

1-1996

## Standards for Constitutional Review of Privacy-Invasive Welfare Reforms: Distinguishing the Abortion-Funding Cases and Redeeming the Undue-Burden Test

Susan F. Appleton

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Constitutional Law Commons](#)

---

### Recommended Citation

Susan F. Appleton, Standards for Constitutional Review of Privacy-Invasive Welfare Reforms: Distinguishing the Abortion-Funding Cases and Redeeming the Undue-Burden Test, 49 *Vanderbilt Law Review* 1 (1996)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol49/iss1/1>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact [mark.j.williams@vanderbilt.edu](mailto:mark.j.williams@vanderbilt.edu).

## Standards for Constitutional Review of Privacy-Invasive Welfare Reforms: Distinguishing the Abortion-Funding Cases and Redeeming the Undue-Burden Test

*Susan Frelich Appleton\**

I. INTRODUCTION .....	2
II. WELFARE PRESENT, FUTURE, AND PAST.....	4
III. THE DUAL SYSTEM CONSTITUTIONALIZED: THE LEGACY OF THE ABORTION-FUNDING CASES .....	13
A. <i>Constitutional Privacy: Reproductive Choice and         Family Autonomy</i> .....	13
B. <i>State Value Judgments and Behavior         Modification: The Price of Public Support</i> .....	17
C. <i>The Abortion-Funding Approach to Welfare         Reforms</i> .....	22
IV ELEVATING THE STANDARD OF REVIEW FOR WELFARE REFORMS .....	25

---

\* Professor, Washington University School of Law. A.B. 1970, Vassar College; J.D. 1973, Boalt Hall, University of California at Berkeley.

I gratefully acknowledge the early guidance of numerous colleagues at Washington University who participated in my informal presentation of the issues examined here as well as the helpful discussion by members of the Chicago Women Law Professors and Friends at a workshop on this Article. Katharine T. Bartlett, Kathleen Clark, Ronald Mann, Jane Rutherford, and Nadine Taub provided useful suggestions on previous drafts of this Article, although the customary disclaimers for remaining errors apply. Special thanks go to Peggy McDermott, "library superhero," and to Barbara J. Flagg and Daniel L. Keating, who became my "personal trainers," making certain that I followed the daily regimen necessary to see this project through to completion and publication.

A.	<i>Welfare Reforms and Equal Protection</i> .....	25
1.	Race: Welfare Stereotypes .....	26
2.	Gender: Biology, History, and Role Assignments .....	31
3.	Birth Status: Child Exclusions, Not Family Caps.....	37
B.	<i>Revisiting the Abortion-Funding Cases and Refining the Undue-Burden Test</i> .....	44
1.	Reasons to Distinguish Welfare Reforms from Abortion Funding.....	44
2.	The Migration of the Undue-Burden Standard.....	50
3.	Why the Undue-Burden Standard Should Govern Welfare Reforms: State Action and Inaction .....	56
4.	The Undue Burden of Welfare Reforms ....	62
V.	CONCLUSION .....	69

## I. INTRODUCTION

As the debate on welfare reform proceeds relentlessly toward what many hope will be a drastically altered system, critics of reform proposals have wisely focused their attention on the competing policy choices faced by Congress and the president (and ultimately perhaps the states). As a result, Congress's avowed determination to limit available funds and to abolish certain entitlements to public assistance has prompted arguments about the merits of programs that might compete for dwindling federal dollars. For example, should Congress stop welfare payments to unmarried teenage mothers? Should it cap the amount of support a family receives, regardless of the birth of additional children? Alternatively, should state governments make such decisions because of their greater familiarity with the particular problems faced by their poor citizens, or should uniform federal rules of eligibility continue to control?

Many of the most disputed calls for change explicitly target the reproductive and familial choices made by welfare recipients, private matters that in other contexts have been held presumptively outside the reach of governmental authority. Such "privacy-invading" reforms unquestionably include plans to influence personal decisions about how many children a family should have, whether unmarried teenagers should have children at all, and whether an individual

should marry.<sup>1</sup> In addition, the term could arguably cover plans to influence single parents' decisions about working outside the home even while children are young, plans to influence the decisions of families with teenage mothers about living arrangements, and plans to press for more cooperation in paternity establishment.<sup>2</sup> Although critics have not hesitated to point out what is wrong with the proposed changes in welfare,<sup>3</sup> one argument remains noticeably absent from the debate: the contention that the Constitution prohibits reform measures invading protected individual rights or requiring the poor to compromise liberties guaranteed to others.

This gap in the debate shows how effectively the Supreme Court, in recent years, has communicated the message that governmental funding decisions not only belong to the legislature but also provide an opportunity for the imposition of state value judgments subject only to minimal judicial review. Against the background of the evolving history of the American welfare system, this Article examines existing doctrine that makes privacy-invading welfare reforms appear immune from successful constitutional challenges. It then presents several reasons to question this apparent unassailability. These reasons include constitutional equality norms and the recent elaboration of a constitutional standard rooted in the abortion-funding cases, the "undue-burden" test. The heightened standard of review resulting from this analysis establishes limits on the government's authority to manipulate protected choices in the name of welfare reform.

---

1. Examples of such proposed plans are detailed below. See notes 14, 18-19, 24-25, 29, 34 and accompanying text. I call them "privacy-invading" because each is designed to effect a change in a matter of personal choice—procreation or marriage—that the U.S. Supreme Court has held protected under the right to privacy or its somewhat wider constitutional umbrella, substantive due process. See note 69 and accompanying text.

2. For examples of such plans, see notes 12, 16, 20, 27 and accompanying text. At first glance, these plans, which do not seek to change decisions about procreation and marriage, may appear to steer clear of the right to privacy. One could argue that the "privacy-invading" label nonetheless applies to the extent that these plans implicate parental decisions about child-rearing: whether to stay home or to entrust childcare to another; whether to allow an emancipated child (and her offspring) to live at home; whether, as a teenage parent, to subject one's own childrearing choices to the second-guessing of parents and grandparents; and whether to identify a child's father. See notes 71, 73 and accompanying text.

3. See, for example, Martha Albertson Fineman, *The Neutered Mother, The Sexual Family, and Other Twentieth Century Tragedies* 113-14 (Routledge, 1995); Mark Robert Rank, *Welfare Does Not Cause Babies*, St. Louis Post-Dispatch 3B (May 8, 1994); Martha Shirk, *Teen Pregnancies at Center of Welfare Debate; Young Mothers Here Scoff at GOP Plan*, St. Louis Post-Dispatch 1A (Feb. 5, 1995); Lucie E. White, *On the "Consensus" to End Welfare: Where Are the Women's Voices?*, 26 Conn. L. Rev. 843, 844-45 (1994).

## II. WELFARE PRESENT, FUTURE, AND PAST

President Clinton's 1992 campaign promises included a commitment "to end welfare as we know it."<sup>4</sup> This promise had only begun to take shape in the administration-backed "Work and Responsibility Act of 1994,"<sup>5</sup> however, when Republicans gained a majority in Congress<sup>6</sup> and made welfare reform their own legislative priority. They did so as one step in their general effort to reduce federal spending (in the expressed hope of balancing the budget) and also as a means of staking out moral high ground on a variety of family issues that had become contentious in recent years, particularly during congressional and presidential election campaigns.<sup>7</sup> Indeed, November 1996 now looms sufficiently near that the political battle to claim ownership of welfare reform has reached a fever pitch, with almost daily announcements of new developments.<sup>8</sup> At the same time,

4. See, for example, Mickey Kaus, *Welfare Waffle: What's That Plan Again, Bill?*, *New Republic* 10 (Oct. 12, 1992) (describing campaign television ads promising "to end welfare as we know it").

5. H.R. 4605, 103d Cong., 2d Sess. (June 21, 1994), in 140 *Cong. Rec.* H4753-54 (June 21, 1994). One may question, of course, whether the enactment of this bill would have brought about the transformation President Clinton had promised, because the emphasis on work outside the home parrots the theme already put in place by the Family Support Act of 1988, 42 U.S.C. §§ 601-87 (1988 ed. & Supp. V). See Martha Minow, *The Welfare of Single Mothers and Their Children*, 26 *Conn. L. Rev.* 817, 819 (1994) (asserting that the Family Support Act shows that society expects everyone to work). Indeed, federal work requirements for welfare recipients were enacted even earlier, in 1981, but without the funding necessary for success. See Sylvia A. Law, *Women, Work, Welfare, and the Preservation of Patriarchy*, 131 *U. Pa. L. Rev.* 1249, 1274-79 (1983).

6. See R.W. Apple, Jr., *The 1994 Elections: News Analysis*, *N.Y. Times* A1 (Nov. 9, 1994); David E. Rosenbaum, *Right Stuff: G.O.P. Unleashes Its New Weapon: Winning Candidates*, *N.Y. Times* § 4 at 4 (Nov. 13, 1994).

7. Prominent examples in recent campaigns include then Vice-President Quayle's "Murphy Brown" speech, condemning this fictional television character for providing a role model for single motherhood, see Eleanor Clift, with Clara Bingham, *The Murphy Brown Policy*, *Newsweek* 46 (June 1, 1992), President Bush's campaign for "family values," see Curtis Wilkie, *Mandate Provides Incentive to Act*, *Boston Globe, National/Foreign*, at 1, 26 (Nov. 4, 1992), and Patrick Buchanan's call to arms in America's "culture war" at the 1992 Republican National Convention, see Robert Brustein, *Arts Wars II: The Empire Strikes Back*, *New Republic* 38 (Oct. 12, 1992). Although some analysts attributed President Clinton's success in the 1992 election to these Republican policy positions, the "family values" theme has persisted, with 1994's victorious Republicans incorporating some "family values" points in their "Contract With America," the ultra-conservative Christian Coalition developing its own "Contract with the American Family," and President Clinton then announcing his own "American Family Values Agenda," which includes campaigns against teenage pregnancy and smoking. See Alison Mitchell, *On Issue of Family Values, Clinton Unveils an Agenda of His Own*, *N.Y. Times* § 1 at 6 (July 29, 1995). See also Elizabeth Kolbert, *Whose Family Values Are They, Anyway?*, *N.Y. Times* § 4 at 1 (Aug. 6, 1995) (observing how Republican presidential hopefuls tout "family values" despite their own divorces).

8. See, for example, Alison Mitchell, *Clinton and Dole Present Programs to Alter Welfare*, *N.Y. Times* A1 (Aug. 1, 1995) (describing their speeches to governors); John Ashcroft, *A Plan to*

a number of states have seized the issue, formulating their own solutions to the welfare problem. In some cases, states have secured waivers from federal requirements in order to adopt welfare innovations, while legislators and activists in other states have advanced no further than to float new strategies before the court of public opinion.

To provide some representative illustrations: The House of Representatives passed the "Personal Responsibility Act of 1995,"<sup>9</sup> purported to be "an Act to restore the American family, reduce illegitimacy, control welfare spending and reduce welfare dependence."<sup>10</sup> Although the act would transfer some significant responsibilities for public aid from the federal government to the states by allocating block grants for states to distribute according to their own eligibility rules for recipients,<sup>11</sup> it includes national work requirements<sup>12</sup> and a five-year limit on assistance,<sup>13</sup> as well as a prohibition on support for out-of-wedlock births to minors and a prohibition on additional cash assistance for children born to families already receiving welfare,<sup>14</sup> a measure often described as a "family cap." The Senate's "Work Opportunity Act of 1995,"<sup>15</sup> although similar to the House bill in its approach to work requirements<sup>16</sup> and time limits on assistance,<sup>17</sup> would allow even more flexibility for experimentation with block grants by remitting to the states whether or not to impose a family cap<sup>18</sup> or to deny assistance to teenage parents,<sup>19</sup> while mandating that states providing support for such teens require them to live in adult-supervised settings and attend school.<sup>20</sup>

---

*End Welfare Dependency*, St. Louis Post-Dispatch 3E (July 2, 1995) (commentary by a U.S. Senator).

9. H.R. 4, 104th Cong., 1st Sess. (version passed by the House of Representatives on March 24, 1995).

10. *Id.*

11. *Id.* § 101.

12. *Id.* (replacement for § 404 of the Social Security Act, Pub. L. No. 271, 49 Stat. 620 (1935), codified in scattered sections of 42 U.S.C. (1988 ed. & Supp. V)).

13. *Id.* (replacement for § 405 of the Social Security Act).

14. *Id.*

15. H.R. 4, 104th Cong., 1st Sess. (version passed by the Senate on Sept. 19, 1995).

16. *Id.* § 101 (replacement for § 404 of the Social Security Act). The work requirement is coupled with the provision of childcare. *Id.* (replacement for § 419 of the Social Security Act).

17. *Id.* (replacement for § 405 of the Social Security Act).

18. *Id.* § 101 (replacement for § 406 of the Social Security Act).

19. *Id.*

20. *Id.* See, for example, Rebert Pear, *Clinton and Dole Bidding to Break Welfare Impasse*, N.Y. Times § 1 at 1 (July 30, 1995) (reporting that Dole is considering requirements that teen mothers live at home and attend school as well as a mandate that states deny benefits to teen mothers).

Emerging in the midst of government-closing conflicts about the federal budget,<sup>21</sup> the "Personal Responsibility and Work Opportunity Act of 1995" reconciles these two bills.<sup>22</sup> Consistent with both proposals, it replaces the federal entitlements of Aid to Families with Dependent Children ("AFDC") with block grants to the states.<sup>23</sup> Its approach to aid for teenage parents resembles that in the Senate bill,<sup>24</sup> but its family cap provision splits the difference between the two proposals by prohibiting states from increasing aid to welfare families upon the birth of additional children, while allowing a state to opt out of this restriction only if the state enacts a law to this effect.<sup>25</sup> Despite his announced support for the Senate bill, the conference report has been vetoed by President Clinton,<sup>26</sup> whose own pitch professes commitment to work incentives, including childcare so parents can work, and to protecting children.<sup>27</sup> In the meantime, advocates of federal reform have vowed to press forward.<sup>28</sup>

Some state plans, developed even before the current national frenzy, have already been implemented, serving not only as a gauge of local effectiveness but also as a laboratory for measures that might be adopted nationwide. Accordingly, Wisconsin's "bridefare" tests financial incentives designed to encourage welfare mothers to marry.<sup>29</sup> Its approach to increasing paternity establishments focuses attention on

---

21. See, for example, *Business Digest*, N.Y. Times § 1 at 39 (Dec. 23, 1995) (reporting the continuation of the budget stalemate between the president and congressional leaders, promising to keep federal offices closed into 1996).

22. Personal Responsibility and Work Opportunity Act of 1995, Conference Report on H.R. 4, in 141 Cong. Rec. H15317 (daily ed. Dec. 21, 1995). See *id.* at H15533 (daily ed. Dec. 21, 1995) (adopted by the House); *id.* at S19145 (daily ed. Dec. 22, 1995) (adopted by the Senate).

23. 141 Cong. Rec. at H15319-28 (daily ed. Dec. 21, 1995) (H.R. 4 § 103).

24. *Id.* at H15323 (H.R. 4 § 103) (replacement for § 408 of the Social Security Act). See 141 Cong. Rec. at H15401-02 (daily ed. Dec. 21, 1995) (comparison of the House, Senate, and Conference versions).

25. *Id.* at H15323 (H.R. 4 § 103) (replacement for § 408 of the Social Security Act). See 141 Cong. Rec. at H15402 (daily ed. Dec. 21, 1995) (comparison of the House, Senate, and conference versions).

26. *Presidential Veto Message: Welfare-to-Work Provisions Cited in Veto of Overhaul*, 54 Cong. Q. Weekly Rep. 103 (Jan. 13, 1996).

27. *Id.* *White House Briefing: Remarks by President Bill Clinton to Natl. Governors Assoc. Meeting*, Fed. News Service (July 31, 1995); *Excerpts from News Conference with President Clinton*, N.Y. Times B8 (April 19, 1995); David E. Rosenbaum, *Welfare in Transition: The Background; Clinton in Awkward Role in the Debate on Welfare Reform*, N.Y. Times B11 (Sept. 21, 1995).

28. See Pamela H. Prah, *Welfare Reform: Clinton Vetoes Welfare Package; Lawmakers Look to 1996 to Try Again*, Daily Labor Report 7 (Jan. 11, 1996).

29. See Julie Kosterlitz, *The Marriage Penalty*, 24 Natl. J. 1454 (June 20, 1992) (reporting the debate about whether Wisconsin's "bridefare" rewards marriage or removes financial disincentives for marrying).

efforts to identify fathers.<sup>30</sup> New Jersey's Family Development Program, a family cap instituted in 1992,<sup>31</sup> provides data about whether a ceiling on welfare will deter the birth of additional children among the poor (it hasn't<sup>32</sup>), while Congress considers analogous plans for the entire country.<sup>33</sup> Other state proposals, such as financial rewards for poor women using Norplant,<sup>34</sup> although excoriated in the media,<sup>35</sup> remain useful talking points in surveying the expansive landscape of welfare reform.

Beneath the wide array of proposed changes lie a few core criticisms of "welfare as we know it." Existing welfare rules, we are told, perpetuate dependency.<sup>36</sup> Rather than simply insuring subsistence for poor children, the present system supposedly provides financial incentives for recipients to produce children in order to receive subsidies and avoid work.<sup>37</sup> It makes fatherless families financially

---

30. See Christa Andrews, *State Intervention into the Lives of Single Mothers and Their Children: Toward a Resolution of Maternal Autonomy and Children's Needs*, 8 Law & Ineq. J. 567, 602-04 (1990) (explaining and critiquing Wisconsin's approach).

31. See *C.K. v. Shalala*, 883 F. Supp. 991 (D.N.J. 1995) (unsuccessfully challenging New Jersey's family cap).

32. Barbara Vobejda, *N.J. Welfare 'Cap' Has No Effect on Births, Study Finds*, Washington Post A3 (June 21, 1995) (reporting the results of a Rutgers University study of New Jersey's law); *Law Fails to Curb Births to Welfare Mothers*, Baltimore Sun 6F (July 2, 1995) (same). See also Mark R. Rank, *Fertility Among Women on Welfare: Incidence and Determinants*, 54 Am. Soc. Rev. 296 (1989) (finding that the fertility rate of welfare recipients is lower than that of women in the general population and that the longer a woman receives welfare, the less likely she is to give birth). But see Iver Peterson, *Welfare in Transition: New Jersey: The G.O.P.'s "Family Cap" Has a Democratic History*, N.Y. Times B10 (Sept. 21, 1995) (reporting statistics showing a drop in the birth rate of 11.4%, but an increase in abortions).

33. See Kathleen Best, *"Family Cap"; Yesterday's Crazy Idea on Curbing Welfare Is Today's Law*, St. Louis Post-Dispatch 4B (Sept. 17, 1995) (discussing Illinois's family cap); Robert Pear, *Dole Reversal; A Welfare Revolution Hits Home, But Quietly*, N.Y. Times § 4 at 1 (Aug. 13, 1995) (discussing state welfare experiments).

The bill initially approved by the House includes, in addition to a mandatory family cap, a prohibition on assistance for families that refuse to cooperate in establishing paternity, H.R. 4 § 101 (cited in note 9) (replacement for § 405 of the Social Security Act), as well as measures to increase paternity establishment, such as authorization for states to require welfare recipients and their children to undergo genetic testing, id. § 931.

34. See Tamar Lewin, *A Plan to Pay Welfare Mothers for Birth Control*, N.Y. Times § 1 at 9 (Feb. 9, 1991).

35. See, for example, Charlotte Allen, *Norplant—Birth Control or Coercion?*, Wall St. J. A10 (Sept. 13, 1991); American Medical Association, *Board of Trustees Report: Requirements or Incentives by Government for the Use of Long-Acting Contraceptives*, 267 J. A.M.A. 1818 (1992); Stephanie Denmark, *Birth-Control Tyranny*, N.Y. Times § 1 at 3 (Oct. 19, 1991).

36. See generally, for example, American Enterprise Institute for Public Policy Research, *A Community of Self Reliance: The New Consensus on Family and Welfare* (1987); Mary Jo Bane and David T. Ellwood, *Welfare Realities: From Rhetoric to Reform* 67-123 (Harvard U., 1994).

37. Gary L. Bauer, *Family Cap: Incentive for Welfare Moms*, St. Louis Post-Dispatch 17D (Nov. 17, 1995); Charles A. Murray, *Losing Ground: American Social Policy, 1950-1980* at 154-



viable, thus arguably stunting the next generation's emotional development, fostering irresponsible and immoral sexual activity, and imposing crushing burdens on government that other families themselves must bear.<sup>38</sup>

How did we arrive at this mess?

Welfare historians have chronicled the development of the modern "welfare state" from its ancestry in the Elizabethan Poor Laws and its birth during the New Deal.<sup>39</sup> According to Linda Gordon, contemporary welfare programs—notably AFDC—evolved from a feminist project honoring mothering and emphasizing casework.<sup>40</sup> During the Progressive Era, elite and middle-class women, "maternalists," became activists for "Mothers' Pensions" to provide support for poor women who conformed to the gender roles of respectable married women.<sup>41</sup> With such pensions, even unmarried mothers could afford to imitate the behavior of their more comfortable counterparts, who stayed at home with their children and depended upon their husbands for a "family wage."<sup>42</sup> Yet ultimately

66 (Basic Books, 1984). See, for example, Nancy Gibbs, *The Vicious Cycle*, Time 24, 28 (June 20, 1994); Note, *Dethroning the Welfare Queen: The Rhetoric of Reform*, 107 Harv. L. Rev. 2013, 2019-20 (1994).

38. See, for example, Law, 131 U. Pa. L. Rev. at 1271 (cited in note 5) (stating that critics of welfare claim it has undermined family stability); Minow, 26 Coun. L. Rev. at 826 (cited in note 5) (describing the "equity argument," which asks why welfare mothers should not work if others must do so in order to support families). But compare Mark R. Rank and Li-Chen Cheng, *Welfare Across Generations: How Important Are the Ties That Bind?*, 57 J. Marriage & Fam. 673, 678, 681-82 (1995) (finding that three quarters of welfare recipients did not grow up in welfare families, but that children in welfare families are more likely to become welfare recipients as a result of poverty, not because of welfare per se).

39. See, for example, Bane and Ellwood, *Welfare Realities* at 1-27 (cited in note 36) (discussing welfare's development from the early 1960s through the present); Linda Gordon, *Pitied But Not Entitled: Single Mothers and the History of Welfare, 1890-1935* (Free Press, 1994); Law, 131 U. Pa. L. Rev. at 1252-54 (cited in note 5); Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development and Present Status*, 16 Stan. L. Rev. 257 (1964) (Part I); 16 Stan. L. Rev. 900 (1964) (Part II); 17 Stan. L. Rev. 614 (1965) (Part III).

40. See Gordon, *Pitied But Not Entitled* at 38 (cited in note 39). Gordon describes the casework approach in the following way:

[T]his technique required in-depth investigation of a client's background, circumstances, and attitudes. Individualization was in fact the essence of casework: Its guiding principle was "to treat unequal things unequally." The very premise of casework was anti-bureaucratic, in the pure sense of bureaucracy, since it insisted on the worker's discretion. The caseworker was emphatic that money alone was not enough. . . .

Casework was nevertheless scientific in an important sense. It derived from the "scientific charity" movement, which equated casework with the scientific method itself. In the nineteenth century charity workers identified causes of poverty which they then counted.

Id. at 175 (footnotes omitted).

41. See id. at 55.

42. See id.; Gwendolyn Mink, *Welfare Reform in Historical Perspective*, 26 Conn. L. Rev. 879, 879 (1994); White, 26 Conn. L. Rev. at 852 (cited in note 3).

governmental support for children of single mothers became the disfavored and stigmatized stepchild of an approach in which social insurance (reflecting male notions of poverty and need) emerged as the only respectable vision of public assistance.<sup>43</sup> That poor widows with children could always justify departures from this vision simply brightens the line that Gordon traces between “deserving” and “undeserving” recipients of public aid.<sup>44</sup> One sees this line today in the pervasive requirements of means- and morals-testing for welfare eligibility.<sup>45</sup> One sees it as well in the rhetoric of modern welfare critics, particularly those who insist that public assistance encourages single mothers to bear child after child in order to avoid the hard work of self-sufficiency.<sup>46</sup>

Given its roots in casework, welfare historically has served not only as a humanitarian response to poverty but also as a tool promising “behavior modification” of its recipients.<sup>47</sup> The particular social

43. See Gordon, *Pitied But Not Entitled* at 270-73 (cited in note 39); Joel F. Handler, *Two Years and You're Out*, 26 Conn. L. Rev. 857, 858-59 (1994). From 1935 to 1968, welfare was not a legal entitlement, but a gratuity that states had discretion to provide to those who met certain requirements. Law, 131 U. Pa. L. Rev. at 1261 (cited in note 5).

44. See Gordon, *Pitied But Not Entitled* at 27 (cited in note 39) (stating that welfare strategists initially focused on poor widows as epitomizing the “deserving poor”); id. at 281 (stating that the later decline in young widowhood and the rise in the number of the divorced and unmarried mothers stigmatized poor single mothers). See also Peter B. Edelman, *Toward a Comprehensive Anti-Poverty Strategy: Getting Beyond the Silver Bullet*, 81 Georgetown L. J. 1697, 1703-09 (1993) (tracing the “deserving poor” through American history); Minow, 26 Conn. L. Rev. at 830-31 (cited in note 5) (noting that widows receiving Social Security are not expected to work, unlike welfare mothers). See generally Herbert A. Gans, *The War Against the Poor: The Underclass and Antipoverty Policy* (Basic Books, 1995) (criticizing “undeserving” and other pejorative labels applied to the poor).

At one time, women with children, like the aged, blind, and disabled, were treated as “deserving” because they were presumed unemployable, based on their traditional “unsuitability” for wage labor and their responsibility for child care. Law, 131 U. Pa. L. Rev. at 1253 (cited in note 5).

45. Means-testing refers to eligibility based on a specified level of financial need. See Murray, *Losing Ground* at 184-85 (cited in note 37) (criticizing this practice). Morals-testing refers to eligibility requirements conditioned on moral behavior. See, for example, Gordon, *Pitied But Not Entitled* at 282 (cited in note 39) (discussing the “suitable home” requirement for AFDC); Law, 131 U. Pa. L. Rev. at 1325 (cited in note 5) (observing that, unlike the blind and disabled, poor women must comply with sexual and social norms). The program that became AFDC “was unique among all welfare programs in its subjection of applicants to a morals test.” Gordon, *Pitied But Not Entitled* at 298 (cited in note 39). Obviously, many of the current welfare reform proposals would impose new morals-testing requirements.

46. See, for example, William J. Bennett, *The Best Welfare Reform: End It*, Washington Post A19 (March 30, 1994) (“Welfare subsidizes and sustains illegitimacy”). See also Bane and Ellwood, *Welfare Realities* at 68-74 (cited in note 36) (providing a rational-choice model for understanding welfare dependency).

47. After long using this phrase to describe programs conditioning the receipt of welfare benefits on specific changes in behavior (for example, employment, marriage, or discontinued reproduction), I discovered that I was not alone. See Julie Kosterlitz, *Behavior Modification*, 24

goals of this "reward system" have varied over the years, including Americanizing poor immigrants,<sup>48</sup> encouraging the maintenance of a "suitable home" free from the corruption of immoral sexual behavior,<sup>49</sup> promoting self-sufficiency,<sup>50</sup> or—as in recent headline-grabbing proposals—limiting family size, encouraging marriage, deterring illegitimate births, and increasing the involvement of fathers in the lives of their children.<sup>51</sup> Today, such "morals-testing" coupled with the practice of "means-testing"<sup>52</sup> for eligibility often pose dilemmas for those seeking to qualify as both "properly behaved" and needy. For example, a mother's employment may demonstrate the appropriate striving for self-support while simultaneously disqualifying her as insufficiently destitute.<sup>53</sup> On the other hand, remaining at home to care for her children may create the perception of a lazy "welfare queen," requiring reformation by state financial incentives.<sup>54</sup> Lost in the struggle to identify the most efficient and worthy model of behavior are the personal choices that the individuals in question would make if left to act according to their own preferences. Lost as well are

---

Natl. J. 271 (Feb. 1, 1992); Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 Yale L. J. 719 (1992). The analogy to psychologists' efforts to "condition" rats and pigeons through "reinforcement" remains irresistible. See, for example, B. F. Skinner, *Science and Human Behavior* 65-66 (Macmillan, 1953).

Douglas Besharov of the American Enterprise Institute has referred to this approach as the "new paternalism." *Innovations, New Directions, and New Convergences in Poverty Alleviation*, Hearings before the House Select Committee on Hunger, 102d Cong., 2d Sess. 38, 39 (1992) (statement of Douglas J. Besharov).

48. See Gordon, *Pitied But Not Entitled* at 46 (cited in note 39).

49. See *id.* at 298. Compare *King v. Smith*, 392 U.S. 309, 333-34 (1968) (invalidating Alabama's "substitute father" regulation, designed to discourage immorality and illegitimacy, that denied AFDC to children whose mother cohabited with a man, regardless of his duty to support them).

50. Bane and Ellwood, *Welfare Realities* at 124-42 (cited in note 36).

51. Hearings at 49-51 (cited in note 47) (chart cataloguing many of the measures). The welfare reform bill passed by the House, H.R. 4 (cited in note 9), provides incentives for states to reduce the illegitimacy rate and requires strict state laws for paternity establishment. Compare Fineman, *The Neutered Mother* at 185-86 (cited in note 3) (criticizing the latter approach).

52. See note 45. Such requirements ultimately resulted in the replacement of the individualized casework approach, see note 40, with the unwieldy bureaucracy that has become a hallmark of the modern welfare system. See Bane and Ellwood, *Welfare Realities* at 1-27 (cited in note 36).

53. See, for example, Bane and Ellwood, *Welfare Realities* at 6-7 (cited in note 36) (explaining that the system often "encourages passivity" by focusing recipients' efforts on retaining eligibility instead of attaining self-sufficiency). See also Murray, *Losing Ground* at 162-64 (cited in note 37) (arguing that work incentives for some induce others not to work). Even before federal law embraced the expectation that everyone should work, as reflected in the Family Support Act of 1988, 42 U.S.C. §§ 601-87, see note 5, many local rules imposed explicit wamework requirements on mothers. Law, 131 U. Pa. L. Rev. at 1257-58 (cited in note 5). Compare H.R. 4, notes 9, 12, 15, 16 and accompanying text (describing the work requirements in the House and Senate bills).

54. See generally Minow, 26 Conn. L. Rev. 817 (cited in note 5).

the interests of poor children, whom even the earliest welfare efforts sought to protect.<sup>55</sup>

Thus, the distinction between the deserving and undeserving poor conveys more than one meaning. It not only refers to the well-entrenched line separating beneficiaries of social insurance programs from welfare recipients,<sup>56</sup> but it also describes differences among welfare recipients who meet some prescribed behavioral norm versus those who do not.

Still another classification parallels these distinctions. Thirty years ago, in his important critique of "California's dual system of family law,"<sup>57</sup> Jacobus tenBroek identified two distinct bodies of family law in operation in that state in the 1960s: one for families "in comfortable circumstances" and another for poor families.<sup>58</sup> Under this divided regime, vastly different legal rules govern family matters, such as support obligations between spouses and the parent-child relation, for the two groups. Professor tenBroek demonstrated this duality by pointing out the strings the state attaches to public assistance:

the family law of the poor derives its particular content and special nature from the central concept of the poor law system: public provision for the care and support of the poor. He who pays the bill can attach conditions, related or unrelated to the purpose of the grant, and almost always does.<sup>59</sup>

---

55. See Gordon, *Pitied But Not Entitled* at 15-35 (cited in note 39). See also *King*, 392 U.S. at 322-27 (finding that Congress has determined that immorality and illegitimacy should be addressed through rehabilitation, since the protection of dependent children is the paramount goal of AFDC).

56. See note 44. Yet another reflection of the distinction emerges from the difference in status between assistance programs that were entirely federal, such as OAI, and those based on federal grants to the states, leaving more room for state control, such as AFDC. See Gordon, *Pitied But Not Entitled* at 274, 293 (cited in note 39). See also Law, 131 U. Pa. L. Rev. at 1326 (cited in note 5) ("Since 1974, another factor in the comparatively disfavored status of AFDC recipients has been the fact that the federal government takes primary responsibility for financing and administering the SSI program for the aged, blind, and disabled but has not taken primary responsibility for AFDC" (footnote omitted)). This stratification will likely become even more pronounced under a block-grant system like those approved by the House and Senate. See notes 11, 18-20, 23 and accompanying text.

57. tenBroek, 16 Stan. L. Rev. 257; 16 Stan. L. Rev. 900; 17 Stan. L. Rev. 614 (cited in note 39).

58. tenBroek, 16 Stan. L. Rev. at 978 (cited in note 39) (tracing the former primarily to common-law developments while attributing the latter to legislative action modeled on the Elizabethan Poor Law of 1601).

59. tenBroek, 17 Stan. L. Rev. at 676 (cited in note 39). Congress also has used this "carrot and stick" approach to impose required legal actions as conditions on states receiving federal funds. Prominent examples appear in the Family Support Act of 1988. See, for example, 42 U.S.C. § 666(a)(5) (requiring states to have procedures for establishing paternity

By contrast, the common-law doctrine of family privacy shields families that receive no financial aid, leaving to each family the resolution of its own controversies and restraining the state from imposing a single vision of appropriate family conduct.<sup>60</sup> For tenBroek, the answer to the "dual system" probably lay in the Constitution. Concluding his critique on a note of optimism, he cited the movement toward equality reflected in some landmark constitutional decisions of the day, including *Brown v. Board of Education*.<sup>61</sup> In these decisions he saw the promise of an eventually unified family law, applicable to comfortable and poor alike.<sup>62</sup> Subsequent constitutional decisions show how far tenBroek's prediction missed the mark, however.

---

anytime prior to a child's 18th birthday), and the House's welfare reform legislation, H.R. 4 § 101 (cited in note 9) (replacement for § 405 of the Social Security Act) (prohibiting a state's use of block grants for assistance for out-of-wedlock births to minors). See generally Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 Stan. L. Rev. 1103 (1987).

60. The classic exemplars, leaving families the responsibility of resolving internal disputes in the manner that suits the particular family best, include *McGuire v. McGuire*, 59 N.W.2d 336, 341, 157 Neb. 226 (1953) (holding that a wife cannot enforce a husband's duty of support unless the couple separates); *Kilgrow v. Kilgrow*, 107 So. 2d 885, 888, 268 Ala. 475 (1958) (holding that the court has no jurisdiction to resolve a parental dispute concerning a child's schooling absent a custody question); *Roe v. Doe*, 272 N.E.2d 567, 569, 324 N.Y.S.2d 71 (1971) (holding that the court has no authority to order a father to support a disobedient, unemancipated child). Of course, although it fosters pluralism, the "family privacy" doctrine has provoked considerable criticism, particularly from feminists. See, for example, Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. Mich. J. L. Ref. 835, 837 (1985) (describing the debate about intervention and nonintervention as incoherent, given the state's involvement in the "formation and functioning of families"); Nadine Taub and Elizabeth M. Schneider, *Perspectives on Women's Subordination and the Role of Law*, in David Kairys, ed., *The Politics of Law: A Progressive Critique* 117 (Pantheon, 1982) (arguing that privacy perpetuates male domination and sex discrimination); Elizabeth M. Schneider, *The Violence of Privacy*, 23 Conn. L. Rev. 973 (1991) (arguing that nonintervention permits family violence).

61. 347 U.S. 483 (1954).

62. See tenBroek, 17 Stan. L. Rev. at 678 (cited in note 39) ("In this historic, dual system of family laws, reembodyed in California's present-day welfare programs, two new elements are beginning to emerge: Welfare purposes beyond relieving the distress of poverty are influencing the character of the law of the poor; the poor are beginning to receive the safeguards and protections of the Constitution").

### III. THE DUAL SYSTEM CONSTITUTIONALIZED: THE LEGACY OF THE ABORTION-FUNDING CASES

#### A. *Constitutional Privacy: Reproductive Choice and Family Autonomy*

Whether one cites as the cornerstone case *Prince v. Massachusetts*,<sup>63</sup> *Skinner v. Oklahoma*,<sup>64</sup> *Loving v. Virginia*,<sup>65</sup> or *Griswold v. Connecticut*,<sup>66</sup> modern constitutional jurisprudence has unquestionably carved out an enclave of familial decisions, relationships, and activities protected from state intrusion. True, the resulting right to privacy raises numerous points of contention; critics' lists of such points might include questions about where in the Constitution the right resides, whether the matters protected by the right legitimately can be described as private, why the right does not embrace some matters that closely resemble those it does protect, and what meaningful limits can be fashioned for a concept so amorphous.<sup>67</sup> Though the Supreme Court's answers do not put any of these questions to rest, it has developed some now well-established responses.

After attempting to rely on the "penumbras" of the First, Third, Fourth, Fifth, and Ninth Amendments to the Constitution,<sup>68</sup> a majority of the Court found a less evanescent source for the right to privacy in the liberty component of the Fourteenth Amendment's Due

---

63. 321 U.S. 158 (1944). In upholding a child-labor restriction, the Court recognized a "private realm of family life which the state cannot enter." *Id.* at 166. *Prince* followed two earlier cases containing language supportive of parental autonomy in childrearing, despite holdings resting more squarely on the economic substantive due process rights of schools and teachers. See *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

64. 316 U.S. 535 (1942) (holding that a statute calling for compulsory sterilization of some felons, but not others, violates equal protection). The Court observed that procreation is "one of the basic civil rights of man." *Id.* at 541.

65. 388 U.S. 1 (1967) (holding that an antimiscegenation law violates equal protection and due process). The Court recognized freedom of choice in marriage as a fundamental right. *Id.* at 12.

66. 381 U.S. 479 (1965). The Court invalidated Connecticut's ban on the use of contraceptives, even by married couples, because it invaded the constitutional right to privacy found in the penumbras of various parts of the Bill of Rights. See *id.* at 482-85.

67. See, for example, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind. L. J.* 1, 7-11 (1971) (criticizing *Griswold*); *Comments on the Griswold Case*, 64 *Mich. L. Rev.* 197 (1965) (symposium with contributions by Robert G. Dixon, Jr., Thomas I. Emerson, Paul G. Kauper, Robert B. McKay, and Arthur E. Sutherland).

68. See *Griswold*, 381 U.S. at 482-85.

Process Clause.<sup>69</sup> Although in doing so the Court has concededly given "privacy" an elastic or even double meaning,<sup>70</sup> it has invoked the right to protect individual decisions concerning educating and rearing one's children,<sup>71</sup> choosing a spouse<sup>72</sup> and family living arrangements,<sup>73</sup> using and having access to contraceptives,<sup>74</sup> and terminating or continuing a pregnancy.<sup>75</sup> Although each of these matters has some

69. *Roe v. Wade*, 410 U.S. 113, 153 (1973). *Roe* prompted criticism about the Court's resurrection of "substantive due process," see, for example, Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159, 184-85, a phrase the Justices more forthrightly embraced a term later, see *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion) (invalidating a city ordinance prohibiting an extended family from living together as a violation of substantive due process).

70. See, for example, *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977):

The cases sometimes characterized as protecting "privacy" have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.

Id. (citations omitted).

The first privacy interest arguably traces back to Warren and Brandeis's proposal for reforming the law of torts to protect individual "thoughts, emotions and sensations." Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 206 (1890). See, for example, *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383 (1960); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 Cornell L. Rev. 291 (1983). *Griswold's* emphasis on shielding the marital bedroom from police searches (rather than on protecting the availability of contraceptives), see 381 U.S. at 485-86, suggests the Court was protecting "nondisclosure" or "seclusion" privacy in that case.

The second privacy interest, really a form of liberty or autonomy, has emerged as the more far-reaching and controversial of the two. See, for example, *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 674 (1992), discussed at notes 314-33 and accompanying text. See also David J. Garrow, *Liberty & Sexuality: The Right to Privacy and the Making of Roe v. Wade* (Macmillan, 1994) (providing an historian's account).

71. See, for example, *Meyer*, 262 U.S. 390 (protecting teaching German to schoolchildren); *Pierce*, 268 U.S. 510 (protecting private schooling); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (requiring exemption of Amish children from compulsory school attendance beyond the eighth grade). See also *Santosky v. Kramer*, 455 U.S. 745 (1982) (holding that the termination of parental rights for neglect based on a mere preponderance of the evidence violates due process); *Stanley v. Illinois*, 405 U.S. 645 (1972) (holding that presuming an unmarried father's unfitness to rear children violates due process and that denying him a hearing on fitness, accorded to all other parents, violates equal protection).

72. See, for example, *Loving*, 388 U.S. at 1 (holding a state's antimiscegenation law unconstitutional); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (holding that state restrictions on marrying for persons with outstanding support obligations violates equal protection); *Turner v. Safley*, 482 U.S. 78 (1987) (holding restrictions on inmate marriages unconstitutional).

73. *Moore*, 431 U.S. at 505 (declaring an ordinance barring a grandmother from residing with her two grandchildren unconstitutional).

74. *Griswold*, 381 U.S. at 485 (protecting the use of contraception by married couples); *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972) (protecting access to contraceptives for unmarried individuals). See also *Carey v. Population Servs. Intl.*, 431 U.S. 678, 693 (1977) (overturning restrictions on access by minors).

75. *Roe*, 410 U.S. 113 (establishing a fundamental right to abortion protected by the compelling-state-interest test). See also *Casey*, 112 S. Ct. 2791 (joint opinion) (ruling that the fundamental right to abortion is protected by the undue-burden test). The Justices have made

tie to intimate association, bodily integrity, self-definition, or all of the above, the Court has made clear that such criteria may be necessary but not sufficient for privacy status. Accordingly, privacy does not encompass consensual homosexual intimacy,<sup>76</sup> and despite finding some constitutional support for a right to refuse life-saving medical treatment, the Court has failed to utter the word “privacy” in addressing that issue.<sup>77</sup> Although the standard itself leaves substantial room for the Justices to disagree about its contours, the opinions have consistently stated that history and tradition define the boundaries of privacy,<sup>78</sup> preventing it from becoming a cover for the unprincipled and constitutionally unwarranted imposition of judicial values.<sup>79</sup>

---

clear that the right protected is one of choice: whether to terminate or continue the pregnancy. See *id.* at 2811 (joint opinion) (“If indeed the woman’s interest in deciding whether to bear and beget a child had not been recognized as in *Roe*, the State might as readily restrict a woman’s right to choose to carry a pregnancy to term as to terminate it, to further asserted state interests in population control, or eugenics, for example”). See also *Eisenstadt*, 405 U.S. at 453 (characterizing the protected right as the “decision whether to bear or beget a child”).

76. See *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986) (explicitly refusing to apply the privacy doctrine in an unsuccessful challenge to Georgia’s criminal ban on consensual sodomy). See Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. Rev. 187, 225-27 (showing that the interests at stake in *Bowers* are the same as those at stake in the abortion and contraception cases).

77. See *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261 (1990). The majority, while not mentioning the right to privacy, was willing to assume for purposes of that case that “the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.” *Id.* at 279. The assumed right, however, did not trump the state’s interest in insisting on clear and convincing evidence of an incompetent patient’s refusal of treatment. The “right to die” raised in such cases implicates the same *individual* interests in self-determination, physical integrity, and family autonomy recognized in the abortion and contraception cases (a conclusion that does not require equating the *state’s* interests in these different contexts). See generally Renald Dworkin, *Life’s Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (Arthur A. Knopf, 1993).

78. See, for example, *Roe*, 410 U.S. at 140 (relying on history in recognizing the right to abortion); *Moore*, 431 U.S. at 503 (plurality opinion) (“Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition”). See also *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (reflecting the Justices’ disagreement about how to characterize asserted rights to determine whether they are “traditional”); *Bowers*, 478 U.S. at 192 (citing the “ancient roots” of the proscription against sodomy). Compare *Cruzan*, 497 U.S. at 305 (Brennan, J., dissenting) (finding a right to refuse medical treatment “deeply rooted in this Nation’s traditions”), with *id.* at 294-95 (Scalia, J., concurring) (citing the traditional criminalization of suicide). Compare by analogy Katharine T. Barlett, *Tradition, Change, and the Idea of Progress in Feminist Legal Thought*, 1995 Wis. L. Rev. 303 (showing the use of tradition in constitutional jurisprudence and arguing that it is an important component of progress); David L. Faigman, *Measuring Constitutionality Transactionally*, 45 Hastings L. J. 753, 781-83 (1994) (discussing the debate about “generality” in conceptualizing rights).

79. But see *Griswold*, 381 U.S. at 521 (Black, J., dissenting) (stating that no constitutional provision protects “privacy” and that the Court cannot substitute its views for the legislature’s); *Roe*, 410 U.S. at 174 (Rehnquist, J., dissenting) (contending that the Court has imposed its own views in place of the legislature’s).



The doctrinal significance of privacy protection for a particular choice, activity, or relationship lies in the standard of review that it triggers. Although the *Griswold* majority failed to discuss any standard of review in its recognition of privacy, thus implying that this right is absolutely protected from all state intrusions,<sup>80</sup> subsequent cases have employed a balancing approach. Because the Court has classified privacy as a "fundamental" constitutional right, state action interfering with the right must meet the most demanding level of judicial review in order to survive a challenge: the state action must serve a compelling state interest and must be narrowly tailored to advance that end. Thus, for fundamental rights, the balance of individual and state interests favors the individual.

The majority's analysis in *Roe* provides an instructive example of the way the formula<sup>81</sup> usually works. As a result of a series of physical and familial "detriments" that unwanted pregnancy can impose on a woman and her family, the fundamental right to privacy includes the decision whether to terminate a pregnancy.<sup>82</sup> Applying strict judicial scrutiny to Texas's criminal prohibition of all abortions except those necessary to save the life of the mother yields *Roe*'s familiar trimester timetable, which disallows virtually all state interference during the first trimester when the state lacks any compelling countervailing interest;<sup>83</sup> permits regulations reasonably designed to further the State's interest in maternal health once this interest reaches its "compelling point" after the first trimester;<sup>84</sup> and allows bans on all but therapeutic abortions upon fetal viability,<sup>85</sup> when the state's interest in protecting potential life reaches its

---

80. The *Griswold* majority never inquired about the state's interests in banning birth control although, in condemning the law as unnecessarily broad, it implied that the unidentified state interests could be served by a more narrowly drawn measure. 381 U.S. at 485.

81. See Hans A. Linde, *Who Must Know What, When, and How: The Systemic Incoherence of "Interest" Scrutiny*, in Stephen E. Gotthieb, ed., *Public Values in Constitutional Law* 219, 220-22 (U. Mich., 1993) (discussing "the formulas" for judicial review); Robert F. Nagel, *The Formulaic Constitution*, 84 Mich. L. Rev. 165 (1985); Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 Hastings L. J. 711, 735 n.62 (1994) ("the Constitution has taken on a 'formulaic' cast") (citing Robert F. Nagel, *Constitutional Cultures: The Mentality and Consequences of Judicial Review* 121-22 (U. Cal., 1989)). But see Carl E. Schneider, *State Interest Analysis in Fourteenth Amendment "Privacy" Law: An Essay on the Constitutionalization of Social Issues*, 51 Law & Contemp. Probs. 79, 82-96 (1988) (describing the uncertainties of the present standard in substantive due process cases, despite the formulaic recitations).

82. *Roe*, 410 U.S. at 153.

83. *Id.* at 163, 164.

84. *Id.* at 163. The Court relied on the increasing danger of abortion as pregnancy progresses.

85. See *id.* at 163-65. The Court thus ruled that the Constitution always protects from state interference abortions necessary to preserve the pregnant woman's life or health.

“compelling point.”<sup>86</sup> *Roe* and its successors stand out as extraordinary because they concede that some state interests can qualify as compelling, instead of demonstrating the usual fatality of strict scrutiny.<sup>87</sup> Nonetheless, these cases illustrate the power of this level of judicial review. After all, the outcome of *Roe* was the invalidation of every abortion prohibition in the United States, including those in jurisdictions that had recently modernized and liberalized their laws.<sup>88</sup>

*B. State Value Judgments and Behavior Modification: The Price of Public Support*

This strict-scrutiny standard, however, does not apply when the state seeks to advance its interests and limit individual privacy rights through the allocation of public funds. The Court has articulated this doctrine most clearly and forcefully in the abortion-funding cases. In 1977, in *Maher v. Roe*,<sup>89</sup> the Court held that, despite the super-protected status of the abortion choice, a state’s refusal to subsidize elective abortions for indigent women need only pass the easy rational-basis test, even when the state provides financial assistance for poor women who choose continued pregnancy and childbirth.<sup>90</sup> In

---

86. The Court sought to explain its choice of viability on both “logical and biological” grounds: “the fetus then presumably has the capability of meaningful life outside the mother’s womb.” *Id.* at 163.

Although the three Justices in *Casey*, 112 S. Ct. 2791, thought the special character of abortion and the abiding nature of the state’s interest in the fetus justified replacing strict scrutiny with an undue-burden test, *id.* at 2819-21, they reaffirmed that the abortion choice belongs within the fundamental right to privacy. They also adhered to viability as the point when the state’s asserted interest becomes sufficiently compelling to justify even “unduly burdensome” abortion restrictions, *id.* at 2817. See notes 314-33 and accompanying text (discussing *Casey*).

87. See Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972) (observing “scrutiny that was ‘strict’ in theory and fatal in fact”).

88. See *Doe v. Bolton*, 410 U.S. 179 (1973) (holding unconstitutional Georgia’s statute, based on the Model Penal Code, allowing abortions under specified conditions). Justice White’s statement that *Roe* invalidated “most existing state abortion statutes” appears to be an understatement. See *id.* at 222 (White, J., dissenting) (emphasis added).

89. 432 U.S. 464 (1977).

90. See also *Beal v. Doe*, 432 U.S. 438 (1977) (holding that the Social Security Act does not require participating states to provide Medicaid coverage for nontherapeutic abortions); *Poelker v. Doe*, 432 U.S. 519 (1977) (per curiam) (holding that *Maher*’s reasoning validates a city’s prohibition of nontherapeutic abortions in a public hospital).

1980, in *Harris v. McRae*,<sup>91</sup> the Court extended this holding to cover selective funding that excludes therapeutic abortions, that is, terminations of pregnancies posing health risks.<sup>92</sup>

The Court observed that, in protecting particular rights against state action, the Fourteenth Amendment addresses only state-imposed obstacles,<sup>93</sup> penalties,<sup>94</sup> restrictions,<sup>95</sup> and "unduly burdensome" interferences.<sup>96</sup> In deciding that selective funding does not impose an undue burden on the right to an abortion, the Court explained that constitutional protection from state action impinging on a right does not confer an "entitlement"<sup>97</sup> to state support for the right because privacy and other fundamental rights are exclusively negative rights.<sup>98</sup> As a result, governmental refusals to subsidize or otherwise facilitate the exercise of protected rights do not count as "deprivations" or "denials," the only kind of state action addressed by the Fourteenth Amendment's guarantees.<sup>99</sup> As the Court subsequently clarified, state action and state inaction are governed by different rules, and the Court will characterize as an omission the failure to fund or provide a particular service or to take a particular protective step in a larger state assistance program.<sup>100</sup> Thus, the government's selective provision of an expansive range of medical services, including care incident to continued pregnancy and childbirth but excluding abortion, evokes only rational-basis review.<sup>101</sup>

---

91. 448 U.S. 297 (1980) (validating the federal "Hyde Amendment"). While the 1977 holdings rested on the Equal Protection Clause (including strict scrutiny for fundamental rights), *McRae* asked similar questions under the Due Process Clause of the Fifth Amendment.

92. See also *Williams v. Zbaraz*, 448 U.S. 358 (1980) (validating a similar state statute). Although both the federal and state measures offered abortion assistance for life-threatening pregnancies, the Court's reasoning in both cases would have supported provisions without such exceptions.

93. *Maher*, 432 U.S. at 474; *McRae*, 448 U.S. at 316.

94. *Maher*, 432 U.S. at 474 n.8; *McRae*, 448 U.S. at 317 n.19.

95. *Maher*, 432 U.S. at 474; *McRae*, 448 U.S. at 314.

96. *Maher*, 432 U.S. at 474; *McRae*, 448 U.S. at 314.

97. *McRae*, 448 U.S. at 316, 318.

98. Susan Frelich Appleton, *Beyond the Limits of Reproductive Choice: The Contributions of the Abortion-Funding Cases to Fundamental-Rights Analysis and to the Welfare-Rights Thesis*, 81 Colum. L. Rev. 721, 734-36 (1981).

99. See *id.* at 748.

100. See, for example, *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 202 (1989) (holding that the state's failure to protect a child from a violent father is not actionable under the Fourteenth Amendment's Due Process Clause, even though a social services agency had investigated the problem and made recommendations). But see *id.* at 204-05 (Brennan, J., dissenting) (concluding that the state had taken action); Patricia M. Wald, *Government Benefits: A New Look at an Old Gifhorse*, 65 N.Y.U. L. Rev. 247, 262 (1990) ("[The] county's relationship with [the victim in *DeShaney*] cannot accurately be described as 'inaction'").

101. *Maher*, 432 U.S. at 474, 478; *McRae*, 448 U.S. at 316-17, 324. But compare Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 Harv. L. Rev.

The abortion-funding cases did not explain why *any* standard of review should govern state inaction, given the Due Process Clause's exclusive aim at official action.<sup>102</sup> Nonetheless, the Court examined whether the denial of abortion funding for indigents rested on a rational basis, a balancing test so deferential to state authority that courts themselves will supply a justifying state interest completely apart from the reasons for a law's enactment.<sup>103</sup> Although subsidizing childbirth proves more costly than subsidizing abortion<sup>104</sup> and although refusals to fund therapeutic abortions would seem to undermine the state interest in maternal health, asserted in support of many abortion restrictions and recognized in *Roe*,<sup>105</sup> the Court found the required rational basis in official value judgments preferring childbirth over abortion.<sup>106</sup> The state can use its largesse to encourage some behaviors and discourage others, even behaviors with fundamental-rights status.<sup>107</sup> This analysis also suggests that the Court believes public funds serve an expressive function, putting the state on record regarding the policy choices it seeks to support and those it seeks to disavow.

The Court invoked private-school education as an analogy. Although parents have a fundamental, substantive due process right to select private schooling for their children, a choice the state cannot prohibit,<sup>108</sup> the Constitution does not require state subsidies for such education. Rather, the state can encourage parents to choose public

---

989, 1003, 1046 (1991) (theorizing that a government's failure to fund raises constitutional problems only when the government funds substitutes for constitutionally protected activities, for example, funding childbirth but not abortion).

102. In other words, the Court failed to explain why it did not simply end its analysis once it determined that no "deprivation" or "denial" had occurred. See Appleton, 81 Colum. L. Rev. at 748-49 (cited in note 98). Compare Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1425 (1989) (arguing that minimum rationality is required even for the government's distribution of "gratuitous" benefits).

103. See Laurence H. Tribe, *American Constitutional Law* 1443 (Foundation Press, 2d ed. 1988) (stating that, in effect, rational-basis review amounts to no serious review at all).

104. The Court so observed in the abortion-funding cases. See *Maher*, 432 U.S. at 468, 478-79. If the resulting child is supported by public assistance, the difference in costs obviously increases. See Michael J. Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on Harris v. McRae*, 32 Stan. L. Rev. 1113, 1124 (1980).

105. 410 U.S. at 163. See Appleton, 81 Colum. L. Rev. at 731-37 (cited in note 98).

106. *Maher*, 432 U.S. at 474, 478; *McRae*, 448 U.S. at 314, 324-26.

107. See *Maher*, 432 U.S. at 474 ("The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision"); *McRae*, 448 U.S. at 325 (noting how "Congress has established incentives that make childbirth a more attractive alternative than abortion"). Compare Rosenthal, 39 Stan. L. Rev. at 1158-59 (cited in note 59) (theorizing various reasons for the refusal to fund abortions).

108. *Pierce*, 268 U.S. 510.

schooling by making it available at no cost, through public financial support, while leaving private schools accessible only to those who can find their own means to pay tuition.<sup>109</sup>

The abortion-funding cases remain excruciatingly hard to reconcile with the long line of decisions invalidating "unconstitutional conditions."<sup>110</sup> Those decisions struck down governmental efforts to condition receipt of a benefit on the sacrifice of a constitutional right. For example, the state cannot require workers seeking unemployment compensation to forego religious observance of their Sabbath, as the Court held in *Sherbert v. Verner*.<sup>111</sup> Given such precedents, why don't funds for childbirth but not abortion fall as unconstitutional conditions? Only poor women who forego their protected right to abortion can receive medical care at state expense.

In response, the Court sought to distinguish a state's failure to pay for a given activity (permissible under the abortion-funding cases) from a state's imposition of a penalty—financial or otherwise—as the result of one's exercise of a protected right (impermissible under the unconstitutional conditions cases).<sup>112</sup> According to the Court, a penalty occurs *only* when the state deprives the right-holder of something that otherwise belonged to him or her—again, reflecting reliance on the active/passive dichotomy.<sup>113</sup> To conclude that no penalty was at work in the abortion-funding cases, however, the Court had to isolate

109. *Maier*, 432 U.S. at 476-77. The Court developed a similar analogy regarding foreign language instruction. *Id.*

110. See generally, for example, Richard A. Epstein, *The Supreme Court—1987 Term, Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 1, 89-91 (1988); Sullivan, 102 Harv. L. Rev. at 1413 (cited in note 102); Cass R. Sunstein, *Is There an Unconstitutional Conditions Doctrine?*, 26 San Diego L. Rev. 337 (1989). But see Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 Cornell L. Rev. 1185 (1990) (presenting a theory to explain the outcomes in cases). Compare Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. Rev. 593 (1990) (attempting to reformulate the doctrine in light of modern functions).

111. 374 U.S. 398 (1963). For a more recent case recognizing the unconstitutional conditions doctrine, see *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2317, 129 L. Ed. 2d 304 (1994) (relying on the doctrine in protecting a landowner's rights under the Fifth Amendment Takings Clause).

112. *McRae*, 448 U.S. at 317 n.19.

113. *Id.* But see, for example, Susan Bandes, *The Negative Constitution: A Critique*, 88 Mich. L. Rev. 2271, 2297-2308 (1990) (criticizing the penalty/subsidy distinction as questionable). There are other ways to attempt to express the distinction between the two lines of cases but they prove equally slippery. See, for example, Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. Pa. L. Rev. 1293, 1352-53 (1984) (contrasting threats versus offers); Pildes, 45 Hastings L. J. at 738-39 (cited in note 81) (discussing unconstitutional constraints operating directly on rights versus "program-defining" conditions); Sullivan, 102 Harv. L. Rev. at 1427 (cited in note 102) (inferring that the choice must lie ahead, not behind).

the non-funding of abortions from the larger Medicaid program that provides the poor with virtually all other medical care, including subsidized childbirth.<sup>114</sup> Put differently, in the abortion-funding cases, the Court assumed the “baseline” for determining the existence of a penalty was the absence of funds for any medical care at all. From this perspective, the state has not acted at all with respect to abortion though it has provided support for other medical services. But the state’s subsidy of all other medical care besides abortion represents an equally plausible baseline; from this starting point for the analysis, the state is singling out abortion for unfavorable treatment, compared to other medical care.<sup>115</sup> Numerous other plausible baselines exist as well.<sup>116</sup>

The reasoning in the abortion-funding cases casts new light on earlier cases, notably *Dandridge v. Williams*,<sup>117</sup> which upheld Maryland’s dollar limit on public assistance to a single family, said to serve rationally as an incentive for family planning.<sup>118</sup> In addition, the reasoning has continued to gain momentum and new applications.<sup>119</sup> It reached one peak in *DeShaney v. Winnebago County*

---

114. Appleton, 81 Colum. L. Rev. at 738-40 (cited in note 98).

115. See Sullivan, 102 Harv. L. Rev. at 1440 (cited in note 102). See also note 101 (summarizing McConnell’s argument). Compare Charles R. Bogle, Note, *Unconscionable Conditions: A Contractual Analysis of Conditions on Public Assistance Benefits*, 94 Colum. L. Rev. 193, 237 (1994) (arguing that, although the government does not monopolize health care, it has displaced private actors by subsidizing almost all medical care for the poor).

116. See Kreimer, 132 U. Pa. L. Rev. at 1358-74 (cited in note 113) (examining as possible baselines: history, equality, and prediction).

117. 397 U.S. 471, 484-87 (1970).

118. The Court also justified Maryland’s action as “an incentive to seek gainful employment.” *Id.* at 486.

The abortion-funding cases also provide an analytic framework that brings some order to the otherwise confusing “pregnancy-discrimination” cases. See, for example, *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977). See also Appleton, 81 Colum. L. Rev. at 749-50 n.216 (cited in note 98).

119. For example, courts have rejected substantive due process challenges to allocations of public funds that operate as financial disincentives to close family relationships, notwithstanding the constitutional protection for such relationships recognized in cases such as *Stanley*, 405 U.S. at 650-52, and *Moore*, 431 U.S. at 499. See, for example, *Lyng v. Castillo*, 477 U.S. 635 (1986) (upholding as rational a statutory distinction between households composed of immediate family members and those composed of distant relatives and unrelated persons, resulting in a smaller allotment of food stamps for the former); *Bowen v. Gilliard*, 483 U.S. 587, 609 (1987) (upholding an AFDC amendment requiring consideration of support payments by noncustodial parents); *Libscomb v. Simmons*, 962 F.2d 1374, 1384 (9th Cir. 1992) (upholding subsidies for foster care by nonrelatives only). Of the cases cited, however, only *Libscomb* expressly relies on the abortion-funding cases. 962 F.2d at 1379. Compare *Zablocki*, 434 U.S. 374 (holding marriage restrictions unconstitutional), with *Califano v. Jobst*, 434 U.S. 47, 58 (1977) (upholding the termination of secondary benefits for disabled, dependent children upon marriage). See also *Lyng v. International Union, UAW*, 485 U.S. 360, 369 (1988) (citing *McRae* to uphold ineligibility for food stamps of any household while any member is on strike).

*Department of Social Services*,<sup>120</sup> in which the Court relied on these cases to find no constitutional violation in the state's failure to protect an abused child from his violent father, notwithstanding that state social service workers had notice of the problem, had previously investigated the family, and had entered into an agreement with the father in an effort to halt the abuse.<sup>121</sup> The Court explained that the Due Process Clause confers "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."<sup>122</sup> This approach peaked again in *Rust v. Sullivan*,<sup>123</sup> which established that first amendment values do not change the basic analysis. As a result, the "gag rule's" withholding of public financial support from family planning clinics that provide abortion counselling survived constitutional challenge, for, once again, government can fund what it wishes and, through its expenditures, it can promote chosen values and seek to mold the behavior of recipients.<sup>124</sup> Finally, for some of the Justices, the abortion-funding cases have oozed beyond the limits spelled out in their underlying rationale, providing authority to support even active intrusion on protected rights.<sup>125</sup>

### C. *The Abortion-Funding Approach to Welfare Reforms*

The reasoning in the abortion-funding cases apparently legitimizes the most controversial of the proposed welfare reforms. Under this approach, government can influence the most intimate, personal, and physical choices through its allocations of public funds. If a legislature seeks to deter childbearing among welfare recipients by providing financial incentives for use of Norplant or by refusing to subsidize the birth and care of additional children, so the argument goes, the Constitution will not prohibit such efforts so long as they have a ra-

---

120. 489 U.S. 189 (1989).

121. See note 100.

122. 489 U.S. at 196 (citing *McRae*).

123. 500 U.S. 173 (1991). See also *Webster v. Reproductive Health Services*, 492 U.S. 490, 507-13 (1989) (upholding the constitutionality of a Missouri statute prohibiting the use of public employees and facilities for abortions unnecessary to save the mother's life).

124. Compare David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. Rev. 675 (1992) (analyzing and critiquing *Rust's* approach to selective subsidies of speech); McConnell, 104 Harv. L. Rev. at 1023-31 (cited in note 101) (giving the pre-*Rust* analysis); Gary A. Winters, Note, *Unconstitutional Conditions as "Nonsubsidies": When Is Deference Inappropriate?*, 80 Georgetown L. J. 131 (1991) (criticizing *Rust*).

125. See notes 292-333 and accompanying text. See also Appleton, 81 Colum. L. Rev. at 750-53 (cited in note 98) (predicting this expansion).

tional relation to the desired end. If official value judgments supplied the requisite rational basis in the abortion-funding cases, it follows that value judgments can perform the same role in justifying welfare reforms.<sup>126</sup> Hence, concerns expressed by Congress and state legislatures about the increasing number of births to welfare mothers and the rising rate of illegitimacy appear as *prima facie* justifications for the proposed reforms, dooming any constitutional challenge following their enactment.

Not surprisingly, in an early test, *C.K. v. Shalala*,<sup>127</sup> New Jersey's so-called "family cap" withstood claims of unconstitutionality in an opinion in which the district judge relied on the abortion-funding rationale.<sup>128</sup> The challengers had argued that strict judicial scrutiny applies because, in the court's words, "the Family Cap is a governmental attempt to alter recipients' reproductive behavior by denying them benefits should they make procreative decisions disfavored by the state."<sup>129</sup> The court rejected this argument, explaining that a state "is not obligated to remove obstacles that it did not create"<sup>130</sup> and that the scheme leaves recipients free to bear additional children, albeit without additional state assistance. Under the rational-basis test dictated by the abortion-funding cases, New Jersey's welfare reforms survive based on their relationship "to the legitimate state interests of altering the cycle of welfare dependency that [New Jersey] has determined AFDC engenders in its recipients as well as promoting individual responsibility and family stability."<sup>131</sup>

No doubt because of the obvious parallel to the abortion-funding cases, the plaintiffs' substantive due process claim played only a bit part in their challenge, with other arguments, particularly those based on the Administrative Procedure Act, dominating their briefs.<sup>132</sup>

---

126. Compare Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 Harv. L. Rev. 1348, 1349 (1994) (arguing that the Constitution forbids state action that has no purpose other than moral standard-setting), with Carl E. Schneider, *State-Interest Analysis and the Channeling Function*, in Gottlieb, ed., *Public Values in Constitutional Law* 97 (cited in note 81) (theorizing that family laws perform a "channeling" function that the Court has undervalued in privacy cases).

127. 883 F. Supp. 991 (D.N.J. 1995).

128. *Id.* at 1014-15. The court used the term "family cap" to describe New Jersey's denial of additional funds to welfare families upon the birth of additional children. See text accompanying note 14. Critics of such reforms claim that the term "child exclusion" more accurately describes how these measures operate. See notes 225-32 and accompanying text.

129. 883 F. Supp. at 1014.

130. *Id.*

131. *Id.* at 1015.

132. In support of their motion for summary judgment, plaintiffs devoted just seven pages out of fifty-nine to their claim based on "the fundamental right to procreative choice." The



No matter how coercively and intrusively a family cap operates on constitutionally protected reproductive decision making, absent some points of distinction, such contentions are the same as those that failed to carry the day in the abortion-funding cases.<sup>133</sup> If government can allocate public funds to discourage abortions, in accord with its own value judgments, then it presumably follows that New Jersey can use the same method and invoke similar reasons to discourage childbirth.<sup>134</sup>

The remainder of this Article explores the possible grounds for intensifying the judicial scrutiny of certain privacy-invading welfare reforms, notwithstanding the abortion-funding cases. If successful, this quest for an elevated standard of review will not mean that welfare can never be changed; it will mean, however, that the reforms considered here must undergo close examination by the courts, which will look beyond stereotypes and political popularity for justifications. This search concludes that, while equal protection norms offer some foundation for an elevated standard of review, an examination of the "undue-burden" test—a test with some of its strongest roots in the abortion-funding cases—ultimately provides a more promising path.

---

remainder of the brief advanced arguments under the Administrative Procedure Act, Pub. L. No. 404, 60 Stat. 237 (1946), codified in scattered sections of 5 U.S.C. (1994 ed.), the Social Security Act, HHS regulations governing experimentation involving pregnant women and fetuses, and constitutional irrationality. Plaintiffs' Brief in Support of Plaintiffs' Motion for Summary Judgment, *C.K. v. Shalala*, 883 F. Supp. 991 (D.N.J. 1995). See also Plaintiffs' Brief in Opposition to Federal Defendant's Motion for Summary Judgment, *C.K. v. Shalala*, 883 F. Supp. 991 (D.N.J. 1995). The court rejected all of plaintiffs' contentions. 883 F. Supp. at 1015.

133. Plaintiffs argued in *C.K.* that unlike "a governmental decision not to subsidize one particular act related to procreative choice," New Jersey's law constitutes a denial of "general welfare benefits" to women exercising the disfavored choice and, that as such, it is an "obstacle" making plaintiffs "worse off" than otherwise, hence meriting strict scrutiny. Brief in Support of Plaintiffs' Motion for Summary Judgment at 57-58 (cited in note 132). See also Brief in Opposition to Federal Defendant's Motion for Summary Judgment at 41-42 (cited in note 132); Reply Brief in Support of Plaintiffs' Motion for Summary Judgment 14-15, *C.K.*, 883 F. Supp. 991 (D. N.J. 1995) (same argument). The court disagreed, citing *McRae* and *Rust* for the proposition that "while a state may not hinder one's exercise of protected choices, it is not obligated to remove obstacles that it did not create, including a lack of financial resources." *C.K.*, 883 F. Supp. at 1014. Compare Yvette M. Barksdale, *And the Poor Have Children: A Harm-Based Analysis of Family Caps and the Hollow Procreative Rights of Welfare Beneficiaries*, 14 L. & Ineq. J. 1 (forthcoming 1995) (analyzing harms under the unconstitutional conditions doctrine); Laura M. Friedman, Comment, *Family Cap and the Unconstitutional Conditions Doctrine: Scrutinizing a Welfare Woman's Right to Bear Children*, 56 Ohio St. L. J. 637 (1995) (attempting an unconstitutional conditions analysis).

134. I explored this argument fully, long before the current debate on welfare reform, in Susan Frelich Appleton, *The Abortion-Funding Cases and Population Control: An Imaginary Lawsuit (and Some Reflections on the Uncertain Limits of Reproductive Privacy)*, 77 Mich. L. Rev. 1688 (1979). See also Eve W. Paul and Paula Schaap, *Abortion and the Law in 1980*, 25 N.Y. L. Sch. L. Rev. 497, 520 n.121 (1980) (citing an unpublished Arizona challenge to local funding of abortion and sterilization but not prenatal care and childbirth).

## IV. ELEVATING THE STANDARD OF REVIEW FOR WELFARE REFORMS

The conclusion that the undue-burden test, a standard of review designed to give the government a larger role in reproductive decision making,<sup>135</sup> should apply to privacy-invading welfare reforms is disquieting to say the least.<sup>136</sup> Yet it is a conclusion built frankly on two foundations: the Court's clear rejection of strict scrutiny for allocations of public funds and my own certainty that welfare reformers' explicit efforts to manipulate private choices must evoke more than rational-basis review. Many features of the undue-burden test, including its immaturity in the courts,<sup>137</sup> make it suitable for development as a means of strengthening judicial review of welfare reforms. Adopting this test as a compromise would serve the right to privacy, not dilute it, because financial coercion undertaken to alter private behavior necessarily imposes an unconstitutional undue burden.

But first, another avenue for sharpening judicial scrutiny of modern welfare reforms—their express and inherent discrimination—merits attention.

A. *Welfare Reforms and Equal Protection*

Although the abortion-funding cases explicitly rejected an equal protection challenge resting on wealth discrimination,<sup>138</sup> judicial opinions and the literature agree that the freedom accorded to states in the distribution of subsidies does not permit invidious discrimination.<sup>139</sup> Hence, welfare reforms embodying invidious discrimination

135. See notes 297-333 and accompanying text.

136. As Kate Bartlett has written after supporting the role of tradition in feminist legal thought:

I am worried about a movement whose identity seems too often connected with a relentless pushing away from a contaminated past. . . .

But with this worry comes anxiety—anxiety about whether all this represents womanly compromise, about whether I have prescribed a solution ripe for co-optation, and about whether I have taken shots at forefront feminism only to abdicate to a watered-down sell-out.

Bartlett, 1995 Wis. L. Rev. at 342 (cited in note 78). I feel similar anxiety about advancing the undue burden test.

137. But see Alan Brownstein, *How Rights Are Infringed: The Role of Undue-Burden Analysis in Constitutional Doctrine*, 45 Hastings L. J. 867, 872 (1994) (citing the undue-burden test as a standard reflected "throughout the fundamental rights case law of the past forty years").

138. *Maier*, 432 U.S. at 470-71; *McRae*, 448 U.S. at 322-23.

139. See, for example, *Califano*, 443 U.S. at 89 (holding that sex discrimination in the provision of AFDC unemployment benefits is unconstitutional); *United States Dept. of*

would not evoke the deference to state value judgments used in the abortion-funding cases, and classifications triggering heightened scrutiny under the Equal Protection Clause would require precisely the same level of judicial review in the evaluation of welfare measures as they command in other contexts.<sup>140</sup> Indeed, tenBroek's expressed hope for a constitutional solution to the dual system of family law contemplated reliance on a still developing equality doctrine.<sup>141</sup> Against this background, three bases of discrimination merit consideration: race, gender, and birth status. Although all three provide insights about precisely which groups will bear the brunt of welfare reforms, the analysis of birth status will probably prove most convincing to courts and least susceptible to welfare reformers' efforts to obscure the problem.<sup>142</sup>

### 1. Race: Welfare Stereotypes

In the United States, race oppression and poverty are intimately related.<sup>143</sup> The sheer existence of such milestones as *Brown v. Board of Education*,<sup>144</sup> Title VII of the Civil Rights Act,<sup>145</sup> and official affirmative action programs,<sup>146</sup> shows that, during various periods in

*Agriculture v. Moreno*, 413 U.S. 528, 534-35, 538 (1973) (holding that discrimination against hippies in the distribution of food stamps violates equal protection); *Lyng*, 485 U.S. at 370 n.8 (stating that *Moreno* applied the rational-basis test, but held that a statute cannot be saved by relation to an illegitimate governmental objective). See Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. Pa. L. Rev. 715, 780 (1978); Seth F. Kreimer, *Government "Largesse" and Constitutional Rights: Some Paths Through and Around the Swamp*, 26 San Diego L. Rev. 229, 230 (1989); Wald, 65 N.Y.U. L. Rev. at 256 (cited in note 100) (advocating an equal protection rather than an unconstitutional conditions analysis of governmental benefit schemes).

140. The abortion-funding cases stated that rational-basis review governed because no state action had impinged a fundamental right. See notes 93-101 and accompanying text. Similarly, *Bowers*, 478 U.S. 186, applied rational-basis review after finding no fundamental right at stake. Both authorities strongly suggest that the standard of review would prove determinative, with value judgments alone offering a sufficient state interest only under the minimal review of the rational-basis test. *Casey*, 112 S. Ct. 2791, could make this generalization problematic, however, if one reads the joint opinion to mean that value judgments alone can provide adequate justifications under the heightened (but not strict) scrutiny of the undue-burden test. See also *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 568-72 (1991) (plurality opinion) (justifying a ban on nude dancing, despite its limitations on some expressive activity, with the state's interest in protecting morality). But see note 391 and accompanying text.

141. See notes 61-62 and accompanying text.

142. See note 260 and accompanying text.

143. Edelman, 81 Georgetown L. J. at 1698 (cited in note 44).

144. 347 U.S. 483 (1954).

145. 42 U.S.C. §2000e-2(a) (1988 ed. & Supp. V).

146. But see *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995) (holding that race-based preferences in affirmative action for federal contracts must satisfy strict scrutiny). In the contemporary political climate, *Adarand* could signal the beginning of the end of such programs. See, for example, Steven A. Holmes, *G.O.P. Lawmakers Offer a Ban on Federal Affirmative*

our recent national history, African-American citizens have suffered significant disadvantages in education and employment on the basis of their race. With education and previous employment experience cited as two primary predictors of those likely to exit welfare on the basis of earnings,<sup>147</sup> it should come as no surprise that victims of discrimination in education and employment face a significant risk of poverty. Demographic studies show that a disproportionate number of African-American families live in poverty,<sup>148</sup> even though the poor is a group of considerable diversity in terms of race,<sup>149</sup> as well as geography, age, and ability to work.<sup>150</sup>

Race has played a notable role in the history of welfare. At one time African-Americans were excluded from the Social Security program,<sup>151</sup> the legislative home of the modern welfare system.<sup>152</sup> Not surprisingly, the officially sanctioned racial divisions that characterized so many aspects of American life infected welfare as well. A separate movement led by African-American women, shunned by their white counterparts, paralleled the mainstream efforts historically credited with establishing what became AFDC.<sup>153</sup> The distinctive approach of this black movement reflected a resistance to means- and morals-testing<sup>154</sup> and an acceptance of employment for married women, with women's economic independence as an explicit goal.<sup>155</sup>

---

*Action*, N.Y. Times A17 (July 28, 1995); B. Drummond Ayres, Jr., *California Board Ends Preferences in College System*, N.Y. Times A1 (July 21, 1995).

147. Bane and Ellwood, *Welfare Realities* at 61, 97 (cited in note 36). A third important variable, a male partner for a poor woman, see *id.* at 50, 55-56, is discussed at note 202 and accompanying text.

148. See Edelman, 81 Georgetown L. J. at 1706 & nn.45-46 (cited in note 44) (citing census figures for households with children and female-headed households with no spouse present).

149. See Note, 107 Harv. L. Rev. at 2019-20 (cited in note 37) (citing statistics on the racial composition of the welfare population). See also White, 26 Conn. L. Rev. at 861 (cited in note 3) (summarizing statistics).

150. See Edelman, 81 Georgetown L. J. at 1706-08 (cited in note 44).

151. See Minow, 26 Conn. L. Rev. at 824 (cited in note 5). See also David Stoesz, *Poor Policy: The Legacy of the Kerner Commission for Social Welfare*, 71 N.C. L. Rev. 1675, 1675 (1993) (reporting that Charity Organization Societies refused to include African-Americans and that the Social Security Act of 1935, as a "tactical concession to southern legislators," excluded domestic and agricultural workers, mostly African-Americans).

152. See generally Gordon, *Pitied But Not Entitled* at 253-85 (cited in note 39) (detailing the history of the Social Security Act).

153. See *id.* at 111-43 (including a separate chapter on welfare activism by African-American women).

154. See *id.* at 129-30.

155. See *id.* at 135-37.

There is evidence of the importance of race in the calls for welfare reform as well. In the 1960s, Daniel Patrick Moynihan, speaking for the Department of Labor, singled out the African-American family's matriarchal structure for blame in the increasing incidence of welfare dependency among blacks.<sup>156</sup> Condemnation of existing programs has expressly targeted single mothers who are alleged to continue reproducing just to maintain and increase their benefits: so-called "welfare queens."<sup>157</sup> Despite the racial diversity of welfare recipients, the "welfare queen" is stereotypically black.<sup>158</sup> Data about the higher fertility rate among single African-American females compared to single white females reinforce this stereotype.<sup>159</sup> By supporting these black women and their many children, welfare is said to enable them to create and perpetuate a variety of social ills, including rising rates of violent crime and drug abuse.<sup>160</sup> Indeed, Lucie White persuasively theorizes that the popular image of an unmarried African-American mother as the typical welfare recipient explains why middle-class and elite women have not followed their foremothers as activists supporting welfare.<sup>161</sup>

Legislative efforts to reform welfare reveal explicit considerations of race. Indeed, the evidence is remarkable, given the modern political taboo against overt race discrimination. In the initial bill passed by the House, the section reflecting the "sense of Congress" expresses in racially specific terms the negative consequences of out-of-wedlock births, providing official recognition of welfare stereotypes.<sup>162</sup> Accordingly, it indicates that Congress has been

---

156. See Minow, 26 Conn. L. Rev. at 836, n.107 (cited in note 5) (citing the "Moynihan Report").

157. See generally Note, 107 Harv. L. Rev. at 2013 (cited in note 37).

158. *Id.* at 2019-20. See Kimberly J. McLarin, *For the Poor, Defining Who Deserves What*, N.Y. Times § 4 at 4 (Sept. 27, 1995); Mink, 26 Conn. L. Rev. at 881 (cited in note 42); Murray, *Losing Ground* at 18, 162 (cited in note 37); Lucie E. White, *No Exit: Rethinking "Welfare Dependency" from a Different Ground*, 81 Georgetown L. J. 1961, 1966 (1993). See also Catherine Albiston, *The Social Meaning of the Norplant Condition: Constitutional Considerations of Race, Class, and Gender*, 9 Berkeley Women's L. J. 9, 17-18 (1994) (citing racist assumptions underlying the "welfare queen" stereotype).

159. See, for example, *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697, 701 n.12 (8th Cir. 1987) (offering a higher fertility rate for black women as evidence to show the disparate impact of a rule prohibiting unwed pregnancy). See also Murray, *Losing Ground* at 127 (cited in note 37) (noting that there is a higher fertility rate for single black teenagers). But see *U.S. Fertility Rates Fell During 1992, Even Among Black Teenagers, Women Over 30*, 27 Family Planning Perspectives 91, 91 (1995) (reporting the recent decline in the nonmarital fertility rate among blacks and a rise among whites).

160. See Minow, 26 Conn. L. Rev. at 836-37 (cited in note 5); Dorothy E. Reherts, *The Value of Black Mothers' Work*, 26 Conn. L. Rev. 871, 877 (1994). See also Murray, *Losing Ground* at 175 (cited in note 37) (summarizing the factors to which he attributes the rise in crime).

161. White, 26 Conn. L. Rev. at 853-55 (cited in note 3).

162. H.R. 4 § 100 (cited in note 9).

motivated to write this legislation because the illegitimacy rate for “black Americans was 26 percent in 1965, but today the rate is 68 percent and climbing.”<sup>163</sup> (For whites, it has risen “from 2.29 percent in 1960 to 22 percent today.”<sup>164</sup>) Similarly, “the likelihood that a young black man will engage in criminal activities doubles if he is raised without a father and triples if he lives in a neighborhood with a high concentration of single parent families.”<sup>165</sup> At the very least, this evidence shows that race was consciously on the minds of those voting for the bill.<sup>166</sup> In addition, some members of Congress have been caught speaking of welfare reform in racially charged terms.<sup>167</sup> State lawmakers have made such remarks as well.<sup>168</sup> Finally, observers have detected the role of race in the legislative efforts to reform welfare even when race has not been mentioned expressly.<sup>169</sup>

Although, without more, racially disproportionate effects of legislation will not satisfy the “intent to discriminate” necessary to evoke the compelling-state-interest test that makes race-based classifications presumptively unconstitutional,<sup>170</sup> it remains to be decided whether official actions premised on racial stereotypes and explicit references to race trigger such strict scrutiny. Making such stereotypes count in constitutional analysis would not require adopting Barbara Flagg’s intriguing proposal to invalidate “transparently

---

163. *Id.*

164. *Id.*

165. *Id.*

166. By contrast, the Senate’s findings on illegitimacy, single-parenthood, and welfare dependency—recited in support of its goal of “promoting responsible parenting”—are presented without any racially specific references. H.R. 4 § 101 (cited in note 15) (replacement for § 406 of the Social Security Act). The conference report follows the Senate’s approach. See, for example, 141 Cong. Rec. at H15319 (daily ed. Dec. 21, 1995) (H.R. 4 § 101).

167. See, for example, Carl Rowan, *Duplicitous Newt a Bigot in Denial*, Chicago Sun-Times, Editorial Section 39 (June 21, 1995) (reporting Newt Gingrich’s declaration that blacks are lazier than whites and his claim that poverty is caused by laziness); DeWayne Wickham, *Gingrich Blames Poor for ‘Self-Made’ Poverty*, USA Today 11A (July 3, 1995) (reporting Gingrich’s statement about how blacks could get out of the “poorhouse”).

168. See, for example, Iver Peterson, *The Governor and Race: Off the Cuff, Off Key*, N.Y. Times § 13 at 2 (April 30, 1995) (reporting how New Jersey’s Governor described black young men bragging about the numbers of illegitimate children); Nicholas Goldberg, *Silver: Bruno Courting Bigots*, Newsday A4 (April 10, 1995) (reporting that the New York State Assembly Speaker said blacks and Hispanics have “their hands out” for welfare payments).

169. See, for example, Jack Gormond and Jules Witcover, *Welfare Debate Is Lively, Major Reforms Unlikely*, Baltimore Sun 2A (Aug. 2, 1995) (stating that “race is obviously a factor” in Congress’s efforts to give states the responsibility for welfare eligibility); Robin Toner, *Ideas and Trends: The New Bipartisanship; Resolved: No More Bleeding Hearts*, N.Y. Times § 4 at 1 (July 16, 1995) (reporting that Rep. John Lewis of Atlanta said race matters in welfare reform).

170. *Washington v. Davis*, 426 U.S. 229, 239-45 (1976). See *Jefferson v. Hackney*, 406 U.S. 535, 547-49 (1972).

white" decision making.<sup>171</sup> Nor would it necessarily require strict scrutiny for all measures reflecting *exclusively unconscious* racism under the "cultural meaning" test advanced by Charles Lawrence.<sup>172</sup>

The suggestion posed here is a more modest one, addressing only decision making that more closely resembles what Title VII case-law calls a "pretext" for disparate treatment<sup>173</sup> than what it calls discrimination based on "disparate impact."<sup>174</sup> Stereotypical thinking about men and women has often signalled the presence of unconstitutional *sex* discrimination, at least in cases of explicit classifications.<sup>175</sup>

171. Barbara J. Flagg, "Was Blind, But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 Mich. L. Rev. 953 (1993).

172. Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987). In rejecting the rule that confines strict judicial scrutiny to official decisions showing an intent to discriminate, assumed to operate at a conscious level, Lawrence proposes that "proof that governmental action will be interpreted in racial terms should lead a court to closely scrutinize that action," so long as such "racial understanding will be widely shared within the predominant culture." *Id.* at 375, 379. But as Lawrence points out, sometimes state actors with economic purposes display a "'selective sympathy and indifference' [that] could have occurred at a conscious or unconscious level." *Id.* at 348 (quoting Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 Harv. L. Rev. 1, 7 (1976), and analyzing *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), which held that proof of racially discriminatory intent is required to show a violation of the Equal Protection Clause). Lawrence goes on to say: "It is more than likely that the decisionmakers [in *Arlington Heights*] knew that the poor people they were excluding [by refusing to rezone for a low-income housing development] were black, but they would not be likely to have known that they undervalued the cost to poor people because they thought of them as black rather than white." *Id.* at 348.

A similar mixture of conscious and unconscious consideration of race appears at work in the welfare reform movement.

Interestingly, Lawrence classifies limits on subsidies to the poor as "hard cases" for establishing discrimination under his proposed test. See *id.* at 376-78. The questions he would have plaintiffs ask survey respondents, in order to satisfy his test, include in pertinent part: "Do most people think of all AFDC recipients as black . . .? Do these perceptions reflect statistical reality, or are they based on generalizations? Do the survey respondents hold pejorative beliefs about AFDC recipients that coincide with prevalent racial stereotypes?" *Id.* at 377. He would also have courts examine "contemporaneous policy discussions within the academic and political communities. . . as well as media coverage of the debate over welfare legislation." *Id.* at 378.

At this particular time in history, the movement for welfare reform should satisfy Lawrence's test.

173. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973) (interpreting Title VII to prohibit the use of conduct as a pretext for discrimination).

174. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 428-30 (1971) (rejecting the requirement of a discriminatory purpose for a Title VII violation). Alternatively, in writing about sex discrimination in employment, Nadine Taub has proposed "stereotyping *per se* as a [separate] concept of discrimination" under Title VII. Nadine Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C. L. Rev. 345, 402 (1980).

175. See, for example, *Orr v. Orr*, 440 U.S. 268, 279-83 (1979) (holding that an Alabama statute imposing alimony obligations on husbands but not wives violates equal protection); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 729-30 (1980) (holding that a state university nursing school's discrimination against men violates equal protection). In these cases, the stereotype violates equal protection even if it proves statistically accurate because it overlooks possible exceptions to the rule and creates a self-fulfilling prophecy. But compare

While the Supreme Court has imposed an extremely demanding test for establishing the requisite discriminatory intent in a facially neutral law,<sup>176</sup> some decisions invite consideration of the racism found in the history of welfare, as well as the racial stereotypes and racially specific data animating modern welfare reforms.<sup>177</sup> Applying strict judicial scrutiny to laws that rest on such overt racial elements would be entirely compatible with a colorblind approach to constitutional analysis.<sup>178</sup>

## 2. Gender: Biology, History, and Role Assignments

While race discrimination activates strict judicial scrutiny, sex discrimination calls for intermediate scrutiny, a heightened standard of review requiring at least an important state interest and a substantial relationship between legislative means and end.<sup>179</sup> Gender discrimination is not insulated from this standard of review simply because it occurs in the distribution of governmental

*Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 281 (1979) (upholding an employment preference for veterans despite the impact on women).

176. The Court has held that statistical evidence of disparate impact alone is insufficient to establish discriminatory intent, see *Arlington Heights*, 429 U.S. at 264-65, that generally it will decline to inquire into legislative "motives," see *Palmer v. Thompson*, 403 U.S. 217, 224-25 (1971), and that the challenger of the law must show that the legislature "selected . . . a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group," *Feeney*, 442 U.S. at 279.

177. Just as "pretextual" decision making can be established in employment-discrimination litigation, see text accompanying note 173, it can presumably be established in constitutional challenges as well. For example, in *Hunter v. Underwood*, 471 U.S. 222 (1985), the Court invalidated part of the Alabama Constitution disenfranchising those convicted of crimes of moral turpitude; the Court relied both on evidence of the statistical impact on black voters, *id.* at 227, and the history of the provision's enactment, *id.* at 228-31. See Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 Sup. Ct. Rev. 95 (proposing a more probing search for illicit motives). Compare generally Tribe, *American Constitutional Law* at 819-25 (cited in note 103).

In addition, the Court has indicated that a combination of invidious and legitimate bases for enactment will not shield a law from strict review. *Arlington Heights*, 429 U.S. at 265.

Finally, both the explanation of the undue-burden test adopted by the *Casey* plurality, with its focus on a law's "purpose or effect," *Casey*, 112 S. Ct. at 2820, and the Court's examination of anti-abortion motives in pre-*Casey* opinions lend support to the idea of taking into account any racial stereotypes underlying legislative action. See notes 322, 363-70 (providing more on "purpose" in *Casey*'s undue-burden analysis); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 762 (1986) (holding unconstitutional a requirement "designed" to persuade a woman to withhold consent for an abortion), overruled by *Casey*, 112 S. Ct. 2791. On the kinds of evidence that could establish an approach to welfare reform based on such racial stereotypes, see notes 179-215 and accompanying text (discussing gender-based discrimination).

178. Compare generally Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 *Stan. L. Rev.* 1 (1991).

179. *Hogan*, 458 U.S. at 724; *Craig v. Boren*, 429 U.S. 190, 197 (1976).



benefits.<sup>180</sup> Once again, however, established doctrine requires showing more than a disproportionate effect on women (or men) to support a claim of invidious sex discrimination.<sup>181</sup> Making a case for the proposition that many proposed welfare reforms rely on invidious gender-based discrimination perhaps calls for a less innovative approach than charges of race discrimination, though it too requires negotiating some hurdles.

Some proposals, such as "Norplant bonuses" and welfare cut-offs for unwed teenage mothers, inescapably target women.<sup>182</sup> Yet early challenges to abortion restrictions and to pregnancy-based discrimination revealed a Court unable or unwilling to accept that such rules, which necessarily address only females, amount to gender classifications.<sup>183</sup> Despite an acknowledgment by several of the Justices that they now "get it" with respect to abortion restrictions and sex discrimination<sup>184</sup> and despite the presence on the Court of Justice Ruth Bader Ginsburg, who years earlier addressed the equality issue buried in *Roe v. Wade*,<sup>185</sup> some members of the Court continue to reject attempts to equate an anti-abortion animus with sex discrimination.<sup>186</sup> Which of these two views about abortion ultimately prevails

---

180. See, for example, *Califano*, 443 U.S. at 85 (finding gender discrimination subject to intermediate scrutiny in an AFDC benefit scheme based on the father's, but not the mother's, unemployment). See also *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (involving a pre-intermediate scrutiny case holding discrimination in survivors' benefits under the Social Security Act unconstitutional).

181. *Feeney*, 442 U.S. at 277-79. See also *Geduldig v. Aiello*, 417 U.S. 484 (1974) (holding that the exclusion of pregnancy from a state disability benefits plan is not invidious sex discrimination). Compare note 170 and accompanying text.

182. See John Robert Hand, Note, *Buying Fertility: The Constitutionality of Welfare Bonuses for Welfare Mothers Who Submit to Norplant Insertion*, 46 Vand. L. Rev. 715, 720 (1993); Jeanne L. Vance, Note, *Womb for Rent: Norplant and the Undoing of Poor Women*, 21 Hastings Const. L. Q. 827, 845-854 (1994). Compare Tracy Ballard, *The Norplant Condition: One Step Forward or Two Steps Back?*, 16 Harv. Women's L. J. 139, 160-63 (1993) (discussing gender discrimination in criminal and child-abuse contexts).

183. See Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955, 977-87 (1984) (tracing the separate development of the sex-equality doctrine and the constitutional analysis of laws governing female reproduction).

184. See *Casey*, 112 S. Ct. at 2809 ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives"); *id.* at 2842 (Stevens, J., concurring in part and dissenting in part) (asserting that the waiting period for abortion suggests women are "less capable of deciding matters of gravity"); *id.* at 2846-47 (Blackmun, J., concurring in part and dissenting in part) (claiming that abortion restrictions implicate gender equality).

185. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. Rev. 375 (1985). Justice Ginsburg's contributions as an attorney to the doctrine of unconstitutional gender discrimination are summarized in Ruth Bader Ginsburg and Barbara Flagg, *Some Reflections on the Feminist Legal Thought of the 1970's*, 1989 U. Chi. Legal Forum 9.

186. See *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 113 S. Ct. 753, 759, 122 L. Ed. 2d 34 (1993) (determining that anti-abortion demonstrations were not directed at women

will help determine the analogous question whether Norplant bonuses and measures based on unwed teenage childbirth constitute gender-based state action subject to intermediate scrutiny.

Seeing the gendered nature of other proposed welfare reforms requires a closer look that encompasses three important points of reference. First, welfare's history is even more infused with sex discrimination than race discrimination. Welfare began as an effort to reward poor women who conformed to the gender-assigned roles assumed by women of the elite and middle classes.<sup>187</sup> A defining feature of a woman's role was economic dependence, inevitably resulting from the separate spheres allocated to each sex, the marketplace and the public world of ideas for men contrasted with the private realm of domesticity for women.<sup>188</sup> Mothers' Pensions and the later AFDC were designed to allow poor, unmarried mothers to care for their children at home, relying on funds that would come from the government, rather than the husbands on whom their wealthier counterparts depended.<sup>189</sup> In short, "the preservation of patriarchy" has operated as a central, organizing principle of the welfare system.<sup>190</sup>

Second, many superficially gender-neutral reforms unquestionably target women, not men. The large majority of AFDC families consist of women and their children.<sup>191</sup> Moreover, although family caps purport to address entire families, genderless collectives, they seek to set a limit for—who else?—the "welfare queen," whose royal title identifies her gender expressly, in contrast to the less explicit racial implications of the term.<sup>192</sup> "Welfare queens" are regarded as

---

as a class). Compare McConnell, 104 Harv. L. Rev. at 1040-43 (cited in note 101) (arguing that anti-abortion laws are based on concern for the unborn rather than on gender discrimination).

187. See note 42 and accompanying text.

188. See generally, for example, Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 Harv. L. Rev. 1497 (1983).

189. See note 42 and accompanying text.

190. See Law, 131 U. Pa. L. Rev. at 1281 (cited in note 5). See also Fineman, *The Neutered Mother* at 101-42 (cited in note 3) (arguing that single mothers are seen as deviant, reinforcing male domination of the reproductive unit); Ellen Goodman, *Where Have All Poor Mothers Gone? Gone to Work, Everyone*, St. Louis Post-Dispatch 7B (Sept 20, 1995) (finding the end of "a long cultural debate about motherhood" in plans to overhaul welfare).

191. Law, 131 U. Pa. L. Rev. at 1256 (cited in note 5). Men joined the AFDC ranks in significant numbers only in 1961, when a parent's unemployment became a basis for assistance for which federal matching funds would be available. *Id.* at 1259. More recent figures (for 1992) place the average monthly number of adult female AFDC recipients at 3,931,624 compared to 503,107 for adult male recipients. United States Department of Health and Human Services, AFDC Information Memorandum (No. ACF-IM-94-7) (Dec. 12, 1994).

192. See note 158 and accompanying text.

the least deserving of the poor.<sup>193</sup> Beyond such stereotypes, however, an implicit female norm makes it difficult to envision how such welfare reforms would operate without regard to gender. For example, would proposals directed at “teenage parents” apply to a teenage male who fathers a child with an adult woman?<sup>194</sup> Under a family cap, would the eligibility for assistance of a father’s new child be determined with reference to the welfare status of his other children, born of different women, just as the children of women who conceive with different men are considered?<sup>195</sup> Certainly, gender-specific assumptions about the likely custodial parent of children on welfare help construct this gendered norm, and these assumptions are reinforced by all the ways that the law pressures women to be custodial parents without so pressuring men.<sup>196</sup> Even without such assumptions, explicit concerns about single mothers and their children have injected gender into the development of specific welfare reforms with an openness virtually unthinkable today with respect to race.<sup>197</sup> Both the House and Senate welfare-reform bills contain numerous references to unmarried mothers, as does the conference report.<sup>198</sup> To the extent that reducing “illegitimacy” is a primary goal of these reform efforts,<sup>199</sup> recall that the traditional meaning of this

193. See McLarin, *N.Y. Times* (cited in note 158) (citing welfare author Michael B. Katz).

194. For example, would he be required to live with his parents, and attend school, see note 20 and accompanying text, in order for his child to receive public assistance?

195. Significantly, despite the New Jersey law’s use of the gender-neutral verb “parents,” both illustrations developed by the court to explain how the law operates describe the situation of a welfare “mother.” *C.K.*, 883 F. Supp. at 999-1000.

196. See, for example, Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 U.C.L.A. L. Rev. 1415, 1417-31 (1991); Law, 132 U. Pa. L. Rev. at 988-98 (cited in note 183).

197. As a result, the evidence here exceeds that showing explicit consideration of race. See notes 162-69 and accompanying text.

198. The House’s welfare reform bill, which claims as its goal the reduction of out-of-wedlock births, emphasizes the problems of young, single mothers. H.R. 4 § 100 (cited in note 9) (expressing the “sense of the Congress”). The Senate bill also stresses the plight of unmarried mothers. H.R. 4 § 101 (cited in note 15) (replacement for § 406 of the Social Security Act). Similar language appears in the conference report. 141 Cong. Rec. at H15319 (daily ed. Dec. 21, 1995) (H.R. 4 § 101). Individual lawmakers have articulated the objectives of welfare reform in a gender-specific manner. See, for example, Eliza Newlin Carney, *Legitimate Questions*, 27 *Natl. J.* 679 (March 18, 1995) (quoting Rep. Talent: “fewer teenagers would make the decision to become unmarried moms” under welfare reform); Pear, *N.Y. Times* § 1 at 1 (cited in note 20) (reporting Sen. Dole’s consideration of plans aimed at teen mothers). Compare Mink, 26 *Conn. L. Rev.* at 883 (cited in note 42) (“Welfare politics has always been about gender roles and about race and cultural order”); Katha Pollitt, *Why I Hate “Family Values”*, in Katha Pollitt, ed., *Reasonable Creatures: Essays on Women and Feminism* 31, 40 (Alfred A. Knopf, 1995) (concluding that “[f]amily values and the cult of the nuclear family is . . . just another way to bash women, especially poor women”).

199. See H.R. 4 § 100 (cited in note 9); H.R. 4 § 101 (cited in note 15) (replacement for § 406 of the Social Security Act).

term was based exclusively on the mother's marital status.<sup>200</sup> Similarly, how could a proposal for "wedfare," a scheme of financial incentives to encourage welfare recipients to marry, possibly escape charges of sex discrimination once this scheme acquires the nickname "bridefare"<sup>201</sup> and even government experts write about finding a husband as one of the most promising "exits" from the rolls for welfare mothers?<sup>202</sup>

Third, all women have long suffered unique disadvantages in the workplace in obtaining jobs, in receiving compensation equivalent to men's, and in attempting to balance family responsibilities with work.<sup>203</sup> But as Sylvia Law documents, federal welfare law has actively exacerbated these inequities for poor women.<sup>204</sup> In 1971, statutory amendments to the Social Security Act imposed work requirements on state AFDC plans for all able-bodied men and for single mothers when their youngest child turned six, without any such requirements for married women.<sup>205</sup> Later, the Department of Labor was statutorily directed to favor unemployed fathers over mothers for job placement.<sup>206</sup> Writing about work requirements adopted by Congress in 1981, Law observes:

Federal welfare policy relies on the Employment Service to place the eligible poor in jobs or training programs and the Service, in turn, shapes its

---

200. See Harry D. Krause, *Illegitimacy: Law and Social Policy* 15-17 (Bobbs-Merrill, 1971) (presenting the presumption of legitimacy for children born to married women).

201. See Kosterlitz, 25 Natl. J. at 272 (cited in note 47); Minow, 26 Conn. L. Rev. at 820 (cited in note 5). In interviewing welfare recipients about their reaction to the plan (then phrased as a reward for teenage mothers who marry), a reporter elicited comments revealing the gender-based underlying assumptions:

"These mothers have no control over whether these guys take a hike or not," said Deborah Darden, a former welfare recipient. . . . " . . . I think a lot of them would love to get married. . . . But what kind of song and dance are they supposed to do to get [to] keep these men around?"

Isabel Wilkerson, *Wisconsin Welfare Plan: To Reward the Married*, N.Y. Times A16 (Feb. 12, 1991).

202. Bane and Ellwood, *Welfare Realities* at 50, 55-56 (cited in note 36). Bane now serves as Assistant Secretary for Children and Families in the Department of Health and Human Services; Ellwood serves in the same department as Assistant Secretary for Planning and Evaluation. *Id.* at x.

203. See, for example, Victor R. Fuchs, *Women's Quest for Economic Equality* 58 (Harvard U., 1988) (contending that "[t]he conflict between family and career appears to be much greater for women than for men, and the persistence of that conflict continues to frustrate women's quest for economic equality"); *Symposium on Gender Gap in Compensation*, 82 Georgetown L. J. 27 (1993); Czapanskiy, 38 U.C.L.A. L. Rev. at 1454-57 (cited in note 196) (analyzing the difficulties faced by women in the workplace).

204. Law, 131 U. Pa. L. Rev. at 1286-87 (cited in note 5).

205. *Id.* at 1264-65.

206. *Id.* at 1266-67 n.66.

operations to conform to the discriminatory nature of the marketplace. Federal welfare law, by attempting to force poor women into the job market without taking steps to change the market's discriminatory structure, both perpetuates the discriminatory structure and subjects poor women to its abuse. Wage labor, moreover, is structured on the assumption that the workers have someone to care for their children. Women receiving AFDC are, by definition, responsible for the care of their children; AFDC mothers do not have wives. Yet, federal policy refuses to consider the needs of children whose mothers do full-time waged work.<sup>207</sup>

Thus, facially neutral work requirements in today's reforms come with significant discriminatory baggage, including some of quite recent vintage.

Although the question examined here concerns the standard of review that should apply to welfare reforms, not their ultimate constitutionality or unconstitutionality, a glimpse at possible governmental interests is instructive. While condemning archaic stereotypes based on gender,<sup>208</sup> sex-discrimination precedents have emphasized the importance of determining whether, in the particular context addressed by a gender-specific law, females and males are "similarly situated."<sup>209</sup> These precedents have left unclear, however, whether a determination that females and males are not similarly situated with respect to a challenged law amounts to a conclusion that the discriminatory treatment is justified under heightened scrutiny or whether it simply suspends the need to apply heightened scrutiny in the first place.<sup>210</sup> In other words, case law does not unequivocally establish whether the "similarly-situated" test (invoked to uphold a statutory rape law punishing only males<sup>211</sup>) emerges from the application of intermediate scrutiny to sex discrimination or whether it spells out a different, less demanding standard of review.

In any event, proposals for Norplant bonuses might be supported by the biological fact that only women can use this device. Women and men, so the argument might go, are not similarly situated with respect to the use of Norplant. Yet the availability of male contraceptives (and the absence of welfare plans relying on their use) unmasks the true character of such proposals: They fail because they rely on archaic stereotypes singling out women as solely responsible

---

207. *Id.* at 1283.

208. See note 175 and accompanying text.

209. See *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 469 (1981) (plurality opinion).

210. See Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 *Women's Rts. L. Rptr.* 175, 182-83 n.50 (1982).

211. *Michael M.*, 450 U.S. at 471-73.

for the conception and birth<sup>212</sup> of additional welfare-dependent children. One can draw the same conclusion about welfare cutoffs for teenage single mothers. Any argument that, for purposes of family caps and bridefare plans, females and males are not similarly situated should also fail because classifying family size and marriage as "women's problems" rests on impermissible stereotypes, not real biological differences.<sup>213</sup> Certainly, a paternalistic effort to help vulnerable women make sound family choices will not support such plans, as the Supreme Court has made plain in other cases about autonomy in marriage<sup>214</sup> and reproduction.<sup>215</sup>

### 3. Birth Status: Child Exclusions, Not Family Caps

Finally, many of the proposed welfare reforms require heightened scrutiny because they expressly discriminate on the basis of a child's birth status. Cases striking down laws disfavoring illegitimate children provide the controlling precedents for this conclusion. In describing this line of cases, the Court has explained that it has "invalidated classifications that burden illegitimate children for the

---

212. See *Law*, 132 U. Pa. L. Rev. at 988-98 (cited in note 183) (criticizing the Supreme Court's failure to distinguish between biological differences and social stereotypes of males and females).

213. See, for example, *Orr*, 440 U.S. at 283 (asserting that sex classifications are unconstitutional when state interests are equally served by a gender-neutral application of the law).

214. See *Turner v. Safley*, 482 U.S. 78, 99 (1987) (ruling that Missouri's marriage regulation aimed at rehabilitating female prisoners is paternalistic and unconstitutional).

215. See *Casey*, 112 S. Ct. at 2830-31 (joint opinion) (holding a spousal notice requirement for abortion unconstitutional).

One might argue, however, that state paternalism is appropriate for the teenage targets of welfare reform, however out of place it may be with respect to adult women. But even for young women, childbearing decisions are constitutionally protected, compelling states to let mature minors make their own abortion decisions, for example. See *Bellotti v. Baird*, 443 U.S. 622, 644 (1979) (plurality opinion) (establishing that a pregnant minor is entitled to show she is sufficiently mature to choose abortion). Indeed, the Court's opinions suggest even greater constitutional protection for a minor's decision to bear a child than to terminate a pregnancy. See Elizabeth Buchanan, *The Constitution and the Anomaly of the Pregnant Teenager*, 24 *Ariz. L. Rev.* 553, 594-96 (1982). Further, a number of state statutes give minors the same ability as adults to consent to medical treatment in connection with pregnancy and childbirth, excluding abortion. See, for example, Mo. Rev. Stat. § 431.061(4)(a) (1994).

Recent studies show that adult males father at least half of the children born to teenage mothers. Jennifer Steinhauer, *Study Cites Adult Males for Most Teen-Age Births*, *N.Y. Times* A10 (Aug. 2, 1995) (discussing a national study by the Alan Guttmacher Institute). Such demographic data suggest that official efforts to reduce the teenage birth rate ought to include these males who are committing statutory rape or child sexual abuse. The Senate's welfare reform bill expresses the "sense of the Senate that States and local jurisdictions should aggressively enforce statutory rape laws," H.R. 4 § 1309 (cited in note 15), an approach followed by the conference report, 141 *Cong. Rec.* at H15391 (daily ed. Dec. 26, 1995) (H.R. 4 § 1107).

sake of punishing the illicit relations of their parents, because 'visiting this condemnation on the head of an infant is illogical and unjust.'<sup>216</sup> The Court has reached such results by subjecting these classifications to an intermediate scrutiny similar to that applied to gender-based classifications.<sup>217</sup> It has used this same approach whether the state actively burdened illegitimate children or simply failed to afford them a benefit granted to others.<sup>218</sup>

The Court has clearly stated in these cases that a state's interest in molding the behavior of adults cannot justify discrimination against their children. Thus, state promotion of marital families and deterrence of illegitimacy cannot justify the differential treatment of legitimate and illegitimate children.<sup>219</sup> Similar convictions about the unfairness of using children to influence parental behavior led the Court in *Plyler v. Doe*<sup>220</sup> to hold unconstitutional a state's attempt to discourage illegal immigration by excluding undocumented, alien children from public school. In this context, however, the Court stopped short of applying articulated strict or intermediate scrutiny because illegal-alien status—unlike race, sex, and illegitimacy at birth—is not an immutable characteristic.<sup>221</sup> Nonetheless, even if alien status can be changed, the Court noted that children cannot do so themselves.<sup>222</sup> In the end, the Court emphasized that the invalidated law had disadvantaged innocent children based on a situation beyond their control, in violation of the central tenet of the illegitimacy cases,<sup>223</sup> and applied a more searching standard than rational-basis review.<sup>224</sup>

Many proposed welfare reforms warrant heightened scrutiny because they pressure parents by withholding benefits from their

216. *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (quoting *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972)).

217. "To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective." *Clark*, 486 U.S. at 461. See note 179 and accompanying text.

218. See *Jimenez v. Weinberger*, 417 U.S. 628, 632 (1974) (applying this approach to restrictions on entitlement to Social Security disability benefits); *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619, 620-21 (1973) (finding an equal protection violation in the marital-status restrictions on eligibility for family assistance for the working poor).

219. See, for example, *Trimble v. Gordon*, 430 U.S. 762, 768-70 (1977).

220. 457 U.S. 202 (1982).

221. *Id.* at 218-22.

222. *Id.* at 219-220, 223. Compare *Polouchak v. Meese*, 774 F.2d 731, 738 (7th Cir. 1985) (showing how a minor successfully sought asylum in the U.S. despite his parents' objections).

223. *Plyler*, 457 U.S. at 220 (quoting *Weber*, 406 U.S. at 175).

224. *Id.* at 216. See Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 Ohio St. L. J. 161, 165-66, 178-80 (1984) (commenting on the standard of review used in *Plyler*).

children. For example, eliminating assistance when an unmarried teenager has a baby threatens the baby's well-being in an effort to discourage the teenager's underlying behavior. Similarly, read against the background of these precedents, so-called family caps earn the more accurate title, "child exclusions."<sup>225</sup> As the plaintiffs in *C.K.* argued, a true family cap, for example, the monetary ceiling on welfare benefits upheld in *Dandridge v. Williams*,<sup>226</sup> imposes a maximum grant limitation applicable to all families that reach a specified size, whatever the family's need and without regard to a mother's AFDC status at the time of any particular child's conception or birth. It is "a dollar maximum, not a number of children maximum."<sup>227</sup> In contrast, today's proposed limitations—including the mandatory provision in the House bill—exclude all children born under particular parental circumstances, such as AFDC status, maternal age, or marital status.<sup>228</sup> The measure now in effect in New Jersey is illustrative because it "eliminates the standard AFDC grant increase (for example, \$102 for a second child and \$64 for a third child) for any child conceived by and born to an AFDC recipient."<sup>229</sup> This measure denies new children benefits on the basis of a parent's AFDC status rather than capping benefits once they reach a specified level. In other words, a child exclusion "focuses solely on the status of each individual child at conception and birth," targeting particular children and excluding them from the AFDC program "regardless of the total size of the grant the family receives."<sup>230</sup> These reforms seek to deter

---

225. This is the term used by advocates who oppose the enactment of such measures or who have challenged them once enacted. For example, the Reproductive Freedom Project of the American Civil Liberties Union has explained:

By "child exclusion" proposals, we mean any governmental legislation or regulation that denies a child public benefits to meet basic human needs on the ground that: 1) the child was conceived or born while the family was already receiving welfare; 2) the child's mother was not married or was under the age of eighteen when the child was born; 3) the child's mother is under the age of eighteen and does not reside with her parents; or 4) the child's paternity is not established.

ACLU, *Reproductive Rights Update* 1 (April 1995). See also Brief in Support of Plaintiffs' Motion for Summary Judgment at 3 (cited in note 132) (using the term to describe a provision in New Jersey's Family Development Program, which eliminates the standard AFDC grant increase for any child conceived by and born to an AFDC recipient).

226. 397 U.S. 471 (1970).

227. Brief in Opposition to Federal Defendant's Motion for Summary Judgment at 6-7 (cited in note 132).

228. See H.R. 4 § 101 (cited in note 9) (replacement for § 405 of the Social Security Act).

229. *C.K.*, 883 F. Supp. at 999. See also *id.* at 999 n.2 (providing the text of the statute).

230. Brief in Opposition to Federal Defendant's Motion for Summary Judgment at 7 (cited in note 132). Under the New Jersey legislation challenged in *C.K.*, the only exception that the



welfare mothers, in particular unmarried teenagers, from having children.<sup>231</sup> Just as in the illegitimacy cases and *Plyler*, the state is discriminating against these excluded children in order to modify the behavior of their parents.<sup>232</sup>

In upholding the New Jersey legislation against an equal protection challenge, the court in *C.K.* rejected the name "child exclusion" in favor of "family cap."<sup>233</sup> It justified this choice of terminology by observing that "no child is excluded from benefits; rather, the additional child born to the AFDC recipient household simply partakes of the assistance already received by that household at the same monetary level."<sup>234</sup> Disclaiming the analogy to the illegitimacy cases and *Plyler*, the court likened the provision to that upheld in *Dandridge* on the ground that both simply result in a smaller per capita share of benefits for children in families covered by the respective rules. The Court observed that this reasoning makes the conclusion that the newest child is excluded no more accurate than the conclusion that the first child's grant has been withdrawn.<sup>235</sup> According to the court, families affected by each provision will simply share the limited benefits that the unit does receive.<sup>236</sup>

Underlying this characterization of New Jersey's reform is an appeal to equity: the assumption that it equalizes the situations of welfare families and other families, who receive no automatic increase in income with the birth of an additional child.<sup>237</sup> Also underlying this characterization is the court's express refusal to see the measure as a " 'behavior-modification' statute[ ] that penalize[s] children."<sup>238</sup>

child exclusion recognizes is "for the children of new AFDC applicants born within ten months of their families' application for benefits. N.J.A.C. 10:82-1.11(a)2." 883 F. Supp. at 1001.

231. See notes 9-35 and accompanying text.

232. Moreover, it is doing so in situations that lie beyond parental control as well, as when a pregnancy and birth result from rape or incest or when a pregnancy produces multiple births. See Brief in Support of Plaintiffs' Motion for Summary Judgment at 11-12, n.14 (cited in note 132). The House bill's prohibitions on assistance for out-of-wedlock births to minors and on additional assistance for children born to welfare families contain exceptions for children born as the result of rape or incest, H.R. 4 § 101 (cited in note 9) (replacement for § 405 of the Social Security Act), an approach followed by the conference report, 141 Cong. Rec. at H15323 (daily ed. Dec. 21, 1995) (H.R. 4 § 103) (replacement for § 408 of the Social Security Act).

233. 883 F. Supp. at 1010.

234. *Id.* See also *id.* at 1013 (stating that the law permits a child to share a "capped" family income).

235. *Id.* at 1010 (quoting *Dandridge*, 397 U.S. at 477-78).

236. *Id.* at 1010.

237. *Id.* at 1013-14. See also Minow, 26 Conn. L. Rev. at 826-31 (cited in note 5); Murray, *Losing Ground* at 231 (cited in note 37) ("Why should the [welfare] mother be exempted by the system from the pressures that must affect everyone else's decision to work?").

238. *C.K.*, 883 F. Supp. at 1013. The court stated:

[R]eliance on the [illegitimacy cases and *Plyler v. Doe*] is unavailing here because the Family Cap is not an example of a state's attempt to influence the behavior of men and

But writing this statement does not make it so, especially in an opinion that then sought to justify New Jersey's law on precisely the behavior-modification grounds purportedly rejected. Thus, the court listed among the law's purposes "the reasoned legislative determination that a ceiling on benefits provides an *incentive* for parents to leave the welfare rolls for the work force"<sup>239</sup> and the fact that "it cannot be gainsaid that the Family Cap *sends a message that recipients should consider the static level of their welfare benefits before having another child*, a message that may reasonably have an *ameliorative effect* on the rate of out-of-wedlock births that only foster the familial instability and crushing cycle of poverty currently plaguing the welfare class."<sup>240</sup> Further, by proceeding to rely on the abortion-funding cases,<sup>241</sup> the C.K. court necessarily embraced the behavior-modification rationale at the core of those precedents.<sup>242</sup> Given such reasoning, the court was disingenuous when it rejected the applicability of *Plyler* and the illegitimacy cases on the ground that the state is not trying to change the behavior of parents by disadvantaging their children.

The C.K. court's analysis suffers from additional weaknesses that ultimately compel a closer look at *Dandridge* itself. First, *Dandridge* cannot provide persuasive authority precisely because it upheld a family cap, not a child exclusion. While, under *Dandridge*, large families may have had to share the same size AFDC grant as smaller families, modern welfare reforms may provide nothing to share.<sup>243</sup> And although *Dandridge* was litigated on equal protection grounds, the upheld law treated all similarly situated families alike,

---

women by imposing sanctions on the children born of their illegitimate relationships. The legislation here does not direct the onus of parental conduct against the child, nor does it completely deprive children of benefits which they might otherwise receive but for the conduct of their parents. Rather, New Jersey's cap merely imposes a ceiling on the benefits accorded an AFDC household while permitting any additional child to share in that "capped" family income. Accordingly, this case is simply not within the ambit of *Plyler* and its forefathers, which found "behavior-modification" statutes that penalized children to be irrational.

Id.

239. Id. at 1014 (emphasis added).

240. Id. (emphasis added).

241. See id. at 1014-15 (citing *Rust*, 500 U.S. 173, and *Harris v. McRae*, 448 U.S. 297 (1980)). The court invoked these cases in support of its rejection of the plaintiffs' arguments that the New Jersey law unconstitutionally interferes with private reproductive decisions.

242. See notes 106-07 and accompanying text. The court's reliance on *Dandridge*, with its own language of incentives, 397 U.S. at 484, 486, reinforces this conclusion.

243. Withholding all assistance from unmarried teenage parents, see note 14 and accompanying text, provides an example.

increasing grants with the birth of additional children but finally capping assistance uniformly at \$240 to \$250 per month.<sup>244</sup> Thus, the constitutional problems presented in *Dandridge* look more like the issues of substantive due process later resolved in the abortion-funding cases.<sup>245</sup>

By contrast, child exclusions *do* raise equal protection questions because they discriminate among families of identical size and need, based on factors such as welfare status or maternal age, with consequent unequal treatment for the children of the different families.<sup>246</sup> For example, under a true family cap all three-child families receive the same size grant. Under a child exclusion like New Jersey's or the House of Representatives', however, a welfare family with three children on the effective date will continue to receive a grant based on the calculated per capita needs of a group of that size while another family with two children at that time will receive no additional allotment for a third child subsequently born, regardless of need.<sup>247</sup> Children in the second family are disadvantaged—either because the third child receives nothing or because all three must share a grant calculated to meet the needs of a two-child family.

Second, despite the intuitive pull of the *C.K.* court's appeal to equity,<sup>248</sup> the comparison between welfare and other families defies such simplistic generalizations. The benefits of a family newly applying for AFDC are not limited by the family cap.<sup>249</sup> Further, the fact that New Jersey law allows such families to get benefits for children born within ten months of the AFDC application<sup>250</sup> puts non-welfare families expecting an additional child in a wholly different position than their welfare counterparts. Only the former have a financial cushion measured on the basis of the usual subsistence

---

244. See 397 U.S. at 473-75.

245. By imposing a limit once a family reaches a particular size, the state in *Dandridge*, in effect, refused to subsidize additional children beyond this limit. Conceptualizing *Dandridge* as the Court's validation of a state's refusal to subsidize personal choices about procreation and family size reveals its similarity to the abortion-funding cases. See notes 89-109 and accompanying text. The equal protection issue arises because individual children in large families receive a smaller grant than their counterparts in small families, assuming each family shares the grant among all the children. See *Dandridge*, 397 U.S. at 477-78.

246. *C.K.*'s assertion that the New Jersey law can be described as an exclusion of the first child, as accurately as it can be described as an exclusion of the newest child (borrowed from *Dandridge*, 397 U.S. at 477), does not diminish the implications of the label "child exclusion." It simply redirects those implications to a different child, equally penalized for parental behavior over which the child has no control.

247. See *C.K.*, 883 F. Supp. at 999-1000.

248. See note 237 and accompanying text.

249. See Barksdale, 14 L. & Ineq. J. at 4 (cited in note 133) (making this comparison).

250. See note 230 and accompanying text.

formula, not the new "welfare disincentive."<sup>251</sup> As one consequence of this disparity, non-welfare families anticipating a birth do not experience a state-created incentive for abortion that the child exclusion imposes on welfare families.<sup>252</sup> The Court understandably ignored this factor in deciding *Dandridge* in 1970, three years before *Roe v. Wade* brought legalized abortion to most of the United States.<sup>253</sup>

Given the change in abortion law worked by *Roe* and the Court's recent sensitivity to disadvantages imposed on children in response to the choices and behaviors of their parents, as expressed in *Plyler*, *Dandridge* arguably merits reconsideration. Today the family cap upheld in *Dandridge* would operate as an incentive for abortion. Further, it would leave some children with smaller grants than others, solely because of parental decisions about family size. To say that several children can share a grant calculated to support a smaller number provides a no more satisfactory answer than to say that several illegal alien children can take turns attending school, sharing a single education.<sup>254</sup> If *Plyler* stands for the proposition that a classification otherwise not evoking heightened scrutiny nonetheless violates the Equal Protection Clause when it denies a benefit to blameless children,<sup>255</sup> then *Dandridge's* classification according to the size of a child's family presents a more difficult question than the Court acknowledged at the time.<sup>256</sup> But even if the Supreme Court would still decide *Dandridge* as it did in 1970, its family cap is distinguishable from today's child exclusions for all the reasons examined above.

---

251. In some states, however, the child support guidelines (used to calculate the amount a noncustodial parent must pay to support his or her children) give priority to the children of the obligor's first marriage, with subsequent children forced to divide what is left. See *Feltman v. Feltman*, 434 N.W.2d 590 (S.D. 1989) (upholding the state's support priority for children of the obligor-parent's first marriage under the rational-basis test). One could argue that these schemes "penalize" subsequent children for their parents' choices.

252. See Kathleen Best and Tim Poor, *Abortion Will Play Role in Battle Over Welfare Reform*, St. Louis Post-Dispatch 5B (March 19, 1995); Tamar Lewin, *Abortion Foes Worry About Welfare Cutoffs*, N.Y. Times § 4 at 4 (March 19, 1995); Iver Peterson, *Abortions Up Slightly for Welfare Mothers*, N.Y. Times B7 (May 17, 1995) (reporting after the adoption of New Jersey's family cap); Cheryl Wetzstein, *Abortion Tops "Family Cap" Debate: Policy Feared as Coercion to End Pregnancy*, Washington Times A6 (May 1, 1995).

253. A few states had decriminalized all early abortions before *Roe*, but Maryland (the state in *Dandridge*) was not one of them. See Susan Frelich Appleton, *Abortion*, in Sanford H. Kadish ed., 1 *The Encyclopedia of Crime and Justice* 4 (Free Press, 1983).

254. That is, even if the children in *Plyler* had not suffered a total deprivation of education, the Court's reasoning would have yielded the same result.

255. See notes 220-24 and accompanying text.

256. But see Bogle, 94 Colum. L. Rev. at 238-39 (cited in note 115) (arguing that *Dandridge's* family cap is not "unconscionable").

*B. Revisiting the Abortion-Funding Cases and Refining the Undue-Burden Test*

1. Reasons to Distinguish Welfare Reforms from Abortion Funding

The preceding arguments that welfare reforms trigger elevated scrutiny under the Equal Protection Clause are not free from difficulty, and their acceptance concededly will require stretching, but certainly not shattering, the existing doctrinal boundaries of race, sex, and birth-status discrimination. Nevertheless, these arguments reveal some promising constitutional challenges to privacy-invading welfare reforms based on equal protection analysis. Thus, challengers should continue to raise equal protection claims because courts might adopt such arguments by slightly extending, but not overturning, controlling precedents. In the end, however, reliance on the Equal Protection Clause, albeit an advisable strategic move, blinks at two important weaknesses.

First, as a practical matter legislatures could rewrite welfare reforms to remove the appearance of discrimination, perhaps persuading a court that any remaining inequality is simply one of disproportionate effect. For example, in contrast to the House bill, with its recitations of racially specific data, the Senate bill and conference report present statistics without regard to race.<sup>257</sup> New Jersey's Family Development Program legislation, phrased in gender-neutral terms about parenting, did not evoke a sex-discrimination challenge,<sup>258</sup> although it undoubtedly affects mothers more than fathers. Accordingly, plans currently aimed at teenage mothers might be insulated from sex-discrimination challenges by similar attention to language,<sup>259</sup> depending upon the courts' receptivity to arguments about underlying stereotypes and historical discrimination. (Of course, with reducing both illegitimacy and welfare dependence as explicit and central objectives of proposed reforms,<sup>260</sup> legislators will find disguising classifications based on birth status a much more

---

257. Compare H.R. 4 § 101 (cited in note 15) (replacement for § 406 of the Social Security Act); 141 Cong. Rec. at H15319 (daily ed. Dec. 21, 1995) (H.R. 4 § 101).

258. See *C.K.*, 883 F. Supp. at 999 n.2.

259. Although Rep. Talent of Missouri has orally advocated welfare cutoffs to teenage mothers, see note 198, in writing he carefully uses gender-neutral words. See James M. Talent, *End Incentives for Teen-Age Parents*, St. Louis Post-Dispatch 3B (Jan. 8, 1995) (providing an editorial commentary).

260. See, for example, note 10 and accompanying text.

difficult feat—a point that adds considerable force to this particular equal protection argument.)

Second, as the prior observations suggest, equal protection attacks on privacy-invading welfare reforms remain an “end run” around the real problem: the abortion-funding cases’ approval of state efforts to dictate private behavior through allocations of public funds. Consequently, arguments that welfare reforms interfere with private reproductive choice, however compelling, cannot prevail without a substantial reexamination of the abortion-funding cases.<sup>261</sup> The analysis that follows attempts such reexamination, based on the Justices’ more recent elaborations of the undue-burden test, a test previously articulated in the abortion-funding cases.<sup>262</sup>

It is tempting to recite once again why the abortion-funding cases should have come out the other way, as many critics wrote in response to the Court’s holdings.<sup>263</sup> Unless Justice Ginsburg persuades a majority of the Court that all unfavorable treatment of abortion amounts to unconstitutional sex discrimination,<sup>264</sup> however, these holdings are here to stay, a conclusion reinforced by the Court’s continuing reliance on them.<sup>265</sup> As a result, any effort to loosen their grip on the emerging challenges to welfare reform probably should accept these precedents as a given.

Establishing this starting point, however, does not require ignoring the contrasting political impacts these precedents have in their original context and in the context of welfare reform. For critics of *Roe v. Wade* and its successors, the abortion-funding holdings signalled a welcome limit to abortion rights, a victory for those seeking

---

261. The plaintiffs in *C.K.* unsuccessfully sought to distinguish the abortion-funding cases. In addition to the arguments summarized in note 133, they also claimed that the state’s interest in deterring childbirth “is significantly less than the governmental interest in protecting potential life at issue in both [*McRae*] and *Maier*.” Brief in Support of Plaintiffs’ Motion for Summary Judgment at 58 (cited in note 132).

262. See notes 96-97 and accompanying text.

263. See, for example, Perry, 32 *Stan. L. Rev.* at 1113 (cited in note 104); Laurence H. Tribe, *Commentary: The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 *Harv. L. Rev.* 330 (1985).

264. See note 185 and accompanying text. Justice Ginsburg has written that the abortion-funding cases may have had a different outcome if the Court had acknowledged the gender-discrimination issues posed by these funding restrictions. Ginsburg, 63 *N.C. L. Rev.* at 385 (cited in note 185). Compare *DKT Memorial Fund Ltd. v. Agency for Intl. Development*, 887 F.2d 275, 299, 304-05 & n.7 (D.C. Cir. 1989) (Ginsburg, J., concurring in part and dissenting in part) (delineating the scope of the abortion-funding cases).

265. See generally *DeShaney*, 489 U.S. 189; *Rust*, 500 U.S. 173. But see *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S. Ct. 2510, 2518-19, 132 L. Ed. 2d 700 (1995) (distinguishing *Rust*), discussed in notes 282-83 and accompanying text.

to curb abortion freedom through whatever avenue the Court might make available. Many of today's proposed welfare reforms, however, face opposition from precisely the same quarters because of the tendency of these reforms to encourage abortion.<sup>266</sup> According to these opponents, governmental refusals to support new children operate as a financial incentive to terminate existing pregnancies.<sup>267</sup> Perhaps the specter of state-induced abortions reveals serious tension between individual privacy and governmental influence, a tension which the peculiar politics of abortion funding kept hidden.<sup>268</sup>

In any event, rationalizing the abortion-funding cases as a "clean hands" measure for anti-abortion taxpayers<sup>269</sup> fails to offer a satisfactory parallel justification for modern welfare reforms. Even if Michael McConnell is correct that serious theoretical difficulties prevent transforming the private choice of abortion into a matter of the "general Welfare" supported by tax dollars,<sup>270</sup> these problems evaporate when the funding withheld encompasses subsistence benefits for children.<sup>271</sup> As McConnell suggests, albeit not in response to welfare reforms, subsistence for the needy does not provoke charges equivalent to the cries of "murder" engendered by abortion,<sup>272</sup> although members of the public no doubt believe something must be done to change the welfare system. Further, some may argue that the right to have a child, endangered by proposed welfare reforms, is even

266. See note 252.

267. As a result, for example, the bill passed by the House allows states to provide vouchers for childcare services and products even in situations in which the so-called family cap (child exclusion) or the ban on aid for out-of-wedlock teenage births applies. H.R. 4 § 101 (cited in note 9) (replacement for § 405 of the Social Security Act). The conference report follows this approach for its family cap. 141 Cong. Rec. at H15323 (daily ed. Dec. 21, 1995) (H.R. 4 § 103) (replacement for § 408 of the Social Security Act). Many anti-abortion activists remain unsatisfied by these concessions.

268. In other words, perhaps the questions raised by welfare-reform proposals which explicitly undertake to influence reproductive choice, and thus encourage abortion, will provoke second thoughts about the Court's approval of reproductive "behavior modification" in the abortion-funding cases themselves.

269. See McConnell, 104 Harv. L. Rev. at 1008-11, 1046-47 (cited in note 101). But see Tribe, 99 Harv. L. Rev. at 339-40 (cited in note 263) (arguing that taxpayers' qualms are irrelevant).

270. See McConnell, 104 Harv. L. Rev. at 1008-09 (cited in note 101).

271. Providing subsistence for poor children is a matter of the "general welfare" just as providing public schooling is, for example. See *Yoder*, 406 U.S. at 213 ("Providing public schools ranks at the very apex of the function of a State"). Certainly, destitute children who lack basic necessities of life will have difficulty benefitting from public education.

272. Compare McConnell, 104 Harv. L. Rev. at 1009 (cited in note 101) ("For those who consider abortion to be murder, it is 'sinful and tyrannical' to require them to participate with their tax dollars"), with *id.* at 1012 ("Not even the most dedicated proponent of abortion funding objects to . . . programs [like AFDC]"); *id.* at 1046 ("[P]roviding medical assistance at childbirth is important to the health and safety of the newborn infant, a purpose with which we all agree" (emphasis added)).

more inalienable—and hence more protected from manipulations with governmental funds—than the right to abortion.<sup>273</sup>

Indeed, transplanting the general issue in the abortion-funding cases to any other substantive due process controversy may well evoke a very different popular or political reaction. This political analysis is relevant, not because it assumes that constitutional adjudication simplistically mirrors popular morality,<sup>274</sup> but rather because it takes note of the fact that in a number of controversial cases the Court *has* reached results consistent with public opinion.<sup>275</sup>

Accordingly, even if public opinion opposes government-funded abortions,<sup>276</sup> it seems doubtful that a similar consensus would clearly develop about other applications of the exclusively negative right under substantive due process that emerges from reading *Roe v. Wade* together with the abortion-funding cases.<sup>277</sup> For example, consider whether the negative right recognized in *Moore v. City of East Cleveland*<sup>278</sup> has a positive-right counterpart. All the reasons given why the government cannot prohibit Inez Moore from sharing her home with her two grandsons (who are cousins, not brothers) remain compelling even if the legal question presented had been, not an exclusionary zoning ordinance, but rather an exclusion from a subsidized housing project. If the right recognized in *Moore* is solely a negative right, then the government can decline to subsidize even

---

273. Compare Margaret Jane Radin, *Market-Inalienability*, 100 Harv. L. Rev. 1849, 1925-36 (1987) (exploring the problems of commodification of women's reproductive capacities).

274. But see Michael J. Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 U.C.L.A. L. Rev. 689 (1976).

275. See, for example, Perry, 32 Stan. L. Rev. at 1113 (cited in note 104) (discussing *Roe* and public opinion); *Griswold*, 381 U.S. at 519 n.13 (Black, J., dissenting) (noting a Gallup poll showing that 46% of U.S. citizens favored in-school education about birth control). Even the joint opinion in *Casey*, 112 S. Ct. 2791, adopts a "middle ground" that comports with the public's preference for abortion freedom and its discomfort with any perceived casual attitude about terminating fetal life. See Dworkin, *Life's Dominion* at 244 n.18 (cited in note 77) (citing polls following *Casey*, which reflect the support for legal abortion accompanied by restrictions of the type upheld in *Casey*).

276. In the context of health care reform, one recent survey found that 59% of those asked believed that abortion should not be included in a plan providing medical benefits for Americans. George Gallup, Jr., *The Gallup Poll* 110 (Scholarly Resources, 1995) (reporting the results of a poll on July 1, 1994). Thirty-four percent thought abortion should be included. *Id.* A similar poll three weeks later, however, found 48% opposed to coverage of abortion and 44% in favor. *Id.* at 121 (poll on July 22, 1994). Whatever the popular consensus, the scholarly consensus has been critical of the abortion-funding cases. See, for example, Perry, 32 Stan. L. Rev. at 1113 (cited in note 104); Tribe, 99 Harv. L. Rev. at 330 (cited in note 263). Compare McConnell, 104 Harv. L. Rev. 989 (cited in note 101).

277. See text accompanying note 98.

278. 431 U.S. 494 (1977).



living arrangements that "slic[e] deeply into the family itself"<sup>279</sup> so long as it has a rational basis for doing so. Yet the values protected in *Moore* are so politically different from those protected in *Roe* that, even if the democratic process were to make Ms. Moore choose between public housing and living with both of her grandchildren, the Court may well have found a violation of substantive due process.

This conclusion rests not just on the sympathetic plight of Ms. Moore, who sought only to care for her orphaned grandchild, and on the well-entrenched belief that the extended family epitomizes the traditional values that define substantive due process; it rests also on the fact that the Court has not unswervingly adhered to the distinction between positive and negative rights. Despite subsequent observations about its limited reach, *U.S. Dept. of Agriculture v. Moreno*<sup>280</sup> is one pre-abortion-funding decision that suggests that the legislature cannot always decline to subsidize behavior, in this case a living arrangement, of which it disapproves.<sup>281</sup> More recently, in

279. *Id.* at 498 (plurality opinion).

280. 413 U.S. 528 (1973).

281. *Id.* at 534-35 (quoting the district court):

For if the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest. As a result, "[a] purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify [the food stamp] amendment."

As a result of the Court's equal protection holding in *Moreno*, Congress was required to provide food stamps, and thus to support "hippie communes," just as it supported other, more "legitimate," lifestyles. Later, in *Lyng v. International Union, UAW*, 485 U.S. at 370 n.8., the Court noted that *Moreno* merely had applied the usual rational-basis test while disallowing an *illegitimate* interest ("discrimination against a politically unpopular group") to serve as the justification under that standard of review.

Other decisions predating the abortion-funding cases that recognized positive rights include those guaranteeing access to courts. See *Douglas v. California*, 372 U.S. 353 (1963) (holding that the state must furnish counsel to indigent criminal defendants for a single appeal as of right); *Griffin v. Illinois*, 351 U.S. 12 (1956) (holding that the state must furnish necessary records of trial proceedings to indigents for criminal appeals); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (holding that the state must waive divorce fees for indigents); *Bounds v. Smith*, 430 U.S. 817 (1977) (holding that prison officials must provide inmates with law libraries and other assistance for filing legal papers). In the abortion-funding cases, the Court distinguished such precedents as addressing situations in which the government "monopolizes" access to the services in question, in contrast to abortion services. See *Maher*, 432 U.S. at 469-70 n.5; *id.* at 471 n.6. Compare *Webster*, 492 U.S. at 510 n.8 (upholding a ban on the use of public facilities and employees in abortions, but noting that a "different analysis might apply if a particular State had socialized medicine and all of its hospitals and physicians were publicly funded"). The abortion-funding cases distinguished still other precedents appearing to recognize a positive right to life's "necessities," see *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974) (holding that a durational residency requirement for indigents' medical assistance burdens the right to travel in violation of equal protection); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (holding that a durational residency requirement for subsistence benefits burdens the right to travel in violation of equal protection), by explaining that, unlike the refusal to subsidize

*Rosenberger v. Rector and Visitors of the University of Virginia*,<sup>282</sup> the Court held that the First Amendment prohibits viewpoint discrimination in a limited public forum, forcing the state to fund religious activities on the same terms as other student activities. The majority expressly rejected the argument that the abortion-funding cases leave the state university free to allocate its financial support as it chooses.<sup>283</sup> For me, these examples demonstrate that some values are sufficiently strong to warrant the recognition of positive constitutional rights;<sup>284</sup> the values embodied in *Roe v. Wade*, however, happen not to be among them.

The issues posed by welfare reform can be distinguished from the denial of abortion funding in two other important ways suggested by the earlier analysis of equal protection. First, AFDC limits and cutbacks send a much clearer racial message than refusals to subsidize abortion.<sup>285</sup> Second, denying assistance for abortions does not threaten harm to innocent children the way today's welfare reforms do.<sup>286</sup> Apart from their equal protection consequences, these

---

abortion, the invalidated laws imposed a penalty on a constitutional right, *Maier*, 432 U.S. at 474 n.8; *McRae*, 448 U.S. at 317 n.19.

282. 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995).

283. The case challenged the University's policy of withholding authorization of payments in support of a student newspaper promoting religious beliefs. In defense of this policy, the University argued that the First Amendment's protection of free expression confers only a negative right, citing the abortion-funding cases for the proposition that a state subsidy of one protected right does not require a state subsidy of analogous counterpart rights. Brief for the Respondents at 20-21, *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995). See Linda Greenhouse, *Justices Hear Campus Religion Case*, N.Y. Times B7 (March 2, 1995) (describing the University's strategy to rely on the abortion-funding cases, especially *Rust v. Sullivan*). The University bolstered its argument by claiming that providing funds to support a religious newspaper would violate the Establishment Clause. The Court rejected both arguments, explaining, among other things, that in *Rust v. Sullivan* the government was promoting its own message through private speakers, while in the instant case the university was discriminating on the basis of the personal viewpoints of individuals. *Rosenberger*, 115 S. Ct. at 2518-19.

284. See generally Peter B. Edelman, *A Mandated Minimum Income*, Judge Posner, and *the Destruction of the Idea of Law*, in Gottlieb, ed., *Public Values in Constitutional Law* 171 (cited in note 81):

Both the distinction between state action and inaction and the distinction between positive and negative rights are artificial and misleading. The real question is not whether there is a legislative outcome, but whether the minority coming to court is identifying a public value (again, in Hohfeldian terms, a value involving a correlative right) that is not outweighed by a public value asserted by the majority.

*Id.* at 187.

285. See notes 156-78 and accompanying text. See also Lawrence, 39 Stan. L. Rev. at 378 (cited in note 172) (claiming that it is more difficult to show unconscious race discrimination in *Harris v. McRae* than in *Dandridge v. Williams* or *Jefferson v. Hackney*).

286. See notes 216-32, 255 and accompanying text. Constitutional protection for such innocent children is the essence of *Plyler v. Doe*, 457 U.S. 202.

distinctions support a more rigorous standard of review for welfare reforms under substantive due process than the test used in the abortion-funding cases, even if those precedents must remain undisturbed.<sup>287</sup>

The governmental interests at stake in welfare reform also differ from those in the abortion-funding cases. These interests include conserving public funds, decreasing the birth rate for welfare-dependent and illegitimate children, and expressing preferences for the marital family and personal responsibility.<sup>288</sup> In the abortion-funding cases, the Court identified "encouraging normal childbirth" as the state's interest.<sup>289</sup> The Justices have noted the unique features of the state's interest in potential life.<sup>290</sup> These features are absent from the governmental interests in reforming welfare. Indeed, "discouraging normal childbirth" is a central objective of welfare reform, and increased abortion rates are likely to follow.<sup>291</sup> Nonetheless, whether the balance of distinct interests at stake in welfare reform favors the individual or the state ultimately depends upon the applicable standard of constitutional review.

## 2. The Migration of the Undue-Burden Standard

When the Court upheld subsidies for childbirth but not abortion in *Maher v. Roe* and *Harris v. McRae* because such selective funding does not constitute "unduly burdensome interference with the freedom" to have an abortion,<sup>292</sup> it did so on the ground that no interference at all had occurred.<sup>293</sup> The Court's finding of no state restriction on abortion,<sup>294</sup> its rejection of an entitlement to funds for an abortion,<sup>295</sup> and its conclusion that selective funding "does not impinge on

---

287. Sometimes the combination of problematic elements will raise the standard of review or yield a determination of unconstitutionality even though each element standing alone may not have produced such a result. For example, in *Boddie*, 401 U.S. 371, the Court found a violation of due process based on the importance of divorce combined with the impact of the required filing fee on the poor alone. See also *Zablocki*, 434 U.S. 374 (finding that a marriage license restriction violates equal protection, based on wealth classification and the importance of marriage).

288. See, for example, H.R. 4 § 100 (cited in note 9).

289. *Maher*, 432 U.S. at 478. See *McRae*, 448 U.S. at 324-25.

290. See *Casey*, 112 S. Ct. at 2817-20 (joint opinion). See also *id.* at 2807 ("Abortion is a unique act . . . fraught with consequences for others [including society]").

291. See note 252.

292. See *McRae*, 448 U.S. at 314 (quoting *Maher*, 432 U.S. at 473-74).

293. See notes 93-99 and accompanying text.

294. *McRae*, 448 U.S. at 314; *Maher*, 432 U.S. at 474.

295. *McRae*, 448 U.S. at 317-18.

the due process liberty” recognized in *Roe*<sup>296</sup> all indicate that the absence of an undue burden followed from the absence of *any* burden *actively* imposed by the state.

In the years since the abortion-funding cases, the Court’s doctrine has departed significantly from these principles, however. Although the abortion-funding cases purported to draw a bright line between state action and passivity, some of the Justices soon relied on the asserted absence of an undue burden when confronting actively imposed abortion restrictions falling short of a complete ban—that is, restrictions erecting surmountable obstacles to abortion. The opinions written by Justice O’Connor, who joined the Court after the abortion-funding cases, have consistently pursued this approach, effecting several substantial changes in how to determine when there is no undue burden on the right to abortion.

In 1983, quoting *Maher v. Roe*, Justice O’Connor’s dissent in *Akron v. Akron Center for Reproductive Health*<sup>297</sup> explained that the right to choose abortion protects the woman only from “unduly burdensome interference with her freedom” to choose an abortion.<sup>298</sup> In its 1983 incarnation, Justice O’Connor’s undue-burden test served as a threshold for strict judicial scrutiny, with less burdensome interferences evoking only rational-basis review.<sup>299</sup> The opinion justified the test by noting the uniquely “qualified” nature of the right to abortion<sup>300</sup> and supported the test’s application by references to the abortion-funding cases and cases outside the abortion realm altogether.<sup>301</sup> Under this test, Justice O’Connor, considering primarily cost and availability, would have upheld the hospitalization, detailed

---

296. *Id.* at 318. See Appleton, 81 Colum. L. Rev. at 721 (cited in note 98).

297. 462 U.S. 416 (1983).

298. See *id.* at 461 (O’Connor, J., dissenting, joined by White and Rehnquist, JJ.).

299. See *id.* at 461-63.

300. See *id.* at 463-64.

301. See *id.* at 461 n.8, 464 (relying on *Maher* and *McRae*); *id.* at 462-63 (citing cases on school finance, first amendment rights, and contraception). Justice O’Connor also relied on cases establishing the governing standard for restrictions on abortion freedom for minors. See *id.* at 461-62 n.8. Though these cases have used the language of “undue burdens,” see *Bellotti v. Baird*, 428 U.S. 132, 147 (1976) (*Bellotti I*); *Bellotti v. Baird*, 443 U.S. 622, 640 (1979) (*Bellotti II*) (plurality opinion), I do not read these cases as exemplifying a general “migration” of the undue-burden standard used in the abortion-funding cases. Indeed, *Bellotti I* preceded the first round of funding cases. More importantly, as *Bellotti II* persuasively outlines, there are a number of special considerations raised by freedom of choice for minors that might merit a different standard of review than that applicable to restrictions on abortions for adult women. See, for example, *Bellotti II*, 443 U.S. at 633-39. See also *Casey*, 112 S. Ct. at 2830 (joint opinion) (stating that the assumption that minors will benefit from parental consultation offers no parallel assumption for requiring adult women to notify their husbands).

informed-consent, and waiting-period requirements struck down by the majority because each constituted something less than an undue burden.<sup>302</sup> Accordingly, no undue burden exists so long as abortions remain available, although at an increased cost.<sup>303</sup> And without an undue burden, such laws must satisfy only the rational-basis test, which Justice O'Connor found satisfied.<sup>304</sup>

Justice O'Connor elaborated on this approach, in her 1986 dissent in *Thornburgh v. American College of Obstetricians and Gynecologists*.<sup>305</sup> Relying on her earlier language, she explained that "[a]n undue burden will generally be found 'in situations involving absolute obstacles or severe limitations on the abortion decision,' not wherever a state regulation 'may "inhibit" abortions to some degree.'"<sup>306</sup> Again, attempting to display the undue-burden test's credentials, Justice O'Connor invoked the abortion-funding cases.<sup>307</sup> And again, she relied on these cases to support actively imposed restrictions on abortions, such as a detailed informed-consent requirement, in contrast to a passive failure to subsidize.<sup>308</sup>

Three years later, in *Webster v. Reproductive Health Services*,<sup>309</sup> Justice O'Connor formed part of a majority that upheld a Missouri law prohibiting the use of public facilities and the participation of public employees in abortions not necessary to save the woman's life.<sup>310</sup> This majority found the issue indistinguishable from that in *Maher* and *McRae*, reasoning that, like public funds, public facilities and employees are public resources and thus withholding them does not burden the right to abortion.<sup>311</sup> Justice O'Connor, however, also voted to uphold Missouri's actively imposed requirement of viability testing before terminations of certain pregnancies, on the ground that such tests usually do not impose an undue burden on a woman's abortion decision.<sup>312</sup> Indeed, because the

---

302. See *Akron*, 462 U.S. at 466-67, 470-74.

303. See *id.* at 466.

304. See *id.* at 467 (maintaining that hospitalization rationally ensures health and welfare); *id.* at 472 (concluding that informed consent attempts to ensure knowing abortion decisions).

305. 476 U.S. 747 (1986).

306. *Id.* at 828 (O'Connor, J., dissenting, joined by Rehnquist, J.) (quoting *Akron*, 462 U.S. at 464). Justice O'Connor added that even undue burdens on abortion, once subjected to the compelling-state-interest test, might survive such strict scrutiny. 476 U.S. at 828.

307. 476 U.S. at 828 (citing *McRae*, *Maher*, and *Beal v. Doe*, 432 U.S. 438, 446 (1977)).

308. See *Thornburgh*, 476 U.S. at 830-31.

309. 492 U.S. 490 (1989).

310. *Id.* at 507-11 (opinion of the Court). See *id.* at 523-25 (O'Connor, J., concurring).

311. *Id.* at 510.

312. *Id.* at 530 (O'Connor, J., concurring). The requirement applied to all pregnancies reasonably believed to have reached a stage of gestation of twenty weeks or more. See *id.* at 500 (quoting the statute).

required tests would only marginally increase the cost of abortions, she classified them as even less burdensome than the hospitalization requirement she would have upheld in *Akron*.<sup>313</sup>

In 1992, Justice O'Connor found two co-authors in *Planned Parenthood v. Casey*.<sup>314</sup> The joint opinion of Justices O'Connor, Kennedy, and Souter assessed a series of Pennsylvania abortion restrictions under an undue-burden test differing in several important respects from the version used either in the abortion-funding cases or in Justice O'Connor's previous opinions. As applied in *Casey*, the undue-burden test operates not as a threshold for strict scrutiny, but as an expression of the ultimate balance between individual abortion rights and conflicting state interests: a law that imposes an undue burden on abortion liberty is unwarranted, that is, unconstitutional.<sup>315</sup> As Alan Brownstein has observed, the joint opinion in *Casey* transforms the undue-burden test from "a threshold inquiry to determine the appropriate standard of review," to "an independent standard of review."<sup>316</sup> It is a balance that, while favoring the government more than the balance fashioned in *Roe v. Wade*,<sup>317</sup> nevertheless offers more hope to challengers than traditional rational-basis review.<sup>318</sup>

Despite the transformation of the undue-burden test in *Casey*, the joint opinion prominently cited and relied upon the abortion-funding cases (and Justice O'Connor's earlier dissents) as evidence of the test's established history and accepted use.<sup>319</sup> Tracing this language trail failed to persuade either Chief Justice Rehnquist or

---

313. See *id.* Justice O'Connor's analysis in *Webster* does not clearly state whether she continues to see the undue-burden standard as only a threshold issue. The citation to her *Akron* dissent, however, suggests that she was adhering to the view that she expressed in 1983. Compare notes 315-16 and accompanying text (discussing how the operation of the test changes in *Casey*).

314. 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992).

315. See *id.* at 2820-21. The opinion noted and then attempted to clarify inconsistencies with previous explanations of this test. *Id.*

316. Brownstein, 45 *Hastings L. J.* at 879 (cited in note 137).

317. The joint opinion explained that the undue-burden standard achieves a truer balance between individual and state interests than did *Roe*'s trimester formula, which rests on an inherent contradiction by recognizing the state's interest in potential life *throughout* pregnancy while confining the state's efforts to advance that interest to the brief period after viability. *Casey*, 112 S. Ct. at 2820.

318. Four Justices in *Casey* have applied rational-basis review to all abortion restrictions. See *id.* at 2867 (Rehnquist, C.J., concurring in part and dissenting in part, joined by White, Scalia, and Thomas, JJ.) ("States may regulate abortion procedures in ways rationally related to a legitimate state interest").

319. *Id.* at 2819 (quoting *Maier v. Roe* and citing, among others, *Harris v. McRae*).

Justice Scalia, however. The former condemned the undue-burden test as "created largely out of whole cloth by the authors of the joint opinion,"<sup>320</sup> and the latter called it "a unique concept created specially for this case."<sup>321</sup>

But, beyond the question of ancestry, what is an undue burden under *Casey*, and how does one differ from a "due" burden? The joint opinion stated:

A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.<sup>322</sup>

As applied in *Casey*, the undue-burden test led the joint opinion writers to validate Pennsylvania's definition of medical emergency and its actively imposed requirements for detailed informed consent, a twenty-four-hour waiting period, recordkeeping, and reporting.<sup>323</sup>

320. *Id.* at 2866 (Rehnquist, C.J., concurring in part and dissenting in part).

321. *Id.* at 2878 (Scalia, J., concurring in part and dissenting in part).

Professor Brownstein rejects such criticisms, contending that the Court has used the undue-burden test in one form or another in a wide variety of contexts for the last forty years. See Brownstein, 45 *Hastings L. J.* at 872 (cited in note 137). Although I am not entirely convinced by his thesis, some pre-*Casey* analyses stand out as possible precursors of the undue-burden test. See, for example, *Zablocki*, 434 U.S. at 386 ("[R]easonable regulations that do not significantly interfere with decisions to enter the marital relationship may legitimately be imposed") (citing *Califano*, 434 U.S. at 55 n.12); *id.* at 388 (noting that when a statutory classification significantly interferes with a fundamental right, here the right to marry, it must be "supported by sufficiently important state interests" and "closely tailored to effectuate only those interests"). Nonetheless, *Zablocki's* reliance on *Jobst*, which upheld the termination of a dependent child's Social Security benefits upon marriage, simply reflects the active/passive distinction drawn in the abortion-funding cases: substantive due process provides protection from state-created interference and state-imposed burdens, but the failure to subsidize amounts to no interference or burden at all. See notes 292-96 and accompanying text. As a result, *Zablocki* fails to establish either the proper standard of review for or the outcome of constitutional challenges to restrictions that, however "slight," represent active or "direct" interference.

In the end, only the writers of the joint opinion used the undue-burden standard in *Casey*. Two Justices, Blackmun and Stevens, voted to maintain conventional strict scrutiny. 112 S. Ct. at 2841 (Stevens, J., concurring in part and dissenting in part) (asserting that the standard in *Akron* and *Thornburgh* should govern); *id.* at 2847 (Blackmun, J., concurring in part and dissenting in part) (explaining why *Roe's* strict scrutiny should govern). Four others, Justices Rehnquist, White, Scalia, and Thomas, would have jettisoned *Roe* and its demanding standard of review altogether. See note 318.

322. *Casey*, 112 S. Ct. at 2820.

323. See *id.* at 2822-26, 2832-33.

By contrast, the joint opinion found that the spousal-notification requirement created an undue burden, despite its express exceptions in cases of feared physical violence against the woman. According to the joint opinion, the risk of psychological abuse and fear of child abuse from spouses demonstrated that the requirement was "likely to prevent a significant number of women from obtaining an abortion."<sup>324</sup>

The joint opinion is replete with problems. In particular, the joint opinion fails to explain satisfactorily how the number of women prevented from obtaining abortions by the spousal-notification provision (an undue burden) exceeds the number prevented by, say, the waiting period (a due burden).<sup>325</sup> More generally, it makes little sense to rank a choice as fundamental, for all the reasons eloquently recited in the joint opinion in *Casey*,<sup>326</sup> and then to authorize governmental efforts designed to dissuade its exercise.<sup>327</sup> The affront to equality inflicted by the gendered nature of an analysis applicable only to abortion rights exacerbates the problem.<sup>328</sup> As Justice Scalia quipped in dissent, certainly the Court would not permit a twenty-four hour waiting period for the purchase of religious books on the ground that this restriction does not unduly burden the First Amendment.<sup>329</sup> Whatever the countervailing state interests that make abortion

---

324. *Id.* at 2829.

325. The joint opinion's effort to base its assessment of a law's impact on only the group of women affected by the law, *id.*, does not eliminate the problem. A waiting period could require more than one visit to the clinic: the first to obtain the state-required information and the second to obtain the abortion, after the mandated interval. For women living significant distances from the nearest clinic, the burden imposed would be considerable, in terms of travel, cost, and time away from home. This requirement would likely discourage some women from having an abortion. But would it constitute an *undue* burden? After *Casey*, Justice O'Connor (joined by Justice Souter) explained that a waiting period could constitute an undue burden if "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Fargo Women's Health Org. v. Schafer*, 113 S. Ct. 1668, 1669, 123 L. Ed. 2d 285 (1993) (O'Connor, J., concurring in the denial of an application for a stay and an injunction) (quoting the joint opinion in *Casey*). Compare, for example, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 114 S. Ct. 909, 911-12 (1994) (holding the record in *Casey* adequate for the joint opinion to apply the undue-burden test and denying the stay); *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 532 (8th Cir. 1994) (holding that the North Dakota waiting period does not constitute an undue burden under a statute read to mandate only one personal visit, because the first contact can be made by telephone); *Planned Parenthood v. Miller*, 860 F. Supp. 1409, 1420-21 (D.S.D. 1994) (holding that the South Dakota waiting period does not impose an undue burden).

326. 112 S. Ct. at 2807; *id.* at 2810-11.

327. See Jane Maslow Cohen, *A Jurisprudence of Doubt: Deliberative Autonomy and Abortion*, 3 Colum. J. Gender & L. 175, 186-90 (1992) (criticizing the joint opinion's support of state intervention into the pregnant woman's decision process).

328. See generally *id.*

329. *Casey*, 112 S. Ct. at 2878 (Scalia, J., concurring in part and dissenting in part).



unique, they are just that: state interests, not limitations on the scope of the individual right,<sup>330</sup> nor reductions in the degree of the state interference with it. Further, as unprincipled and ad hoc as the Court's undue-burden test for abortion rights appears,<sup>331</sup> applying it across the board to all fundamental rights would radically change constitutional law and significantly weaken all protected freedoms.<sup>332</sup> In doing so, it would multiply the uncertainties, previewed in *Casey*,<sup>333</sup> about precisely which restrictions constitute undue burdens on specific rights.

Although *Casey*'s deeply flawed approach continues to raise questions, this much is clear. First, the undue-burden test no longer expresses the difference between state action and state passivity, as it did in the abortion-funding cases. Second, the new criteria for identifying an undue, and thus unconstitutional, burden focus on a law's purpose and effects. Third, the test provides an intermediate level of review, one that is less rigorous than strict scrutiny but also less deferential than the rational-basis standard.

### 3. Why the Undue-Burden Standard Should Govern Welfare Reforms: State Action and Inaction

Critics of the abortion-funding cases have observed that the Court had difficulty distinguishing state inaction from action in *Maher* and *McRae* because in the "welfare state,"<sup>334</sup> the regime of "the

330. See *Thornburgh*, 476 U.S. at 776 (Stevens, J., concurring) (criticizing Justice White's treatment of state interests as limitations on definitions of individual liberty); *Michael H.*, 491 U.S. at 145 (Brennan, J., dissenting) (claiming that the plurality erroneously "conflates the question whether a liberty interest exists" with the state's interest in terminating it). Compare *Casey*, 112 S. Ct. at 2807-08 (joint opinion) (asserting that the personal interest at stake is the same in abortion and contraception cases, and that *Roe* resolved the issue of whether the state interest in protecting prenatal life outweighs the personal interest).

331. See notes 300, 320-21 and accompanying text.

332. The damage *Casey* did to abortion freedom, see, for example, Sylvia A. Law, *Abortion Compromise—Inevitable and Impossible*, 1992 U. Ill. L. Rev. 921, would then spread to other fundamental rights.

Since *Casey*, some courts have begun to apply the undue-burden test to cases in which restrictions on other constitutional rights have been perceived to fall short of complete infringements. See, for example, *Herndon v. Tuhey*, 857 S.W.2d 203, 208-10 (Mo. 1993) (holding that court-ordered grandparent visitation, over the parents' objections in an intact family, does not impose an undue burden on the parental right to make childrearing decisions); *Campbell v. Campbell*, 896 P.2d 635, 641-42 (Utah Ct. App. 1995) (relying on *Casey*, upholding a grandparent visitation statute because it does "not substantially infringe" on parents' rights).

333. See note 325 and accompanying text.

334. See generally, for example, Theodore R. Marmor, Jerry L. Mashaw and Philip L. Harvey, *America's Misunderstood Welfare State: Persistent Myths, Enduring Realities* (Basic Books, 1990).

new property,"<sup>335</sup> government support is so pervasive that a discrete funding question—whether or not to subsidize abortions—becomes difficult to isolate from the larger mosaic.<sup>336</sup> Nonetheless, the Court wrote these opinions as if the government's refusal to fund even medically necessary abortions could be analyzed coherently apart from its provision of other services for Medicaid recipients, including care incident to continued pregnancy and childbirth.<sup>337</sup>

In the context of programs providing general family assistance, such as AFDC or its block-grant successor, it becomes far *more* difficult to distinguish state passivity from state action than in the context of abortion funding. One could plausibly envision withholding funds earmarked for a recipient's abortion, while affording her medical care for carrying her pregnancy to term, as a refusal to subsidize abortion—that is, inaction—on the part of the state, even if the woman chooses to divert other funds for an abortion anyhow. The state provides assistance for certain care, that for childbirth, but not for its mutually exclusive alternative, abortion.<sup>338</sup>

In contrast, isn't a governmental refusal to subsidize an additional child just another way of describing a smaller grant for an entire family, with no conceivable mutually exclusive alternatives to justify a claim of state inaction? This question becomes unavoidable given the understanding articulated in *C.K.* that, under New Jersey's Family Development Program, no child is excluded; rather, welfare families with new children are expected to share their capped grants among a larger number of family members.<sup>339</sup> Such anticipated sharing necessarily amounts to state support of the same new children for whom welfare reforms disclaim such action. Ironically, then, acknowledging reforms like New Jersey's as child exclusions, rather

335. Charles A. Reich, *The New Property*, 73 Yale L. J. 733 (1964). Compare generally William H. Simon, *Rights and Redistribution in the Welfare System*, 38 Stan. L. Rev. 1431 (1986).

336. These are the critics who have questioned the Court's identification of the complete absence of governmental medical care as the "baseline" in the abortion-funding cases. See notes 115-16 and accompanying text. See also Edelman, *A Mandated Minimum Income*, in Gottlieb, ed., *Public Values in Constitutional Law* at 186-87 (cited in note 284).

337. See also Appleton, 81 Colum. L. Rev. at 738-40 (cited in note 98) (claiming that the Court separated the abortion right from the right to procreate in order to conclude that funding the latter, but not the former, is state inaction).

338. The abortion-funding cases referred specifically to childbirth as an "alternative" to the abortion sought by an indigent pregnant woman. *Maher*, 432 U.S. at 474; *McRae*, 448 U.S. at 325.

339. In essence, this was one of the points the court used to reject the label "child exclusion" and its implications of unconstitutionality for New Jersey's reform. See notes 233-36 and accompanying text.

than calling them family caps, would more convincingly support an argument of state inaction consistent with the abortion-funding cases, that is, a state refusal to subsidize additional children for welfare recipients. Yet recognition that such welfare reforms completely deprive new children of public assistance makes such plans vulnerable under *Plyler v. Doe* and the illegitimacy cases.<sup>340</sup> As a result, in rejecting the label "child exclusion" in favor of "family cap," C.K. inadvertently weakened the applicability of the abortion-funding cases while repudiating the plaintiffs' *Plyler*-based challenge.

Similarly, the provision of childcare services and goods, such as diapers, allowed by the House bill and the conference report,<sup>341</sup> reinforces the characterization of the state's role under welfare reform as one of action with respect to the new children of welfare recipients and teenage mothers. These illustrations demonstrate that the problem of indeterminate "baselines" raised in criticism of the abortion-funding cases proves far more intractable when considering welfare reforms, because here the state certainly has acted with respect to particular families and certainly will continue to act, albeit at a less generous level per person.<sup>342</sup> The state action disclosed by this analysis calls for a higher standard of review than the rational-basis test triggered by the state inaction described in the abortion-funding cases.

Although other proposed welfare reforms, notably Norplant bonuses, aim at a discrete behavior and in that way more closely resemble the abortion-funding problem, they too cannot be presented as a case of state inaction. Here the proposal goes beyond a governmental subsidy of Norplant for users, with the state simply declining to subsidize other methods of birth control or their absence. Similarly, conditioning assistance for teenage parents on their school attendance contemplates something other than a subsidy.<sup>343</sup> Instead, these proposals contemplate financial *rewards*, offered in addition to the state's provision of Norplant or education free of charge.<sup>344</sup> Simply put, this is state action.

---

340. See notes 216-32, 255 and accompanying text.

341. See note 267.

342. See notes 115-16 and accompanying text. "Reformed" welfare schemes present an even more obvious case of action than the facts of *DeShaney*, in which critics persuasively have rejected the majority's description of state inaction. See note 100.

343. See, for example, H.R. 4 § 101 (cited in note 15) (replacement for § 406 of the Social Security Act); 141 Cong. Rec. at H15323 (daily ed. Dec. 21, 1995) (H.R. 4 § 103) (replacement for § 408 of the Social Security Act).

344. See David S. Coale, *Norplant Bonuses and the Unconstitutional Conditions Doctrine*, 71 Tex. L. Rev. 189, 208-10 (1992) (showing how a poor woman is "worse off" for exercising the constitutional right to procreate because she must forego the bonus); Vance, 21 Hastings Const.

"Bridefare" lends itself to a similar analysis. The abortion-funding cases distinguished state inaction (or a refusal to subsidize) from a financial penalty, that is, withdrawing support that the pregnant woman would otherwise receive but for her abortion.<sup>345</sup> The financial rewards of bridefare present the mirror image of financial penalties and, hence, fall outside the doctrinal rubric of the abortion-funding cases, with their emphasis on state passivity.<sup>346</sup>

Another proposed measure, cutting off assistance to unmarried teenage mothers who as children themselves had been beneficiaries of AFDC, meets the criteria for an unconstitutional penalty under the abortion-funding cases because it would take away existing benefits from the covered class.<sup>347</sup> This step leaves these individuals considerably worse off than if the state merely had declined to provide support for their new offspring.<sup>348</sup>

Given these observations, one might argue that these welfare reforms should evoke the strict scrutiny the Court refused to apply in the abortion-funding cases. I would support this argument because I believe the Court should have used strict scrutiny in *Maher* and *McRae*. Confining those holdings to their own narrow context would at least minimize the damage they could inflict on other facets of the right to privacy.

Yet, despite the differences between abortion funding and welfare reforms,<sup>349</sup> strict scrutiny for privacy-invading welfare reforms strikes me as wishful thinking that has only a negligible chance of

---

L. Q. at 842 (cited in note 182) (distinguishing Norplant bonuses from the state's role in abortion-funding cases).

345. *Maher*, 432 U.S. at 474-75 n.8 (stating that the denial of general welfare benefits to women having abortions would constitute a penalty); *McRae*, 448 U.S. at 317 n.19 (stating that withholding all Medicaid benefits from women having abortions would constitute a penalty). See notes 112-13 and accompanying text.

346. Proposals to terminate all assistance unless the recipient uses Norplant, see Laurence C. Nolan, *The Unconstitutional Conditions Doctrine and Mandating Norplant for Women on Welfare Discourse*, 3 Am. U. J. Gender & L. 15, 22, n.58 (1994), would clearly impose unconstitutional financial penalties.

347. H.R. 4 § 101 (cited in note 9) (replacement for § 405 of the Social Security Act). This provision prohibits states from using block grants for "cash benefits for a child born out-of-wedlock to an individual who has not attained 18 years of age, or for the individual, until the individual attains such age." *Id.* I read this language to require states to discontinue support for minors in welfare families when these minors themselves have children out of wedlock. Thus, they lose their existing benefits, along with the denial of support for their new offspring. See also 141 Cong. Rec. at H15323-24 (daily ed. Dec. 21, 1995) (H.R. 4 § 103) (replacement for § 408 of the Social Security Act).

348. See McConnell, 104 Harv. L. Rev. at 1015-17 (cited in note 101) (analyzing what it means to make one "worse off").

349. See notes 257-91 and accompanying text.

coming true.<sup>350</sup> This is so for two reasons, the first a matter of analysis and the second a matter of prediction. First, and most importantly, although proposed welfare reforms do not present cases of pure state inaction, neither do they present paradigm cases of state action, such as restrictions on reproductive autonomy enforced by criminal punishment or civil sanctions,<sup>351</sup> the typical trigger for strict judicial scrutiny. Second, the significant evisceration of the right to privacy accomplished by *Casey* may well signal the present Court's reluctance to accord maximum protection to freedoms that a majority of the Justices must see as lying at the edges of the Constitution.<sup>352</sup>

The same points, however, suggest that it is not unrealistic to expect the Court to apply something more than rational-basis review to state manipulations of reproductive choice through the combination of action and inaction embodied in welfare reform. According to the abortion-funding cases, "[c]onstitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader."<sup>353</sup> But constitutional concerns do not evaporate when not at their greatest, and government's broader power to encourage acts in the public interest certainly has its limits. Under the continuum suggested by the Court's language, an intermediate standard of review like the undue-burden test<sup>354</sup> may usefully split the difference between strict scrutiny and rationality review that govern, respectively, state action and inaction encroaching on constitutional rights. It may also capture the current Court's effort to accommodate state interests while recognizing what it deems peripheral fundamental rights.

Alan Brownstein has attempted to show that *Casey*'s undue-burden test has played a considerable role in constitutional law for

---

350. Compare Barksdale, 14 Law & Ineq. J. at 49-69 (cited in note 133) (advocating a "harms-based test" to make family caps invalid under the unconstitutional conditions doctrine).

351. See, for example, *Casey*, 112 S. Ct. at 2834, 2837 (reproducing Pennsylvania's abortion statute, including its penalty provisions, in an appendix).

352. See Linda C. McClain, *The Poverty of Privacy?*, 3 Colum. J. Gender & L. 119, 127-33 (1992) ("The Disappearance of Privacy?"). Compare notes 76-77.

353. *McRae*, 448 U.S. at 315 (quoting *Maher*, 432 U.S. at 476).

354. Brownstein writes:

An undue burden standard that evaluates both the purpose and effect of challenged regulations [as in *Casey*] has support in the case law, but it reflects a three-tier model of analysis. Unlike the prior [two-tier] model, this approach provides for an additional level of scrutiny. In addition to strict scrutiny and minimum rationality review, there is an intermediate level of scrutiny that usually involves some form of balancing test.

Brownstein, 45 Hastings L. J. at 909 (cited in note 137).

forty years.<sup>355</sup> He examines a number of discrete doctrinal areas, including cases involving the Establishment Clause and those interpreting the Takings Clause.<sup>356</sup> Brownstein's analysis, however, does not address the abortion-funding cases, much less mention proposals for welfare reform. Nonetheless, some of his observations, removed from the context he has developed, strengthen the case for applying the undue-burden test to privacy-invading welfare reforms. In particular, Brownstein has ventured that a flexible balancing test like the undue-burden standard better suits the contemporary "complexity of human society"<sup>357</sup> than a constitutional jurisprudence based on categorically defined rights, with violations invariably subject to rigorous review.<sup>358</sup> In certain areas, he continues, "some framework of review more sensitive to reasonable *regulatory* concerns must be implemented."<sup>359</sup>

In contrast to Brownstein, I remain reluctant to depart from full constitutional protection for all fundamental rights, including the choices embraced by the right to privacy. The abortion-funding cases and *Casey* already have stopped short of that ideal, however. Given that reality, perhaps Brownstein's suggestion—although meant to resolve different constitutional questions—may offer a promising, practical alternative to a scheme in which all allocations of public funds otherwise seem destined for nothing more than rational-basis review. This alternative may prove particularly appropriate for evaluating the entangled threads of the complex welfare system, either "as we know it" or as drastically reformed. Whether or not Brownstein has correctly pointed to the complexity of modern society<sup>360</sup> in general, the American welfare system unquestionably manifests such complexity, as any AFDC recipient, state eligibility worker, member of Congress, or reader of the Social Security Act will attest. Despite the "brutal need"<sup>361</sup> it was designed to address, everyone would agree that the system must have some limits, even if there is

---

355. See generally *id.*

356. See *id.* at 903-08.

357. *Id.* at 956.

358. *Id.* In Brownstein's words, "[t]he conventional understanding that all conflicts between rights-related activity and state action must be resolved under strict scrutiny review simply immunizes too large an area of human activity from democratic deliberation and regulation." *Id.*

359. *Id.* at 957 (emphasis added). Brownstein's statement addresses freedom of speech.

360. See notes 357-58 and accompanying text.

361. See Martha F. Davis, *Brutal Need: Lawyers and the Welfare Rights Movement, 1960-1973* at 98 (Yale U., 1993) (providing the history of the phrase).

vigorous disagreement about what those limits should be. Transplanted to this new context that he did not explore, Brownstein's claim that the undue-burden test is a standard properly "sensitive to reasonable regulatory concerns" makes an even stronger case for using the test to assess welfare reforms than for applying it in *Casey* itself.<sup>362</sup>

In sum, the undue-burden test may offer a helpful middle ground for assessing welfare reforms that superficially resemble the refusal to fund abortion but, on closer inspection, do not comfortably fit the description of state inaction because of the intricacies of the larger assistance programs in which these reforms are proposed to occur.

#### 4. The Undue Burden of Welfare Reforms

The undue-burden test formulated in *Casey* directs courts to consider the purpose and effect of a legal rule or governmental decision. Although the joint opinion's language indicates that a law can fail on the basis of *either* its purpose *or* its effect, both elements probably play a role in the application of the test.<sup>363</sup> The joint opinion's analysis of Pennsylvania's spousal-notification requirement supports this understanding, because the Justices found constitutional defects in *both* the law's purpose and its effects.<sup>364</sup> Indeed, if an anti-abortion purpose alone spelled invalidity, the joint opinion could not have cited with approval all of Justice O'Connor's previous dissents, which regularly ignored a statute's anti-abortion purposes to focus instead on the absence of an undue burden according to the law's effects.<sup>365</sup>

Further, considering effects alone would make the undue-burden test unnecessarily problematic. This approach would implicate a wide range of decisions about welfare, including the *rejection* of wel-

---

362. In other words, Pennsylvania's restrictions and their enforcement, examined in *Casey*, operate in a comparatively simple and straightforward way. By contrast, the layers of bureaucracy in the administration of AFDC and its proposed successors make Brownstein's "regulatory concerns" especially pressing.

363. Although the joint opinion in *Casey* speaks of "purpose *or* effect" (emphasis added), see note 322 and accompanying text, the analysis contemplated by the three Justices considers both elements. See Brownstein, 45 *Hastings L. J.* at 908 (cited in note 137) (discussing the "complex inquiry directed at both purpose and effect").

364. See *Casey*, 112 S. Ct. at 2829 (stating that the requirement is likely to prevent a significant number of women from obtaining abortions); *id.* at 2830-31 (finding that the state's purpose of protecting the husband's interest embodies an impermissible view of women and marriage, giving the husband authority over his wife's reproductive decisions).

365. Compare, for example, *Akron*, 462 U.S. at 444 (asserting that much of the informed-consent requirement is "designed not to inform the woman's consent but rather to persuade her to withhold it altogether"), with *id.* at 472 (O'Connor, J., dissenting) (finding no undue burden).

fare reforms, that have *unintended* effects and consequences.<sup>366</sup> For example, critics claim that existing rules of public assistance encourage childbearing, though they are not designed for this purpose.<sup>367</sup> If privacy-invading effects alone condemned a rule under the undue-burden standard, then both the present system and the proposed reforms would become constitutionally suspect.<sup>368</sup> Government would become paralyzed, and questions about how to address such problems would become incoherent.

Under *Casey*, the law's purpose or effect must "plac[e] a substantial obstacle in the path" of the individual's exercise of reproductive choice.<sup>369</sup> "Obstacle," like "penalty" or "direct interference," is a term that traces back to the Court's efforts in the abortion-funding cases to distinguish state action from inaction.<sup>370</sup> Because today's welfare reforms contemplate far more involvement by the state than a hands-off stance,<sup>371</sup> they cannot summarily survive the undue-burden test for failure to create an obstacle; rather, they warrant a closer examination for purposes and effects.

While the abortion-funding cases virtually conceded the anti-abortion purposes underlying the selective funding schemes they upheld,<sup>372</sup> the cases emphasized the absence of any cognizable effect on the challengers. Indigent women seeking abortions were no worse off than if the government got out of the Medicaid business altogether.<sup>373</sup> Further, as the Court observed, these women could find other means to obtain this discrete and relatively inexpensive service.<sup>374</sup> By contrast, many welfare reforms threaten ongoing and per-

---

366. At one time, Congress considered a proposal that would have required a "family impact statement" before the enactment of any law likely to affect family behavior. See *American Families: Trends and Pressures*, Hearings before the Subcommittee on Children and Youth of the Sen. Committee on Labor and Public Welfare, 93d Cong., 1st Sess. 69 (1973) (dialogue between Sen. Walter Mondale and Dr. Edward Zigler).

367. See notes 36-38 and accompanying text. See generally Murray, *Losing Ground* (cited in note 37).

368. Thus, the test is *not* a pure effects test. Compare McConnell, 104 Harv. L. Rev. at 1002 (cited in note 101) (critiquing Professor Sullivan's effects test for unconstitutional conditions as being too broad).

369. See note 322 and accompanying text.

370. See notes 93-96 and accompanying text.

371. See notes 338-48 and accompanying text.

372. *Maher*, 432 U.S. at 478; *McRae*, 448 U.S. at 324-25.

373. *Maher*, 432 U.S. at 469, 474; *McRae*, 448 U.S. at 317-18.

374. *Maher*, 432 U.S. at 474; *McRae*, 448 U.S. at 314. See Rosalind Pollack Petchesky, *Abortion and Woman's Choice: The State, Sexuality and Reproductive Freedom* 160 (Longman, 1984) (asserting that the Hyde Amendment did not deter the majority of poor women from having legal abortions).



vative effects, permeating the conditions of everyday familial life, and are not confined to an isolated decision.<sup>375</sup> The woman who obtains an unfunded abortion finds herself under financial pressure at that time. For the woman who has an "unfunded child," the pressure continues throughout the child's minority. As a result, child exclusions or family caps, as well as assistance cut-offs for unmarried teenage mothers, create precarious conditions under which the families in question must live indefinitely. These conditions deter the exercise of reproductive autonomy. To the extent these deterrents work, they constitute substantial obstacles under *Casey*.<sup>376</sup>

In addition, the privacy-invading purposes underlying many proposed reforms have been touted by the decision makers for all the world to see. The most often expressed purpose of welfare reform, to stop welfare mothers or unmarried teenagers from reproducing,<sup>377</sup> is reflected in every measure or proposal. For example, the House bill explicitly aims to reduce illegitimate births and seeks to achieve this goal by rewarding states with increased grants when they reduce out-of-wedlock births; a mathematical formula called the "illegitimacy ratio" measures a state's success.<sup>378</sup> The Senate bill contains an

375. Obviously, if an indigent woman seeking an abortion cannot find alternative means to purchase one, the effect on her life is ongoing and pervasive, whether she rears the child or resorts to adoption. *Roe* certainly implies that adoption does not solve the problem of unwanted pregnancy. See *Roe*, 410 U.S. at 153 (recognizing the burdens imposed by abortion bans despite the opportunity to choose adoption). See also Robert D. Goldstein, *Mother-Love and Abortion: A Legal Interpretation* 54-59 (U. Cal., 1988) (concluding that by banning abortion the state exploits women, because they will ultimately come to love the children of their unwanted pregnancies).

376. They are unquestionably obstacles because they result from active efforts of the state. See notes 338-48 and accompanying text.

377. See notes 9-35 and accompanying text.

378. SEC. 403. PAYMENTS TO STATES

(a) Entitlements.—

(1) Grants for family assistance.—

(A) In general.— Each eligible State shall be entitled to receive from the Secretary for each of fiscal years 1996, 1997, 1998, 1999, and 2000 a grant in an amount equal to the State family assistance grant for the fiscal year.

(B) Grant increased to reward states that reduce out-of-wedlock births.— The amount of the grant payable to a State under subparagraph (A) for fiscal year 1998 or any succeeding fiscal year shall be increased by—

- (i) 5 percent if the illegitimacy ratio of the State for the fiscal year is at least 1 percentage point lower than the illegitimacy ratio of the State for the fiscal year 1995; or
- (ii) 10 percent if the illegitimacy ratio of the State for the fiscal year is at least 2 percentage points lower than the illegitimacy ratio of the State for fiscal year 1995. . . .

(b) Definitions.— As used in this section: . . .

(2) Illegitimacy ratio.— The term 'illegitimacy ratio' means, with respect to a State and a fiscal year—

analogous provision,<sup>379</sup> and elements of both versions appear in the conference report.<sup>380</sup> Similarly, New Jersey's Family Development

- (A) the sum of—
  - (i) the number of out-of-wedlock births that occurred in the State during the most recent fiscal year for which such information is available; and
  - (ii) the amount (if any) by which the number of abortions performed in the State during the most recent fiscal year for which such information is available exceeds the number of abortions performed in the State during the fiscal year that immediately precedes such most recent fiscal year; divided by
- (B) the number of births that occurred in the State during the most recent fiscal year for which such information is available. . . .

H.R. 4 § 101 (cited in note 9) (replacement for § 403 of the Social Security Act).

379. (f) Grant Increased To Reward States That Reduce Out-of-Wedlock Births.—

- (1) In general.— The amount of the grant payable to a State under section 403(a)(1)(A) for fiscal years 1998, 1999, and 2000 shall be increased by—
  - (A) an amount equal the product of \$25 multiplied by the number of children in the State in families with incomes below the poverty line, according to the most recently available census data, if—
    - (i) the illegitimacy ratio of the State for the most recent fiscal year for which such information is available is at least 1 percentage point lower than the illegitimacy ratio of the State for fiscal year 1995 (or, if such information is not available, the first available year after 1995 for which such data is available); and
    - (ii) the rate of induced pregnancy terminations for the same most recent fiscal year in the State is not higher than the rate of induced pregnancy terminations in the State for fiscal year 1995 (or, the same first available year); or
  - (B) an amount equal the product of \$50 multiplied by the number of children in the State in families with incomes below the poverty line, according to the most recently available census data, if—
    - (i) the illegitimacy ratio of the State for the most recent fiscal year for which information is available is at least 2 percentage points lower than the illegitimacy ratio of the State for fiscal year 1995 (or, if such information is not available, the first available year after 1995 for which such data is available); and
    - (ii) the rate of induced pregnancy terminations in the State for the same most recent fiscal year is not higher than the rate of induced pregnancy terminations in the State for the fiscal year 1995 (or, the same first available fiscal year). . . .
- (3) Illegitimacy ratio.— For purposes of this subsection, the term 'illegitimacy ratio' means, with respect to a State and a fiscal year—
  - (A) the number of out-of-wedlock births that occurred in the State during the most recent fiscal year for which such information is available; divided by
  - (B) the number of births that occurred in the State during the most recent fiscal year for which such information is available.

H.R. 4 § 101 (cited in note 15) (replacement for § 406 of the Social Security Act).

380. 141 Cong. Rec. at 15370-21 (daily ed. Dec. 21, 1995) (H.R. 4 § 103) (replacement for § 403 of the Social Security Act) (using the House's 5% and 10% figures, but the Senate's definition of the illegitimacy ratio and the Senate's denial of rewards to state whose abortion rates increase). See *id.* at 15394-96 (comparing the House, Senate, and conference versions).

Program is undergoing evaluation according to its impact on the fertility rate of covered AFDC recipients, compared to those in a control group.<sup>381</sup> These measurements of the success of welfare reforms fuse considerations of purpose and effect, clearly disclosing legislative goals in the assessments of each law's impact.

Under Kathleen Sullivan's interpretation of *Casey*, the undue-burden test's inquiries into purpose and effect coalesce in a determination of an abortion restriction's coercive strength.<sup>382</sup> Abortion bans and laws giving what amounts to veto power to third parties strongly coerce a woman's choice and thus fail the test, according to this analysis.<sup>383</sup> According to *Casey*, if a husband psychologically abuses his wife or withdraws his financial support as the result of a law requiring her to notify him of her abortion plans, then the state has imposed a palpable cost on the woman as a precondition for the exercise of her right.<sup>384</sup>

Proposed privacy-invading welfare reforms coerce because they give the state a role like that of the notified husband hypothesized in *Casey*'s joint opinion to strike down the spousal notification requirement: the man who will use his financial control to impress his will on his economically dependent wife.<sup>385</sup> If the possibility that a husband will deprive his wife or her children of support creates a substantial obstacle (an undue burden), then a policy of the state to

---

381. See Bureau of Economic Research, Rutgers University School of Social Works, *The Family Development Program: An Analysis of Impacts, Costs and Benefits* 50 (proposal submitted to the State of New Jersey) (on file with the Author); Brief in Opposition to Federal Defendant's Motion for Summary Judgment at Exhibit C (cited in note 132); Telephone Interview with Dr. Rudy Myers, Assistant Director, State of New Jersey Department of Human Services, Division of Economic Assistance (Aug. 8, 1995).

382. Kathleen M. Sullivan, *The Supreme Court 1991 Term—Foreword: The Justices of Rules and Standards*, 106 Harv. L. Rev. 22, 33-34 (1992). Professor Sullivan emphasizes effects, at the expense of purpose, explaining that the new standard "takes into account the quantity of impact on pregnant women." *Id.* at 34. But see Sullivan, 102 Harv. L. Rev. at 1500-01 (cited in note 102) (arguing that the Court should have decided the abortion-funding cases under a strict-scrutiny standard, because of the government's "rights-pressuring intent"). Sullivan also identifies "coercion" as a key element in the Court's unconstitutional conditions cases, while pointing out the Court's failure to give the term a clear meaning. *Id.* at 1428-56.

383. See Sullivan, 106 Harv. L. Rev. at 32-34 (cited in note 382). By contrast, laws requiring a physician to "inform" a woman's choice, just like waiting periods, survive the test because they ultimately leave the woman free to decide. See *id.* at 34.

384. See *Casey*, 112 S. Ct. at 2829.

385. *Id.* at 2826 (quoting the district court's finding that exceptions in the notification requirement would not exempt a woman "whose husband, if notified, would, in her reasonable belief, threaten to . . . use his control over finances to deprive [her] of necessary monies for herself or her children"); *id.* at 2828 ("Many abused women who find temporary refuge in shelters return to their husbands, in large part because they have no other source of income"); *id.* at 2829 ("Many [women] may fear devastating forms of psychological abuse from their husbands, including . . . the withdrawal of financial support").

wield its financial power to influence the reproductive choices of economically dependent citizens must create such obstacles and burdens as well. The state's efforts to deter childbearing by restricting assistance for new children or rewarding the use of Norplant, just to cite a few examples, embody such financial coercion. Indeed, the parallel roles of spouse and state in this analysis should come as no surprise, for historically welfare has served as a "stand-in" for husbands and fathers to provide single mothers with the "family wage" enjoyed by their married (and equally economically dependent) counterparts.<sup>386</sup>

*Casey* suggests that *undue* burdens are those that prevent a woman from choosing abortion. In other words, they are anti-abortion legal rules that have a high likelihood of success precisely because they coerce. Lesser (or due) burdens on the abortion right presumably leave more women undeterred from their original plan to terminate their pregnancies; otherwise they would have the effect of creating a substantial obstacle.<sup>387</sup> If the goal of the restrictions upheld in *Casey* is not to decrease abortion but rather simply to push women to think longer and harder about abortion, as the joint opinion intimates,<sup>388</sup>

---

386. See Gordon, *Pitied But Not Entitled* at 37-64 (cited in note 39); notes 42, 187-90 and accompanying text. The point emerges even more clearly in the words of welfare reformer Johnnie Tillmon Blackston, who compared welfare to a "supersexist marriage." Robert McG. Thomas, Jr., *Johnnie Tillmon Blackston, Welfare Reformer, Dies at 69*, N.Y. Times B11 (Nov. 27, 1995). The obituary quotes Blackston as follows:

You trade in "a" man for "The" man. But you can't divorce him if he treats you bad. He can divorce you, of course—cut you off—anytime he wants. But in that case "he" keeps the kids, not you.

"The" Man runs everything. . . . "The" Man, the welfare system, controls your money.

Id.

387. Even if the joint opinion underestimates the impact of the restrictions that it found constitutional, see Law, 1992 U. Ill. L. Rev. at 931 (cited in note 332) (stating that *Casey* may represent the "worst of all possible worlds. . . [by] allowing the state to adopt measures that effectively curtail many women's exercise of the abortion right"), unconstitutional restrictions must have an even greater impact in order to prevent the test from becoming entirely incoherent.

388. 112 S. Ct. at 2821, 2824. Compare Cohen, 3 Colum. J. Gender & L. at 186-90 (cited in note 327) (criticizing *Casey* on this point).

then the analysis might make theoretical sense,<sup>389</sup> notwithstanding the bottom line in numbers of abortions actually discouraged.<sup>390</sup>

Proposed welfare reforms have more concrete and measurable goals: reducing the number of welfare-dependent children, the illegitimacy rate, and the prevalence of teenage motherhood. Certainly, most proponents of these reforms seek to accomplish more than additional thinking about these issues by welfare recipients, as documented by formulae designed to assess the legislation's success, such as the illegitimacy ratio.<sup>391</sup>

Preliminary data from New Jersey send conflicting signals about the effectiveness of privacy-invading welfare reforms, with some studies showing no impact and others indicating reduced birth rates and increased abortions.<sup>392</sup> Under *Casey*, welfare reforms powerful enough to achieve goals like reducing particular birth rates are more likely to earn condemnation as undue burdens than those that would fall short of such success. That is, *Casey* paradoxically suggests that the most effective measures face the greatest risk of constitutional invalidity and less effective measures have a better chance of surviving judicial review. And yet, if they survive scrutiny under the undue-burden test because they are deemed not sufficiently coercive to achieve their goal of reducing targeted birth rates, how can welfare reforms that deny subsistence to the needy, that jeopardize innocent children, and that seek to inject the government into the most intimate of life's decisions, be anything but *undue* burdens? Creating such risks for the poor, *without* accomplishing the intended ends, produces harm without justification.

---

389. To say that the joint opinion's approach might make some theoretical sense does not mean that it makes practical sense. Requiring women who have visited an abortion clinic or physician to spend more time thinking about whether or not to terminate a pregnancy pursues an illusory goal because such women already have decided on abortion. See Susan Frelich Appleton, *Doctors, Patients and the Constitution: A Theoretical Analysis of the Physician's Role in "Private" Reproductive Decisions*, 63 Wash. U. L. Q. 183, 201-02 (1985).

390. If the recognized goal were reducing the number of abortions, the joint opinion would be taking the peculiar position of invalidating the very laws that most effectively achieve this end. See 112 S. Ct. at 2880 (Scalia, J., concurring in part and dissenting in part) (noting that under the joint opinion, the state "may not regulate abortion in such a way as to reduce significantly its incidence"; the joint opinion permits the state to pursue its interest in human life "only so long as it is not too successful").

391. See notes 378-81 and accompanying text. Nor does the mere expression of "family values" often linked with the proposed reforms fully reflect the underlying purposes, as these measurement tools make plain. In any event, standing alone, such official "values" will not suffice as justifications under any kind of heightened scrutiny. See note 140 and accompanying text; Davis, 107 Harv. L. Rev. 1348 (cited in note 126).

392. See notes 32, 252 and accompanying text.

## V. CONCLUSION

Under the “happily-ever-after” conclusion to this Article, privacy-invading welfare reforms will serve as a vehicle for the Supreme Court to realize it reached the wrong results in the abortion-funding cases, as well as in *Dandridge v. Williams* and *Planned Parenthood v. Casey*. Constitutional challenges to welfare reforms would help the Court belatedly see that official manipulations of reproductive choice, through funding childbirth but not abortion, intrude on the fundamental right to privacy protected in a long line of holdings by strict judicial scrutiny under the Fourteenth Amendment. Challenges to the proposed reforms would also reveal why *Dandridge* erroneously failed to protect innocent children from the harmful consequences of state efforts to mold parental behavior, a flaw illuminated by subsequent illegitimacy cases and *Plyler v. Doe*. Finally, close analysis of welfare reforms would force a majority of the Court to abandon expressly *Casey*’s undue-burden test as both insufficiently protective of reproductive autonomy and paradoxical in its understanding of undue burdens.

These fantasies are unlikely to materialize, however, and for now the abortion-funding cases, *Dandridge*, and *Casey* all remain good law.<sup>393</sup> Nonetheless, even under a “down-to-earth” conclusion to this Article, the prospects for successful constitutional challenges to proposed privacy-invading welfare reforms, an issue largely absent from the ongoing debate, are not as bleak as these precedents might suggest. The continued validity of the abortion-funding cases does not require extending them to welfare reforms. Several different kinds of discrimination addressed by the equal protection guarantee set welfare reforms apart from the funding schemes upheld in those precedents. In addition, the unique politics of abortion also supply reasons to distinguish the abortion-funding cases from the current controversy. Similarly, *Dandridge*’s family cap can be distinguished from today’s child exclusions. Finally, despite all of *Casey*’s difficulties, it may be put to good use by providing an intermediate standard of review well suited for the “state inaction plus action” characteristic of welfare reforms. The test’s intermediate scrutiny

---

393. Of course, “good law” is an overstatement with respect to *Casey*’s joint opinion, which simply embodies the lowest common denominator that would produce a holding in the case. The point, however, is that no subsequent case has set *Casey* aside, and lower courts have relied on its undue-burden test. See notes 314, 325, 332 and accompanying text.

also serves the perceived need to consider the intricacies and regulatory interests presented by the contemporary welfare system. By so deploying the undue-burden test, the courts may begin to create a constitutional foundation for a more unified system of family law, one in which poverty does not invite a less demanding standard of review than that applicable to the private behavior of others. Although accepting an intermediate standard of review for purposeful manipulations of reproductive choice represents a troubling compromise,<sup>394</sup> this middle ground may offer the most promising approach available.

---

394. See note 136 and accompanying text.