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ARTICLES

IN SUPREME JUDGMENT OF THE POOR:

THE ROLE OF THE UNITED STATES SUPREME COURT IN WELFARE LAW AND POLICY

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"Welfare reform punishes the poor for being poor.
Our responsibility . . . is to end poverty as we know it, not welfare."
S. Clara Kim[1]

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1. S. CLARA KIM, PROS AND CONS: SOCIAL POLICY DEBATES OF OUR TIME 276 (2001) (citation omitted).

INTRODUCTION

At its onset, welfare was reserved almost exclusively for white women. At that time, poverty was understood to be a cause of temporary societal inequity, and welfare was a socially-acceptable solution to those temporary setbacks. [2] However, as Black women entered the welfare rolls, racialized presumptions about behavior and poverty began to structure the very contours of welfare law. Welfare and poverty in general came under political attack.[3] With increasing welfare rolls and the changing racial composition of recipients, Congress began to respond to arguments that poverty was a product of culture, behavior, and even biologically determined racial traits. [4] Consequently, Congress started to limit benefits for those deemed "undeserving."[5] Welfare legislation and policy implementation were less attempts to protect citizens by subsidizing an economic downturn than the manifestation of an effort to limit citizens' (Black women in particular) access to state power and benefits. More and more, Black working-class recipients saw the courts, juxtaposed with the overwhelmingly antagonistic spaces of the local welfare offices and the floor of Congress, as their most viable sites of struggle and social possibility for a more humane social welfare worldview.[6]

Legal decisions are a key way of understanding the larger discussions and debates within welfare policy and the implications of such policy on the lives of many working-class Black women. While the United States Supreme Court (Supreme Court) has not decided a significant number of cases with direct bearing on welfare policy, many important and historic cases structuring current welfare policy and reform were resolved from the 1960s to the present.[7] These decisions raised major questions about the parameters and constraints of welfare entitlement.[8] Discussions of the intent and impact of welfare policy generally focus on the congressional floor, media representations, or the caseworker-client relationship.[9] This leaves the courts (and the Supreme Court in particular) inadequately examined as a key institutional space where the social policy of welfare is implemented.

This article will examine the major Supreme Court rulings since the late 1960s that have directly addressed Aid to Families with Dependent Children

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2. *See* JOANNE L. GOODWIN, GENDER AND THE POLITICS OF WELFARE REFORM: MOTHER'S PENSION IN CHICAGO (1911-1929) 16 (1997).

3. *See generally* ELIZABETH BUSSIERE, (DIS)ENTITLING THE POOR: THE WARREN COURT, WELFARE RIGHTS, AND THE AMERICAN POLITICAL TRADITION (1997).

4. *See* ANGE-MARIE HANCOCK, THE POLITICS OF DISGUST: THE PUBLIC IDENTITY OF THE WELFARE QUEEN 57-60, 95-106 (2004).

5. *Id.*

6. *See* MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT (1960-1973) 1 (1993).

7. *See* Goldberg v. Kelly, 397 U.S. 254 (1970); Shapiro v. Thompson, 394 U.S. 618 (1969); King v. Smith, 392 U.S. 309 (1968).

8. *See Goldberg,* 397 U.S. at 254; *Shapiro*, 394 U.S. at 618; *King*, 392 U.S. at 309.

9. *See generally* HANCOCK, *supra* note 4 (discussing congressional, media and individual perceptions of welfare recipients).

(AFDC), commonly known as welfare. The Supreme Court decided cases, such as *King v. Smith*,[10] *Shapiro v. Thompson*,[11] and *Goldberg v. Kelly*,[12] in favor of welfare recipients.[13] The outcomes of these cases suggest that while the Supreme Court viewed welfare policy as a negotiation between federal and state governments,[14] it reserved a special role for the judicial branch in protecting equal rights. The judicial understanding of the relationship between federal and state government power within welfare policy ranged from "cooperative federalism," (expanding powers of the national government in areas traditionally left to the states) to fiscal conservatism (privileging state power and proffering a hands-off approach). These conceptual rubrics do not follow a linear narrative nor offer a story of change over time; instead they are competing approaches that can be implemented by the Supreme Court simultaneously.

While the historical arch from the Civil Rights Era to the present normally presents a story of expanded liberties and freedoms to the socially disenfranchised,[15] the lens of the Supreme Court welfare decisions narrates a much different story. Instead, we see the devolution of racial liberalism, the intensification and expansion of poverty, and the rise of social conservatism so familiar by the mid-1980s.[16] Here, Black women became both the symbolic scapegoat and the site of social policy surveillance. At the apex of this symbolic/social policy convergence were national attacks on the stereotyped "welfare queen" in particular, and any redistribution of national resources to the poor, in general. Part I of this paper examines Supreme Court case law on welfare policy through the lens of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Part II surveys the Supreme Court case law on welfare policy through the lens of federalism. Finally, Part III reviews

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10. *King*, 392 U.S. at 309.

11. *Shapiro*, 394 U.S. at 618.

12. *Goldberg*, 397 U.S. at 254.

13. It is important to note that while not all of the plaintiffs (welfare recipients) presented in this article are African-American mothers, welfare has traditionally been racialized. At the center of America's attitude about welfare policy is race and racism and, therefore, African-American mothers were routinely held out as iconographic images of who was on welfare. Moreover, since African-American mothers were disproportionately poor, any laws regulating entitlement to welfare assistance would also have a disparate impact on them. For causal certainty, it should also be noted that many of the major figures in these cases were black women. *See*, *e.g.*, *Goldberg*, 397 U.S. at 254; *Shapiro*, 394 U.S. at 618; *King*, 392 U.S. at 309.

14. *See, e.g.*, *Shapiro*, 394 U.S. at 645 (Warren, J., dissenting); *King*, 392 U.S. at 316.

15. *See* DAVID A. HOLLINGER, POSTETHNIC AMERICA: BEYOND MULTICULTURALISM (1995). For a critique of this vision, *see generally* CHARLES M. PAYNE, I'VE GOT THE LIGHT OF FREEDOM: THE ORGANIZING TRADITION AND THE MISSISSIPPI FREEDOM STRUGGLE (1995) *and* NIKHIL PAL SINGH, BLACK IS A COUNTRY: RACE AND THE UNFINISHED STRUGGLE OF DEMOCRACY (2004).

16. *See, e.g.*, ROBERT O. SELF, AMERICAN BABYLON: RACE AND THE STRUGGLE FOR POSTWAR OAKLAND (2003); THOMAS J. SUGRUE, THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POST-WAR DETROIT (1996); WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY (1990).

much of the same case law contrasted through the lens of fiscal conservatism. Through these lenses, it is clear that the seemingly value-neutral Supreme Court was not at all immune to the changing political landscape of the nation over the last forty years.

I. DUE PROCESS, EQUAL PROTECTION AND FUNDAMENTAL FAIRNESS

A. Substantive Constitutional Rights: Equal Protection and the Fundamental Right to Travel

During the Warren Court (1953-1969) and well into the Burger Court (1969-1986),[17] the concept of equal protection under the law accelerated rapidly as a new "interventionist" instrument.[18] The Supreme Court under Chief Justice Earl Warren still employed a modest approach toward review of legislative policies, but the Supreme Court granted certain cases more active scrutiny.[19] Particularly during Warren's tenure, more issues were reviewed using a strict scrutiny approach.[20] Strict scrutiny is the highest level of review used by the Supreme Court to review any government laws and policies that restrict or limit a constitutional right.[21] When a government attempts to impose legislation which infringes on a fundamental right or interest[22] or enacts

17. For a survey of Supreme Court cases decided during the first term of the Burger Court era, *see* Gerald Gunther, *Foreward: In Search of Evolving Doctrine on Changing a Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

18. *Id.* During Justice Warren's tenure, a two-tier system of review was employed in cases involving Equal Protection claims. In most circumstances, equal protection claims would fail because the Supreme Court would find that the statute in question was constitutional because the legislative body had a reasonable purpose for the particular discriminatory practice in place. However, when the statute in question employed a discriminatory practice based on race, alienage or lineage (suspect classifications) or encroached a fundamental right or interest, the governing body would have to show more than a reasonable purpose. On such occasions the Supreme Court would apply a higher level of scrutiny in determining the constitutionality of a law. For a survey of the equal protection doctrine, *see generally, Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076-1192 (1969); Lawrence Schlam, *Equality in Culture and Law: An Introduction to the Origins and Evolution of the Equal Protection Principle*, 24 N. ILL. U. L. REV. 425, 445-456 (2004); Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 343-365 (1949).

19. *See Goldberg*, 397 U.S. at 254; *Shapiro*, 394 U.S. at 618; *King*, 392 U.S. at 309.

20. *See*, *e.g.*, Tinker v. Des Moines Indep. Comm. Sch. Dist., 393 U.S. 503, 509 (1969); Abbington v. Schempp, 374 U.S. 203, 294 (1963); Gideon v. Wainwright, 372 U.S. 335, 343 (1963); Mapp v. Ohio, 367 U.S. 643, 660 (1961); Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 495 (1954).

21. *See generally* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (hinting for the first time at a heightened level of scrutiny when "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

22. A fundamental right or interest is one that has its foundation from the Constitution, like the Bill of Rights, the right to vote, the right to travel and the right to privacy. *See, e.g.*,

legislation that targets groups identified as a suspect class (groups legally identified by race, nationality, or alienage)[23] the Supreme Court approves of such legislation *only* if the government can show that the particular law is essential, narrowly tailored, and the least restrictive means to accomplish its goal.[24]

The Equal Protection Clause of the Fourteenth Amendment guarantees an independent constitutional right that similarly situated citizens be treated similarly under the law.[25] Within welfare law, states may not have directly attempted to violate the Equal Protection Clause, but nevertheless created separate rules for its recipients based on gender,[26] socioeconomic status,[27] and

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Police Dep't of Chicago v. Mosely, 408 U.S. 92, 96 (1972) (acknowledging that rights established in the first amendment are fundamental rights); Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965) (providing examples of fundamental guarantees).

23. In order to qualify as a suspect class, a social group's characteristics must be immutable, the group must suffer from a history of discrimination, the group must be politically impotent, and the group must constitute a distinct and insular minority. Suspect class refers to a group that has been historically discriminated against in the political process. For information on how a suspect class is defined, *see* Nyquist v. Mauclet, 432 U.S. 1, 7-9 (1977). *See also* Hernandez v. Texas, 347 U.S. 475, 477-78 (1954) (implying that persons of Mexican descent constitute a suspect class); Korematsu v. United States, 323 U.S. 214, 216 (1944) (referencing race as a suspect classification triggering strict scrutiny review); Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (implying that persons of Chinese descent constitute a suspect class).

24. *See generally* Joel F. Handler, *"Constructing Political Spectacle": The Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History*, 56 BROOK. L. REV. 899 (1990); Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

25. "State[s] [shall not] deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. For a survey of the tiers of review used to analyze the Equal Protection Doctrine, *see* Edward J. Imwinkelried, *Of Evidence and Equal Protection: The Unconstitutionality of Excluding Government Agents' Statements Offered as Vicarious Admissions Against the Prosecution*, 71 MINN. L. REV. 269, 291-97 (1986). *See generally* Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195 (1985).

26. The Court has been reticent to apply the strict scrutiny to cases involving discriminatory treatment on the basis of gender. However, classifications based on gender are considered quasi-suspect, thus triggering an intermediate review between rational basis and strict scrutiny analysis. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 731 (1982) (holding that a law discriminating on the basis of the male sex does not relieve it from the heightened level of scrutiny); Craig v. Boren, 429 U.S. 190, 197 (1976) (describing the appropriate level of review for gender classifications); Frontiero v. Richardson, 411 U.S. 677, 682 (1973) (plurality opinion) (ruling that gender classifications are analogous to race discrimination and therefore should be subjected to strict scrutiny).

27. The Supreme Court has rejected the notion that wealth (or lack of wealth) alone is enough to trigger strict scrutiny. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28-29 (1973) (concluding that poverty is not a suspect class and statutes challenged on this basis will receive rational basis review); Edwards v. California, 314 U.S. 160, 184-85 (1941) (stating that "indigence in itself is a neutral fact—constitutionally an irrelevance, like race, creed, or color."). *But see* Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966) (holding that a poll tax in order to vote was unconstitutional), *and* Griffin v. Illinois, 351 U.S. 12, 18-19 (1956) (holding that it violated equal protection to deny free trial transcripts to indigent

status of non-marital children.[28] Many states also created durational residency restrictions to control the skyrocketing state welfare rolls and the belief that people migrated across state lines in pursuit of the most generous monthly welfare payment.[29] Under most state regulations, in order to be eligible for aid, a person had to be a resident of the county/state for at least a year.[30] In effect, states could deny otherwise eligible persons aid simply because they had failed to live in the geographical area for the minimum statutory period of time.[31] When the state took such action, the Supreme Court reviewed the law to determine if the groups of people identified by the law were a protected class, or if the law violated a fundamental interest or right guaranteed by the Constitution.[32]

By way of example, in the case of *Shapiro,* the Supreme Court was asked to determine the constitutionality of conditioning receipt of welfare aid on residency restrictions.[33] Single Black mothers challenged the residency requirements of Connecticut, the District of Columbia, and Pennsylvania.[34] Pursuant to their welfare policy, respective states denied single mothers benefits under AFDC if they resided in the state for less than one year.[35] Congress had authorized this residency restriction[36] and, therefore, the states' welfare policies were in compliance with federal law.[37]

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criminal defendants). For a discussion suggesting that claims made based on discrimination against the poor should receive strict scrutiny, *see* Stephen Loffredo, *Poverty, Democracy and Constitutional Law,* 141 U. PA. L. REV. 1277, 1278 (1993).

28. Similar to gender classification, the Supreme Court has been reticent to apply strict scrutiny to cases involving discriminatory treatment on the basis of illegitimacy. However, the Supreme Court has admonished states not to favor "legitimate" children over "illegitimate" children. N.J. Welfare Rights Org. v. Cahill, 411 U.S. 619, 621 (1973); Gomez v. Perez, 409 U.S. 535, 538 (1973); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 176 (1972); Levy v. Louisiana, 391 U.S. 68, 72 (1968).

29. For an example of residence requirements and voting restrictions, *see e.g.*, Dunn v. Blumstein, 405 U.S. 330, 360 (1972) (striking down a Tennessee statute which required a one year residence in the state as a condition for voting).

30. *See* Shapiro v. Thompson, 394 U.S. 618, 627 (1969).

31. KENNETH NEUBECK & NOEL A. CAZENAVE, WELFARE RACISM: PLAYING THE RACE CARD AGAINST AMERICA'S POOR 61 (2001).

32. *See* Shapiro v. Thompson, 394 U.S. 618, 627 (1969).

33. *Id.*

34. *Id.*; *see also* Ernest N. Blasingame, Jr., Comment, *Public Welfare and Public Housing: Due Process and Equal Protection Standards*, 38 TENN. L. REV. 345, 347 (1971).

35. *Shapiro*, 394 U.S. at 623-27; *see also* DAVIS, *supra* note 6, at 77.

36. For background on the history of residency restrictions in welfare policy, *see* James R. Kristy, Note and Comment, *A Showdown Between* **Shapiro** *and the Personal Responsibility and Work Opportunity Reconciliation Act: Infringement of the Right to Travel*, 20 WHITTIER L. REV. 449, 452-64 (1998).

37. 42 U.S.C § 602(b) (1958); *Shapiro,* 394 U.S. at 639. According to A.P. van der Mei, the states in the case argued that the real issue in *Shapiro* was whether Congress had the authority to authorize states to impose residency requirements. A.P. van der Mei, *Freedom of Movement for Indigents: A Comparative Analysis of American Constitutional Law and European Community Law*, 19 ARIZ. J. INT'L & COMP. LAW 803, 818 (2002).

The Supreme Court granted a victory to the welfare rights movement when it struck down the residency requirement statute as an unconstitutional violation of the Equal Protection Clause and the fundamental right to travel.[38] The Supreme Court found that conditioning welfare benefits on residency requirements "create[d] a classification which constitute[d] an invidious discrimination denying . . . [welfare recipients] equal protection of the laws"[39] and impinged upon their fundamental right to travel.[40] While Supreme Court decisions on the right to travel have varied, the core underpinnings of travel as a fundamental right can be found within the meaning of the Equal Protection Clause.[41] Legal scholar A.P. van der Mei notes that "the personal right to move freely from state to state is a product of this political Union and it occupies within the constitutional system 'a more protected'" status.[42]

While the Supreme Court in *Shapiro* recognized the state's interest in preserving the integrity of its programs—saving money and keeping its welfare rolls down—the Supreme Court ruled that residency requirements were unconstitutional because they failed to meet the "stricter standard of whether it promotes a compelling state interest,"[43] and served "'no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who chose to exercise them . . . .'" [44] In applying the more heightened level of review, the Supreme Court took into account the socio-economic context where the modernization of agricultural labor pushed many unskilled farm laborers to urban and northern communities in search of employment.[45] When jobs were unavailable, the only means of subsistence was the local welfare program.[46]

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38. *Shapiro*, 394 U.S. at 638.

39. *Id.* at 627.

40. *Id.* at 638.

41. Jide Nzelibe, *Free Movement: A Federalist Interpretation*, 49 AM. U. L. REV. 433 (1999). *See also* C. Thomas Dienes, *To Feed the Hungry: Judicial Retrenchment in Welfare Adjudication*, 58 CAL. L. REV. 555, 593-600 (1970); Bernard Evans Harvith, *Federal Equal Protection and Welfare Assistance*, 31 ALB. L. REV. 210, 222-26 (1967).

42. A.P. van der Mei, *supra* note 37, at 811 (quoting Edwards v. California, 314 U.S. 160, 177 (1941)).

43. *Shapiro*, 394 U.S. at 638 (emphasis omitted).

44. *Id.* at 631 (quoting United States v. Jackson, 390 U.S. 570, 581 (1968)).

45. *See generally* Judith E. Koons, *Motherhood, Marriage, and Morality: The Pro-Marriage Moral Discourse of American Welfare Policy*, 19 WIS. WOMEN'S L.J. 1, 39 (2004) (discussing the general movement towards industrialization).

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> [A] State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally. Implicit in any such distinction is the notion that indigents who enter a State with the hope of securing higher welfare benefits are somehow less deserving than indigents who do not take this consideration into account. But we do not perceive why a mother who is seeking to make a new life for herself and her children should be regarded as less deserving because she considers, among others [sic] factors, the level of a State's public assistance. Surely such a mother is no less deserving than a mother who moves into a particular State in order to take advantage of its better educational facilities.

The Supreme Court found that the one-year waiting period created two categories of eligible recipients who were distinguished by the number of months they had resided in the respective states[47] and ruled that "any classification which serves to penalize the exercise of that right [to travel], unless shown to be necessary to promote a compelling [state] interest is unconstitutional."[48] Scholars Kenneth Neubeck and Noel Cazenave argue that if the Supreme Court had sustained state residency requirements, many citizens would have had no means of livelihood.[49] Therefore, in *Shapiro,* the Supreme Court was unwilling to apply a lower level of scrutiny and refused to accept the states' contention that (1) the states' objectives justified imposing a residency restriction and (2) that any rational relationship existed between these identified states' objectives and implementation of the waiting periods.[50]

Most states that employed residency requirements and similar strategies did so under the guise of preserving their welfare resources for residents of the state.[51] The state of Connecticut argued in *Shapiro* that the statutory residency requirement was necessary "to protect its fisc[al budget] by discouraging entry to those who come needing relief."[52] In response to the state's arguments, the Supreme Court opined,

> We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any

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Shapiro, 394 U.S. at 631-32.

47. The Court stated:

> There is no dispute that the effect of the waiting-period requirement in each case is to create two classes of needy resident families indistinguishable from each other except that one is composed of residents who have resided a year or more, and the second of residents who have resided less than a year, in the jurisdiction. On the basis of this sole difference the first class is granted and the second class is denied welfare aid upon which may depend the ability of the families to obtain the very means to subsist - food, shelter, and other necessities of life.

Id. at 627.

48. *Id.* at 634 (emphasis omitted).

49. NEUBECK & CAZENAVE, *supra* note 31, at 61; *see also Shapiro*, 394 U.S. at 627.

> The effect of [residency restrictions] is to create two classes of needy resident families indistinguishable from each other except that one is composed of residents who have resided a year or more, and the second of residents who have resided less than a year, in the jurisdiction. On the basis of this sole difference the first class is granted and the second class is denied welfare aid upon which may depend the ability of the families to obtain the very means to subsist—food, shelter, and other necessities of life.

Id.

50. *Shapiro*, 394 U.S. at 634.

51. *Id.* at 623.

52. *Id.* (quoting Thompson v. Shapiro, 270 F. Supp. 331 (D. Conn. 1967)).

> other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens.[53]

The Supreme Court also held that it was unconstitutional to discriminate against eligible poor citizens who migrated to a state seeking welfare benefits and additionally hinted at an affirmative duty for states to redress economic inequalities.[54] While *Shapiro* did not declare that welfare entitlement was a constitutional right or "fundamental interest" under Supreme Court case law, access to welfare benefits eventually did become a legal entitlement via *Goldberg v. Kelly*,[55] which for a short time guaranteed some constitutional protection for welfare recipients.[56]

The Equal Protection Clause has also been used in the welfare law arena to invalidate a state's acts of discrimination based on gender.[57] In state-based welfare legislation, gender-based discrimination occurred because the mother usually served as the sole economic provider (in contrast to the traditional male breadwinner model).[58] Such a model went beyond the world of welfare to reinforce various gendered divisions of labor where, for example, men were given a higher wage (termed the family wage) with the presumption that "he" was supporting a family or where men were seen as more aggressive and hard working employees.[59] This model never took into account the additional "home work" for women that affect the differential in male and female productivity in the workplace.

Yet such gendered assumptions pervaded the distribution and management of welfare benefits as well. In *Califano v. Westcott*, the Supreme Court decided to eliminate gender-based discrimination in an effort to equalize state protections between unemployed mothers and fathers. [60] Aid to Families with Dependent Children – Unemployed Father (AFDC – UF) was a federally sponsored program that provided welfare to families with an unemployed father, but denied benefits for an unemployed mother.[61] After recent unemployment, two families in which women served as the primary breadwinner applied for and were denied AFDC-UF benefits because the husbands did not qualify as "unemployed" fathers under the Act.[62] Both of the

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53. *Id.* at 633.

54. Gunther, *supra* note 17, at 39.

55. Goldberg v. Kelly, 397 U.S. 254, 262 (1970).

56. *See Goldberg*, 397 U.S. at 261; *Shapiro*, 394 U.S. at 634; King v. Smith, 392 U.S. 309, 324-27 (1968).

57. Califano v. Westcott, 443 U.S. 76, 85 (1979) (Powell, J., concurring).

58. *See Califano,* 443 U.S. at 81-82; Karl E. Klare, *Toward New Strategies for Low-Wage Workers*, 4 B.U. PUB. INT. L.J. 245, 261–62 (1995); Lucie E. White, *Closing the Care Gap That Welfare Left Behind*, 577 ANNALS AM. ACAD. POL. & SOC. SCI. 131, 134 (2001).

59. White, *supra* note 58, at 134-35.

60. *Califano*, 443 U.S. at 76.

61. 42 U.S.C. § 607 (1935).

62. *Califano*, 443 U.S. at 80-81.

applicants in *Califano* would have qualified for benefits if they were males.[63] In this case, the Supreme Court denounced this discriminatory statute as a violation of the equal protection principles embedded in the Due Process Clause of the Fifth Amendment.[64] The Commonwealth of Massachusetts argued that the gender distinctions were important to deter fraud by two-parent families.[65] The key language in this case turned on the Supreme Court's belief that the Massachusetts's statute was founded on archaic principles, which supported "sexual stereotypes"[66] and "presume[d] the father has the 'primary responsibility to provide [for] a home and its essentials.'"[67] The Supreme Court concluded, "legislation that rest[s] on such presumptions, without more, cannot survive [intermediate] scrutiny under the Due Process Clause of the Fifth Amendment."[68] The objectives advanced by Massachusetts for gender-based distinctions were rejected by the Supreme Court because they were not substantially related to any significant government objective.[69] Therefore, the Supreme Court ruled that benefits under the AFDC-UF program must be available to unemployed mothers as well as unemployed fathers.[70]

The Due Process Clauses of both the Fifth and Fourteenth Amendments are equally important to a case analysis of welfare law and policy and are intrinsically connected to the Equal Protection Clause. The Due Process Clause not only provides protection for substantive rights, but also mandates procedural safeguards before the government can restrict a citizen's liberty, life, or property.[71] Once a substantive right has been identified by the Supreme Court, procedural due process dictates that appropriate precautions must be provided before the government may act in this constitutionally protected area.[72]

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63. *Id.*

64. *Id.* at 83-89.

65. *Id.* at 83.

66. *Id.* at 81, 89 (quoting Orr v. Orr, 440 U.S. 268, 283 (1975)).

67. *Id.* at 89 (quoting Stanton v. Stanton, 421 U.S. 7, 10 (1975)).

68. *Id.* When the Supreme Court reviews cases using an intermediate level of scrutiny, the government must show that the challenged classification—here, gender—serves an important state interest and that the classification is substantially related to serving that interest. *See, e.g.,* Craig v. Boren, 429 U.S. 190, 197 (1976).

69. *Califano,* 443 U.S. at 88; *see also* Amy S. Cleghorn, *Justice Harry A. Blackmun: A Retrospective Consideration of the Justice's Role in the Emancipation of Women*, 25 SETON HALL L. REV. 1176, 1191-96 (1995).

70. *Califano*, 443 U.S. at 89.

71. *See generally* Gitlow v. New York, 268 U.S. 652 (1925).

72. Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976). The Supreme Court in *Mathews v. Eldridge*, identified three distinct factors which must be considered in order to determine whether "administrative procedures . . . are constitutionally sufficient." *Id.* First, the court considers private interests that are affected by the government action. *Id.* at 335. Second, the court weighs the likelihood of an erroneous deprivation against the likelihood that the additional safeguard will be needed. *Id.* Finally, the court considers any government's interest in curtailing fiscal and administrative burdens that additional procedural safeguards might impose. *Id.*

B. Procedural Due Process

In the area of welfare law and policy, the Social Security Act of 1935 (SSA) set up national standards for eligibility.[73] However, states could administer these standards in the ways they deemed appropriate.[74] The ambiguity that existed here partially stems from the original SSA's lack of clarity in defining welfare; is was either 1) a substantive right (which the poor could demand in times of need) and thus entitled to due process protection or 2) a privilege (which could be denied or restricted at the whim of the federal/state governments). Ideally, if welfare benefits were a substantive right, procedural due process required that the recipient received, at a bare minimum, a "fair hearing" before she could be removed from the program.[75] However, the reality was that under most circumstances, procedural due process was not initiated when a welfare mother's continued eligibility was subjectively and summarily evaluated.[76] In fact, when it came to denying benefits to welfare mothers, most procedures put in place could hardly have been said to reach the level of due process required by the Fourteenth Amendment. However, the 1970 Supreme Court decision *Goldberg v. Kelly* changed this.[77]

In *Goldberg*, welfare mothers in New York challenged the procedures used to terminate welfare benefits.[78] Under New York policy, a caseworker's mere doubts as to a welfare recipient's eligibility were sufficient to suspend or terminate the benefits, affording the recipient no safeguard against arbitrary and unjustified denial of benefits.[79] Upon request, a recipient could review the caseworker's official justifications in support of termination of welfare benefits and ask for a hearing to contest the allegations, but only after benefits had been discontinued.[80] The Supreme Court addressed whether the Due Process Clause of the Fourteenth Amendment required that welfare mothers receive an

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73. 42 U.S.C.S. § 607 (1935).

74. *Califano*, 443 U.S. at 79; *see also* King v. Smith, 392 U.S. 309, 316-17 (1968).

75. Arlo Chase, *Maintaining Procedural Protections for Welfare Recipients: Defining Property for the Due Process Clause*, 23 N.Y.U. REV. L. & SOC. CHANGE 571, 572 (1997).

76. The Fifth and Fourteenth Amendments to the United States Constitution guarantee each citizen the right to Due Process of law. This legal concept has been used to restrict or limit the federal and state governments from enacting laws or conducting legal proceedings which deprive citizens of fundamental fairness, justice and liberty. At a bare minimum, a person must be given notice of proceedings and the opportunity to be heard. Chase, *supra* note 75, at 571-72; Stephen N. Subrin & A. Richard Dykstra, *Notice and the Right to be Heard: The Significance of Old Friends*, 9 HARV. C.R.-C.L. L. REV. 449, 451-52 (1974).

77. Goldberg v. Kelly, 397 U.S. 254, 258-59 (1970). For an examination of the U.S. Supreme Court decisions defining the scope of the government's ability to terminate public benefits, *see* Jim Moye, *Can't Stop the Hustle: The Department of Housing and Urban Development's "One Strike" Eviction Policy Fails to Get Drugs Out of America's Projects*, 23 B.C. THIRD WORLD L.J. 275, 282-83 (2003).

78. *Goldberg*, 397 U.S. at 256-57.

79. *Id.*

80. *Id.* at 259, *see also* Risa E. Kaufman, *Bridging the Federalism Gap: Procedural Due Process and Race Discrimination in a Devolved Welfare System*, 3 HASTINGS RACE & POVERTY L.J. 1, 16-18 (2005).

evidentiary hearing *before* benefits were terminated, providing for the continuation of benefits pending resolution of eligibility concerns.[81] In order to answer this question, the Supreme Court needed to determine whether welfare was "more like 'property' [or more like] a 'gratuity.'"[82] If welfare was considered property, the Constitution required that the government provide due process of law before the property could be taken.[83] Prior to the decision in *Goldberg*, welfare benefits had been considered a privilege.[84] The Supreme Court declared earlier in *Board of Regents v. Roth*:

> [T]he requirements of procedural Due Process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural Due Process is not infinite.[85]

Therefore, procedural protections were only required when an analysis of "whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment" had been shown to be violated.[86] In an astonishing blow to conservative welfare reformists, the Burger Court [87] ruled:

> The constitutional challenge cannot be answered by an argument that public assistance benefits are a 'privilege' and not a 'right.' . . . The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss, . . . and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. . . . For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. . . . Thus the crucial factor in this context . . . is that termination of aid pending resolution of a controversy over eligibility may deprive an

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81. *Goldberg*, 397 U.S. at 261.

82. *Id.* at 262, 262 n.8. The Court stated in its opinion that "[s]uch benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights." *Id.* at 262 (footnote omitted). This proposition established the basis for the Court's reference to welfare benefits as property in footnote eight of the decision: "It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.' Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property." *Id.* at 262 n.8.

83. Steven J. Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal,* 51 ALA. L. REV. 977, 979-80 (2000).

84. MARK V. TUSHNET, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 214 (1988).

85. Bd. of Regents v. Roth, 408 U.S. 564, 569-70 (1972).

86. Morrissey v. Brewer, 408 U.S. 471, 481 (1982).

87. It is important to note that Chief Justice Burger dissented from this ruling.

> *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate.[88]

The Supreme Court declared that the entitlement to receive welfare was a property right and as such, meaningful procedural safeguards consistent with the Fourteenth Amendment must be implemented prior to taking that property.[89] While this decision was a resounding victory for welfare rights advocates and at least suggested that the liberal activism of the Warren Court might survive the transition to the Burger Court, it was not the final word. At this time, the racial composition of those benefiting from welfare was increasingly African-American, and social welfare became even more intimately tied to public metaphors of behavioral laziness and promiscuity, which coincided with a moment of national fiscal insecurity.[90] In addition, as legal scholar Martha Davis noted, many of the dissenting justices in *Goldberg* also refused at that time to declare welfare a fundamental right.[91] Moreover, the Supreme Court's description of welfare as "more like 'property' than a 'gratuity'"[92] also provides evidence of the Supreme Court's ambiguous stance on welfare as a property right. The vague language of "more like" left the door open to revisit the issue of welfare entitlement.

C. Equal Protection and Special Class Protection

As early as the 1970s, legislation and the rights of the poor in particular, were vulnerable to the rising hegemony of the "moral majority" which argued that entitlement to basic rights should be predicated on behavioral prescriptions unrelated to actual need.[93] The changing public sentiment translated into denial of access to welfare benefits cloaked in arguments about greater deference toward state's rights. It was hardly surprising to see the welfare recipients[94] challenge the family cap law[95] in 1970. Equally not surprising the Supreme Court declined to hold in *Dandridge v. Williams* that welfare was a

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88. Goldberg v. Kelly, 397 U.S. 254, 262-64 (1970).

89. *Id.* at 262 n.8; Handler, *supra* note 24, at 899. *But see* Mathews v. Eldridge, 424 U.S. 319, 331-32 (1976) (restricting the right to a pre-termination hearing in welfare benefits cases under Goldberg's due process analysis).

90. *See generally* HANCOCK, *supra* note 4; HERBERT J. GANS, THE WAR AGAINST THE POOR: THE UNDERCLASS AND ANTIPOVERTY POLICY (1996); THE UNDERCLASS DEBATE (Michael B. Katz ed., 1993); MICHAEL B. KATZ, THE UNDESERVING POOR (1990).

91. DAVIS, *supra* note 6, at 102-18. For a discussion of welfare benefits and procedural due process in *Goldberg*, *see* Blasingame, *supra* note 34, at 349-53.

92. *Goldberg*, 397 U.S. at 262 n.8.

93. *See generally* MATTHEW D. LASSITER, THE SILENT MAJORITY: SUBURBAN POLITICS IN THE SUNBELT SOUTH (2007); LISA MCGIRR, SUBURBAN WARRIORS: THE ORIGINS OF THE NEW AMERICAN RIGHT (2002)

94. Dandridge v. Williams, 397 U.S. 471 (1970).

95. Family cap legislation allows a state to set a maximum amount of cash assistance per family regardless of established need. *Id.* at 473.

fundamental right and therefore welfare recipients were not a suspect class entitled to special constitutional protection.[96]

In *Dandridge*, the state of Maryland provided welfare benefits for families based upon calculating their "standard of financial need."[97] If a family had a "standard of financial need" which was greater than $250 per month, the state imposed a limit on the total amount that family could receive from AFDC. [98] The "family cap" rule was used to discourage mothers from continuing to have children supported by welfare.[99] Plaintiffs Linda Williams and Junius Gary each had eight children and were financially destitute.[100] If each member of their respective families were counted individually their "standard of financial need" would range from $296.00-$331.00 per month.[101] However, under Maryland's family cap rule both families were only eligible for $250.00 per month.[102] In this case, the welfare recipients charged that the maximum grant regulation violated the Equal Protection Clause of the Fourteenth Amendment.[103] In this ruling, the Supreme Court appeared to compromise on its previous inflexibility about welfare being an entitlement[104] (via cooperative federalism) and ruled that the "family cap" law, although discriminatory, did not violate the Equal Protection Clause and was permissible social and economic legislation.[105] The Supreme Court reasoned: "[T]he Constitution does not empower this court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients."[106] The plaintiffs in *Dandridge* argued that the family cap legislation discriminated against a suspect class, and relying on the precedent of *Goldberg,* argued that caps to welfare benefits violated a fundamental constitutionally protected right.[107] However, the Supreme Court did not recognize such claims and, therefore, declined to review Maryland's maximum grant regulation under a strict scrutiny standard.[108] The implication of lessening the standard of judicial review was to uphold any rationale articulated by the state that justified the imposition of family caps.

The above ruling demonstrates how the state's welfare policy legislated a bias for smaller families, yet the Supreme Court nonetheless upheld the statute.

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96. *Id.* at 485-86.

97. *Id.* at 473.

98. *Id.* In the city of Baltimore the maximum grant was $250, while outside of the city of Baltimore the maximum grant was $240.00. Williams v. Dandridge, 297 F. Supp. 450, 453 (1968), *rev'd*, 397 U.S. 471 (1970).

99. *Dandridge*, 397 U.S. at 477.

100. *Id.* at 490.

101. *Id.*

102. *Id.*

103. *Id.* at 473.

104. *Id.* at 508 (1970) (Marshall, J., dissenting).

105. *Id.* at 484-86.

106. *Id*. at 503.

107. *Id.* at 519-23 (Marshall, J., dissenting).

108. *Id.* at 486.

While the Constitution does not require that each citizen be treated identically to satisfy the Equal Protection Clause, the level of judicial scrutiny will vary based on whether a right is considered fundamental or a social group is a suspect class (such as race).[109] However, it is extremely difficult for a social group to be identified by the Supreme Court as a suspect class. Consider the Supreme Court's decision in *Harris v. McRae*, [110] where the Hyde Amendment was at issue.[111] Under the Hyde Amendment, state Medicaid programs could not use federal funds to pay for abortions for indigent women, unless the mother's life was in danger or the pregnancy was the result of rape or incest.[112] Cora McRae, whose situation did not fit into either of the exceptions authorizing Medicaid coverage, wanted to terminate her pregnancy. She was pregnant, in her first trimester, and receiving welfare and Medicaid from the state of New York.[113] Ms. McRae argued that the Hyde Amendment denied her equal protection under the law because it refused to fund abortions to those who were eligible for Medicaid, while permitting Medicaid to cover the costs associated with childbirth.[114] Since the Hyde Amendment only restricted access

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109. A suspect class is a group identified by their history of unequal treatment due to immutable characteristics that result in position of political powerlessness. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

> The general rule that legislation is presumed to be valid gives way when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy,-- a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.

Id.

110. 448 U.S. 297 (1980).

111. *Id.*; Hyde Amendment, Pub. L. No. 94-439, 209, 90 Stat. 1418 (1976); Larry P. Boyd, Comment, *The Hyde Amendment: New Implications for Equal Protection Claims*, 33 BAYLOR L. REV. 295, 295 (1981).

112. *Harris*, 448 U.S. at 303; *see also* Ken Agran, *When Government Must Pay: Compensating Rights and the Constitution*, 22 CONST. COMMENT. 97, 120-22 (2005) (applying the theory of compensating rights to the abortion funding decisions in *Maher v. Roe* and *Harris v. McRae* requiring the government to compensate for the coercive pressure designed to persuade poor women to choose childbirth over abortion).

113. *Harris*, 448 U.S. at 303.

114. *Id.* McRae also argued that the Hyde Amendment violated

> (1) the right of a woman, implicit in the Due Process Clause of the Fifth Amendment, to decide whether to terminate a pregnancy, (2) the prohibition under the Establishment Clause of the First Amendment against any 'law respecting an establishment of religion,' and (3) the right to freedom of religion protected by the Free Exercise Clause of the First Amendment.

Id. at 311.

The Supreme Court held:

> Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the

to abortions for women who relied on Medicaid, McRae wanted the court to recognize that poor mothers as a class represented a politically weak social group which had suffered prejudicial treatment due to the immutable characteristic of poverty, and this justified the designation of a suspect class with a higher standard of review.[115] Under such a heightened review, the validity of the statute depended on whether the Hyde Amendment could demonstrate that it furthered an essential government objective, was narrowly tailored to achieve such objective, and the means employed were the least restrictive to accomplish the intent of the legislation.[116] If, however, the Supreme Court determined that poor mothers were not a group in need of special recognition as a suspect class, the validity of the Hyde Amendment would be authorized if it could merely demonstrate that the enacted statute reasonably and rationally furthered any legitimate state objective.

In this case, the Supreme Court reiterated that poverty is not a suspect classification. The Supreme Court reasoned:

> An indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized by our cases. Nor does the fact that the impact of the regulation falls upon those who cannot pay lead to a different conclusion. In a sense, every denial of welfare to an indigent creates a wealth classification as compared to nonindigents who are able to pay for the desired goods

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> context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. To hold otherwise would mark a drastic change in our understanding of the Constitution. . . . To translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation would require Congress to subsidize the medically necessary abortion of an indigent woman even if Congress had not enacted a Medicaid program to subsidize other medically necessary services. Nothing in the Due Process Clause supports such an extraordinary result. Whether freedom of choice that is constitutionally protected warrants federal subsidization is a question for Congress to answer, not a matter of constitutional entitlement. Accordingly, we conclude that the Hyde Amendment does not impinge on the due process liberty recognized in [*Roe v.*] *Wade*.

Id. at 317-18.

115. *Id.* at 301-303. Although the District Court concluded that the Hyde Amendment discriminated against teenage mothers who were a suspect class, the Supreme Court concluded that the Hyde Amendment did not single out recipients based on age and that regardless of age, funding for abortions would only be allowed in cases of medical necessity, rape or incest. Therefore, in order to warrant judicial review under strict scrutiny, McRae would be required "to prove that Congress 'selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.'" *Id.* at 323 (quoting Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).

116. *See supra* note 18 and accompanying text.

> or services. But this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis.[117]

The Hyde Amendment did discriminate by distinguishing levels of benefits between two classes of poor mothers.[118] However, under the lowest level of judicial review, the Supreme Court concluded that the means employed (denying funds to pay for abortions for Medicaid recipients) was rationally and reasonably related to meet the state's legitimate interest.[119] The Supreme Court denied welfare recipients access to financially supported abortions (even though the state paid for expenses relating to childbirth) holding that "[a]n indigent woman who desires an abortion suffers no disadvantage as a consequence of [a state's] decision to fund childbirth."[120]

The Supreme Court added that the Constitution or any case interpreting constitutional rights (i.e., *Roe v. Wade*) did not require constitutional entitlement to financial resources, especially if the barrier (to exercise the constitutional right) was not one "of its own creation."[121] While the Supreme Court did recognize the fundamental right to choose to have a child, *McRae* made it clear that there was no right to abortion at the government's expense.[122] Within the emerging welfare policy, the choices that women could make with their bodies were heavily circumscribed by their access to financial resources.[123] Moreover, notwithstanding inter-generational dependency arguments,[124] the decision by the Supreme Court was wholly inconsistent with support of restrictive "family cap" legislation discussed earlier in *Dandridge* or even the dangerous and racially targeted eugenics arguments put forth to limit the number of illegitimate children decades earlier.[125]

D. Balance of Power Between the Judicial and Legislative Branches

On the surface, the next two cases, *Saenz v. Roe* and *Legal Services v. Velazquez*, seem to be decisions which aggressively protected the rights of welfare recipients and ruled in favor of their fundamental rights. Upon closer

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117. *Harris*, 448 U.S. at 323 (quoting Maher v. Roe, 432 U.S. 464, 470-71).

118. *See supra* note 27 and accompanying text.

119. *Harris*, 448 U.S. at 323.

120. *Id.* at 314.

121. *Id*. at 316.

122. *Id.* at 307-08.

123. *See generally* DOROTHY E. ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION AND THE MEANING OF LIBERTY (Vintage 1st ed. 1999).

124. *See, e.g.*, DANIEL PATRICK MOYNIHAN, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1965), *reprinted in* LEE RAINWATER & WILLIAM L. YANCEY, THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY 75 (1967).

125. Lisa Powell, Note, *Eugenics and Equality: Does the Constitution Allow Policies Designed To Discourage Reproduction Among Disfavored Groups?*, 20 YALE L. & POL'Y REV. 481, 502-07 (2002); Nicole Huberfeld, Recent Development, *Three Generations of Welfare Mothers Are Enough: A Disturbing Return to Eugenics in the Recent "Workfare" Law*, 9 UCLA WOMEN'S L.J. 98, 128 (1998).

examination, however, it is clear that these cases were actually struggles for power between the Supreme Court and Congress, where welfare recipients became unintended beneficiaries. Here it appears that the main goal was not to benefit welfare recipients but to maintain checks and balances between the legislative and judicial branches of government.

A perfect example of this power struggle is *Saenz v. Roe,*[126] a case which came on the heels of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) and the welfare reform agenda.[127] Thirty years prior to this case, in *Shapiro,*[128] the Supreme Court ruled that residency restrictions under AFDC violated the fundamental right to travel.[129] In order to comply with *Shapiro*, most states eliminated or altered the time period that indigent mothers had to wait in order to receive benefits.[130] Unlike the residency requirement in *Shapiro*—where the state denied benefits to eligible new residents unless they resided in the state for one year—California established a residency policy which created a sliding scale for benefits based on the time a family had lived in the state.[131] In an effort to escape abusive domestic relationships, the three women in *Saenz v. Roe* case moved to California.[132] Once in California they applied for AFDC and were informed that under California law if welfare benefits in California exceeded those in the prior state of residence, the recipients would receive a reduced amount for one year.[133] California argued unsuccessfully that unlike *Shapiro* the welfare policy here did not impose on the fundamental right to travel because individuals were not denied access to welfare benefits.[134] Further, financial restraint justified reducing welfare benefits.[135] And last, under the new welfare reform legislation Congress had granted the state the authority to set the residency requirement.[136]

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126. 526 U.S. 489 (1999).

127. Personal Responsibility and Work Opportunity Reconciliation Act, 42 U.S.C. § 1305 (2000).

128. Shapiro v. Thompson, 394 U.S. 618 (1969).

129. *Id.* at 638.

130. *See* A.P. van der Mei, *supra* note 37, at 821; Wisconsin had a sixty day waiting period. *Id*. at 821 (citing WIS. STAT. § 49.19(11m) (1992)). Minnesota reduced benefits of those who resided less than six months. *Id.* (citing MINN. STAT. § 256D.065 (1991)). In California benefits could not exceed those obtain in the prior state of residence. *Id.* (citing CAL. WELF. & INST. CODE § 11450.03 (1994)).

131. *Saenz*, 526 U.S. at 493. For background and analysis of the implications of the court decision in this case, *see* Erica K. Nelson, *Unanswered Questions: The Implications of* Saenz v. Roe *for Durational Residency Requirements*, 49 KAN. L. REV. 193 (2000) *and* Dan Wolff, *Right Road, Wrong Vehicle?: Rethinking Thirty Years of Right to Travel Doctrine:* Saenz v. Roe*, 119 S. Ct. 1518 (1999)*, 25 DAYTON L. REV. 307 (2000).

132. *Saenz*, 526 U.S. at 493.

133. *Id.* at 494.

134. *Id.* at 500.

135. *Id.* at 497.

136. 42 U.S.C. § 604(c) (1994).

PRWORA had in fact explicitly authorized states to limit welfare benefits to families who had resided in the state for less than one year.[137]

Re-affirming the "principles" established in *Shapiro,* the Supreme Court ruled that the residency restriction in California was unconstitutional and violated the fundamental and constitutional right to travel.[138] Supreme Court explained that:

> [T]he right to travel . . . embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.[139]

While the Supreme Court acknowledged that California's welfare policy did not impact a person's freedom of movement, it found that California's policy violated the right of new residents to be treated as equal citizens of the state.[140] Therefore, "[w]hat is at issue in this case, . . . [is] the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State."[141] The Supreme Court also warned that under the laws of the country, it is the citizens who make up the citizenry of a state and not the states who choose its citizens.[142] While great deference was given to state laws, these laws must also yield to the Constitution.[143] In its concluding remarks the Supreme Court noted that:

> Citizens of the United States, whether rich or poor, have the right to choose to be citizens "of the state wherein they reside." The States, however, do not have any right to select their citizens. The Fourteenth Amendment, like the Constitution itself, was, as Justice Cardozo put it, "framed upon the theory that the peoples of the

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137. *Id.*

138. *Saenz*, 526 U.S. at 499.

139. *Id.* at 500.

140. *Id.* at 502.

141. *Id.* For scholarly debates on the Supreme Court decision in *Saenz v. Roe*, *see* Tim A. Lemper, Recent Case, *The Promise and Perils of "Privileges or Immunities":* Saenz v. Roe*, 119 S. Ct. 1518 (1999)*, 23 HARV. J.L. & PUB. POL'Y 295 (1999); Kevin Maher, Comment, *Like a Phoenix from the Ashes:* Saenz v. Roe*, The Right to Travel, and the Resurrection of the Privileges or Immunities Clause of the Fourteenth Amendment,* 33 TEX. TECH L. REV. 105 (2001); Bradley A. Meyer, Case Comment, *Constitutional Law — Right to Travel: The United States Supreme Court Invalidates a Statute Requiring Welfare Recipients to Reside in a State For One Year Before Receiving Full Benefits* Saenz v. Roe*, 526 U.S. 489 (1999)*, 76 N. DAK. L. REV. 427 (2000).

142. *Saenz*, 526 U.S. at 511 (quoting Baldwin v. G.A.F. Seeling, Inc., 294 U.S. 511, 523 (1935)).

143. *Id.*

> several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."[144]

The Supreme Court further noted that while preserving state resources is a justifiable goal, California can not legitimately accomplish that goal by discriminating between citizens.[145] The Supreme Court concluded the following:

> [T]he question is not whether such saving is a legitimate purpose but whether the State may accomplish that end by the discriminatory means it has chosen. . . . But our negative answer to the question does not rest on the weakness of the State's purported fiscal justification. It rests on the fact that the Citizenship Clause of the Fourteenth Amendment expressly equates citizenship with residence: "That Clause does not provide for, and does not allow for, degrees of citizenship based on length of residence."[146]

The Supreme Court admonished that even if Congress had authorized California to impose residency restrictions:

> [Congressional] legislative powers are however limited not only by the scope of the Framer's affirmative delegation, but also by the principle "that they may not be exercised in a way that violates other specific provisions of the constitution." . . . Congress has no affirmative power to authorize the states to violate the Fourteenth Amendment and is implicitly prohibited from passing legislation that purports to validate any such violation.[147]

Essentially, this passage was one of the Supreme Court's clearest articulations of the limited powers of Congress. Here the Supreme Court stated that any attempt by Congress to allow states to set residency restrictions was in violation of the Constitution.[148] The Supreme Court's reading of the boundaries of the Constitution continually served as a powerful force in restricting the reach of Congressional decision-making in welfare policymaking.

Legal Services v. Velazquez further crystallized how the struggle between Congress and the Supreme Court unintentionally encouraged the Supreme Court to argue that welfare rights were a fundamental right. The Legal Service Corporation (LSC), which was created by the Legal Service Corporation Act,

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144. *Id*.

145. *Id.* at 506 (quoting Zoble v. Williams, 457 U.S. 55, 69 (1982)).

146. *Id*.

147. *Id.* at 508 (quoting Williams v. Rhodes, 393 U.S. 23, 29 (1968)).

148. *Id. See also* Shapiro v. Thompson, 394 U.S. 618, 641 (1969) (holding that "Congress is without power to enlist state cooperation in a joint federal-state program by legislation which authorizes the States to violate the Equal Protection Clause.") (citing Katzenbach v. Morgan, 384 U.S. 641, 651, n.10 (1966)).

provided funding to organizations that assisted lower income citizens with legal matters unrelated to criminal law.[149] In 1996 the Omnibus Consolidated Rescissions and Appropriations Act prohibited funds granted through the LSC to be used by litigants for purposes of "amending or otherwise challenging existing [welfare] law in effect on the date of the initiation of the representation."[150] In *Legal Services*, the LSC argued that this provision was invalid because the restriction denied welfare mothers the right to counsel in order to object to unconstitutional or conflicting welfare laws and policies.[151]

The Supreme Court held that it was unconstitutional for Congress to provide funds for legal counsel to welfare mothers on the condition that those funds were not used to challenge the authority of Congressional welfare policy.[152] Further, the Supreme Court found that it was impermissible for Congress to assume the traditional role of review afforded to the judicial branch.[153] Additionally, the Supreme Court noted that such a statute interfered with the "'unfettered interchange of ideas [used] for the bringing about of political and social changes desired by the people'" and therefore violated the fundamental rights of the First Amendment.[154] The Supreme Court continued:

> Interpretation of the law and the Constitution is the primary mission of the judiciary when it acts within the sphere of its authority to resolve a case or controversy . . . . "It is emphatically the province and the duty of the judicial department to say what the law is." An informed, independent judiciary presumes an informed, independent bar. Under § 504(a)(16), however, cases would be presented by LSC attorneys who could not advise the courts of serious questions of statutory validity. . . . By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power. Congress cannot wrest the law from the Constitution which is its source . . . .

149. 42 U.S.C. § 2996 (1974).

150. *Id.*

151. Legal Services v. Velazquez*,* 531 U.S. 533, 548 (2001); *see also* Rust v. Sullivan, 500 U.S. 173, 173 (1991) (upholding Section 1008 of the Public Health Service Act which precluded federal funds from being used to provide "counseling concerning, referrals for, and activities advocating abortion as a method of family planning, and require such projects to maintain an objective integrity and independence from the prohibited abortion activities by the use of separate facilities, personnel, and accounting records."); Arthur N. Eisenberg, *The Brooklyn Museum Controversy and the Issue of Government-Funded Expression*, 66 BROOK. L. REV. 275 (2000) (discussing government funded expression and first amendment principles).

152**.** *Velazquez*, 531 U.S. at 545-46.

153. *Id.*

154. *Id* at 548 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964)).

> The restriction imposed by the statute here threatens severe impairment of the judicial function.[155]

While *Legal Services* could be viewed as another victory for welfare mothers, the Supreme Court's opinion and strong dissent by Justice Scalia made it clear that welfare mothers had merely reaped the benefits of this more general debate over Congressional authority in a moment heavily governed by (when it came to the poor) a rising fiscal conservatism and personal responsibility. Consider, for example, Justice Scalia's dissenting opinion where he argued that an indigent welfare mother would not be deterred from bringing a lawsuit simply because she cannot be represented by the LSC, since the indigent welfare mother would simply have to *hire* a lawyer who did not work for LSC.[156] And even if it did mean fewer statutory challenges to welfare laws, "so what? . . . [T]he welfare recipient [is] in no worse condition than she would have been in had the LSC program never been enacted."[157] Theoretically this was true, since everyone had access to the Supreme Court. But, in the context of this situation and the reality of poverty, LSC would be the only feasible option for these welfare recipients.

Despite the Supreme Court's signature endorsement here of procedural due process, equal protection under the law, and fundamental rights, there are still other cases decided on welfare law which signal the Supreme Court's retreat from ruling in a manner which afforded welfare recipients a more complete granting of constitutional rights.[158] These legal cases would reorganize the working power relationship between the state and federal government.

II. FEDERALISM

One of the key features of the Constitution is its focus on federalism (or, its explanation of what role and exactly how much authority the federal government could take from the states).[159] Scholar Andrew McLaughlin defined federalism as a "system of political order in which powers of the government are separated and distinguished and in which these powers are distributed among governments, each government having its quota of authority and each its distinct sphere of activity."[160] Within the federalist relationship, the

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155. *Id.* at 545-46.

156. *Id.* at 556-57 (Scalia, J., dissenting).

157. *Id.*

158. *See, e.g.,* Van Lare v. Hurley, 421 U.S. 338 (1975); King v. Smith, 392 U.S. 309 (1968).

159. *See* WAYNE D. MOORE, CONSTITUTIONAL RIGHTS AND POWERS OF THE PEOPLE (1996); LAWRENCE FRIEDMAN, AMERICAN LAW: AN INTRODUCTION (1984); Richard E. Levy & Stephen R. McAllister, *Federalism in the 21st Century: Defining the Roles of the National and State Governments in the American Federal System*, 45 KAN. L. REV. 971, 971-72 (1997).

160. Andrew C. McLaughlin, *The Background of American Federalism,* 12 AM. POL. SCI. REV. 215, 215 (1918).

courts serve a regulating function, using the Constitution to mediate the relationship between state and national governments.[161]

However, the question still remains as to what specific role the Supreme Court has in this complex matrix of mediation. In the case of welfare law, the Supreme Court was the instrument used by working poor and specifically working class Black women to challenge acts of discrimination implemented through state policies.[162] When it came to distribution of welfare funds, state and local government officials were paternalistically involved in the lives of low-income Black mothers.[163] As in larger Civil Rights struggles, the call for "states' rights" became the perfect foil to implement and enforce "separate and unequal" under the law.[164] In most cases, without the intervention of the Supreme Court Black mothers were "at greater risk of being discriminated against because of personal and institutional race bias."[165]

In the context of welfare and federalism, it was also clear that the Supreme Court was limited in what could be offered by its legal decisions. Scholar Polyvois G. Polyviou notes, "[t]he Constitution does not provide judicial remedies for every social and economic ill."[166] However, the Supreme Court's role did regulate "appropriate" levels of power between state and federal governments. Under different theories of federalism, the federal or state government may hold stronger control over issues relating to, for example, welfare, health, and/or education.[167] Therefore, decisions by the Supreme Court fluctuate between ideas of "cooperative federalism" (preference for a decentralized structure of government where state and federal institutions work together to regulate policy implementation)[168] to ideas of "new federalism" (where federal government takes a hands off approach on matters relating to

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161. Richard B. Stewart, *Federalism: Allocating Responsibility Between the Federal and State Courts*, 19 GA. L. REV. 917, 918 (1985).

162. Levy & McAllister, *supra* note 159.

163. *See* DEBORAH WARD, THE WHITE WELFARE STATE: THE RACIALIZATION OF U.S. WELFARE POLICY (2005); JILL QUADAGNO, THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY (1994); NEUBECK & CAZENAVE, *supra* note 31.

164. KEVIN KRUSE, WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM (2007).

165. Risa E. Kaufman, *supra* note 80, at 15.

166. POLYVIOS G. POLYVIOU, THE EQUAL PROTECTION OF THE LAWS 217 (1980).

167. For a discussion of cooperative federalism, see Philip J. Weiser, *Cooperative Federalism and Its Challenges*, 2003 MICH. ST. DCL L. REV. 727, 729 (2003).

> A critical advantage of a cooperative federalism approach is that it sets forth a basic federal framework while allowing states to experiment within certain contours . . . respecting long-standing state interests and autonomy . . . facilitating local participation and greater accountability for public policies . . . allowing for local experimentation and interstate competition . . . and . . . relying on the economy of local agencies (rather than creating or expanding a national bureaucracy.)

Id.

168. Weiser, *supra* note 167, at 730-31.

state governance).[169] This section will examine some Supreme Court decisions through the lens of federalism and see how changes in the inquiry of federal-state relationships affected welfare law decisions.

The "War on Poverty," officially waged in August 1964, was an ambitious legislative effort to address the problem of a persistent racialized poverty in America.[170] Over the next decade, the federal government (in conjunction with state and local governments, non-profits, and grassroots organizations) created a new institutional infrastructure for antipoverty and civil rights action.[171] Characterized alternatively as times of consensus and controversy,[172] this antipoverty and civil rights agenda highlighted growing ideological and racial tensions in American society. Congress felt discomfort in the realization that after all their declarations of equality, it was evident that some citizens were "more equal" than others.[173]

While there was national consensus building around the idea that poverty was a problem in need of eradication or at least deserving of vigorous attention, there was less agreement in Congress as to the cause and subsequent solution to the problem.[174] The increase in welfare rolls after the initiation of the *War on Poverty* agenda encouraged many states to experiment with regulations to control the growth and cost of their welfare programs.[175] Many of these restrictive measures— declaring a home "unsuitable" in order to deny benefits, denying benefits under the "man-in-the-house" rule, and establishing residency requirements—pre-dated the *War on Poverty* agenda and were heavily enforced against poor Black mothers in particular.[176] Some state legislation declared that, for example, men who had sexual relationships with mothers on welfare were financially responsible for them and their children.[177] These "substitute parent" regulations removed the mother from the roll regardless of whether the "boyfriend" contributed to that family's income.[178] The following cases discuss

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169. Irving L. Horowitz, *From the New Deal to the New Federalism: Presidential Ideology in the U.S. from 1932 to 1982*, 42 AM. J. ECON. SOC. 129, 131 (1983).

170. ALLEN J. MATUSOW, THE UNRAVELING OF AMERICA: A HISTORY OF LIBERALISM IN THE 1960S 116-24 (1984).

171. FELICIA KORNBLUH, THE BATTLE FOR WELFARE RIGHTS: POLITICS AND POVERTY IN MODERN AMERICA (2007); PREMILLA NADASEN, WELFARE WARRIORS: THE WELFARE RIGHTS MOVEMENT IN THE UNITED STATES xiv-xvi (2004).

172. KORNBLUSH, *supra* note 171; NADASEN, *supra* note 171.

173. ALICE O'CONNOR, POVERTY KNOWLEDGE: SOCIAL SCIENCE, SOCIAL POLICY, AND THE POOR IN TWENTIETH-CENTURY U.S. HISTORY (2001).

174. *Id.*

175. NEUBECK & CAZENAVE, *supra* note 31, at 59.

176. GERTRUDE SCHAFFNER GOLDBERG & SHEILA D. COLLINS, WASHINGTON'S NEW POOR LAW: WELFARE REFORM AND THE ROADS NOT TAKEN, 1935 TO THE PRESENT 20 (2000). Goldberg and Collins argued that most restrictions, such as the "suitable home" requirements were attempts by states to deny aid to poor Black women and children. *Id.*

177. Nineteen states and the District of Columbia had man-in-the-house rules. King v. Smith, 392 U.S. 309, 337 (1968) (Douglas, J., concurring).

178. *Id.* at 314; NEUBECK & CAZENAVE, *supra* note 31, at 60.

these types of regulations and reveal that the Supreme Court articulated and maintained a dominant federal government presence over welfare legislation

King v. Smith challenged the constitutionality of state restrictions that deviated from the federal mandates outlined in the SSA.[179] As one of the first cases to reach the Supreme Court, *King* came through the federal courts because state courts were hostile to the interest of the poor and especially Black people, as the primary beneficiaries of the increased welfare rolls during the late 1960s.[180] Mrs. Sylvester Smith, a Black mother of four children, received AFDC to supplement the sixteen to twenty dollars she earned weekly working as a waitress.[181] Her welfare benefits were terminated because it was alleged that "Mr. [Willie E.] Williams came to her home on weekends and had sexual relations with her."[182] Based upon this description of Mrs. Smith and Mr. Williams's relationship alone, Mr. Williams was classified as a "substituted father."[183] Alabama's regulation denied benefits to families who had a "substitute father."[184]

Alabama argued that its motivations for the "substitute father" rule were to preserve the spirit of morality and worthiness embodied in its welfare law provisions.[185] Further, Alabama stressed that it was unfair to allow sexually active, unmarried and immoral mothers who refused to marry to receive benefits over those married mothers in the same economic situations.[186] Unimpressed by this rationale, the Supreme Court concluded that Alabama's standards of morality were clearly outdated and concluded that "it is simply inconceivable . . . that Alabama is free to discourage immortality and illegitimacy by the device of absolute disqualification of needy children."[187]

In a unanimous decision, the Supreme Court relied on the doctrine of "cooperative federalism" to knock down the "substitute father" rule.[188] Under

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179. *King*, 392 U.S. at 309.

180. DAVIS, *supra* note 6, at 60.

181. *King*, 392 U.S. at 315.

182. *Id*.

183. *Id.* Under substitute father provisions, otherwise eligible mothers were removed from the rolls if the social worker concluded that they were inappropriately associating with a man or if a man was found inside the recipient's home. Such regulations would be enforced through frequent unannounced nighttime raids. *See* Tonya L. Brito, *From Madonna to Proletariat: Constructing a New Ideology of Motherhood in Welfare Discourse*, 44 VILL. L. REV. 415, 423 n.51 (1999).

184. *King*, 392 U.S. at 315. In 1964, Governor George Wallace approved the substitute father rule which removed over 14,000 Black children from the welfare rolls in Alabama. William E. Forbath, *Not So Simple Justice: Frank Michelman on Social Rights*, 39 TULSA L. REV. 597, 606 (2004).

185. *King*, 392 U.S. at 320.

186. *Id.* at 320-27.

187. *Id.* at 325. "[S]ubsequent developments clearly establish that these state interests are not presently justifications for AFDC disqualification. Insofar as this or any similar regulation is based on the state's asserted interest in discouraging illicit sexual behavior and illegitimacy, it plainly conflicts with federal law and policy." *Id*. at 320.

188. *Id.* at 316.

the doctrine of "cooperative federalism" states were free to administer their respective AFDC programs to reflect whatever goals and philosophies needed to assist and serve the poor.[189] However, state programs were still bound by federal-state financing arrangements, and state standards had to be consistent with the Constitution as well as federal regulations and statutes. The Supreme Court determined that Alabama's definition of parent conflicted with the SSA, and "any state law or regulation inconsistent with such federal terms and conditions is to that extent invalid."[190] Therefore, in order to continue to receive money from the federal government to assist in financing its AFDC programs, the state could not impose a man-in-the-house rule.[191]

The *King* case demonstrates a conceptual shift in Supreme Court welfare ideology toward cooperative federalism, where the federal government conditioned funding according to how state governments regulated and legislated their AFDC programs in accordance with federal (constitutional) concerns. Moreover, under this theory, the Supreme Court concluded that states had an obligation (if they accept federal funding) to furnish aid to all eligible poor.[192] *King* signaled expanded control of the federal government over state policies and practices. The *King* doctrine was also expanded to exclude a live-in boyfriend[193] as well as a roommate.[194]

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189. *See id.* The AFDC program is an example of cooperative federalism. *See* Alexia Pappas, *Welfare Reform: Child Welfare or the Rhetoric of Responsibility*, 45 DUKE L.J. 1301, 1307 (1996); Stephen D. Sugarman, *Welfare Reform and the Cooperative Federalism of America's Public Income Transfer Programs*, 14 YALE J. ON REG. 123, 124 (1996) (Symposium Issue).

190. *King*, 392 U.S. at 333 n.34.

191. *Id.* at 309. Justice Douglas argued that the case should have been decided on equal protection grounds because Alabama had the option to reject federal funding and continue imposing the man-in-the-house eligibility restriction. *Id.* at 320, 326-27, 332-33 (Douglas, J., concurring).

192. *Id.* at 334.

193. *Id.* at 335-36. In *Lewis v. Martin* decided two years after *King*, the Supreme Court ruled that California could not declare a non-adopting live-in boyfriend (who had no legal obligation to provide financial assistance to the dependent child) a breadwinner ". . . unless the bread is actually set on the table." Lewis v. Martin, 397 U.S. 552, 559 (1970). The *Lewis* case can be distinguished from *King* in several respects. First, unlike in *King*, California did not remove the welfare mother from the welfare roll, but instead included the live-in boyfriend as a breadwinner and reduced the amount she would receive. *Id.* Second, the boyfriend in this case assumed the role of spouse or stepfather whereas the boyfriend in *King* did not. *Id.* The Supreme Court invalidated the California statute because it was in conflict with the United States Department of Health Education and Welfare (HEW) regulation. *Id.* Accordingly, it was impermissible for a state to use the income of a live-in boyfriend or a non-adopting stepfather in calculating the need of the child unless the live-in boyfriend had a legal obligation to provide such support. *Id.* at 557, 559-60.

194. King, 392 U.S. at 335-36. *Van Lare v. Hurley* also addressed the issue of legal obligation in providing financial assistance for a needy child. Van Lare v. Hurley, 421 U.S. 338, 346 (1975). In *Van Lare*, the Supreme Court invalidated New York's statute that used the income generated from a roommate/lodger to be considered for determination of benefits. *Id.* Briefly, the Supreme Court reiterated that it was inconsistent with the SSA to

Under cooperative federalism, the state and federal governments jointly administered, implemented, and financed some areas of social welfare (i.e. AFDC, Medicaid, education). If the federal government provided grants to the state for a particular program, the state had considerable latitude in developing policies and regulations for such programs. However, if the state's statutes in relationship to the granted program were in conflict with the same federal statute, the Supreme Court could intervene.[195] The Supreme Court invalidated a state statute if it failed to further the federal statute's objective for the particular program.[196] In this context, the federal objective of the Social Security Act (Title IV) was to provide assistance to all *eligible* poor.[197] Two cases that are perfect examples of the Supreme Court's preemptive powers and exercise of cooperative federalism are *Carleson v. Remillard*[198] and *Townsend v. Swank.*[199]

In *Carleson*, the Supreme Court preempted a statute which was in clear conflict with the SSA.[200] Here, federal legislation required each state to provide aid "with reasonable promptness to all eligible individuals."[201] Nancy Remillard had one child and her husband was deployed to fight in Vietnam.[202] The state of California denied aid because in order to be entitled to cash assistance the absence of a parent had to be considered "continued absence," and under California regulation "absence occasioned by a father's military duties can never be 'continued.'"[203] The state's regulation defined "continued absence" in a narrow way that limited the conditions of eligibility.[204] However, the Supreme Court read the federal statute broadly and concluded that a state was forbidden from denying AFDC benefits to a child because the parent's absence was due to military service.[205] In fact, Congress argued that the

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use the income of a person who was not the natural or legally obligated supporter of a needy child as justification to reduce welfare benefits. *Id.*

195. *See, e.g.,* Saenz v. Roe, 526 U.S. 489, 506 (1999) (quoting Zoble v. Williams, 457 U.S. 55, 69 (1982)).

196. *Id.*

197. *See* Dandridge v. Williams*,* 397 U.S. 471, 480 (1970).

198. 406 U.S. 598 (1972); *see generally* Larry Catá Backer, *Poor Relief, Welfare Paralysis, and Assimilation*, 1996 UTAH L. REV. 1 (1996) (examining constitutional cases under a theory of mobile immobility of poor relief systems).

199. 404 U.S. 282 (1971).

200. 42 U.S.C. §§ 402(a)(10), 602 (2000).

201. *Carleson*, 406 U.S. at 600.

202. *Id.* at 599.

203. Remillard v. Carleson*,* 325 F. Supp. 1272, 1272-73 (N.D. Cal. 1971), *aff'd*, 406 U.S. 598 (1972).

204. *Id.*

205. *Carleson,* 406 U.S. at 604. It is significant that the law was changed in amendments to the Social Security Act relating to the AFDC and ADC programs in 1982. Pub. L. No. 97-248, 96 Stat. 317 (1982) (codified as amended at 42 U.S.C. § 406(a)(1) (1982)). The amendment read that a parent whose absence is "occasioned *solely* by reason of the performance of active duty in a uniformed service of the United States is *not* considered absent from the home." *Id.* After 1982, therefore, military parents were no longer eligible for AFDC. *Id.*

eligibility requirements of parental "continued absence" included absence attributed to any reason.[206] Unfortunately, this decision made no provision for parents who were "provisionally absent" due to unemployment or simply because of poverty, but the Supreme Court did recognize in *Townsend v. Swank* that not only were absent parents with children eligible, but also families with children under the age of twenty continuing studies in colleges and universities.[207]

In *Townsend*, plaintiff Georgia Townsend was denied benefits because her child was enrolled in college.[208] In the state of Illinois, mothers of poor children between the ages of eighteen and twenty were eligible to receive benefits so long as that child was enrolled in high school.[209] However, if the child was enrolled in college, the mother was no longer eligible for AFDC benefits.[210] Under SSA, Townsend would have been eligible for benefits.[211] In order to disqualify Townsend from the state AFDC program, Illinois had the discretion to opt out of the federal AFDC program. Since Illinois did participate in AFDC it could set standards of eligibility to widen the requirements without breaching their obligation under the federal-state financing arrangement.[212] If Illinois wanted to tighten eligibility standards, however, they had to adhere to the minimum parameters already established by the SSA.[213] Illinois argued that Congress authorized such disparities in treatment among poor eligible children and this restriction was needed in order to preserve their limited welfare resources.[214] However, the Supreme Court, unmoved by economic concerns, noted that states may not pass laws which "are inconsistent with the [Social Security Act] and that welfare must be furnished 'to all eligible individuals.'"[215]

The Supreme Court also found no support for Illinois' argument that Congress allowed states to "discriminate between these needy dependent

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206. *Carleson,* 406 U.S. at 601-02. HEW's regulations state:

> Continued absence of the parent from the home constitutes the reason for deprivation of parental support or care when the parent is out of the home, the nature of the absence is such as either to interrupt or to terminate the parent's functioning as a provider of maintenance, physical care, or guidance for the child, and the known or indefinite duration of the absence precludes counting on the parent's performance of his function in planning for the present support or care of the child. If these conditions exist, the parent may be absent for any reason, and he may have left only recently or some time previously.

Id.

207. 404 U.S. 282, 286-88 (1971).

208. *Id.* at 283-84.

209. *Id.*

210. *Id.*

211. *Id.* In 1965 Congress amended the SSA which made eighteen to twenty-year-olds eligible for AFDC if they attended a high school, vocational school, college or university. H.R. 6675, 89th Cong. (1965) (enacted).

212. *Townsend*, 404 U.S. at 285.

213. *Id.*

214. *Id.* at 291.

215. *Id.* at 286 (quoting King v. Smith, 392 U.S. 309, 333 n.34).

children solely upon the basis of the type of school attended."[216] At most, as Chief Justice Burger noted in the concurring opinion, states could only discriminate among classes of eligible poor children if it elected to forego federal funding.[217] The Supreme Court stated:

> [I]n the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause.[218]

Accordingly, Illinois could not impose additional restrictive criteria beyond those set forth in the SSA.[219] *Townsend* is significant because the Supreme Court kept the door open for considering welfare as a legitimate claim even if the case did not establish a constitutional right to welfare. Although *Townsend* demonstrated how far federal authority could reach under cooperative federalism, not all cases involving cooperative federalism were decided against states' rights.

The 1971 Supreme Court decision of *Wyman v. James* fits the cooperative federalist frame[220] and yet embodies perhaps one of the most sweeping encroachments on welfare rights. *Wyman* authorized social workers to conduct "consent" home visits of a welfare recipient's home to ensure eligibility requirements were met with threat of aid suspension in the face of noncompliance.[221] Barbara James, a welfare recipient for two years, received notice that she had to submit to a home visit by a social worker.[222] Ms. James refused to allow the social worker to visit her home, but was willing to provide any proof of eligibility required by the law.[223] The social worker did not need any particular reason to perform the search which could be performed without a warrant.[224] The Supreme Court first concluded that since no search had in fact occurred, this case was not within the purview of those rights considered protected by the Fourth Amendment.[225] The court held:

> This natural and quite proper protective attitude, however, is not a factor in this case, for the seemingly obvious and simple reason that we are not concerned with any search by the New York Social

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216. *Id.* at 287.
217. *Id.* at 292 (Burger, C.J., concurring).
218. *Id.* at 286.
219. *Id.*
220. 400 U.S. 309 (1971).
221. *Id.* at 326.
222. *Id.* at 314.
223. *Id.*
224. *Id.* at 317.
225. *Id.* at 318.

> Service agency in the Fourth Amendment meaning of the term. . . . [T]he visitation in itself is not forced or compelled . . . if consent to the visitation is withheld, no visitation takes place. . . . There is no entry of the home and there is no search. [226]

In ruling as it did, the Supreme Court assumed that there was no coercion involved in the decision to grant or withhold consent.[227] The Supreme Court further noted that even if it had concluded that the search by a caseworker was akin to a search by a law enforcement official for a criminal investigation, the search would not be unreasonable under the Fourth Amendment.[228] The Supreme Court decided that the privacy interest of the recipient affected by a search is minimal and that the visits were reasonable to determine the recipient's eligibility.[229] The visits were not part of any criminal investigation, the recipient was not an actual or suspected perpetrator of a crime and caseworkers were not "uniformed authorit[ies]."[230] Therefore, these searches were "reasonable administrative tool[s]" to ensure compliance with AFDC regulations.[231]

The *Wyman* decision, which had negative Fourth Amendment implications, served as evidence of the Supreme Court's new resistance to defining welfare as a property right.[232] The Supreme Court remarked, "one who dispenses purely private *charity* naturally has an interest in and expects to know how his *charitable funds* are utilized and put to work."[233] The Supreme Court's support of states' rights arguments within a federalist logic was striking in this case because it did not observe that the state had exceeded its boundaries concluding that the state had not overreached in a way that generated conflict within the federal law or the Constitution.

Between the decisions reached in *King* and *Townsend*, the Supreme Court had defined a system that allowed the federal government flexibility in determining state AFDC regulations solely on the basis that they provided most of the money.[234] This system did not allow states to create rules that were more

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226. *Id*. at 317-18; *see also* Erik G. Luna, *Welfare Fraud and the Fourth Amendment*, 24 PEPP. L. REV. 1235, 1254-80 (1997) (discussing various types of searches that can be performed on a welfare recipient's home without violating the Fourth Amendment).

227. *Wyman*, 400 U.S. at 317.

228. *Id.* at 318 (emphasis added).

229. *Id.* at 318-19.

230. *Id.* at 322-23.

231. *Id.* at 326.

232. For an alternative discussion of the Supreme Court theme in *Wyman v. James*, *see* Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499, 1522-25 (1991).

233. *Wyman,* 400 U.S. at 319 (emphasis added).

234. Townsend v. Swank*,* 404 U.S. 282, 291 (1971); King v. Smith, 392 U.S. 309, 316 (1968).

restrictive and hence struck down many state regulations.[235] But because the Court also recognized at least the limited validity of state regulations, these cases helped give rise to a new Supreme Court interpretive variation most generally understood as "new federalism."[236] The rubric of "new federalism" institutionalized deference to the state by both Congress and the Supreme Court, for legislating in areas that had historically been controlled by the federal government.[237]

New York State Department of Social Services v. Dublino represents one of the clearest articulations of the Supreme Court's move away from cooperative federalism and into the domain of new federalism and a full endorsement of states' rights.[238] In *Dublino,* it was clear that the state and federal legislation were in conflict, but instead of invalidating the state statute, the Supreme Court found that the Work Incentive Program (WIN) did not forbid the "Work Rules" enacted by the state of New York.[239]

In 1971, the state of New York enacted "Work Rules."[240] Work Rules required that all recipients who can work must "report every two weeks to pick up their assistance checks in person; to file every two weeks a certificate . . . [stating they could not find] suitable employment; to report for requested employment interviews; to report to the public employment office the result of a referral for employment; and not to fail willfully to report for suitable employment, when available."[241] If a recipient failed to perform these requirements under the work rules, welfare benefits were discontinued.[242] By contrast, the federal government's Work Incentive Program (WIN) did not require welfare recipient to demonstrate an effort to seek employment as a condition for receiving benefits.[243] The plaintiffs, most of whom were Black mothers, challenged the validity of Work Rules in light of the WIN legislation.[244] The Supreme Court revitalized states' rights in its decision and reiterated the theory of "new federalism" for solving conflicts over welfare policy legislation.[245] While the New York work requirement was in clear conflict with the WIN legislation, the Supreme Court found persuasive the state's argument that welfare recipients should demonstrate their efforts to find

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235. *See* Goldberg v. Kelly, 397 U.S. 254, 261 (1970); Shapiro v. Thompson, 394 U.S. 618, 633 (1969); King v. Smith, 392 U.S. 309, 320-21 (1968).

236. *See* Horowitz, *supra* note 169, at 131.

237. 413 U.S. 405 (1973).

238. *Id.* at 412-13; *see also* Judith Olans Brown, Lucy A. Williams & Phyllis Tropper Baumann, *The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor*, 6 UCLA WOMEN'S L.J. 457, 492 (1996).

239. *N.Y. State Dep't of Soc. Serv.,* 413 U.S. at 411-12.

240. *Id.* at 405.

241. *Id.* at 408-09.

242. *Id.* at 409.

243. Dublino v. N.Y. State Dep't of Soc. Serv., 348 F. Supp. 290, 295 (W.D.N.Y. 1972), *rev'd*, 413 U.S. 405 (1973).

244. *Id.*

245. *N.Y. State Dep't of Soc. Serv.,* 413 U.S. at 413.

work and demonstrate a profile of employability; and concluded that the statute did not present a real obstacle to the goals and philosophies of the federal program.[246]

Thus, despite the existence of the federal work incentive scheme, the Supreme Court ruled that there was no "clear manifestation" of any Congressional intent to block state policies that required recipients to demonstrate efforts to work.[247] Under new federalism, the Supreme Court was free to interpret how federal statutes—particularly those that favored recipients—were implemented by the state.

Jefferson v. Hackney serves as another example of the new federalist approach, where the Supreme Court decided that the state of Texas had the power to distribute its welfare resources unevenly.[248] The Texas Constitution provided that the state could participate in any federal welfare programs, but could only allocate a maximum of $80,000 to fund the entire program.[249] This included funding for AFDC, Old Age Assistance (OAA),[250] Aid to the Blind (AB),[251] and Aid for the Permanently and Totally Disabled (APTD).[252] In order to efficiently use the funds, Texas calculated the financial need of each individual recipient who applied for the various programs.[253] If the person was handicapped and eligible for a welfare program other than AFDC, that individual received ninety-five to one hundred percent of the calculated financial need.[254] However if the person was eligible for AFDC, that person only received fifty percent of their calculated financial need.[255] This resulted in a significant decrease in benefits paid to the predominately Black AFDC program as compared to the predominately White OAA, AB, or APTD programs.[256]

In upholding this budgetary scheme, the Supreme Court confirmed, "there is no question that states have considerable latitude in allocating their AFDC resources, since each state is free to set its own standards of need and to determine the level of benefits by the amount of funds it devotes to the

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246. *Id.*; *see also* Brown et al., *supra* note 238, at 491-95 (arguing that the Supreme Court's decision in *Dublino* created legal doctrine which contributed to the oppression of women, particularly in the context of welfare and paid labor).

247. *N.Y. State Dep't of Soc. Serv.*, 413 U.S. at 413, 414-15 (quoting Schwartz v. Texas, 344 U.S. 199, 202-03 (1952).

248. Jefferson v. Hackney, 406 U.S. 535, 541 (1972); *see also* Marion Buckley, *Eliminating the Per-Child Allotment in the AFDC Program*, 13 LAW & INEQ. J. 169, 187 (1994) (providing an overview of AFDC and discussing the effects of Supreme Court decisions on per-child allotment legislation).

249. *Jefferson*, 406 U.S. at 537, 537 n.1.

250. Grants to States of Old-Age Assistance for the Aged, 42 U.S.C. § 301 (2000).

251. Grants to States for Aid to the Blind, 42 U.S.C. § 1201 (repealed 1974).

252. Grants to States for Aid to the Permanently and Totally Disabled, 42 U.S.C. § 1352 (1996); *Jefferson*, 406 U.S. at 537 n.2.

253. *Jefferson*, 406 U.S. at 537.

254. *Id.* at 537, 537 n.3.

255. *Id.*

256. *Id.*

program."[257] This case demonstrated a clear ideological shift that veered towards complete deference to "states' rights" in ways that had direct and dire implications for specifically working-class Black women navigating welfare.

Federalism continues to be a central lens through which current welfare cases are decided by the Supreme Court.[258] However, the emerging new federalist approach to welfare demonstrates the growing significance of fiscal concern as a legitimate claim and the rise of fiscal conservatism as a viable framework for endorsing a state's rights argument in welfare law and policy decisions.

III. FISCAL CONSERVATISM

Advocates of a fiscally conservative polity were generally critical of allocating public funds to poverty-related social programs (as opposed to tax subsidies for the wealthy or defense spending).[259] Therefore, the rationale of fiscal conservatism became a powerful interpretive framework through which states adjusted welfare regulations to limit the welfare rolls.[260] Supreme Court decisions were more directly shaped by economically conservative approaches for evaluating the use value or even cost-benefits of social programs for the poor, perhaps influenced by three other developments: a larger backlash against the perceived politics of the 1960s, the ascendancy of centrist democratic and right wing republican governments, and a growth in national deficit. When recipients and their advocates turned to the Supreme Court to challenge restrictive state welfare regulations, most states argued that regulations were needed to control their rising fiscal budgets.[261] For example, in the *Shapiro* decision, the state of Connecticut argued that the statutory residency

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257. *Id.* at 541 (quoting King v. Smith, 392 U.S. 309, 318-19 (1968)).

258. While *Jefferson* solidifies a new federalist outlook, it is also worth mentioning here that this case could also have been explored through the lens of the Equal Protection Clause. One of the main arguments advanced by the appellants was that it was unfair to provide the predominantly white advanced aged and the disabled with higher payments than the predominately Black AFDC recipients. *Id.* at 546-47. Dispensing funds in this manner was not only unfair on its face but also distributed along racial lines. The Supreme Court, in one line dismissed these arguments as "unproved allegations of racial discrimination" and instead admonished that there is no federal constitutional or statutory requirement that relief provided under AFDC or OAA or AB or APTD be treated exactly alike. *Id.* And with this, the decision signaled the end of any interpretation of welfare by the Supreme Court as a constitutional right.

259. *See generally* MICHAEL K. BROWN, RACE, MONEY, AND THE AMERICAN WELFARE STATE (1999); MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA (rev. ed. 1996); CHARLES MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980 (2d ed. 1994); FRANCIS FOX PIVEN AND RICHARD CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE (Vintage Books, 2d ed. 1993); MIKE DAVIS, PRISONERS OF THE AMERICAN DREAM: POLITICS AND ECONOMY IN THE HISTORY OF THE U.S. WORKING CLASS (1986).

260. *See, e.g.,* Lyng v. UAW, 481 U.S. 368, 372 (1987); Shapiro v. Thompson, 394 U.S. 618, 623 (1969).

261. *Shapiro*, 394 U.S. at 623.

requirement was necessary "to protect its fisc[al concerns] by discouraging entry of those who come needing relief."[262] Unless these arguments were in direct conflict with the SSA or violated a fundamental right (as in *Shapiro*), the Supreme Court gave deference to the state.

In the fiscally conservative era, states used various policy tactics to keep their welfare budgets and rolls low, including child exclusion laws (also referred to as the "family cap" rules),[263] "man in the house" rules,[264] and residency requirements.[265] As discussed earlier, the "family cap" rule discouraged mothers from continuing to have more children, reportedly in order to receive increased welfare payments.[266] Within the larger policy agenda of centrist Democratic President Bill Clinton, 1996 set the stage to "end welfare as we know it," a policy approach strengthened by the backdrop of new litigation. The Supreme Court retreated from recipient advocacy and most policy decisions regarding the administration of welfare benefits were left to the discretion of the state within the "new federalist" philosophy.

Despite scarce rulings, a 1995 case decided during the Clinton Administration foreshadowed the fiscally conservative parameters of future welfare policy.[267] In *Anderson v. Edwards*, Verna Edwards was caring for her granddaughter while receiving benefits from AFDC on her granddaughter's behalf.[268] In order to prevent her two grandnieces from going into foster care, Ms. Edwards also began caring for them.[269] The grandnieces were also receiving AFDC and Ms. Edwards was not under any legal obligation to care for any of the children.[270] In 1984, Congress amended the SSA and counted parents, children, and grandparents who lived together as one family unit for payment purposes under AFDC.[271] Subsequently, California also changed its law to include all extended family living together as a part of one single family unit for purposes of calculating AFDC benefits.[272] Under the new rule, when the state calculated the financial need of a family, it included all money coming

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262. *Id.*

263. *See* Dandridge v. Williams, 397 U.S. 471, 473 (1970) (sustaining a Maryland AFDC regulation under which "the standard of need increases with each additional person in the household, but the increments become proportionately smaller").

264. King v. Smith, 392 U.S. 309, 316 (1968); *see also* discussion *supra* Part II.

265. *See generally, Shapiro*, 394 U.S. at 618 (invalidating a statutory provision denying welfare assistance to residents of a state who had not resided within that jurisdiction for at least one year).

266. *See Dandridge*, 397 U.S. at 473-74.

267. Anderson v. Edwards, 514 U.S. 143 (1995).

268. *Id.* at 148.

269. Respondent's Brief on the Merits at 8-10, Anderson v. Edwards, 514 U.S. 143 (1994) (No. 93-1883).

270. *Id.* at 6.

271. Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2640(a), 98 Stat. 1145 (codified as amended at 42 U.S.C. § 602(a)(38)-(39) (1991)).

272. *Anderson*, 514 U.S. at 146-48.

into the home from any sources and reduced the AFDC check accordingly.[273] As a result of this change in law, Ms. Edwards' AFDC payment was reduced by over $200.00.[274]

The Supreme Court's ruling in *Anderson* affirmed states' rights to implement family reduction plans if all children, regardless of kinship or obligations to financially support, lived in the same household.[275] Under federal AFDC standards, children received higher benefits if they were considered children of separate family units that simply live together (a difference of $200).[276] However, in order to save money and to establish lower benefit levels, the state of California grouped all children living in the same household as one single family.[277] This ruling was emblematic of the Supreme Court's move from a new federalist to a fiscal conservative approach, making the state's budgetary concerns for scaling back welfare expenditures a legitimate consideration within the bounds of Supreme Court decisions about welfare legislation.[278]

In fact, a real conflict did exist between state and federal guidelines for family welfare benefits. While federal benefits approved of a reduction scheme similar to the one adopted by California, a state was only allowed to use the income of the recipient in order to calculate his or her financial need.[279] In *Anderson*, by combining family units based upon residency, California was able to consider the income of anyone in the home to calculate the financial need, even if everyone in the home did not share that income.[280] The Supreme Court ignored this clear conflict with SSA in favor of state fiscal concerns. Consequently, instead of preempting state statutes via federal guidelines, the Supreme Court held that the state's legislation was not inconsistent with the *philosophy* of the federal program.[281] States could, therefore, control their welfare budgets by grouping children cared for by the same person into a single family unit.[282]

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273. *Id.* at 154.

274. *Id.* Prior to the consolidated family unit rule, Ms. Edward's received $341 for her granddaughter and $560 for her grandnieces. *Id.* at 148; *see also* Irma S. Jurado, Anderson v. Edwards*: Can Two Live More Cheaply Than One? The Effect of Cohabitation on AFDC Grants*, 26 GOLDEN GATE U. L. REV. 301, 322 (1996).

275. *Anderson,* 514 U.S. at 157-58.

276. *Lukhard v. Reed,* 481 U.S. 368, 371 (1987). For a limited discussion of Justice Scalia's statutory interpretations in *Lukhard v. Reed*, *see* Stephen A. Plass, *The Illusion and Allure of Textualism*, 40 VILL. L. REV. 93, 117-19 (1995) *and* Elizabeth A. Liess, Comment, *Censoring Legislative History: Justice Scalia on the Use of Legislative History in Statutory Interpretation*, 72 NEB. L. REV. 568, 581-82 (1993).

277. *Anderson*, 514 U.S. at 146-47.

278. *See Anderson*, 514 U.S. at 152.

279. Respondent's Brief on the Merits, *supra* note 269, at 12.

280. *Anderson*, 514 U.S. at 146-47.

281. *See Anderson*, 514 U.S. at 143.

282. *Id.* at 145-46.

The clear implication of the *Anderson* case was that conservative policy-makers had retreated from the policy of providing for America's poor, using monetary caps to preserve fiscal budgets and put the poor on the road to work. Other examples of this fiscally conservative approach are represented in the significant cases, *Lukhard v. Reed*[283] and *Lyng v. UAW*.[284]

The fiscal conservative approach unabashedly initiated a purely pro-capitalist (as opposed to labor) stance on welfare entitlement by repressing labor activism through loss of benefits and by decreasing welfare payments through the recalculation of what income would reduce a recipient's aid. In 1981, Congress passed the Omnibus Budget Reconciliation Act of 1981 (OBRA), designed to reduce the federal budget.[285] One section of OBRA purported to make families ineligible for aid if they received income exceeding the need level determined by a particular state.[286] Based on the federal statute, income was never defined.[287] This gave states the freedom to create their own parameters.

In *Lukhard v. Reed,* the Supreme Court was asked to determine whether a civil judgment for personal injury should be calculated as a welfare recipient's income for calculating eligibility.[288] The state of Virginia included lump sum payments of personal injury awards as income, for purposes of determining eligibility.[289] Ona Mae Reed received a lump sum personal injury payment which she used for household living expenses.[290] This lump sum payment subsequently disqualified her from AFDC funds.[291] Ms. Reed argued that counting personal injury payments as income violated federal law.[292] Under OBRA, the period of ineligibility for benefits depended on whether a personal injury award was deemed as income or assets.[293] If the personal injury award was considered income,[294] the state could deny aid to the welfare recipient for as long as the money should last if the person received that monthly economic equivalent from the state.[295] However, if the personal injury award were considered an asset, Ms. Reed would only lose aid for the month in which the

283. 481 U.S. 368 (1987).

284. 485 U.S. 360 (1988).

285. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 736-737 (codified at 7 U.S.C. § 2015(d)(3) (1981)).

286. *Lukhard*, 481 U.S. at 371.

287. *See* 42 U.S.C. § 602(a)(17) (1982 & Supp. at 111).

288. *Lukhard,* 481 U.S. at 371; *see supra* note 276.

289. *Lukhard*, 481 U.S. at 372-73.

290. *Id.* at 386 (Powell, J. dissenting).

291. *Id.* at 391 (Powell, J. dissenting).

292. *Id.* at 373.

293. *Id.* at 371.

294. "'Income may be defined as the gain derived from capital, from labor, or from both combined,' provided it be understood to include profit gained through a sale or conversion of capital assets . . ." *Id.* at 374-75 (quoting Eisner v. Macomber, 252 U.S. 189, 207 (1920)).

295. *Id.* at 372.

personal injury award was received.[296] Labeling a personal injury award as income could be particularly devastating to a permanently disabled mother.

The Supreme Court upheld Virginia's classification of the personal injury award as income, declaring that it was not inconsistent with the OBRA and AFDC statutes, which allowed the state to reduce its budget at the expense of the welfare recipient.[297] *Lukhard* embodied the rising hegemonic force of fiscal conservatism and its evaluative cost benefit standards over and above family need and social justice.

In *Lyng v. UAW*, welfare recipients were forced to choose between social activism and social welfare benefits.[298] In OBRA, Congress decided that those who faced a temporary loss of income due to their position on the picket line would be ineligible for food stamps.[299] Mary Berry went on strike because her union and employer could not reach an agreement regarding the terms of her employment contract.[300] While the strike continued, Ms. Berry received strike insurance benefits for her living expenses.[301] Subsequently, she applied for food stamps to supplement the insurance but was rejected on the basis of her participation in the strike.[302] Ms. Berry argued among other things, that OBRA violated the Equal Protection Clause because it denied eligibility to strikers but allowed those who quit their employment to be eligible.[303]

The Supreme Court summarily dismissed this equal protection claim instead opting to evaluate the merits of this case based on "protecting the fiscal integrity of Government programs."[304] Using fiscal integrity as a guise for "maintaining neutrality in private labor disputes," the Supreme Court was able to mask a clear bias against labor activism.[305] While not directly stated, the Supreme Court's ruling suggested that providing aid to strikers would drain the fiscal resources preserved for those deemed now not just morally, but politically *worthy* of welfare benefits. Therefore, a certain level of discrimination by Congress is warranted (and obviously approved by the Supreme Court) in order to preserve benefits for the "deserving poor." These cases powerfully demonstrate the degree to which marketplace poverty became an indicator of moral failings that, at least by this time, the Supreme Court decided could only be remedied by the public policy ideology of fiscal conservatism.

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296. *Id.*

297. *Id.* at 383.

298. 485 U.S. 360, 360 (1988).

299. *Id.* at 371; *see also* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 736-737 (codified at 7 U.S.C. § 2015(d)(3) (1981)).

300. Brief for Appellees at 16, Lyng v. UAW, 485 U.S. 360 (1988) (No. 86-1471).

301. *Id.*

302. *Id.* at 16-17.

303. UAW v. Lyng, 648 F. Supp. 1234, 1243 (D.C.C. 1985), *rev'd*, 485 U.S. 360 (1988).

304. Lyng v. UAW, 485 U.S. 360, 373 (1988).

305. *Id.* at 372-73.

CONCLUSION

These Supreme Court cases are both reflective of, and at the same time have, shaped America's welfare policies and public opinion. The first Supreme Court cases under examination established that the Supreme Court was interested in protecting equal rights and due process while working within existing frameworks of governance.[306] The most monumental cases for this stage of the welfare legal legacy were *Shapiro v. Thompson* and *Goldberg v. Kelly* in which the Supreme Court's rulings came pretty close to nationalizing AFDC and establishing a right to welfare. However, the Supreme Court concluded that "the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."[307] Additionally, the Supreme Court rejected constitutional mandates for "necessities of life" or declaring these "necessities" as "fundamental interests" of the individual.[308] Further, the Supreme Court also failed to provide a remedy for economic conditions that may discriminately prevent or augment access to the "universal" civil and political rights that allow a citizen to act.[309]

The Supreme Court was also interested in preserving grander notions of federalism. Such federal and state governing techniques ranged from "cooperative federalism" to "new federalism." While the line shifted in the balance of power between state and federal authority, there was a consistent Supreme Court mandate that state policies adhere, at some level, to federal guidelines.[310] When the shift to "fiscal conservatism" emerged, however, decisions by the Supreme Court ultimately led toward a more cost-benefit deference to a states' rights approach and away from concepts of federal authority, fundamental rights, and/or Due Process. AFDC decisions by the Supreme Court endorsed federalism and granted the recipient legislative entitlement status, but AFDC was never established as a constitutional right.[311]

Moving into the twenty-first century, the idea of welfare as a federal entitlement or even as a federal program has become a thing of the past.

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306. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 645 (1969) (Warren, J., dissenting); King v. Smith, 392 U.S. 309 (1968).

307. DeShaney v. Winnebago Co. Dep't. of Soc. Serv., 489 U.S. 189, 196 (1989).

308. *See generally* Harris v. McRae, 448 U.S. 297 (1980) (sustaining an amendment denying public funding for medically necessary abortions); Lindsey v. Normet, 405 U.S. 56 (1972) (rejecting a constitutional guarantee of minimum shelter); Dandridge v. Williams, 397 U.S. 471, 473 (1970) (sustaining a Maryland AFDC regulation under which "the standard of need increases with each additional person in the household, but the increments become proportionately smaller.").

309. *See* Lyng v. UAW, 485 U.S. 360 (1988) (validating a 1981 amendment which denied eligibility for food stamps if a member of the household went on strike).

310. *See* Carleson v. Remillard, 406 U.S. 598 (1972); Townsend v. Swank, 404 U.S. 282 (1971); King v. Smith, 392 U.S. 309 (1968); *see also* N.Y. State Dep't of Soc. Serv. v. Dublino, 413 U.S. 405 (1973).

311. *King,* 392 U.S. at 325-27.

Unfortunately, Temporary Aid to Needy Families, (TANF)[312] a *short-term* relief program has become the superficially and inadequate response to the *long-term* poverty problem. The landscape of long-term poverty is laden with policy judgments based intentionally, subconsciously or consequentially on considerations of race and gender.

With such emphasis placed on "the law," the Supreme Court appears to hold itself above the fray of public opinion, but welfare policy exposes this perspective as a fallacy. As critical race scholars have long shown, the Supreme Court may not be able to change the law, but the Justices' beliefs about responsibility and deservedness heavily inform their decisions about the spirit of the law.[313] The inescapable conclusion is that a gendered and racially unequal pro-capitalist socio-economy has profoundly shaped the "neutral" laws surrounding welfare policy. Pro-capitalism and fiscal conservatism, for example, are at the intersection of a national attack on the "welfare queen" albatross. The Supreme Court has both responded to and helped shape that intersection . . . and that attack. Though political analysts and activists have so far been reluctant to acknowledge the Court's role in welfare policy, welfare advocates would be well-advised to plan future pro-welfare initiatives with a full understanding of the role the Supreme Court might play in influencing the success of those efforts.

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312. Temporary Aid to Needy Families (TANF), Pub. L. No. 104-193, 111 Stat. 2105 (1996) (as amended at 42 U.S.C. § 601).

313. *See, e.g.* Derrick Bell, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (introducing interest convergence theory which suggests that the white majority will advocate for advantages or benefits for black people only if advocating for these benefits will also advance white self-interest.); *see also* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 26 (2000) (using Bell's interest convergence theory and applying it in the case of the Cold War).