claiborne, *Reluctant Allies Oppose Clinton 'Family Cap' Welfare Proposal*, WASH. POST, May 27, 1994, at A1.

5. Williams, *supra* note 4, at 720; Alan Houseman, *Advocacy Responses to State Budget Cuts and Reform Proposals*, CLEARINGHOUSE REV., 731, 733 (1992).

6. See, N.J. STAT. ANN. § 44:10-3.5 (West 1993) (eliminating incremental benefit for any child born into a family enrolled in AFDC). See also, WIS. LEGISLATIVE REFERENCE BUREAU, A SUMMARY OF THE PARENTAL AND FAM. RESP. INITIATIVE, at 4 (1992) [hereinafter WISCONSIN BRIEFS] (providing for incremental benefit for one child, but halving the grant for second child and eliminating the grant for any subsequent children).

7. *New Jersey Pub. Hearing on Assembly Bill Nos. 4700-4705 Before Assembly Health and Hum. Serv. Comm.*, 4 (Oct. 22, 1991) (statement by bill sponsor Assemblyman Wayne R. Bryant) [hereinafter *New Jersey Hearings*].

Legislation that eliminates the per-child allotment essentially removes the incremental benefit⁸ traditionally granted to AFDC families upon the birth of a child.⁹ The legislation is intended to accomplish two goals: conservation of state funds and modification of behavior among AFDC recipients (that is, encourage employment and discourage childbirth).¹⁰ Whether this legislation is capable of accomplishing either goal is questionable.¹¹ The legislation also

8. The incremental benefit is the per-child grant provided to AFDC families. Nationwide, the average monthly allotment per child is \$40-\$60. In New Jersey the benefit per child is \$64 per month. *Changes in State Welfare Reform Programs: Hearing Before the Senate Subcomm. on Social Security and Fam. Policy of the Comm. on Finance*, 102nd Cong., 2nd Sess. (1992) (statement of Wayne Bryant, Assemblyman, New Jersey State Assembly) [hereinafter *Senate Hearings*].

9. See, e.g., N.J. STAT. ANN. § 44:10-3.5 (1993); Irene Lurie, *Major Changes in the Structure of the AFDC Program Since 1935*, 59 CORNELL L. REV. 825, 826 (1974) (discussing the early years of the AFDC program).

10. *New Jersey Hearings*, *supra* note 7 (statement to Assembly Bill 4703); WISCONSIN BRIEFS, *supra* note 6.

11. Legislators have acknowledged that they "can not readily determine" how much money might be saved. *New Jersey Hearings*, *supra* note 7 (legislative fiscal estimate). Opponents assert that there is no empirical evidence to support the claim that the level of AFDC benefits has any effect on childbearing decisions. *New Jersey Pub. Hearing on Assembly Bill Nos. 4700-4705 Before Assembly Health and Hum. Serv. Comm.*, 16X (July 30, 1991) (statement by Joseph Bordo, Chair, and Edward O'Connor, Executive Director, New Jersey Chapter of Nat'l Ass'n of Social Workers) ("The concept that there is an [sic] cottage industry among poor women of having babies for the welfare money is factually unfounded."); HUM. RESOURCES AND COMMUNITY DEV. DIV., CONG. BUDGET OFFICE, *SOURCES OF SUPPORT FOR ADOLESCENT MOTHERS*, 43 (1990) [hereinafter *ADOLESCENT MOTHERS*] ("Studies . . . find no evidence that benefit levels encourage childbearing."). Since the New Jersey law has been in force, some sources cite a slight decrease — approximately 10% — in births to welfare mothers, but experts warn that such reports have not made clear to what extent the figures reflect the underreporting of births or can be attributed to factors other than the new law. Barbara Vobejda, *Gauging Welfare's Role in Motherhood: Sociologists Question Whether 'Family Caps' Are a Legitimate Solution*, WASH. POST, June 2, 1994, at A1; 60 Minutes: *The \$64 Question*, May 15, 1994. But see RANK, *infra* note 79 (noting that women on welfare tend to have lower birth rates than other women); Kerr, *infra* note 67; Sydel, *infra* note 86.

In regard to the goal of encouraging AFDC recipients to seek employment, it should be noted that other means are already in place to meet these objectives. See, e.g., *New Jersey Hearings*, *supra* note 7 (discussing the Family Development Initiative, Assembly Bill 4700, and noting that the objective is "to enable recipients of [AFDC] to secure permanent full-time unsubsidized jobs, preferably in the private sector . . . and to ensure that these individuals . . . obtain the necessary educational skills and vocational training, as appropriate, to secure these kinds of jobs . . ."). The scarcity of jobs is also a factor in whether this legislation can work. See ANDREW HACKER, *TWO NATIONS, BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 101-06 (1992); Jason DeParle, *Trying to Make Teenagers Tomorrow's Skilled Workers*, N.Y. TIMES, Nov. 26, 1992, at A1, D15. Both sources discuss the disappearance of jobs for unskilled workers and the corresponding steep declines in salaries for these workers over the past 20 years, noting that welfare families are often unable to procure the jobs that are available, and that even if jobs were available and the AFDC parent was qualified for the jobs, the costs of childcare often more than offset the wages earned. See *Number of Americans in Poverty Rises for Fourth Straight Year*, DAILY LABOR REPORT, Oct. 7, 1994 ("[Economic Policy Institute economists] . . . noted that

may violate the Social Security Act¹² and the U.S. Constitution's Fourteenth Amendment Equal Protection Clause.¹³ Although over a dozen states appear to be considering this legislation¹⁴ and the Clinton Administration recently endorsed these measures,¹⁵ New Jersey is the only state in which the law has been enacted and is currently in force.¹⁶ For that reason, and because other states' proposals are similar to New Jersey's,¹⁷ this article focuses on the law as enacted in New Jersey.

the wages for the vast majority of the workforce have been eroding since 1979 due to the 'weakening of labor-market institutions (such as a lower minimum wage, weaker unions), the expansion of low-wage service employment, import pressures, and corporate downsizings.'"); MARIAN WRIGHT EDELMAN, *FAMILIES IN PERIL* 92 (1987) (reporting that 60% of all adults in AFDC families have not received a high school education and that at least one in four has no prior work experience); Anders, *supra* note 3, at 569 (stating that the reasons so many households headed by single women are in poverty in the first place is lack of education, lack of jobs, and lack of affordable daycare, as well as wage discrimination); *Adolescent Mothers*, *supra* at xi (citing low educational attainment and inadequate job skills as characteristic of young mothers).

12. See *infra* notes 18-27, 111 and accompanying text (noting that the purpose of the AFDC program, which was enacted as part of the Social Security Act, is to encourage the care of dependent children.); *Beno v. Shalala*, 30 F.3d 1057 (9th Cir. 1994) (invalidating California AFDC measure that reduced benefits across the board without proper review by HHS).

13. See *infra* notes 180-186 and accompanying text (discussing the constitutional guarantee to Equal Protection under State and Federal laws). In fact, the New Jersey law has been challenged by a coalition of legal groups, who argue that the law violates the Equal Protection Clause and the Due Process Clause of the U.S. and New Jersey constitutions, as well as federal statutes and regulations governing AFDC, family planning services, and research on human subjects. Price, *supra* note 4. The lawsuit was filed Dec. 1, 1993. *Id.*

14. Similar bills have been discussed by legislators in California, 1993 CA A.B. 2289, 1993-94 Reg. Sess., April 19, 1993; Colorado, 1993 CO H.B. 1199, 59th Gen. Assembly, 1st Reg. Sess., April 23, 1993; Florida, 1992 FL H.B. 131 and 1992 FL S.B. 1378, 1992 Reg. Sess., Jan. 14, 1992; and Illinois, 1991 IL H.B. 3682, 87th Gen. Assembly, 1991-92 Reg. Sess., April 9, 1992, and 1991 IL S.B. 1540, 87th Gen. Assembly, 1991-92 Reg. Sess., March 31, 1992. Legal publications have also reported that similar legislation has been discussed in Maine, South Carolina, and Virginia, Center on Social Welfare Policy and Law, *The New Welfare Cutbacks and Litigation Responses*, CLEARINGHOUSE REV., 756, 760 (1992) [hereinafter *New Welfare Cutbacks*]. Demonstration projects have been approved for Georgia and Arkansas, (Price, *supra* note 4; *Arkansas Reduction in AFDC Birth Rates Project*, *supra* note 4), and legislators in Connecticut, Louisiana, Massachusetts, Oregon also have discussed similar AFDC legislation.

15. Vobejda, *supra* note 11; Ronald Brownstein, *White House Backs Initiatives to Restrict Illegitimate Births*, HOUSTON CHRON., May 22, 1994, at A4.

16. See N.J. STAT. ANN. § 44:10-3.5 (West 1993).

17. See, e.g., 1992 FL H.B. 131 and 1992 FL S.B. 1378, 1992 Reg. Sess., Jan. 14, 1992 (stating that the bill is designed, in part, to "discourage the birth of additional children, among recipients," by, *inter alia*, eliminating the incremental benefit for a child born while the family is enrolled in AFDC); 1991 IL H.B. 3682, 87th Gen. Assembly, 1991-92 Reg. Sess., April 9, 1992, (stating, "[a] family unit receiving aid . . . shall not receive, on account of the birth of a child . . . any increase in the amount of financial aid . . ."); 1993 CA A.B. 2289, 1993-94 Reg. Sess., April 19, 1993 ("This bill

This article will provide an overview of AFDC, discussing the origins and purposes of the program and how AFDC legislation should be analyzed in light of U.S. Supreme Court precedent. Next, it will address the arguments in support of and in opposition to the law. Moreover, this article will look at other legislation designed to reduce state expenditures on AFDC. In conclusion, this article will discuss the per-child allotment legislation, focusing on the New Jersey statute, which may violate the Social Security Act and the Equal Protection Clause of the Fourteenth Amendment.

A. Aid to Families with Dependent Children

Originally known as Aid to Dependent Children,¹⁸ AFDC was established as part of the Social Security Act of 1935.¹⁹ Initially, AFDC was the federal government's response to states' inability to provide adequate pension payments to widows and their dependent children²⁰ during the Great Depression.²¹ From the outset, the fed-

would prohibit . . . the inclusion of a child conceived while either the father or the mother of the child is receiving aid on behalf of an eligible child. . . ."); 1992 CO H.B. 1302 ("For a[n AFDC] household in which an addition [sic] child is born, the needs of such child shall not be considered in calculating the monthly AFDC grant for the household.").

18. Lurie, *supra* note 9, at 827 (citing Act of July 25, 1962, Pub. L. No. 87-543, § 104(a)(2), 76 Stat. 185 (codified at 42 U.S.C. § 602 (1970))).

19. *Id.* at 826-27 (citing Social Security Act of 1935, Ch. 531, 49 Stat. 620, (codified at 42 U.S.C. §§ 301-1396g (1970))).

20. *Id.* at 826. Under the mothers' pension laws established by the states in the early part of the 20th century, states provided aid to widowed, disabled, or deserted parents in an effort to enable the children of those parents to remain at home and be cared for by their families. *Id.* Prior to enactment of these laws, children whose parents couldn't support them were institutionalized. *Id.* Initially, the AFDC program did not include "unsuitable" mothers, such as unwed or divorced mothers. CHRISTOPHER JENCKS, *RETHINKING SOCIAL POLICY* 2 (1992); Lurie, *supra* note 9, at 828. Gradually, however, the AFDC program was transformed so that it "became mainly a program for unwed, separated and divorced mothers." JENCKS, *supra*, at 2. Jencks notes that this focus caused the AFDC program to become unpopular and controversial: "Since most Americans were still strongly opposed to both unwed motherhood and divorce, a program that sanctioned and even rewarded such behavior was bound to be unpopular." *Id.* The author cites the "endless controversy over [AFDC]" as one reason Congress has been reluctant to make other kinds of social policy. *Id.* He also notes that the portion of the AFDC program that provided benefits to "two-parent families in which the husband was disabled and had never contributed to the social-security system . . . has never aroused much controversy." *Id.* at 237 n.2.

For a discussion of the "deserving" poor versus the "undeserving" poor, see Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499, 1505-09 (1991); HACKER, *supra* note 11, at 84 ("Virtually everyone agrees that [AFDC]—commonly called "welfare"—requires radical reform, if not outright abolition."); NATHAN GLAZER, *THE LIMITS OF SOCIAL POLICY* 21 (1988) ("AFDC by 1970 was no longer a widows' program: it was not even a program primarily for divorced women, or women whose husbands had deserted them. It was increasingly a program for the mothers of illegitimate children. . . . It had become a program for blacks, who made up about half of the recipients of welfare aid. That there should be

eral government left the responsibility for administering the program up to the states.²² Recently, the federal government passed legislation enabling states to obtain "waivers" from the Secretary of Health and Human Services (HHS).²³ These waivers allow the Secretary to approve state welfare programs that have not been reviewed by HHS officials.²⁴ Some sources express concern that the waiver process has enabled states to implement program changes in AFDC that directly conflict with the purposes of the AFDC program and thus otherwise would not be approved.²⁵

The purpose of the AFDC program is to encourage the care of dependent children²⁶ in their own homes or the homes of relatives

more family breakup and more illegitimacy among blacks than whites was understandable in view of the hard economic circumstances under which blacks lived as compared to whites, the particularly great difficulty black men encounter in finding stable jobs, the inferior education blacks received." *Id.* at 23; Houseman, *supra* note 5, at 733 ("Today, the public perceives the welfare system, particularly the AFDC program, as out of control. Instead of encouraging work, it is perceived as rewarding those who do not work.").

21. Lurie, *supra* note 9, at 826.

22. *Id.* at 827. "Congress gave relatively little attention to AFDC in drafting the Social Security Act, anticipating that a fully developed social security program would provide for widows and orphans and that the need for AFDC would 'wither away.'" See also GLAZER, *supra* note 20, at 21 ("[I]t was expected that the numbers of [women and children receiving welfare assistance] would not be large and would decline as the social security system came to maturity.").

23. 42 U.S.C.S. § 1115. Under this section of the Social Security Act, "the Secretary of HHS may waive federal AFDC requirements to allow a state to run an experimental project that the Secretary deems 'is likely to assist in promoting the objectives of' the AFDC program." *New Welfare Cutbacks*, *supra* note 14, at 756.

24. *New Welfare Cutbacks*, *supra* note 14, at 756.

25. *Id.* See also *Senate Hearings*, *supra* note 8, at 39 (statement of Robert Greenstein, Executive Director, Center on Budget and Policy Priorities, Washington, D.C.) ("I am very concerned . . . about a potential misuse of the Federal waiver process. I am not suggesting . . . indiscriminate opposition to waivers. But neither should there be indiscriminate approval of waivers. . . . I think we need to look very carefully at what are the proper uses of waivers here."); Center on Social Welfare Policy and Law, *Welfare in 1994: Inadequate Benefits, Time Limits, and Arbitrary Administration?*, CLEARINGHOUSE REV., 1001, 1009 (1994) (describing the waiver system and stating of demonstration projects recently approved via waivers, "These projects were approved despite recipient opposition and indicate, especially in the case of Wisconsin, that HHS stands ready to approve virtually any state proposal, no matter how repugnant to the underlying purposes of the AFDC program. . . . HHS has responded [to President Clinton's affirmation of the waiver system] by approving virtually whatever the states want to do, without regard to the harm to poor families or how a proposal fits in with the President's plans for welfare reform."); *Beno v. Shalala*, 30 F.3d 1057 (9th Cir. 1994) (invalidating California measure which reduced AFDC benefits, and reviewing the requirements under the waiver program).

26. "Dependent child" is defined as:

[A] needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home (other than absence occasioned solely by reason of the performance of active duty in the uniformed services of the United States), or physical or mental incapacity of a parent, and who is living with his father, mother, grandfa-

and to help maintain and strengthen family life.²⁷ Robert Greenstein, Executive Director of the Center on Budget and Policy Priorities in Washington, D.C., reported that many states have reduced the funding levels of their AFDC programs in recent years²⁸ in response to the states' "large deficits" brought on by the recent economic recession.²⁹ Calling the cuts "a classic case of a tough budget crunch,"³⁰ Greenstein stated that most of the cuts were not aimed at encouraging behavioral changes among AFDC recipients, but rather were implemented solely to save money.³¹ This has resulted

ther, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) at the option of the State, under the age of nineteen and a full-time student in a secondary school (or the equivalent level of vocational or technical training), if, before he attains age nineteen, he may reasonably be expected to complete the program of such secondary school (or such training).

42 U.S.C.S. § 606(a) (Law. Co-op. 1985).

27. 42 U.S.C.S. § 601 (Law. Co-op. 1985). The Social Security Act states:

For the purpose of encouraging the care of dependent children in their own homes or the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to *help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection*, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part.

Id. (emphasis added).

Although the Social Security Act has been interpreted to mean that basic necessities must be provided to AFDC children, the Supreme Court has limited the meaning of "basic necessities," holding that the term did not include such items as medical expenses. *Atkins v. Rivera*, 477 U.S. 154 (1986).

28. *Senate Hearings, supra* note 8, at 35 (statement of Robert Greenstein)

[I]n 1991, 40 states froze or cut AFDC benefits, nine states cut the basic benefit outright, 12 states, many of them in addition to the nine I just mentioned, cut special needs, payments, or emergency assistance; sometimes emergency assistance for homeless families. These were the deepest cuts in at least a decade in AFDC. . . . [B]efore these cuts took place . . . the Congressional Research Service figures show that the benefit in the median state for a family with no other income was 42 percent below the 1972 level.

Id. See also Center on Social Welfare Policy and Law, *Welfare Law Developments*, CLEARINGHOUSE REV. 1175, 1178 (1993) [hereinafter *Welfare Developments*] (reporting that "overall there was a continuing erosion of [AFDC] benefits" in 1992).

29. *Senate Hearings, supra* note 8, at 37.

30. *Id.* at 37-38.

31. *Id.* at 36.

in a system that provides benefits that are below the poverty level³² in every state.³³

The AFDC program is a joint endeavor between the federal government and the states, with states participating in the program on a voluntary basis and the federal government reimbursing a percentage of the monies the states expend.³⁴ If a state agrees to participate in the AFDC program, the state must administer its AFDC program in conformity with federal regulations.³⁵ In part, those regulations require the states to provide aid to all eligible families in a reasonably prompt manner;³⁶ to assure that the funds are used to further the best interests of the child;³⁷ to provide for development of a birth control program targeted to each "appropriate" individual in the AFDC household so that out-of-wedlock births will be reduced or prevented and family life will be strengthened;³⁸

32. The poverty level is defined by the Social Security Administration, which in 1964 devised a poverty index based solely on monetary income. U.S. DEP'T OF COM., STAT. ABSTRACT OF THE UNITED STATES, 426 (1992) [hereinafter STATISTICAL ABSTRACT]. The poverty level for a three-person household was \$10,419 in 1990, up from \$6,565 in 1980. *Id.* at 427, citing U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, P-60, No. 175. For a four-person household, the poverty level in 1990 was \$13,359, up from \$8,414 in 1980. *Id.* As of 1993, the poverty level for a family of four was \$14,763. DAILY LABOR REPORT, *supra* note 11. In 1993, 39.3 million Americans, or 15.1% of the population, lived in poverty, and 22.7% of all children lived in poverty. *Id.* Since 1989, the real median family income has fallen 6.9%, or \$2,737. *Id.*

33. *Welfare Developments*, *supra* note 28, at 1179. The combined assistance available to a family from AFDC and food stamps was below the poverty level in every state, and below 75% of the poverty level in 41 states. *Id.*

34. 42 U.S.C.S. § 603 (Law. Co-op. (1985 & Supp. 1994)).

35. *Id.* § 602.

36. *Id.* § 602(10)(A). "[A]id to families with dependent children shall . . . be furnished with reasonable promptness to all eligible individuals. . . ."

37. *Id.* § 605.

Whenever the State agency has reason to believe that any payments of aid to families with dependent children made with respect to a child are not being or may not be used in the best interests of the child, the State agency may provide for such counseling and guidance services with respect to the use of such payments and the management of other funds by the relative receiving such payments as it deems advisable in order to assure use of such payments in the best interest of such child, and may provide for advising such relative that continued failure to so use such payments will result in substitution therefor of protective payments . . . or in seeking appointment of a guardian or legal representative . . . or in the imposition of criminal or civil penalties

Id.

38. *Id.* § 602 (15)(A). This section states that family planning services should be offered to those individuals who voluntarily request them and adds that acceptance of family planning services "shall not be a prerequisite to eligibility for or the receipt of any other service under the plan." *Id.* (emphasis added).

and to adjust figures on which the standard of need is based in order to reflect cost-of-living changes.³⁹

Although states must establish a standard of need, states need not make payments equal to that standard.⁴⁰ However, anyone whose income exceeds 185% of the state's standard of need is ineligible for AFDC benefits.⁴¹ The U.S. Supreme Court, in holding that AFDC payments need not equal the state standard of need, anticipated that legislators would feel pressure to set welfare payments in accordance with the wishes of the voters.⁴² States are required to reevaluate their standards of need every three years, reporting the results of their evaluation to the Secretary of Health and Human Services⁴³ and the public.⁴⁴

Courts have invalidated some state laws pertaining to the AFDC program,⁴⁵ and some commentators suggest that the courts are a necessary intervenor in AFDC legislation because the Department of Health and Human Services (HHS) more often takes the side of the state than the side of individuals disputing state AFDC

39. *Id.* § 602 (23): "[B]y July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted." *Id.*

40. 45 C.F.R. § 233.20(a)(2)(ii)(1993); *Rosado v. Wyman*, 397 U.S. 397, 413 (1970); *Jefferson v. Hackney*, 406 U.S. 535, 538 (1972).

41. *Rulemaking*, 117 N.J. 311, 320 (1989) (citing the Deficit Reduction Act of 1984, Pub.L. No. 98-369, § 2621, 98 Stat. 494, 1134).

42. *Id.* at 321-23 (discussing Justice Harlan's holding in *Rosado v. Wyman*, 397 U.S. 397 (1970)).

43. *Id.* at 321 (citing Family Support Act of 1988, Pub.L. No. 100-185, § 404, 102 Stat. 2343, 2398).

44. *Id.*

45. *See, e.g., id.*; *Ledbetter v. Baldwin*, 107 S. Ct. 635 (1986) (stating that method of determining grant violated due process); *Pahle v. Adult and Fam.*, 696 P.2d 1135 (Or. App. 1985) (invalidating Oregon statute because it was more restrictive than federal law). *But see Tello v. McMahon*, 677 F. Supp. 1436 (1988 E.D. Cal. 1988) (upholding a "devastating penalty"). *See infra*, notes 108-229 and accompanying text (discussing AFDC challenges decided by the Supreme Court).

legislation.⁴⁶ Experts also express concern over the increasing number of waivers being granted to state programs.⁴⁷

1. AFDC Benefits

The AFDC system is the focus of intense scrutiny and controversy,⁴⁸ and state legislatures are expending a great deal of time attempting to reduce the AFDC rolls.⁴⁹ This can probably be attributed to the fact that AFDC accounted for just over half of all cash aid provided in 1990 by state and local governments—\$9.6 billion in AFDC benefits, compared to \$18.1 billion for all cash benefits⁵⁰ — and just under a third of all cash aid provided by the federal government — \$11.5 billion in AFDC benefits, compared to \$37 billion for all cash benefits.⁵¹ In total, AFDC funds in 1990 accounted

46. Richard Wills Hubbard, *Bacon v. Toia: The Case of an Administrative Agency's Equal Protection Standard*, 55 TEMP. L.Q. 1, 14 (1982). The author notes that the states exhibit a "great reluctance to disapprove questionable state plan provisions," which requires the intervention of the Court if unconstitutional laws and programs are to be invalidated. *Id.* at 14 n.76 (citing as examples *Rosado v. Wyman*, 397 U.S. 397 (1970) and *Carleson v. Remillard*, 406 U.S. 598 (1972)). In *Rosado*, HEW approved a New York plan that established a benefits computation scheme which the U.S. Supreme Court later held to be in violation of the Social Security Act. In *Carleson*, HEW allowed a California plan that denied AFDC benefits to families in which a parent's absence—and consequent lack of support—was due to military service; the U.S. Supreme Court also found this scheme to be in violation of the Social Security Act). *Id.*

47. See *supra* note 25 and accompanying text.

48. See *supra* note 20 (discussing the changes in the AFDC program and providing various authors' comments regarding public opinion on the AFDC program); Lurie, *supra* note 9, at 825 ("AFDC is criticized as being both inadequate and inequitable, and many critics argue that AFDC has increased dependency on welfare by encouraging marital instability, migration to urban ghettos, and withdrawal from the labor force.").

49. See *supra* note 28 (noting that recent cuts in state AFDC programs have been the deepest in at least a decade).

50. STATISTICAL ABSTRACT, *supra* note 32, at 357.

51. *Id.* In 1991, total AFDC benefit payments were \$20.3 billion. Adele M. Blong and Timothy J. Casey, *AFDC Program Rules for Advocates: An Overview*, CLEARINGHOUSE REV., 1164, 1165 (1994).

As with any statistical analysis, it is crucial that the observer maintain an overall perspective. For example, in terms of AFDC funding, the fact that the monies provided to AFDC recipients account for less than one percent of all state expenditures and less than 10% of all public aid expenditures is far more telling than the fact that AFDC funds account for just over half of all cash aid provided by the state and local governments.

By analogy, consider a business that spends \$1,000 per week, including payroll, rent, insurance, and so forth. Operating costs account for 60% of the company's annual expenditures, and half of the operating costs constitute salaries. (The percentages and ratios used in this illustration reflect those of the national government's budget, as reported in the Statistical Abstract). Assume the company provides free bus passes to about 13% of its workers. (The percentage is analogous to the number of Americans who receive non-cash benefits.) The bus passes, which represent non-cash assistance, account for 8% of the company's annual expenditures. Let's also say

for nine percent of all public welfare expenditures at the state level and about thirty-five percent at the federal level.⁵² Total public welfare expenditures accounted for 9.3% of all state and local expenditures in 1990 (and 2.5% of all federal expenditures).⁵³ Thus, AFDC funds account for less than one percent of all government expenditures — at both the federal and the state and local levels.⁵⁴

The federal government provides about fifty-four percent of the cash benefits received by AFDC families; states supply the remainder.⁵⁵ Because the per-child allotment legislation has been enacted only in New Jersey,⁵⁶ it is important to assess the funding levels in that state. In New Jersey, the state spent \$533,594,000 on AFDC maintenance assistance payments in fiscal year 1993, providing benefits to an average of 349,388 recipients, or roughly 125,930 families per month.⁵⁷ As of May 1994, the maximum family grant for a family of four was \$488 in New Jersey,⁵⁸ up slightly from the 1989 level of \$443 per month,⁵⁹ which was less than sixty

this company provides cash assistance to about 4% of its workforce (the same percentage of Americans receiving AFDC). The cash assistance accounts for less than 1% of the company's annual expenditures, but constitutes 54% of its cash expenditures. When the CFO is looking to cut costs, he would save the company more money overall if he trimmed some of the operating costs or reduced the amount of expenditures going toward bus passes than if he eliminated all of the cash assistance. The same holds true for AFDC and other welfare programs: the government would save more money overall if it even just slightly trimmed its operating costs—which account for 35.2% of all federal expenditures and 60.7% of all state and local expenditures—than if it completely eliminated all cash grants.

The dilemma between cash and non-cash grants is further illustrated by a recent discussion among legislators in which Douglas Besharov, Scholar in Residence, American Enterprise Institute, Washington, D.C., noted that as states reduce the cash grants state governments provide to AFDC recipients, those recipients obtain increased aid from the federal government in the form of food stamps. *Senate Hearings*, *supra* note 8, at 25-26.

52. STATISTICAL ABSTRACT, *supra* note 32, at 356-57. AFDC funds accounted for 15% of all government expenditures on welfare—federal, state, and local spending combined. *Id.*

53. *Id.*, at 280, Table No. 450.

54. *Id.* One writer reports that the total dollar amount of federal and state spending for AFDC was \$128 billion less than the government spent on the savings-and-loan bailout. Charles Sennott, *Liberals Finding the Aid System is Broken*, BOSTON GLOBE, May 17, 1994, at 1.

55. STATISTICAL ABSTRACT, *supra* note 32, at 357.

56. See *supra* note 4.

57. Facsimile transmission from H. Lieberman, Office of Family Assistance, Washington, D.C. (May 18, 1994). The U.S. government spent a total of \$22,553,082,000 during fiscal year 1993. *Id.* In fiscal 1986, New Jersey provided 35% of the funds for its AFDC program, the county provided 15%, and the federal government provided the remainder. *Rulemaking*, 117 N.J. at 313.

58. Office of Family Assistance, *supra* note 57.

59. *Rulemaking*, 117 N.J. at 317.

percent of the minimum cost of living in New Jersey at that time.⁶⁰ The cost of living in New Jersey increased over 130% between 1975 and 1985, but AFDC payments increased only thirty-three percent during that period.⁶¹ The same is true for most other states.⁶²

Nationwide, the average monthly AFDC benefit for the typical, three-person family was \$390 in 1990.⁶³ The AFDC payment constituted ninety-two percent of the cash income available to these families.⁶⁴ The average annual cash grant received by an AFDC family in 1990 was \$4,644, with cash allowances ranging from \$1,356 in Alabama to \$7,692 in Massachusetts.⁶⁵ Overall, the cash benefits supplied by AFDC amount to about one-seventh of the average income of American families.⁶⁶

Some experts report that children in AFDC families already are receiving less than half the funds that families need to lead a safe, healthy life.⁶⁷ Others report that most states' AFDC grants combined with food stamps provide support that reaches only seventy percent of the poverty level, with *no state* providing assistance that would bring a mother of two *up to* the poverty level.⁶⁸ Overall, AFDC benefits already have been cut by forty-two percent since 1970.⁶⁹

60. *Id.* at 316-17. As of May 18, 1994, the maximum grant for a family of four was \$488. Office of Family Assistance, *supra* note 57.

61. *Id.*

62. See *supra* notes 8-33 and accompanying text.

63. U.S. DEP'T OF HEALTH AND HUM. SERV., CHARACTERISTICS AND FIN. CIRCUMSTANCES OF AFDC RECIPIENTS 2 (1990)[hereinafter AFDC RECIPIENTS].

64. *Id.* at 2. About 20% of AFDC families had earned income in 1990. In over 80% (five-sixths) of the families with earned income, the mother was the income earner. *Id.*

65. HACKER, *supra* note 11, at 86. See also *Rulemaking*, 117 N.J. at 317 (quoting *Tello v. McMahon*, 677 F.Supp. 1436, 1445 (E.D. Cal. 1988)([T]he devastating truth is that few States, if any, define need at, much less above, the poverty level").

66. HACKER, *supra* note 11, at 86.

67. *New Jersey Hearings*, *supra* note 7, at 15 (statement by Melville Miller, President, Legal Services of New Jersey, July 9, 1991); *Id.* at 44 (statement of Martha Davis, Staff Attorney, NOW Legal Defense and Education Fund); Peter Kerr, *Trenton Legislator Proposes Overhaul of Welfare System*, N.Y. TIMES, Apr. 9, 1991, at B4 (citing David Sciarra, Acting Director, Division of Public Interest Advocacy, New Jersey Public Advocate).

68. Andrew Ward, *When the Republicans Told My Wife that They Care*, WASH. POST, Dec. 17, 1991, at A21 (citing the Center on Budget and Policy). See also Center on Social Welfare Policy and Law, *Welfare Law Developments*, CLEARINGHOUSE REV., 1074, 1076 (Jan. 1991)[hereinafter *Welfare Developments II*]; ADOLESCENT MOTHERS, *supra* note 11, at 41 (noting that the maximum benefits for a two-person family in the 48 contiguous states ranged from 12% of the poverty level in Alabama to 77% in California).

69. Center on Social Welfare Policy and Law, *Welfare Law Developments*, CLEARINGHOUSE REV., 1283, 1284 (Jan. 1992)[hereinafter *Welfare Developments III*]. See also *Welfare in 1994*, *supra* note 25 (providing additional data on poverty and welfare in general and AFDC); Blong, *supra* note 51.

2. Characteristics of AFDC Recipients

Despite common perceptions that the AFDC program constitutes welfare for black mothers of illegitimate children,⁷⁰ or that the average welfare family has "half a dozen children, headed by a mother who has been in the program for at least a dozen years,"⁷¹ the reality is quite different.

The number of individuals receiving AFDC is almost equally divided between white and black families: 39.7% of AFDC recipients in 1990 were black, 38.1% were white, 16.6% were Hispanic, 2.8% were Asian, and 1.3% were Native American.⁷² About eleven million Americans receive AFDC benefits,⁷³ two-thirds of whom are children.⁷⁴ About half the enrollees voluntarily leave the AFDC program within three years;⁷⁵ the median enrollment period is

70. GLAZER, *supra* note 20, at 23. See *infra* note 87.

71. HACKER, *supra* note 11, at 86. See *infra* note 87.

72. AFDC RECIPIENTS, *supra* note 63, at 1. The demographics of Americans receiving AFDC and those living in poverty are substantially different: of the 33.5 million Americans in poverty as of March 1991, two-thirds, or 22.3 million, were white. *Id.* That constitutes 10.7% of the white population. By contrast, less than one-third, or 9.8 million, were black. *Id.* That translates to 31.9% of the black population. *Id.* Additionally, 34% of white single mothers receive AFDC, compared with over 50% of black and Hispanic single mothers. HACKER, *supra* note 11, at 86. (Note that in total numbers the vast majority of Americans in poverty were white, but with whites constituting the vast majority of the population in the United States, the proportion of the white population that was living in poverty was much lower than for blacks.)

The demographic discrepancy between the populations in poverty and those receiving AFDC—i.e., if two-thirds of the nation's poor are white, why don't whites constitute two-thirds of AFDC recipients?—is explained by at least one social scientist as attributable to the fact that white Americans are able to take advantage of many more programs, including widows' survivor's benefits, that help them escape poverty. *Id.* Cf. *Welfare: Publications of Interest*, CLEARINGHOUSE REV. 1433 (Feb. 1993) (stating that although the number of poor is increasing more rapidly among non-Hispanic whites than among blacks, "whites are more than twice as likely as blacks and Hispanics to be lifted out of poverty by government safety net programs," citing ISAAC SHAPIRO, *WHITE POVERTY IN AMERICA*).

73. ADOLESCENT MOTHERS, *supra* note 11, at 44.

74. *Id.* In an average month in 1991, about 4.3 million families with 8.4 million children and 3.9 million adult caretakers received AFDC benefits. Blong, *supra* note 51, at 1165.

Some sources blame the high incidence of poverty among women and children on the failure to enforce orders to pay child support. Karen Levine, *Report Backs Child Support Bill*, MASS. LAW. WKLY., Nov. 15, 1993, at 33; Rorie Sherman, *IRS to Collect From Dad?*, NAT'L L.J., Sept. 13, 1993, at 1 ("[I]n 1989, the U.S. Bureau of the Census found that of those parents who had a court order for child support, only 26 percent actually received all the money due them. In addition, . . . about 10 million parents with custody who theoretically were eligible to receive child support didn't have court orders. The Census Bureau says potentially \$19 billion is owed in child support.").

75. HACKER, *supra* note 11, at 85. See also ADOLESCENT MOTHERS, *supra* note 11, at xvi, 45 (stating that among AFDC recipients, studies show that nearly three-fourths of young AFDC mothers — those in their teens and twenties — left the AFDC program within three years. Statistics for young mothers are especially im-

twenty-three months.⁷⁶ Nearly two-thirds of recipients had been enrolled for three years or less in 1990, and less than one-fourth had been enrolled for five or more years.⁷⁷

Most AFDC families (about forty-three percent) have only one child; thirty percent have two children.⁷⁸ Thus, nearly three-quarters of all AFDC families have no more than two children. Only one in ten AFDC families has four children.⁷⁹ The average size of the welfare family was, as of 1990, 2.9 people,⁸⁰ down from four in 1969.⁸¹ Figuring at least one parent in each family, the average welfare family has no more than two children.⁸² The average age of an AFDC child was seven and a half years in 1990.⁸³ In New Jersey, the average family size overall is 3.3, while the average family size among poor families is 3.5.⁸⁴

As for the idea that AFDC mothers are enjoying "successions of sexual partners (so not only are they bankrupting society but they are also having a fine time while decent people toil),"⁸⁵ again, the reality is quite different. A federally funded study conducted by Harvard University found that from 1972 to 1984, the number of children in black, female-headed households grew by twenty-five percent overall, while the number of children in *AFDC-supported*

portant in the AFDC context because this group constitutes over half of the AFDC recipient pool). *Id.* at 45; Blong, *supra* note 51, at 1166 ("Recent studies estimate that half the families who start to receive AFDC will receive it for no more than two years at a time and that half the families who ever receive AFDC receive it for no more than four years over the course of their lives. As to long-term use, these studies estimate that 30 percent of those who ever receive AFDC will receive it for eight or more years over the course of their lives.").

76. AFDC RECIPIENTS, *supra* note 63, at 1.

77. *Id.*

78. HACKER, *supra* note 11, at 87; Blong, *supra* note 51, at 1166.

79. *Id.* See also, *New Jersey Hearings*, *supra* note 7, at 26 (statement by Margaret Woods, Executive Director, Independence High School) (July 9, 1991) (noting that the average AFDC family is a mother and two children and that only 5% or 6% of all AFDC families have six or more children); Legislative Fiscal Estimate to Assembly Bill 4703 (Oct. 22, 1991) (noting that the legislature *does not know* the size of the AFDC households in which births occur); ADOLESCENT MOTHERS, *supra* note 11, at 44-45 (reporting that the average single-parent AFDC family—which constitutes 90% of AFDC households—comprised 2.8 members, with the two-parent AFDC-UP family averaging 4.4 people); MARK ROBERT RANK, *LIVING ON THE EDGE: THE REALITY OF WELFARE IN AMERICA* (1994) (stating that women on welfare have lower birth rates than other women and that illegitimacy rates tend to be lowest in states with the most generous welfare benefits, and highest in states with the most meager benefits).

80. AFDC RECIPIENTS, *supra* note 63, at 1.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. HACKER, *supra* note 11, at 90; see *infra* note 87.

black, female-headed households *dropped* by fifteen percent.⁸⁶ Furthermore, according to government studies, AFDC enrollees, like other people, base decisions about whether or not to bear a child on a variety of complex "psychosocial" factors, including emotional immaturity and lack of self-esteem, the desire to have someone to love who will return their love and depend upon them, and the wish to escape a home plagued by economic deprivation or abusive circumstances.⁸⁷ Experts also note that although economic incentives — be they AFDC grants or income tax deductions — may not be the reason anyone decides to *parent* an additional child, economic disincentives may well be the determining factor in the decision not to *keep* a child.⁸⁸

86. Kerr, *supra* note 67 (emphasis added); see also Laura Sydel, *New Jersey Takes Controversial Route to Welfare Reform*, National Public Radio, Morning Edition, Jan. 25, 1994 (noting that, according to Martha Davis, attorney with the NOW Legal Defense and Education Fund, research shows that women on public assistance actually have lower birth rates than the general population).

87. *New Jersey Hearings*, *supra* note 7, at 51 (statement of Edward O'Connor, Director of the National Assn. of Social Workers, New Jersey); WISCONSIN BRIEFS, *supra* note 6, at 7; ADOLESCENT MOTHERS, *supra* note 11, at 43.

Experts also note that no empirical evidence supports the notion that AFDC recipients bear children in order to receive the additional grant. Adolescent Mothers, *supra* note 11, at 43; Edelman, *supra* note 1, at 1701 n.16. See also Sydel, *supra* note 86 (interviewing AFDC recipients, one of whom reported that additional benefits or unwillingness to work have nothing to do with pregnancy, adding that her pregnancies resulted from forced sexual intercourse with her then-boyfriend). See also Lisa Brush, *Welfare is a Family Issue, Too*, Tex. Law., 27 (Aug. 29, 1994) ("We have no proof that capping benefits or requiring mothers to work for their welfare checks will reduce either the number or the poverty of single mothers and their children."); Robert Samuelson, . . . *Essential to the Debate*, WASH. POST, Sept. 8, 1993, at A19 ("In the mid-1980s, Leon Dash, a black reporter for The Post, spent more than a year living in one of the city's poorest neighborhoods in an effort to understand why unmarried teens had babies. . . . [H]e later wrote . . . having 'a baby is a tangible achievement in an otherwise dreary and empty future. It is one way of announcing: I am a woman. For many boys . . . , the birth of a baby represents an identical rite of passage.' . . . [T]he choices are shaped by a sense of social isolation and failure that may be hard, perhaps impossible, to change by government policy. . . . The idea that girls have babies to get welfare checks is absurd."); Dorothy Roberts, *Exploding the Myths Behind New Jersey Welfare Reform*, N.J. L.J., 21 (Jan. 25, 1993) ("The act is based on two myths about women on welfare. First . . . the welfare queen—the lazy mother on welfare who breeds children at the expense of the taxpayer in order to increase the amount of her welfare check. . . . In fact, numerous studies have found no causal relationship between welfare and family size. Women on welfare have lower fertility rates and on average give birth to no more children than women off welfare.").

88. See ADOLESCENT MOTHERS, *supra* note 11, at 43 (reporting that "[t]he evidence is less clear about whether the availability of welfare affects the pregnant woman's decisions" regarding abortion, adoption, or marriage).

B. Other AFDC Legislation

AFDC has been the subject of many legislative proposals recently.⁸⁹ The Center on Social Welfare Policy and Law reported "apparent" common trends in welfare legislation: "[i]n AFDC, benefit levels are reduced through cuts or freezes, and the welfare system is used to regulate not only employment, but also marriage, childbirth, living arrangements, interstate migration, children's school attendance, and other behavior of recipients."⁹⁰ The Center also noted "a continuing erosion of [AFDC] benefits" in 1992,⁹¹ which in some states came on top of cuts made in 1991.⁹² The Center concluded, "[t]here is no indication that this is the last round of cuts. Most analysts seem to expect states to continue to experience severe budget problems. Moreover, states continue to contemplate further cuts in public assistance."⁹³ These cuts come in the face of a recommendation by the Congressional Budget Office suggesting that, since these types of financial deprivations do not effectively reduce the AFDC rolls, alternative means should be implemented, including *increased welfare payments*, increased education and better economic opportunities.⁹⁴

Perhaps the greatest impetus behind AFDC legislation is conservation of resources (i.e., saving money).⁹⁵ AFDC laws intended to address this goal require AFDC applicants to assign to the state any rights to receive child support payments;⁹⁶ require AFDC mothers to cooperate with the state in determining the paternity of nonmarital children;⁹⁷ implement mandatory income withholding;⁹⁸ require the Internal Revenue Service to withhold income tax refunds to persons in arrears on child support payments;⁹⁹ and implement expedited procedures for obtaining and enforcing child support.¹⁰⁰

89. See, e.g., *New Welfare Cutbacks*, *supra* note 14; *Welfare Developments*, *supra* note 28 (discussing recent welfare legislation).

90. *New Welfare Cutbacks*, *supra* note 14, at 756.

91. *Welfare Developments*, *supra* note 28, at 1178.

92. *Id.* at 1179.

93. *Id.*

94. *ADOLESCENT MOTHERS*, *supra* note 11, at 43, 68-69.

95. *New Welfare Cutbacks*, *supra* note 14, at 757 (stating that "[t]he new welfare cuts . . . were initiated by states, in apparent responses to recessionary pressures on state budgets and heightened animus against 'welfare' and 'welfare recipients'").

96. 42 U.S.C. § 602(a)(26)(A) (Supp. III 1982).

97. *Id.* § 602(a)(26)(B)(Supp. III 1982).

98. *Id.* § 666(a)(1) (1988).

99. *Id.* § 664 (a)(2)(A) (1988).

100. *Id.* § 666(a)(5)(1988); see *Bowen v. Gilliard*, 483 U.S. 587 (1987); *Anders*, *supra* note 3, at 584.

In addition, AFDC legislation is used as a behavior modification tool.¹⁰¹ Legislation has been used in attempts to reduce the number of births to AFDC families and to encourage AFDC recipients to seek employment.¹⁰² One type of AFDC legislation aimed at the behavior of adult AFDC recipients is the "suitable homes" provision.¹⁰³ First implemented in the 1950s,¹⁰⁴ the "suitable homes" laws denied benefits to homes containing children born out of wedlock.¹⁰⁵ Successfully attacked in the 1960s,¹⁰⁶ these laws have resurfaced today.¹⁰⁷

C. Challenges to AFDC Legislation

The U.S. Supreme Court has reviewed various legislative efforts in the AFDC arena.¹⁰⁸ Generally the Court has upheld state legislation under the rational basis standard of review,¹⁰⁹ but on occasion has sided with the challengers, striking down state AFDC restrictions.¹¹⁰

101. *Welfare Developments*, *supra* note 28. Williams, *supra* note 4, at 1187-88; Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719, 720 (1992); *Senate Hearings*, *supra* note 8, at 29 (statement of Lawrence Mead, Associate Professor, American Public Welfare Politics, New York University) (discussing "The New Paternalism" and stating, "[i]t is a movement that goes beyond AFDC to embrace a number of other ways in which public institutions have begun to try to govern the lives of the dependent."); Lurie, *supra* note 9, at 829.

102. Williams, *supra* note 4, at 720; Lurie, *supra* note 9, at 829-34. In addition to the so-called "family cap" legislation, states' efforts to reduce births among AFDC recipients also include programs such as those that give AFDC mothers monetary incentives to use Norplant, which have been proposed in Kansas, Louisiana, Mississippi, South Carolina and Tennessee. Williams, *supra* note 4, at 720 n.4, 9.

Legislation aimed at encouraging AFDC parents to work includes the Work Incentive (WIN) program. Lurie, *supra* note 9, at 833, citing Dep't Health and Human Services, Social Security Act, Pub. L. No. 90-248, §§ 202(b), 444(a), (b), 81 Stat. 881, 884-9, 890 (codified at 42 U.S.C. §§ 602(a)(8), (19), 630-44 (1970)).

103. Lurie, *supra* note 9, at 831.

104. *Id.*; FRANCES FOX PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR* 13 (1971); JOHN KENNETH GALBRAITH, *THE CULTURE OF CONTENTMENT*, 40-1 (1992).

105. Lurie, *supra* note 9, at 831.

106. *Id.*

107. *Senate Hearings*, *supra* note 8, at 29 (discussing "The New Paternalism"); Williams, *supra* note 4, at 720, 725.

108. See *supra* note 45; see *infra* notes 111-145 and accompanying text.

109. See *infra* notes 202-05 and accompanying text.

110. See, e.g., *Carleson v. Remillard*, 406 U.S. 598 (1971) (invalidating a California provision that excluded parents on military duty from the definition of "continued absence" of a parent), *infra* notes 150-57 and accompanying text; *Townsend v. Swank*, 404 U.S. 282 (1971) (striking an Illinois law that excluded from AFDC coverage children attending a college or university), *infra* notes 162-69 and accompanying text.

1. Judicial Interpretations of AFDC

The U.S. Supreme Court has stated that the focus of the AFDC program is the child, with the purpose of the program being primarily to preserve the child in a family environment.¹¹¹ Nevertheless, state legislatures have enacted various laws regulating AFDC benefits and AFDC recipients,¹¹² many of which have been challenged on a number of different grounds.¹¹³

In *Dandridge v. Williams*,¹¹⁴ the goal of encouraging welfare recipients to seek employment was proffered by the state and accepted by the Court.¹¹⁵ The legislation in question set a maximum grant allotment for AFDC recipients, which the Court upheld,¹¹⁶ giving the state considerable deference. In a dissenting opinion, Justice Douglas noted that the Court's acceptance of the state's argument — that a maximum cap on benefits would encourage employment — rested on the supposition that the AFDC recipients were employable.¹¹⁷ Although the majority viewed the statute as economic-social welfare legislation and accepted the state's assertions as rational,¹¹⁸ Justice Douglas observed that limitations on AFDC benefits "cannot reasonably operate as a work incentive with regard to those who cannot work or who cannot be expected to work."¹¹⁹

In *Jefferson v. Hackney*,¹²⁰ the Court also rejected an Equal Protection challenge to a state law restricting AFDC benefits,¹²¹ and the Court rejected a statutory argument based on the Social Security Act.¹²² The state law in question involved a percentage system by which the Texas state welfare agency distributed funds

111. *Dandridge v. Williams*, 397 U.S. 471, 479 (1970).

112. See *supra* notes 3, 4, 14, 17, 102 and accompanying text.

113. See, e.g., Ross, *supra* note 20, at 1517-32 (discussing Equal Protection challenges brought in *Dandridge v. Williams*, 397 U.S. 471 (1970), and *Jefferson v. Hackney*, 406 U.S. 535 (1972); a Fourth Amendment challenge brought in *Wyman v. James*, 400 U.S. 309 (1971); and a Due Process Challenge brought in *Bowen v. Giliard*, 483 U.S. 587 (1987)); Lurie, *supra* note 9, at 825.

114. 397 U.S. 471 (1970), *reh'g denied*, 398 U.S. 914 (1970).

115. *Id.* at 490.

116. *Id.*

117. *Id.* at 490-508.

118. *Dandridge*, 397 U.S. at 490.

119. *Id.*

120. 406 U.S. 535 (1972), *reh'g denied*, 409 U.S. 898 (1972).

121. *Id.* at 536; see also Lurie, *supra* note 9, at 845 (discussing the Court's analysis).

122. *Id.* at 538. Specifically, appellants in *Jefferson v. Hackney* argued that the state law in question violated § 602(a)(23) of the Social Security Act, 42 U.S.C. § 601, *et seq.* Section 602(a)(23) required each state to make cost-of-living adjustments to the standard of need. *Id.* See also 42 U.S.C.S. § 602 (a)(23) (1985).

to welfare recipients.¹²³ Because the Texas state constitution set a ceiling on welfare spending,¹²⁴ the state adopted a scheme by which an eligible individual's needs were figured on a percentage basis so that the state could guarantee at least some welfare assistance to every eligible needy individual.¹²⁵ Appellants in *Hackney* argued that the scheme violated the Equal Protection Clause of the Fourteenth Amendment because a different percentage was used for different welfare programs, with AFDC recipients subjected to a lower "percentage reduction factor" than other welfare recipients, such as individuals receiving Old Age Assistance,¹²⁶ Aid to the Blind,¹²⁷ or Aid for the Permanently and Totally Disabled.¹²⁸ The Court disagreed, stating that since a state may refuse to participate in the AFDC program altogether while continuing to receive money for other federal welfare programs,¹²⁹ a state participating in AFDC may distribute benefits in a manner of its choosing so long as this manner is rational and is not invidious.¹³⁰ In regard to appellants' assertion that the state scheme violated the Social Security Act,¹³¹ the Court held that "although § 402(a)(23) required states to make cost-of-living adjustments in their standard-of-need calculations, it did not prohibit use of percentage-reduction systems that limited the amount of welfare assistance actually paid."¹³² The Court also held that although the Social Security Act was "intended to prevent the states from denying benefits, even temporarily, to a person who has been found fully qualified for aid[,] . . . [i]t does not . . . enact by implication a generalized federal criterion to which states must adhere in their computation of standards of need, income, and benefits."¹³³

123. *Hackney*, 406 U.S. at 537.

124. *Id.*

125. *Id.*

126. *Id.* For individuals receiving Old Age Assistance, the percentage reduction factor was 100%. *Id.* at 537 n.3.

127. *Id.* For individuals receiving Aid to the Blind, the percentage reduction factor was 95%. *Id.* at 537 n.3.

128. *Hackney*, 406 U.S. at 537, n.2. The percentage reduction factor for AFDC recipients was 75%. For individuals receiving Aid for the Permanently and Totally Disabled, the percentage reduction factor was 95%. *Id.* n.2-3.

129. *Id.* at 550.

130. *Id.* at 549.

131. The Act requires states to make cost-of-living adjustments in the AFDC program. The Texas method of distributing welfare benefits did not enable AFDC recipients to receive a level of benefits equal to their standard of need. *Id.* at 539.

132. *Hackney*, 406 U.S. at 538, (citing the Court's then-recent holding in *Rosado v. Wyman*, 397 U.S. 397, 413 (1970)); see also *Lurie*, *supra* note 9, at 842.

133. *Hackney*, 406 U.S. at 545.

In *Wyman v. James*,¹³⁴ an AFDC recipient challenged New York's practice of requiring home visits by state case workers as a condition for receiving AFDC benefits.¹³⁵ The plaintiff argued that this practice violated her Fourth Amendment right to be free of unreasonable searches of her home.¹³⁶ The Court held that the visit was not a "search," and, even if it were, it was not "unreasonable."¹³⁷

The Supreme Court also disagreed with the plaintiffs' arguments in *Bowen v. Gilliard*.¹³⁸ There plaintiffs challenged the constitutionality of AFDC amendments resulting from the Deficit Reduction Act of 1984¹³⁹ (DEFRA). The DEFRA amendments required that all income of all parents and siblings in a household be counted in calculating AFDC benefits for the family.¹⁴⁰ Plaintiffs argued that the amendments violated their Fifth Amendment due process rights to family integrity and to compensation for property taken by the government.¹⁴¹ The Court said the right to family integrity was not burdened because the DEFRA amendments did not "directly and substantially" interfere with family living arrangements¹⁴² and AFDC recipients have no protected property rights to welfare benefits.¹⁴³

On the other hand, the Court has held that AFDC benefits are an entitlement, *not* a privilege, and thus cannot be withheld for arbitrary reasons.¹⁴⁴ Additionally, the Court has acknowledged that AFDC grants are necessary for the subsistence of many families.¹⁴⁵

134. 400 U.S. 309 (1971).

135. *Id.* at 313-15.

136. *Id.*

137. *Id.* at 318.

138. 483 U.S. 587 (1987); see also Note, *Aid to Families with Dependent Children*, 101 HARV. L. REV. 119, 270 (1987) [hereinafter *Aid to Families with Dependent Children*](discussing recent Supreme Court cases relating to AFDC); A.W. Phinney III, *Feminism, Epistemology, and the Rhetoric of Law: Reading Bowen v. Gilliard*, 12 HARV. WOMEN'S L.J. 151, 152 (1989) (analyzing the Court's decision in *Bowen*, stating that it "increase[s] the hardships of families on welfare by sanctioning State appropriation and redistribution of child support payments . . .").

139. Pub. Law No. 98-369, § 2640(a).

140. Ross, *supra* note 20, at 1528 (citing *Bowen*, 483 U.S. at 591).

141. *Bowen*, 483 U.S. at 595. The due process challenge was based on the family's fundamental right to live together. *Id.* at 596. The takings clause challenge asserted that the AFDC benefit was property due the child, which the government could not withdraw absent compensation. *Id.* at 595-96.

142. *Id.* at 603 (citing *Zablocki v. Redhail*, 434 U.S. 374, 386-87, n.12 (1978)).

143. *Id.* at 604-05.

144. *Goldberg v. Kelly*, 397 U.S. 254, 262 (1969). This view was reaffirmed in *Califano v. Westcott*, 443 U.S. 76, 85 (1978).

145. *Goldberg*, 397 U.S. at 264; *Westcott*, 443 U.S. at 85.

2. Social Security Act¹⁴⁶ Challenges

The U.S. Supreme Court has reviewed many Social Security-based challenges to state AFDC legislation.¹⁴⁷ These challenges are founded in the Act's requirement that if states wish to participate in the AFDC program, they must administer the AFDC program in conformity with federal regulations.¹⁴⁸ Those state laws that conflict with federal regulations governing AFDC have been stricken as violative of the Social Security Act and the Supremacy Clause.¹⁴⁹

In *Carleson v. Remillard*,¹⁵⁰ the Supreme Court invalidated California's failure to define parents on military duty as "continually absent."¹⁵¹ The definition was important because it set the standard for who would be allowed to receive AFDC benefits.¹⁵² The Social Security Act provided for monetary assistance to families with dependent children,¹⁵³ defining "dependent child" as "one 'who has been deprived of parental support or care by reason of . . . continued absence from the home.'"¹⁵⁴ The California legislature interpreted "continued absence" as not including parents who were away because of military duty.¹⁵⁵ The Court struck down the California law, stating, "[w]e cannot assume here . . . that while Congress 'intended to provide programs for the economic security and protection of *all* children,' it also 'intended arbitrarily to leave one class of destitute children entirely without meaningful protection.'"¹⁵⁶ The Court continued, "[w]e are especially confident Congress could not have designed an Act leaving uncared for an entire class who became 'needy children' because their fathers were in the Armed Services defending their country."¹⁵⁷

146. 42 U.S.C. § 301-1394; see *supra* note 18-27 and accompanying text.

147. See, e.g., *Carleson v. Remillard*, 406 U.S. 598 (1971); *Townsend v. Swank*, 404 U.S. 282 (1971); *Hackney*, 406 U.S. 535 (1972); *King v. Smith*, 392 U.S. 309 (1968).

148. See *supra* notes 35-45 and accompanying text.

149. See, e.g., *Carleson v. Remillard*, 406 U.S. 598 (1971) (striking California AFDC law excluding from coverage families in which a parent was absent due to military service); *Townsend v. Swank*, 404 U.S. 482 (1971) (invalidating an Illinois provision that denied AFDC benefits to children enrolled in college); *Hackney*, 406 U.S. 535 (upholding a Texas scheme under which AFDC benefits were reduced more than other SSA benefits).

150. 406 U.S. 598 (1971).

151. *Id.* at 604.

152. *Id.* at 599.

153. *Id.*

154. *Id.*, quoting 42 U.S.C. § 606(a).

155. *Carleson*, 406 U.S. at 599.

156. *Id.* at 604 (quoting *King v. Smith*, 392 U.S. 309, 330 (1968)).

157. *Id.*

Under *King v. Smith*,¹⁵⁸ the Court explained that state eligibility standards excluding those who would be eligible under federal standards violate the Social Security Act and, therefore, are invalid under the Supremacy Clause.¹⁵⁹ The Court also noted that in *Townsend v. Swank*,¹⁶⁰ it "expressly disapproved" policies enabling states to vary eligibility requirements from federal standards without express or clearly implied congressional authorization.¹⁶¹

In *Townsend v. Swank*,¹⁶² the Court invalidated a state statute that conflicted with the Social Security Act.¹⁶³ *Townsend* involved an Illinois provision denying AFDC benefits to children eighteen to twenty years old attending a college or university,¹⁶⁴ even though children of the same age attending high school or vocational training were eligible for AFDC benefits.¹⁶⁵ Noting that federal regulations "seem to imply that states may to some extent vary eligibility requirements from federal standards,"¹⁶⁶ the Court reiterated its holding in *King* that "the principle that accords substantial weight to interpretation of a statute by the department entrusted with its administration is inapplicable insofar as those regulations are inconsistent with the requirement of § 402(a)(10) that aid be furnished 'to all eligible individuals.'"¹⁶⁷ The Court said no evidence supported the state's assertion that Congress authorized the states to "discriminate between these needy dependent children solely upon the basis of the type of school attended."¹⁶⁸ Finally, the Court wrote, "a State's interest in preserving the fiscal

158. 392 U.S. 309 (1968).

159. *Carleson*, 406 U.S. at 600 (citing *Townsend v. Swank*, 404 U.S. 282, 286 (1971)).

160. 404 U.S. 282 (1971).

161. *Carleson*, 406 U.S. at 600-01. The Court also noted that, in *King*, it had recognized this "congressional authorization" exception. *Id.* at 600 (citing *Townsend* 404 U.S. at 286).

162. 404 U.S. 282 (1971).

163. *Id.* at 285.

164. *Id.* at 284.

165. *Id.*

166. *Id.* at 286, citing 45 CFR § 233.10(a)(1)(ii), 36 Fed. Reg. 3866, which states: [t]he groups selected for inclusion in the plan and the eligibility conditions imposed must not exclude individuals or groups on an arbitrary or unreasonable basis, and must not result in inequitable treatment of individuals or groups in the light of the provisions and purposes of the public assistance titles of the Social Security Act.

Townsend, 404 U.S. at 286, n.3.

167. *Id.* (quoting *King*, 392 U.S. at 333 n.34).

168. *Id.* at 287. The Court did not recognize, however, that when Congress extended AFDC eligibility from children under 16 to children aged 18 to 20 years old, States were given the authorization to decide whether to participate in the AFDC program for the older age groups. *Id.* at 287-88.

integrity of its welfare program by economically allocating limited AFDC resources may not be protected by the device of adopting eligibility requirements restricting the class of children made eligible by federal standards."¹⁶⁹

Appellants in *Jefferson v. Hackney*¹⁷⁰ also asserted that the state scheme violated the Social Security Act. The Act requires states to make cost-of-living adjustments in the AFDC program, but the Texas method of distributing benefits did not enable AFDC recipients to obtain a level of benefits equal to their standard of need.¹⁷¹ As previously mentioned,¹⁷² the Court disagreed and upheld the legislation.¹⁷³

The Supreme Court has also ruled that states may not punish children for the "sins" of their parents.¹⁷⁴ In *King v. Smith*,¹⁷⁵ the Supreme Court struck down Alabama's "substitute father" rule because it punished children rather than dealing with the perceived immorality — the mother's cohabitation with her boyfriend — via rehabilitative measures, as mandated by Congress.¹⁷⁶ In *King*, the state sought to deny benefits to children whose mothers were "cohabiting" with a man. The Court concluded that the state's punishment of needy children for their mothers' behavior conflicted with Congress' intent to effect behavioral changes among AFDC parents.¹⁷⁷ Noting that "protection of such [dependent] children is the paramount goal of AFDC,"¹⁷⁸ the Court invalidated the legislation.¹⁷⁹

169. *Id.* at 291.

170. 406 U.S. 535 (1972).

171. *Id.* at 539-40. The state law involved a percentage system by which the state welfare agency distributed funds. *Id.* at 537. Because the Texas state constitution set a ceiling on welfare spending, the state adopted a scheme by which an eligible individual's needs were figured on a percentage basis so that the state could guarantee at least some welfare assistance to every eligible needy individual. *Id.* See *supra* note 145 and accompanying text.

172. See *supra* notes 120-133 and accompanying text.

173. *Hackney*, 406 U.S. at 544-45.

174. *King v. Smith*, 392 U.S. 309, 325-27.

175. *Id.*

176. *King*, 392 U.S. at 325; Lurie, *supra* note 9, at 832. See also Boettger v. Bowen, 714 F. Supp. 272 (E.D. Mich. 1989) (holding suspension of benefits improper because conduct in question was outside the bounds of the AFDC program).

177. The Court discussed Congress' adoption of the Flemming Ruling—a letter from the Secretary of Health, Education, and Welfare issued in response to Louisiana legislation allowing children in "unsuitable" homes to be dropped from the AFDC rolls. *King*, 392 U.S. at 322-23 (citing State Letter No. 452, Bureau of Public Assistance, Social Security Administration, Department of Health, Education, and Welfare. The Court reasoned that Congress had "determined that immorality and illegitimacy should be dealt with through rehabilitative measures rather than measures that punish dependent children[.]" *Id.* at 325.

178. *Id.* at 325.

179. *Id.* at 333.

3. Equal Protection¹⁸⁰ Challenges

AFDC laws also have been challenged on equal protection grounds.¹⁸¹ The Constitution guarantees equal protection under the laws to all citizens.¹⁸² Equal protection means that government — both State and Federal¹⁸³ — may not deny a person or class of persons the same protection of the laws guaranteed to or enjoyed by other similarly situated persons or classes of persons.¹⁸⁴ This protection covers all governmental actions that base "benefits or burdens" on the classification of individuals.¹⁸⁵ Some authorities assert that equal protection analysis is of negligible use in launching successful challenges in modern day federal courts,¹⁸⁶ while others believe the doctrine may still be useful.¹⁸⁷

Equal protection was used to attack the state's percentage system of distributing welfare funds in *Jefferson v. Hackney*.¹⁸⁸ Appellants argued that the scheme violated the Equal Protection

180. See *infra* notes 181-84. See also *Hackney*, 406 U.S. 535 (1972) (holding that the state scheme in question did not violate the Equal Protection Clause since the Court could not say that differential treatment was invidious or irrational); *Dandridge*, 397 U.S. 471 (1970) (upholding a New York law that capped the maximum level of AFDC benefits a family could receive).

181. See *Doe v. Reivitz*, 830 F.2d 1441 (7th Cir. 1987) (holding that otherwise qualified citizens and alien children may not be denied benefits because their parents are illegal aliens); *Largo v. Sunn*, 835 F.2d 205 (9th Cir. 1987) (upholding differentials in benefits where standard of need varies among families of same composition); *Guidice v. Jackson*, 726 F. Supp. 632 (E.D.Va. 1989) (holding that equitable treatment is required in "fairly general terms" only); see also note 180 and accompanying text.

182. U.S. CONST. amend. XIV, § 1.

183. The Fourteenth Amendment Equal Protection guarantee directly applies only to states and local governments, but the Equal Protection guarantee has been applied to the federal government through the Fifth Amendment in Supreme Court cases. See *Lyng v. Castillo* 477 U.S. 635, 636, n. 1 (1986) (citing *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976)); *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 533, n.5 (1972); and *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)).

184. *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 541 (1972) (Douglas, J., concurring).

185. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, § 14.1 (4th ed. 1991).

186. Barbara Sard, *The Role of Courts in Welfare Reform*, CLEARINGHOUSE REV., 367, 375 (Aug./Sept. 1988).

187. See, *Aid to Families With Dependent Children*, *supra* note 138, at 279-80 (noting that in *Bowen v. Gilliard*, 483 U.S. 587 (1987), one reason the Court may have declined to decide the case using heightened scrutiny under equal protection is that the case was brought by the children, not the parents, and arguing that had the non-custodial parents been parties to the case, infringement on the parent-child relationship may have been recognized and higher scrutiny implemented); Anders, *supra* note 3, at 590-97; Phinney, *supra* note 138, at 168-70; Sard, *supra* note 186, at 374-75.

188. 406 U.S. 535, 537-38 (1972). See also *supra* notes 180-81 and accompanying text.

Clause¹⁸⁹ because AFDC recipients were subjected to a lower "percentage reduction factor"¹⁹⁰ than other welfare recipients.¹⁹¹ The Court disagreed. Because a state may refuse to participate in the AFDC program altogether while continuing to receive money for other federal welfare programs,¹⁹² a state may distribute benefits in the manner of its choosing so long as it seems rational and is not invidious.¹⁹³

In *Dandridge v. Williams*,¹⁹⁴ the Supreme Court upheld a Maryland law that capped the maximum benefits a family could receive under that state's AFDC program.¹⁹⁵ Set at a level equal to the income one person would make, working full-time and earning minimum wage, the cap kicked in once the family reached six persons.¹⁹⁶ The Court reasoned that encouraging AFDC recipients to seek employment was a valid state interest and the law did not violate equal protection since the cap applied to all AFDC families.¹⁹⁷

In *King v. Smith*,¹⁹⁸ the Court held that the state legislation in question was not a rational means by which to pursue the state's dual interests of conserving scarce AFDC resources and discouraging "immoral" behavior. The Court noted that, in addition to "senselessly punish[ing] impoverished children," actions such as those the state proposed had forced women into increased immorality in an effort to provide for their children, and had been used to "disguise systematic racial discrimination[.]"¹⁹⁹ Thus, the Court stated, although states may have a reasonable interest in discouraging immorality and illegitimacy, those interests are not legitimate justifications for excluding otherwise eligible dependent children from the AFDC program.²⁰⁰

Equal protection analysis has also been used to attack laws presented as measures by which to confront other problems, but im-

189. *Hackney*, 406 U.S. at 538.

190. *Id.* at 537.

191. *Id.* at 537-38. The percentage reduction factor for AFDC recipients was 75%. For individuals receiving Old Age Assistance, the percentage reduction factor was 100%; for Aid to the Blind, 95%; and for Aid for the Permanently and Totally Disabled, 95%. *Id.* at 537 n.3.

192. *Id.* at 550.

193. *Id.* at 549.

194. 397 U.S. 471 (1970).

195. *Id.* at 480-83.

196. *Id.* at 490 (Douglas, J., dissenting).

197. *Id.* at 486-87.

198. 392 U.S. 309 (1968). Although the case was decided on statutory grounds, the Court engaged in lengthy Equal Protection analysis.

199. *Id.* at 321-22.

200. *Id.* at 334.

plemented primarily to effect social change.²⁰¹ Generally, if social welfare legislation classifies similarly situated individuals and treats those classes differently in order to achieve the government's ends, while not affecting a suspect class²⁰² or impinging on a fundamental right,²⁰³ the classification need only bear some rational relationship to legitimate government goals.²⁰⁴ This type of analysis — minimal scrutiny or rational basis review — has characterized most of the Court's decisions in social welfare cases.²⁰⁵ On occasion, the Court has used minimal scrutiny "with bite," invalidating social welfare legislation because the means were not rationally related to the ends.²⁰⁶

In *Cleburne v. Cleburne Living Ctr.*,²⁰⁷ the Court invalidated a zoning ordinance that prohibited the establishment of a home for mentally retarded individuals in a residential neighborhood.²⁰⁸ Reviewing all of the asserted state goals, only some of which the Court recognized as potentially legitimate,²⁰⁹ the Court concluded that the classification was based on irrational prejudices against the mentally retarded, and so could not rationally support the state interests.²¹⁰ The interests in *Cleburne* included concerns that neighboring residents would harbor "negative attitudes" toward or be fearful of the residents; fears that students from a nearby junior high might harass the residents; that the home was located on a five-hundred-year flood plain; and, concern that the size of the home and the number of occupants would be too great.²¹¹

201. Such laws include the zoning ordinance at issue in *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

202. Suspect classes are defined as those based on race or alienage; semi-suspect classes include illegitimacy and gender. See NOWAK, *supra* note 185, § 14.3.

203. *Id.*

204. *Dallas v. Stanglin*, 490 U.S. 19, 23 (1988); *Lyng v. Castillo*, 477 U.S. 635, 639; *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985); *San Antonio v. Rodriguez*, 411 U.S. 1, 17, 40 (1972).

205. Ross, *supra* note 20, at 1516; see, e.g., *Lyng v. Castillo*, 477 U.S. at 642-43 (stating that "Congress could reasonably determine," "might well have" been convinced, "might have reasoned," or "could rationally conclude" that the legislation in question would serve the state goals). For examples of laws that were struck down because the means could not conceivably promote the state's interests, see *Zobel v. Williams*, 457 U.S. 55 (1982) (invalidating a regulation that the Court said in no way served the state's interest of inducing people to move to that state, when newcomers were not rewarded, but long-time residents were). See also *King*, 329 U.S. at 333-34; *Dallas v. Stanglin*, 490 U.S. at 27; *Phinney supra* note 138, at 166, 168-70.

206. See *Cleburne*, 437 U.S. at 446; *Moreno*, 413 U.S. at 534-36.

207. 473 U.S. 432 (1985).

208. *Cleburne*, 437 U.S. at 450.

209. See *infra* note 212 and accompanying text (discussing the goals proffered and the Court's holding).

210. *Cleburne*, 473 U.S. at 450.

211. *Id.*, at 448-49.

The Court indicated that while the city council's potential concerns regarding the flood plain and the size of the house and number of occupants could be considered legitimate,²¹² the city council's actual concerns regarding the location of the home on a flood plain, the size of the home and the number of occupants could not pass the Court's rationality review because the city council allowed boarding and fraternity houses, nursing homes, and hospitals to be located in the area.²¹³ The Court saw no rational basis for prohibiting the location of a home for the mentally retarded while allowing the other uses.²¹⁴

In *Dep't. of Agric. v. Moreno*,²¹⁵ the Court held that the legislature may not enact laws merely to thrust majoritarian ideals onto a politically unpopular group.²¹⁶ Justice Douglas, in his concurrence, stated that government may not accomplish even a legitimate goal by establishing "invidious distinctions between classes of its citizens."²¹⁷ In *Moreno*, the legislative record included a statement that the legislature sought to prevent "hippie communes" from participating in the food stamp program.²¹⁸ The Court held this to be violative of the constitutional guarantee to equal protection, noting that the "purpose to discriminate against hippies cannot, in and of itself and without reference to (some independent) considerations in the public interest, justify the . . . amendment."²¹⁹ The state offered another goal — prevention of fraud — which the Court accepted as legitimate.²²⁰ However, the Court said the classification — the denial of "essential federal food assistance to *all* otherwise eligible households containing unrelated members" — could not constitute a rational means by which to achieve that goal.²²¹ (The Court's holding was also based in part on the fact that the state's only legitimate goal — fraud prevention — was already being addressed.)²²²

Under rational basis review in the equal protection arena, the means chosen do not necessarily have to be the most reasonable, so long as the classification established by the state is not "wholly ar-

212. *Id.* at 449-50.

213. *Id.*

214. *Id.* at 450.

215. 413 U.S. 528 (1973).

216. *Id.* at 537-38.

217. *Id.* at 543 (Douglas, J. concurring)(quoting *Shapiro v. Thompson*, 394 U.S. 618, at 833 (1969)).

218. *Id.* at 534.

219. *Id.* (quoting *Dep't of Agric. v. Moreno*, 345 F. Supp. 310, 314 n.11 (1972)).

220. *Id.* at 535.

221. *Id.* at 535-36.

222. *Id.* at 537.

bitrary,"²²³ or "wholly without any rational basis."²²⁴ Even where the legislation will result in unfairness or deprivation, the Court has upheld laws promoting legitimate ends and supported by rationally related means.²²⁵ However, the Court has held that the classification must not have been established merely to deny a benefit to a group disfavored by the legislature.²²⁶

Thus, if the classification does not infringe on a fundamental right nor implicate a suspect class, but rather has distinguishing characteristics that are relevant to interests that the state has authority to implement, the courts will defer to the legislature and the classification will be upheld.²²⁷

AFDC regulations are mandatory, as opposed to permissive, so that legislation eliminating the per-child allotment must support the goals of the AFDC program.²²⁸ The goals of AFDC are to provide funds that will be used in the *child's* best interests, as well as to encourage the care of the *child* in his home and "to help maintain and strengthen family life."²²⁹ It is within this framework that the New Jersey statute eliminating the per-child allotment should be analyzed.

D. New Jersey Legislation Eliminating AFDC Per-Child Allotment

The New Jersey law became effective in July 1992. The statute²³⁰ reads as follows:

The Commissioner of Human Services shall revise the schedule of benefits to be paid to [an AFDC family] . . . by eliminating the increment in benefits under the program for which that family would otherwise be eligible as a result of the birth of a child

....

The New Jersey legislative record expressly states that the legislation is intended to discourage AFDC recipients from parenting additional children:

223. *Dallas v. Stanglin*, 490 U.S. 19, 27 (quoting *New Orleans v. Dukes*, 427 U.S. 297, 303-04 (1976)).

224. *Lyng v. Castillo*, 477 U.S. 635, 639 n.3, (citing *Moreno*, 413 U.S. at 538).

225. *Phinney*, *supra* note 138, at 170 (noting that the Court admits that legislation may result in "arbitrary consequences," "inequality," "illogical" accommodations, and "discrimination," (quoting *Bowen v. Gilliard*, 483 U.S. at 3016-17)).

226. *Cleburne*, 473 U.S. at 450 (holding a zoning ordinance invalid because the Court viewed the legislation as based on "irrational prejudice against the mentally retarded").

227. *Id.* at 441-42.

228. *See, e.g., King*, 392 U.S. at 312, n.3.

229. 42 U.S.C.S. §§ 601, 605 (1985) (emphasis added).

230. N.J. STAT. ANN. § 44:10-3.5 (1993). *See also supra* note 4.

The measure seeks to discourage AFDC recipients from having additional children while enrolled on public assistance and encourages recipients to be self-sufficient and earn the funds necessary to sustain the family through gainful employment.²³¹

One of the most common reasons cited as motivating this type of legislation is simple bias.²³² Proponents of welfare reform assert that welfare programs have caused increased unemployment and out-of-wedlock births.²³³ Critics counter that we simply favor the "deserving" poor — widows — over the "undeserving" poor — unwed mothers²³⁴ — and that we favor social security over welfare.²³⁵ Some welfare reformers cite a growing dependency on the part of welfare recipients and say that welfare reform represents a return to "mutual obligation" between the state and the welfare recipients.²³⁶ It is this debate that has given rise to the New Jersey legislation.²³⁷

New Jersey legislators cite two reasons behind the legislation: saving money and modifying behavior.²³⁸ The latter goal is aimed at reducing the number of out-of-wedlock births and teen pregnancies among AFDC recipients, and at encouraging AFDC recipients to seek employment.²³⁹

231. *Senate Hearings*, *supra* note 8, at 76.

232. *See supra* note 11.

233. JENCKS, *supra* note 20, at 11; Edelman, *supra* note 1, at 1722 n.149 ("Conservatives argue that spending on the poor has increased significantly and yet poverty has worsened, 'proving' their point that antipoverty programs do not work.").

In response to assertions that welfare has hurt the poor, Jencks offers evidence that such assertions are not true and an explanation for why such assertions persist—convenience. JENCKS, *supra* note 20, at 15. Edelman's response to assertions that increased spending on the poor has only worsened the problem of poverty is, "... what has increased so substantially is spending on the elderly, hospitals, and doctors, not spending that enhances the income of the nonelderly poor." Edelman, *supra* note 1, at 1722 n.149. For additional discussions regarding assertions that the Great Society has failed, *see id.* at 1712-13. For a discussion of structural poverty vs. pathological poverty, *see id.* at 1700.

234. *See supra* note 20.

235. *Id.* *See supra* note 11; *Rulemaking*, 117 N.J. at 317.

236. Nancy Weaver, *Second Try for Trims in Welfare*, SACRAMENTO BEE, Jan. 9, 1993, at A20 (quoting Russell Gould, California's Secretary of Health and Welfare; and, reporting that the state's most recent attempts at welfare reform are in the wake of increased unemployment).

237. Sydell, *supra* note 86.

238. *Supra* notes 7, 10, 230 and accompanying text. Legislation in the welfare arena has long been perceived as a way to modify behavior. Lurie, *supra* note 9, at 829 ("AFDC payments inherently provide an incentive for the poor to alter their behavior—to migrate, withdraw from the labor force, desert their families, and have children.").

The author notes that any increases in welfare dependency could be blamed as much on government as on the behavior of the poor. *Id.* at 857.

239. *Id.*; WISCONSIN BRIEFS, *supra* note 6.

It does appear that by withholding funds from children born into AFDC families, the state of New Jersey could save \$64 for every child born to an AFDC recipient.²⁴⁰ However, any savings at the state level may be more than offset by the increased expenditures at the federal level since, as AFDC payments decrease, federally funded food stamp allowances increase.²⁴¹ In addition, any savings in the state AFDC budget likely will be offset by increased expenditures in other areas, such as child welfare, foster care, and healthcare if, as some suggest, the legislation gives rise to increased instances of child neglect, increases in the number of children entering foster care, and increased numbers of abortions.²⁴²

In regard to the goal of encouraging AFDC recipients to seek employment, proponents assert that AFDC parents will be motivated to seek employment if an additional AFDC grant is not provided for a newborn;²⁴³ they do not explain why elimination of the per-child allotment will provide that motivation if other pro-employment measures already in place apparently do not.²⁴⁴

Proponents of the measure also insist that the elimination of the per-child allotment is a reasonable measure because, they say, AFDC recipients bear children in order to receive the additional grant.²⁴⁵ Supporters of the legislation claim that, since working families do not receive additional pay from employers when a child is born, AFDC recipients should not receive additional aid from the government.²⁴⁶

Critics argue that the legislation is based on biased stereotypes²⁴⁷ and that there is no basis in fact for assuming that AFDC recipients are influenced to parent children because of the additional grant.²⁴⁸ Critics also argue that the legislation will achieve none of the goals named by proponents, but instead will merely force the moral ideals of those in power onto the relatively power-

240. *Senate Hearings*, *supra* note 8, at 12.

241. *Id.*

242. *Infra* notes 252-56; *Academics Challenge Claim That Welfare Subsidizes Illegitimacy*, *LEGAL INTELLIGENCER*, 6 (June 24, 1994) ("The 76 social scientists . . . said more children would be hungry and homeless under proposals pushed by the right to discourage illegitimacy by denying welfare to young unwed mothers.").

243. *Id.*

244. *See supra* note 11.

245. Sydell, *supra* note 86.

246. *Id.*; *Senate Hearings*, *supra* note 8, at 6. These individuals ignore the fact that working people receive a dependency exemption upon the addition of any dependent—child or adult—to the family. Internal Revenue Code of 1986, §§ 151, 152. The amount of the dependency exemption is \$2,000 per child or dependent. Internal Revenue Code of 1986, § 151 (f).

247. *See supra* note 11.

248. *Id.*

less AFDC recipients and punish the children born into AFDC families.²⁴⁹ Critics predict that such legislation will result in increased homelessness;²⁵⁰ an increase in the number of children not properly housed, clothed, and fed;²⁵¹ forced adoptions or foster care²⁵² since families will not be able to stretch the already inadequate AFDC funds;²⁵³ and increased abortions.²⁵⁴

States currently considering per-child allotment legislation include Wisconsin,²⁵⁵ Georgia, Arkansas, California, Maryland, Colorado, Florida, Louisiana, Massachusetts, and Virginia.²⁵⁶ Connecticut, Illinois, Oregon, Maine, and South Carolina appear to have considered such legislation but have either postponed a vote on the issue or have dropped the idea altogether.²⁵⁷

II. Analysis

A. Overview

Legislation eliminating the AFDC per-child allotment is of importance for several reasons, chief among them the fact that AFDC legislation directly affects approximately nine million children across the United States.²⁵⁸ Presumably, these children will one day be adults.²⁵⁹ Whether or not these children will become productive adults depends largely on whether opportunities are available to them today.²⁶⁰ If we deny these children the opportunity to live in a healthy environment, we deny them the opportunity to learn and grow, and to become productive adults.²⁶¹ In purely economic terms, it is much more efficient to expend a little money to-

249. WISCONSIN BRIEFS, *supra* note 6, at 7; *New Jersey Hearings*, *supra* note 7, at 38, 39; Sydel, *supra* note 86.

250. *Id.*

251. *Id.*; WISCONSIN BRIEFS, *supra* note 6, at 7.

252. WISCONSIN BRIEFS, *supra* note 6, at 7; MacNeil/Lehrer NewsHour, *Focus—Unfair Change?* Apr. 13, 1992, (comments of Theresa Funicello, co-director of Social Agenda); United Press International, *Sullivan Rejects Welfare-Abortion Suggestion*, Apr. 12, 1992.

253. *See supra* note 33 (noting that the AFDC benefit was below the poverty level in every state).

254. WISCONSIN BRIEFS, *supra* note 6, at 7; MacNeil/Lehrer NewsHour, *supra* note 252; United Press International, *supra* note 252.

255. *See supra* note 4 (describing the Wisconsin pilot program).

256. *Id.* *See supra* notes 4, 14, 17.

257. *Id.*

258. ADOLESCENT MOTHERS, *supra* note 11, at 44.

259. Mortality rates for American children in poverty rival the mortality rates for children living in some Third World countries. Jeff Cohen, *Compassion for Children Gets Lost in Big Numbers*, SEATTLE TIMES, Jan. 29, 1994, A11.

260. WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED* 14 (1987).

261. *Id.* at 39-41 (discussing the lack of opportunities for individuals without higher education).

day in an effort to offer these children the opportunity to become productive adults than to deny that funding and that opportunity and, as a result, expend much larger sums to support those unproductive adults. Curiously, for the most part, this issue has not been on the national forefront, unlike topics such as abortion and health care reform.²⁶² Perhaps the reason is that the poor in general have been segregated from the rest of society.²⁶³ Thus we find it nearly impossible to identify with the poor and, therefore, easy to believe the myths and stereotypes about them.²⁶⁴ The resulting biases lead to legislation that penalizes people for circumstances largely beyond their control.²⁶⁵

Common perceptions regarding AFDC families are incorrect. Many Americans believe that the poor are motivated by different factors than the rest of society, whether the motivation in question focuses on incentives to work or decisions to bear children.²⁶⁶ The New Jersey legislation is based on these misperceptions.²⁶⁷

The legislative history shows that the New Jersey legislation was intended to serve as an incentive to seek employment,²⁶⁸ as well as a disincentive to bear children while enrolled in AFDC.²⁶⁹ The legislation is also designed as a means to save money.²⁷⁰ These ideas ignore the sociological as well as the economic realities of the average AFDC family.²⁷¹ To believe that reducing welfare grants will result in a rush to the employment office — and a paying job — is unrealistic at best and very possibly mortally harmful to the children of AFDC families.²⁷² And, to rely on such legislation

262. *Senate Hearings*, *supra* note 8, at 6 (statement by Sen. Daniel P. Moynihan) (noting that, "When we talk about children, the number of people who turn up is rare."); (statement by Sen. Bill Bradley) (adding that the "normal circumstance of a welfare hearing [is] about ten people in the room."). *Id.*

Although welfare ordinarily doesn't make headline news as often as many other issues, such as abortion and health care reform, the topic has received a good deal of media attention since President Clinton unveiled his welfare reform proposals in mid-1994 and Congress created its "Contract with America." LEXIS, Nexis Library, Current News file.

263. Elsa Brenner, *After a Suit, Moving to a New Life*, N.Y. TIMES, Nov. 7, 1993, 13WC, 1; Sharon Bass, *Public Housing Enters New Era*, N.Y. TIMES, Feb. 5, 1989, 12CN, 1.

264. *See supra* notes 11, 20 (discussing various beliefs regarding the poor).

265. Williams, *supra* note 4, at 719 n.2.

266. *See supra* notes 11, 20, 48.

267. *Id.*

268. *See supra* notes 7, 10.

269. *See supra* notes 7, 10, 231.

270. *Id.*

271. Sydel, *supra* note 86.

272. *See supra* notes 250-54 and accompanying text (discussing the likelihood that elimination of the per-child allotment will result in increased abortion, or harm to the children).

as a money saver is, in essence, to "balance the budget on the backs of the poor."²⁷³ In addition to being irrational,²⁷⁴ the per-child allotment legislation is a cruel way in which to save those few dollars that might possibly be saved.²⁷⁵

Because children are the focus of the AFDC program,²⁷⁶ and constitute two-thirds of the eleven million people receiving AFDC benefits,²⁷⁷ and because elimination of the per-child allotment gives rise to serious concerns regarding the potential effects on children,²⁷⁸ the proper perspective from which to view the consequences of the legislation is the child's vantage point.²⁷⁹ Judicial review at the highest federal level is warranted because great potential exists for harm to children of AFDC families,²⁸⁰ because self-policing of federal agencies cannot always be relied upon in matters of such great importance²⁸¹ and because federal courts reportedly have been quite inconsistent in their handling of cases involving administrative regulations.²⁸² Legislation regarding social welfare, however, will most likely receive only rational basis scrutiny, unless the legislation *on its face* affects a fundamental right or implicates a suspect or semi-suspect class.²⁸³

273. Senate Hearings, *supra* note 8, at 29. See also Kathy Barrett Carter, *Welfare Fix: Punitive Paradigm for Paring Poor*, 135 N.J. L.J. 1503 (1993) (comparing the per-child allotment legislation to similar measures that could be directed at the middle-class, such as states deciding to educate only one child per family, or laws forcing only people with children to fund schools. "These ideas surely would not gain much momentum because educating the young is not viewed as simply a parental responsibility, but as a societal one. Similarly, providing food, shelter and other basic needs to children, who are unfortunate enough to be born poor, should be considered the duty of society at large.").

274. See *supra* note 241 and accompanying text (reporting that as AFDC benefits are reduced at the state level, food stamp benefits are increased at the federal level).

275. See *supra* note 11 (revealing that legislators do not know whether the measure will actually save money); Carter, *supra* note 273 (stating: "[a]re the alleged savings really a savings? If these children are forced to live in substandard conditions with inadequate food, housing and clothing, won't we all pay later? When they enter school suffering from malnutrition, when they are forced into special education classes because they have lived their formative years in an environment where it is nearly impossible to thrive, when they show up in hospital emergency rooms sick, when they end up homeless because their mothers used rent money to pay for food or clothing, ultimately taxpayers pay.").

276. See *supra* notes 26-27.

277. ADOLESCENT MOTHERS, *supra* note 11, at 44.

278. See *supra* note 272.

279. Dandridge, 397 U.S. at 479.

280. See *supra* note 25 (discussing the potential dangers of allowing implementation of social welfare "pilot programs" through waivers).

281. Hubbard, *supra* note 46, at 14.

282. *Id.* at 15-16.

283. *Supra* note 202.

B. Social Security Act

Since AFDC was established under the federal Social Security Act,²⁸⁴ AFDC legislation must conform with federal regulations.²⁸⁵ Those state laws in conflict with federal regulations governing AFDC are violative of the Social Security Act and the Supremacy Clause.²⁸⁶ The New Jersey legislation eliminating the per-child allotment is analogous to those laws discussed in *Carleson v. Remillard*²⁸⁷ and *Townsend v. Swank*.²⁸⁸ Just as the law at issue in *Carleson* was overturned because the state's interpretation of "continued absence" directly conflicted with Congress' intent,²⁸⁹ the per-child allotment law should be overturned because New Jersey's withholding of benefits to some children precludes fulfillment of a paramount AFDC goal — maintaining and protecting children. Likewise, as in *Townsend*, where the law arbitrarily denied benefits to college-enrolled 18- to 20-year-olds,²⁹⁰ the per-child allotment law arbitrarily denies benefits to some children in AFDC families but not others.²⁹¹ Furthermore, the New Jersey law merely punishes children for the "sins" of their parents.²⁹² As the Court noted in *King*,²⁹³ such laws violate the very purpose of AFDC — protecting dependent children.²⁹⁴

The New Jersey per-child allotment law is distinguishable from the law discussed in *Jefferson v. Hackney*.²⁹⁵ There, the law allowed a differential to be applied to various welfare programs, but called for figuring all AFDC benefits using a lower percentage.²⁹⁶ The Court upheld the measure, since the percentage used was the same among all AFDC recipients, and since the scheme allowed the state to provide benefits to all needy individuals.²⁹⁷ However, the New Jersey per-child allotment law does not provide the same measure, or ratio, of benefits to all needy individuals: some children are completely left out of the equation and are not covered by the program simply because of the timing of their birth.²⁹⁸ This is in di-

284. See *supra* notes 18-27 and accompanying text.

285. See *supra* note 34 and accompanying text.

286. See *supra* note 45 and 110.

287. 406 U.S. 598 (1971).

288. 404 U.S. 282 (1971).

289. *Id.*

290. See *supra* notes 162-65.

291. See *supra* notes 167-69.

292. Sydel, *supra* note 86.

293. 392 U.S. 309.

294. *Id.* at 325 ("protection of such children is the paramount goal of AFDC.").

295. 406 U.S. 535. See *supra* notes 120-33 and accompanying text.

296. See *supra* notes 120-33 and accompanying text.

297. *Id.*

298. See *supra* notes 5-7 and accompanying text.

rect conflict with AFDC's purpose of protecting and maintaining dependent children.

Like the laws in *Carleson* and *Townsend*, the New Jersey per-child allotment law should be invalidated as a violation of the Social Security Act.

C. *Equal Protection*

The New Jersey legislation divides similarly situated people — children of poor families — into two classifications: children who are allotted AFDC benefits and children who are not. An argument could be made that the classes are not similarly situated at all: one family is receiving AFDC funds when its child is born and thus is subject to the state's regulations and restrictions, while the other family is not receiving AFDC benefits when its child is born and so is not burdened by the state's regulations. However, this argument looks at the situation from the perspective of the parents. Because AFDC is intended first and foremost to help *children*, and because benefits are calculated according to the number of dependent children, it is from the *child's perspective* that the legislation should be viewed.²⁹⁹

By eliminating the per-child allotment for children born to families enrolled in the AFDC program, New Jersey is further classifying children into two groups: those born prior to enrollment, and those born subsequent to enrollment. Only the former will be accounted for in the figuring of benefits for the family.³⁰⁰ That is, "as [families] come into the system . . . there is no limit on the number of children. You can come in with two, five, ten, fifteen. . . ." ³⁰¹ However, if an AFDC family with one child subsequently has a second child, regardless of the circumstances under which the child is conceived,³⁰² the family will not receive benefits for the newborn.³⁰³

This legislation creates two classes of children — those who will be considered in the grant allotment for the family, and those who will not. The classification is based solely on when the child is born. Because the two groups are similarly situated — both are

299. *King*, 392 U.S. at 325 ("protection of such children is the paramount goal of AFDC.").

300. N.J. STAT. ANN. § 44:10-3.5 (1993).

301. *New Jersey Hearings*, *supra* note 7, at 4.

302. See, e.g., *New Jersey Hearings*, *supra* note 7, at 31-33 (July 9, 1991) (statement of May Daniels, Ed.D.) (noting that even the most diligent use of birth control is not always effective).

303. N.J. STAT. ANN. § 44:10-3.5 (1993).

needy, dependent children — but differently treated, the law is subject to equal protection analysis.³⁰⁴

1. Analysis of Ends — Legitimate?

The first inquiry under Equal Protection analysis asks whether the ends are legitimate. Statutes that eliminate the per-child allotment are said to promote the goals of first saving money; second, encouraging AFDC recipients to seek employment; and, third, removing the purported monetary incentive for AFDC families to bear children.³⁰⁵

In *King v. Smith*,³⁰⁶ the U.S. Supreme Court firmly embraced fiscal conservation — particularly as concerns the AFDC program — as a solidly legitimate goal.³⁰⁷ The Court reiterated its stance on money-saving as a legitimate goal in *Shapiro v. Thompson*.³⁰⁸ Likewise, the Court has embraced the goal of encouraging welfare recipients to enter the workforce.³⁰⁹ However, it is less clear whether the Court would accept as legitimate the third goal of the per-child allotment legislation — discouraging AFDC recipients from parenting additional children.

In considering this goal, a distinction must be made between "illicit" sexual activity, in which the state may assert a legitimate interest,³¹⁰ and non-illicit sexual activity, in which the state holds no legitimate interest.³¹¹ The New Jersey legislature has stated that one of its goals is discouraging AFDC recipients from parenting additional children.³¹² Procreation is not considered to be "illicit" sexual activity.³¹³ Given the Court's continued support of the fundamental right to procreate,³¹⁴ this goal should not be viewed as

304. See *Jefferson v. Hackney*, 406 U.S. 535 (1972); *Dandridge v. Williams*, 397 U.S. 471 (1970); *Doe v. Revitz*, 830 F.2d 1441 (7th Cir. 1987); *Largo v. Sunn*, 835 F.2d 205 (9th Cir. 1987); *Guidice v. Jackson*, 726 F. Supp. 632, 638 (E.D.Va. 1989).

305. See *supra* notes 95 and 101.

306. 392 U.S. 309 (1968).

307. *Id.* at 318.

308. 394 U.S. 618, 633 (1969).

309. See *Dandridge v. Williams*, 397 U.S. at 483-84, 486 (accepting as legitimate the State's goal of encouraging employment in support of a statute imposing a maximum cap on AFDC benefits).

310. See *supra* notes 174-229 and accompanying text (discussing the Equal Protection standard of review).

311. *Id.*

312. See *supra* note 231 and accompanying text.

313. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

314. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. —, 112 S. Ct. 2791, 1992 U.S. Lexis 4751, 120 L.Ed. 2d 674, 60 U.S.L.W. 4795, 18 Family Law Reporter 2051, 2056 (1992).

legitimate.³¹⁵ Although the Court grants government wide latitude to enact legislation aimed at social welfare or economic goals,³¹⁶ as indicated in *Moreno*, the Court stops short of allowing legislation that lacks legitimacy. That is, in *Moreno*, the Court held that the purpose of the legislation — to prevent “hippie communes” from participating in the food stamp program — was not legitimate: “[i]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”³¹⁷

Although the goal of discouraging AFDC recipients from having additional children is *not* legitimate,³¹⁸ the goals of saving money and encouraging employment most likely are legitimate.³¹⁹ Because equal protection analysis under the rational basis framework does not require *all* the goals to be legitimate,³²⁰ this legislation could well pass the first prong of the equal protection analysis. The next inquiry in the equal protection analysis must ask whether the means — the classes which the legislation establishes — are rationally related to achieving the State’s legitimate goals?

2. Analysis of Means — Rationally Related to Ends?

Under rational basis review in the equal protection arena, the means chosen to achieve a state’s legitimate goals do not necessarily have to be the most reasonable, so long as the classification established by the state is not “wholly arbitrary,” or “wholly without any rational basis.”³²¹ Even where the legislation will result in unfairness or deprivation, the Court has upheld laws that promote legitimate ends and are supported by rationally related means.³²² However, the Court has held that the classification must not have

315. See also *New Jersey Hearings*, *supra* note 7, at 9X, July 31, 1991 (written statement from Edward Martone, executive director, American Civil Liberties Union of New Jersey) (stating, “there is no legitimate state interest in punishing a woman for not delaying childbirth”).

316. See, e.g., *King v. Smith*, 392 U.S. at 318 (noting that “[t]here is no question that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need”). See also *Lyng v. Castillo*, 477 U.S. 635, 637 (upholding an amendment to the food stamp benefits scheme even though the Court recognized that the change “will impose a severe hardship on a needy family”).

317. *Moreno*, 413 U.S. at 538, 534.

318. See *supra* note 315 and accompanying text.

319. *King*, 392 U.S. at 318; *Shapiro*, 394 U.S. at 633; *Dandridge*, 397 U.S. at 483-84, 486.

320. Nowak, *supra* note 185, § 14.3, at 587-90.

321. *Id.*; *Dallas v. Stanglin*, 490 U.S. 19, 27-28; *Lyng v. Castillo*, 477 U.S. 635, 639 n.3.

322. *Bowen*, 483 U.S. at 3016-17.

been established merely to deny a benefit to a group disfavored by the legislature,³²³ and the Court has held that irrational fears and prejudices against a class of individuals will not justify otherwise legitimate legislation that unreasonably burdens that class.³²⁴

a. Saving Money

Although the goal of saving money generally is considered legitimate,³²⁵ the means employed by the per-child allotment legislation are completely without rational basis. First, the Congressional Budget Office not only reported that these types of financial deprivations do not work, but went on to recommend alternatives, including *increased welfare payments*, increased education and better economic opportunities as more effective means by which to reduce the AFDC rolls.³²⁶ Second, the state has no proof it will save any money at all — in fact, the law may cost the state more in the long run.³²⁷ Third, most young AFDC mothers — the population targeted by the New Jersey law — leave the program within three years and, therefore, are not draining state coffers for years on end.³²⁸ By reducing or eliminating the additional benefit, per-child allotment laws deprive children of the financial benefits necessary to keep them adequately housed, clothed, and fed.³²⁹ Moreover, these deprivations will affect children already covered by AFDC as well as children subsequently born into the AFDC recipient's family, since the already inadequate funding will be stretched even further to meet the needs of a larger family.³³⁰

By classifying AFDC recipients according to whether children were born prior to enrollment or after, and by denying benefits to those children born after AFDC enrollment, the government is making a wholly arbitrary distinction based on irrational prejudices against the poor.³³¹ This type of reasoning and this sort

323. *Cleburne*, 473 U.S. at 451.

324. *Id.* at 449.

325. *King*, 392 U.S. at 318; *Shapiro*, 394 U.S. at 633.

326. *ADOLESCENT MOTHERS*, *supra* note 11, at 43, 68-69.

327. *New Jersey Hearings*, *supra* note 7 (Legislative Fiscal Estimate, Assembly Bill 4703, Sept. 12, 1991) (noting that the legislature "cannot readily determine" exactly how much money will be saved); *Academics*, *supra* note 242; *see supra* notes 252-56; *Carter*, *supra* note 273.

328. *ADOLESCENT MOTHERS*, *supra* note 11, at xvi.

329. *WISCONSIN BRIEFS*, *supra* note 6, at 3.

330. *Id.* The Wisconsin legislature reports that critics of its Parent and Family Responsibility (PFR) program assert that AFDC increases for additional children already are "so low that they do not adequately cover the cost of additional children." *Id.* at 7.

331. *Cleburne*, 473 U.S. at 449.

of irrational classification have been held unconstitutional in the past³³² and should be today as well.

b. Encourage Employment

Having found that the goal of encouraging employment is probably legitimate,³³³ we must determine whether the per-child allotment legislation rationally supports that goal. The reasoning behind this goal ignores key facts. First, the goal of encouraging employment is already being addressed.³³⁴ Second, jobs for this population are scarce;³³⁵ welfare families are often unable to procure the jobs that are available. Third, even if jobs were available and the AFDC parent was qualified for the jobs, the costs of child-care often more than offset the wages earned.³³⁶

The goal of encouraging AFDC parents to seek employment is already being addressed through other means.³³⁷ In *Dep't of Agric. v. Moreno*,³³⁸ the Court held unconstitutional a classification that discriminated against hippies.³³⁹ In part, the Court's reasoning was based on the fact that the state's only legitimate goal — preventing fraud — was already being addressed.³⁴⁰ Here, New Jersey has already implemented programs for education and job training in an effort to encourage AFDC recipients to seek employment.³⁴¹ Like the means in *Moreno*, this law constitutes invidious discrimination and is not reasonably related to the state's goal. Therefore, the law should be declared violative of the constitutional guarantee of equal protection.

Moreover, New Jersey's goal can not possibly be achieved by these means in today's depressed job market, as was assumed in *Dandridge v. Williams*.³⁴² In *Dandridge*, the goal of encouraging welfare recipients to seek employment was proffered by the state and accepted by the Court.³⁴³ There, the legislation in question set a maximum grant allotment for AFDC recipients, which the Court

332. See *supra* notes 223-29 and accompanying text.

333. *Dandridge*, 397 U.S. at 524 (Douglas, J., dissenting).

334. See *supra* note 11.

335. HACKER, *supra* note 11; DeParle, *supra* note 11.

336. See *supra* note 11 (discussing the lack of education, job training, and skills, as well as day care, as reasons many AFDC mothers are unable to obtain employment).

337. See *supra* note 11.

338. 413 U.S. 528 (1973).

339. *Id.* at 534.

340. *Id.* at 537.

341. See *supra* note 11.

342. 397 U.S. 471 (1970).

343. *Id.* at 490.

upheld,³⁴⁴ while giving the state considerable deference. In a dissenting opinion, Justice Douglas noted that the Court's acceptance of the state's argument — that a maximum cap on benefits would encourage employment — rested on the supposition that the AFDC recipients were, in fact, employable.³⁴⁵ The majority simply viewed the statute as economic-social welfare legislation and accepted the state's assertions as rational. As Justice Douglas observed, however, limitations on AFDC benefits "cannot reasonably operate as a work incentive with regard to those who cannot work or who cannot be expected to work;"³⁴⁶ additionally, this reasoning ignores the very people whom AFDC was intended to benefit — dependent children.³⁴⁷

The elimination of the per-child allotment is distinguishable from the legislation in question in *Dandridge* which applied to all AFDC families;³⁴⁸ the legislation in question here applies only to children born while the parent is enrolled in AFDC. The New Jersey classification should cause today's Court to adopt a less deferential stance. If today's Court were to consider the realities of the modern job market and the AFDC recipient,³⁴⁹ the Court would have to agree with Justice Douglas: denying a child AFDC benefits merely because he was born after — instead of before — his parent enrolled in AFDC cannot possibly further the state's goal of encouraging employment if there are no jobs available, if the parent is unemployable, or if daycare costs would swallow the parent's paycheck.

Thus, the goal asserted, like *Moreno*, is already being addressed in other, more reasonable ways. Also, the classification is not rational, like *Dandridge*, and cannot possibly support the state's goal.

c. Discourage Procreation

The third goal of the New Jersey per-child allotment legislation — discouraging AFDC recipients from procreating — is not le-

344. *Id.*

345. *Id.* 490-508.

346. *Dandridge*, 397 U.S. at 524.

347. See *supra* notes 26-27 and accompanying text.

348. *Dandridge*, 397 U.S. 471, 490 (1970).

349. See Edelman, *supra* note 1, at 74-76 (reporting that first, even a full-time minimum wage job provides a paycheck equal to only 75% of the poverty level for a family of three; second, there is no evidence that the poor are unwilling to work — in fact, the evidence is contrary to that notion, with the number of Americans working at minimum wage jobs *quadrupling* from 1979 to 1984; and third, "only four percent of all families receive as much as half of their income from AFDC during the period they are raising their children").

gitimate,³⁵⁰ but even if it were, the means are not rationally related to the ends. Inasmuch as Congress prohibits states from requiring AFDC recipients to accept birth control services as a prerequisite to receiving aid,³⁵¹ this legislation is unreasonable and irrational. Although facially the per-child allotment legislation does not predicate eligibility for AFDC on a recipient's acceptance of birth control services, the effect is the same. If the recipient does not prevent the birth of a child while enrolled in AFDC, the recipient will not receive aid for that child.³⁵² Like the legislation in *King v. Smith*,³⁵³ this legislation violates the purposes of the AFDC program and should be held invalid.

In *King v. Smith*, the Court said that although states may have a legitimate interest in discouraging immorality and illegitimacy, those interests are not legitimate justifications for excluding otherwise eligible dependent children from the AFDC program.³⁵⁴ The same argument can be made here. By eliminating the per-child allotment, the New Jersey legislature is attempting to achieve its goal by establishing an irrational classification based on invidious discrimination. As a result, the legislature is punishing innocent children for behavior over which neither they *nor, in many cases, their parents*, have any control.³⁵⁵ Moreover, as the Court noted in *King*, such discriminatory actions violate the very purpose of AFDC — protecting dependent children. By classifying children of AFDC recipients according to whether the children were born before or after enrollment in AFDC, and by denying benefits to children born after enrollment, the government is making a wholly arbitrary distinction based on irrational prejudices against AFDC recipients. The Court has already determined that this type of reasoning and the resulting classifications are unconstitutional.

In *Dep't of Agric. v. Moreno*,³⁵⁶ the Court held that the legislature may not enact laws merely to thrust the majoritarian ideas of

350. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. —, 112 S. Ct. 2791, 1992 U.S. LEXIS 4751, 120 L. Ed. 2d 674, 60 U.S.L.W. 4795, 18 Family Law Reporter 2051, 2056 (1992); see also *supra* note 314.

351. 42 U.S.C.S. § 605(15)(A).

352. See *supra* note 4.

353. 392 U.S. 309 (1968).

354. *King*, 392 U.S. at 321, 334. Although *King* was decided on statutory grounds, the Court conducted an extensive equal protection analysis.

355. *New Jersey Hearings*, *supra* note 7, at 43 (July 9, 1991 statement of Martha Davis, staff attorney for NOW Legal Defense and Education Fund); *id.* at 31-33 (statement of May Daniels, Ed.D., noting that even the most diligent use of birth control is not always effective); *id.* at 26 (statement of Margaret Woods, Executive Director of Independence High School).

356. 413 U.S. 528 (1973).

morality onto a politically unpopular group.³⁵⁷ The Court stated that government may not accomplish even a legitimate goal by establishing "invidious distinctions between classes of its citizens."³⁵⁸ In *Moreno*, the unpopular group was hippies. Here, the unpopular group is the children of welfare mothers who have the audacity to parent children while enrolled in AFDC. In *Moreno*, some households were denied food stamps solely because they included people who were not related to others in the household. Here, a third or subsequent child effectively would be denied benefits because the child is related to the other children and was born after the family enrolled in AFDC. *Moreno* can be distinguished, opponents assert, because there the entire household was excluded from the food stamp program, while here only the second or subsequent child would effectively be excluded from the AFDC program.

In *Moreno*, the legislative record included a statement that the legislature sought to prevent "hippie communes" from participating in the food stamp program.³⁵⁹ The Court held this to be violative of the constitutional guarantee to equal protection, noting that the "purpose to discriminate against hippies cannot, in and of itself and without reference to (some independent) considerations in the public interest, justify the . . . amendment."³⁶⁰ The state offered another goal — prevention of fraud — which the Court did accept as legitimate. However, the Court said the classification — the denial of "essential federal food assistance to *all* otherwise eligible households containing unrelated members" — could not constitute a rational means by which to achieve that goal.³⁶¹

Here, the legislative record includes a statement that the legislation is intended to discourage AFDC recipients from parenting additional children.³⁶² Because this goal, like that in *Moreno*, would deny essential federal food assistance to otherwise eligible children (but for the timing of their birth, they would receive AFDC benefits), the classification used to achieve the state's asserted goals should not be considered rational.

The Court has also held that irrational fears and prejudices against a class of individuals will not justify otherwise legitimate legislation that unreasonably burdens that class.³⁶³ In *Cleburne v.*

357. *King*, 392 U.S. 309 (1968); *Cleburne*, 473 U.S. at 449; *Moreno*, 413 U.S. at 543.

358. *King*, 392 U.S. 309 (1968); *Cleburne*, 473 U.S. at 449; *Moreno*, 413 U.S. at 543.

359. *Moreno*, 413 U.S. at 534.

360. *Id.* (quoting the District Court opinion).

361. *Id.* at 535-36.

362. See *supra* note 231 and accompanying text.

363. *Cleburne*, 473 U.S. at 446.

Cleburne Living Ctr.,³⁶⁴ the Court invalidated a zoning ordinance that prohibited the establishment of a home for mentally retarded individuals in a residential neighborhood.³⁶⁵ Reviewing all of the asserted state goals,³⁶⁶ only some of which the Court recognized as potentially legitimate,³⁶⁷ the Court concluded that the classification was based on irrational prejudices against the mentally retarded and therefore could not rationally support the state interests.³⁶⁸

Like the legislation in *Cleburne*, the per-child allotment legislation establishes a class of innocents who will be burdened solely because of the state's irrational prejudices and misconceptions. Moreover, the classification should not be considered rational because, as in *Cleburne*, other similarly situated individuals are *not* burdened by the legislation. By focusing solely on children born while the parent is enrolled in AFDC, the state is burdening children born after, but not before, enrollment. The state is thus sending a message that people receiving AFDC should not bear children at the state's expense,³⁶⁹ just as the state in *Cleburne* was sending a message that the mentally retarded were not welcome to establish a home in residential neighborhoods in that city. Where the legislation in *Cleburne* was based on irrational notions about the mentally retarded, the per-child allotment legislation is based on irrational perceptions and prejudices regarding AFDC recipients' sexual activities — that a welfare mother has a child in order to receive additional allotments, and that she has many out-of-wedlock children, each with different fathers. As a result, the classifica-

364. *Id.*

365. *Id.* at 450.

366. *Id.* The interests in *Cleburne* included concerns that neighboring residents would harbor "negative attitudes" toward or be fearful of the mentally retarded residents, fears that junior high students might harass the residents, an assertion that the home was located on a five-hundred year flood plain, and concern that the size of the home and the number of occupants would be too great. *Cleburne*, 473 U.S. at 448-49.

367. The Court indicated that the city council's concerns regarding the flood plain and the size of the house and number of occupants could be considered legitimate. *Id.* at 449-50.

368. The city council's concerns regarding locating the home on a flood plain and concerns regarding the size of the home and the number of occupants could not pass the Court's rationality review because the city council allowed boarding and fraternity houses, nursing homes, and hospitals to be located in the area. The Court saw no rational basis for prohibiting the location of a home for the mentally retarded while allowing the other uses. *Id.* at 449.

369. This argument is especially offensive given the states' assertions in the abortion funding cases—and the Court's approval of those assertions—that promoting childbirth over abortion is a legitimate interest rationally supported by the states' decisions not to fund abortions. See *Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980).

tion constitutes invidious discrimination against the poor and should not be considered a rational means by which to achieve the state's asserted goals.

The classification established by the per-child allotment legislation should not be considered rationally supportive of the goal of discouraging births among AFDC recipients because the classification is simply an attempt to influence the morality of a disfavored group and because the state is treating similarly situated children differently based solely on irrational fears and prejudices.

III. Conclusion

Laws eliminating the incremental benefit for children born to AFDC recipients are based on irrational prejudices and are not effective means by which to attain the goals intended. First, conservation of resources under such laws is unlikely. Legislatures have no proof that such measures will save money at all, and the measures could actually cost the state and federal governments more in the long run. Further, most AFDC families do not tend to bear additional children while enrolled in the program. Second, these laws are unlikely to modify the behavior legislators are targeting — that of discouraging AFDC recipients from procreating in order to receive an additional benefit. No evidence shows that AFDC families exhibit such behavior in the first place, and, even if such behavior were evident, experts question whether withholding benefits would act as a deterrent. Third, those states citing the goal of encouraging AFDC recipients to enter the workforce ignore the fact that most AFDC recipients prefer to work, and would work if jobs were available to them. Proponents of per-child allotment laws as a means to obtain this goal also overlook the daycare dilemma facing AFDC recipients.

In sum, laws eliminating the per-child allotment punish children — the intended beneficiaries of the AFDC program — for the alleged misconduct of their parents. Such laws are unconstitutional, unreasonable, and punitive.