

October 2004

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Repository Citation

Kelly J. Gastley, *Why Family Cap Laws Just Aren't Getting It Done*, 46 Wm. & Mary L. Rev. 373 (2004), <https://scholarship.law.wm.edu/wmlr/vol46/iss1/7>

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WHY FAMILY CAP LAWS JUST AREN'T GETTING IT DONE

INTRODUCTION

Public assistance has long been an essential source of support for indigent Americans, yet the program itself has always been the center of great political controversy. From the time of its implementation during the New Deal, the structure of the public assistance program in America has always reflected the perceptions of policymakers as well as the public. As a result, this structure also reflects the broader goals that politicians embrace and aim to achieve through welfare reform. At the heart of the political battle over public assistance are debates over the practical implementation of welfare legislation and regulations that are designed to further these objectives.

Recently, a new war in the American welfare state has erupted: the debate over the validity and utility of family cap legislation. Family cap laws place a ceiling on the amount of benefits that a welfare family can receive by denying additional benefits to families that would normally receive an increase in funds when an additional child is born into that family. Since the dramatic welfare reform of the 1990s that culminated in the passage of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA),¹ family cap legislation has become a particularly popular instrument in reforming the American public assistance program. In implementing these laws, states seek to promote certain objectives that they see as fundamental to true welfare reform, such as encouraging self-sufficiency, discouraging dependency on the government, and promoting marriage and family values among recipients. Over the past few decades, opponents of family cap laws have attacked the constitutionality of this legislation under the unconstitutional conditions doctrine, arguing that family

1. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 7 U.S.C., 8 U.S.C., 21 U.S.C., 25 U.S.C., and 42 U.S.C.).

cap laws violate due process and equal protection.² The vast majority of legal scholars who have analyzed family cap laws have also focused on the constitutional implications of the legislation.³ Despite these efforts, the few courts that have encountered the issue refuse to overturn the state laws on constitutional grounds.⁴ It is from this point in the chronology of welfare reform that this Note develops.

The judicial response to constitutional challenges of family cap laws has been overtly negative. The Supreme Court has never struck down a family cap law as unconstitutional, and lower federal and state courts have repeatedly upheld state implementation of these provisions.⁵ Thus, it is clear that despite the abundance of legal scholars who criticize family cap legislation as unconstitutional, the courts continue to show great deference to the states that have passed these laws. Due to the judiciary's resistance to strike down such family cap legislation, opponents of the laws should refocus their advocacy efforts toward the state and federal legislatures. In persuading legislators that family cap laws should be abolished, opponents should argue that these laws fail to serve their own goals, the goals of PRWORA, and the goals of the American welfare system, and that consequently, the government should no longer use family cap laws as a way to reform the American welfare system. Hence, this Note abandons the more traditional critique of family cap laws—that they are unconstitutional—in favor of a more pragmatic approach that may actually encourage legislators to reassess the objectives and effectiveness of family cap laws.

This Note reaches that conclusion through a consideration of the legal history that underlies the current controversy over family cap legislation. Part I of this Note discusses the development of the American welfare system from its inception through the 1990s and the passage of PRWORA. This Part analyzes the purposes and goals of the welfare system and how those objectives changed throughout the mid- to late-twentieth century. Part II explores the history of family cap provisions as well as various state legislative approaches

2. See *infra* Part III.

3. See *infra* Part III.B.

4. See *infra* Part III.C.

5. See *infra* Part III.C.

to implementing these laws. This Part also examines the purpose and goals of family cap laws. Part III reviews the unconstitutional conditions doctrine, its application to family cap laws, and the arguments surrounding the constitutionality of family cap provisions. This Part also addresses judicial treatment of these laws at the federal and state level, concluding that courts are reluctant to strike them down as unconstitutional. Part IV moves beyond case law and analyzes whether family cap laws are meeting the goals they set out to achieve. In addition, this Part addresses whether these laws are meeting both the goals of PRWORA and particularly the broader goals of the traditional American welfare system. The Note finds that family cap laws are ineffective because of their inability to achieve their own goals as well as the goals of both PRWORA and the American welfare system, and it concludes that legislators should abandon these provisions as a means of welfare reform.

I. THE DEVELOPMENT OF PUBLIC ASSISTANCE IN THE UNITED STATES

In 1935, President Franklin D. Roosevelt and the New Dealers pushed through Congress the most significant social legislation to date—the Social Security Act of 1935.⁶ Envisioning a comprehensive welfare system that would provide a financial safety net for needy Americans, the politicians of the 1930s fixed their sights on the long-term, idealistic goal that a successful public assistance program could indeed eradicate poverty.⁷ As time passed and as the

6. Social Security Act (Old Age Pension Act), ch. 531, 49 Stat. 620 (1935) (codified as amended in scattered sections of 42 U.S.C.).

7. See William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 *FORDHAM L. REV.* 1821, 1838-39 (2001); see also *Jefferson v. Hackney*, 406 U.S. 535, 544 (1972) ("The history and purpose of the Social Security Act do indicate Congress' desire to help those on welfare become self-sustaining."); Kathleen A. Kost & Frank W. Munger, *Fooling All of the People Some of the Time: 1990's Welfare Reform and the Exploitation of American Values*, 4 *VA. J. SOC. POL'Y & L.* 3, 18 (1996) (noting that "[p]assage of the Social Security Act ... established that the national economy ... was the 'problem' as well as the 'solution' to poverty" and characterizing the federal creation of public assistance in 1935 as "poverty relief"). Even during the recent passage of PRWORA, the 1996 welfare reform law that severely limited the poor's access to public assistance, Congress implicitly recognized this goal of eliminating poverty when it acknowledged that the purpose of public assistance was, in part, to "end the dependence of needy parents on government

number of Americans reliant on welfare grew, however, policymakers' sentiments of providing for the indigent turned into frustration with a welfare system that seemed to propagate dependency on the government. By the 1990s, this frustration had reached a climax, culminating in the passage of the most drastic welfare reform of the century. Yet the journey that the public assistance program took from the New Deal to the present is not quite this simplistic. Instead, it is littered with changes in social norms and economic trends that ultimately help to explain how the ideals on which the American public assistance program was initially based have led to the welfare system of today.

A. The Creation of Aid to Dependent Children (ADC)

When President Roosevelt's administration initiated the implementation of national social programs during the New Deal, it focused primarily on providing a safety net for Americans who might otherwise sink into poverty, thereby attempting to lift all Americans out of poverty.⁸ Through the Social Security Act of 1935,⁹ the New Dealers developed social insurance and public assistance programs on the national level to meet their policy goals. As they created the nation's first federal public assistance program, they also looked to employment as an important instrument in achieving their broad, long-term objective of eliminating poverty.¹⁰ Overall, the ideal behind these new social programs was to ensure that Americans had sufficient social insurance and employment opportunities so that the need for public assistance would subsequently dissipate.¹¹

One public assistance program that the Social Security Act of 1935 created was Aid to Dependent Children (ADC).¹² For the first

benefits by promoting job preparation, work, and marriage." 42 U.S.C. § 601(a) (2000).

8. See Forbath, *supra* note 7, at 1838.

9. Social Security Act, ch. 531, 49 Stat. 620 (1935).

10. See, e.g., Forbath, *supra* note 7, at 1838-39.

11. *Id.*

12. Social Security Act (Old Age Pension Act), ch. 531, §§ 401-406, 49 Stat. 620, 627-29 (1935) (codified as amended at 42 U.S.C. §§ 601-606 (2000)). The Social Security Act of 1935 also created several other important public benefit programs, including old-age assistance, ch. 531, § 1, 49 Stat. at 620 (codified as amended at 42 U.S.C. § 301), and unemployment compensation benefits, ch. 531, § 301, 49 Stat. at 626 (codified as amended at 42 U.S.C. §

time at the federal level, the government provided cash assistance for mothers to provide for their impoverished children.¹³ Though the government distributed the benefits to mothers, they were intended to support only their children.¹⁴ The New Dealers modeled ADC after mothers' pension programs previously implemented by the states.¹⁵ The rationale underlying mothers' pension programs and ADC was the same: the government should provide assistance to poor mothers to allow them to stay at home to raise their children and to avoid employment outside the home.¹⁶ Thus, the New Deal government intended ADC to encourage mothers to actively and properly raise their children with care and without the financial worries that usually accompany unemployment.

During its initial implementation, ADC was both a failure and a success. Strict eligibility requirements at the state and local level, particularly in the South, stunted the government's ability to bring people out of poverty.¹⁷ Because ADC was a federal program that delegated to the states much of the power to determine the

501). Over the years Congress has broadened the benefits that the act provides to include public assistance like disability insurance benefits, Pub. L. No. 84-880 § 103(a), 70 Stat. 807, 815 (1956) (codified as amended at 42 U.S.C. § 423), and supplemental security income for the aged, blind, and disabled, Pub. L. No. 92-603 § 301, 86 Stat. 1329, 1465 (1972) (codified as amended at 42 U.S.C. § 1381). These other benefit programs, however, are not relevant to this discussion because family cap laws only restrict the cash benefits available to families through ADC (and its successor programs). As a result, this Note analyzes only the ADC program.

13. See Social Security Act (Old Age Pension Act), ch. 531, §§ 401-406, 49 Stat. 620, 627-29 (1935) (codified as amended at 42 U.S.C. §§ 601-606 (2000)); MARTIN GILENS, *WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY* 18 (1999).

14. See, e.g., GILENS, *supra* note 13, at 18.

15. See Forbath, *supra* note 7, at 1839, 1850-51.

16. See GILENS, *supra* note 13, at 178; Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783, 799-800 (2003); Carol Sanger, *Separating From Children*, 96 COLUM. L. REV. 375, 476 (1996). Recipients of ADC and of mothers' pension programs in particular were generally white widows, a fact that reflects the pervasive attitude in the early twentieth century that public assistance should only go to those who are "deserving"—those who are prevented from work due to some type of burden (such as a disability or child-rearing) and not due to laziness. See Forbath, *supra* note 7, at 1839. This narrow window of eligibility eventually broadened to include all single mothers, whether widowed or not, who otherwise financially qualified for ADC. See Sanger, *supra*, at 476.

17. See Forbath, *supra* note 7, at 1839-40 (discussing eligibility determinations and particularly how the states kept poor black mothers in the South off the welfare rolls with the rationale that there was always work available in the cotton fields).

distribution of benefits, many states chose to keep benefit levels low in order to discourage the "undeserving" poor¹⁸ from becoming overly dependent on public assistance.¹⁹ Yet at the same time, ADC signaled the federal government's first attempt to provide public assistance to indigent Americans on a national level. It also evidenced the New Deal government's dedication to the broader goals of the Social Security Act of 1935: to provide a financial safety net for all Americans and eventually to eradicate poverty in the United States. Though the actual implementation of ADC by no means achieved the New Dealers' ultimate goal of using "aggressive spending on social welfare programs" to ensure "overall prosperity,"²⁰ it was nonetheless a program that was crucial for laying the ideological foundation of public assistance in America.

B. A Transformation of Programs and Ideals

From the passage of the Social Security Act of 1935 through the 1960s, the number of Americans receiving ADC gradually swelled.²¹ A 1962 amendment to the Social Security Act renamed the program Aid to Families with Dependent Children (AFDC), indicating that the program would now provide assistance to impoverished parents as well as children.²² Passed during the Kennedy administration, the amendment established the first "welfare-to-work" programs associated with AFDC and its successor programs, providing state and local governments with the funds and discretion to implement work programs that would reduce recipients' dependence on public assistance.²³

It was not until President Johnson declared War on Poverty in 1964, however, that the character of the AFDC program truly began to change.²⁴ In principle, "the thrust of the War on Poverty was to

18. See *supra* note 16 for a brief discussion of how states defined the poor as "deserving" and "undeserving."

19. See *supra* note 17.

20. See McCluskey, *supra* note 16, at 802-03.

21. According to Gilens, 370,000 families received ADC in 1940, and by 1960, the program benefited 800,000 families. GILENS, *supra* note 13, at 18.

22. Public Welfare Amendments of 1962, Pub. L. No. 87-543, tit. 4, 76 Stat. 172, 185 (codified as amended in scattered sections of 42 U.S.C.).

23. GILENS, *supra* note 13, at 179.

24. *Id.*

provide alternatives to, rather than reforms of, welfare.”²⁵ In practice, the war translated mostly into an effort to move people off the AFDC rolls and into the workforce.²⁶ Amendments in 1967 to the Social Security Act further solidified the national emphasis on work that pervaded political discussions about the increasing number of Americans receiving AFDC.²⁷ President Johnson’s War on Poverty still retained the ideal that the way to move people off AFDC and out of poverty was broader than work requirements and included education, job training, and reorganization at the community level. It was clear, however, that work requirements were the only economically and politically feasible option.²⁸

Though the focus of AFDC reforms in the 1960s was on moving recipients from welfare to work, the number of people on the welfare rolls actually increased dramatically during the 1960s and continued to do so until the mid 1970s.²⁹ In response to this trend, both the Nixon and Carter administrations attempted, but ultimately failed, to replace AFDC with a national (rather than federal) program³⁰ that would ensure “a minimum basic income” for all American families while retaining work requirements.³¹ Yet it was President Reagan who successfully waged a direct attack on the

25. *Id.*

26. *Id.* at 179-80; see also Sanger, *supra* note 16, at 476-77.

27. For instance, the amendments established the Work Incentive Program (WIN), which permitted states to extend work and job training requirements to recipient mothers of young children so long as the states provided day care. Sonya Michel, *A Tale of Two States: Race, Gender, and Public/Private Welfare Provision in Postwar America*, 9 YALE J.L. & FEMINISM 123, 130-31 (1997).

28. See Forbath, *supra* note 7, at 1846-48.

29. GILENS, *supra* note 13, at 18-19; Forbath, *supra* note 7, at 1841; Michel, *supra* note 27, at 131.

30. There is a subtle distinction between national and federal programs. The federal government generally funds and administers *national* programs. However, with *federal* programs, the federal government’s role is usually limited to funding and regulation of the states, with the states making their own determinations as to how to administer the programs.

31. GILENS, *supra* note 13, at 180-81. Nixon proposed the Family Assistance Plan (FAP), which would have had a much broader application than AFDC and would have provided supplemental income to working as well as impoverished families, two-parent as well as single-parent families, and male-headed as well as female-headed households. Forbath, *supra* note 7, at 1854-55. Both liberals, who disliked the work requirements of FAP, and conservatives, who disliked the funding increases for cash benefits and day care, jointly killed the proposal. GILENS, *supra* note 13, at 181. Carter suggested a plan similar to Nixon’s FAP but likewise found insufficient support in Congress to pass any reform bills. *Id.* at 181.

increasing welfare rolls by demanding that AFDC recipients meet strict work requirements.³² With the passage of the Family Support Act (FSA) of 1988,³³ Reagan ended his presidency by reaffirming the importance of the "welfare-to-work" aspect of public assistance.³⁴

These changes in the structure of the AFDC program that began in the early 1950s and that Reagan cemented in the late 1980s reflect an important shift in the political conception of public assistance in the United States. Much like the view that permeated the politics of New Deal social-economic legislation,³⁵ the Kennedy administration advocated for significant expenditures in the short term that would result in a reduction in poverty in the long term.³⁶ Indeed, Kennedy's proposition for reformation of AFDC focused on *broadening* the pool of Americans eligible for benefits in order to provide the necessary support—in the form of education, employment, medical care, and child care—for individuals to lift themselves out of poverty.³⁷ Yet Congress ultimately shelved Kennedy's proposal and instead passed the 1962 Amendment that conditioned receipt of AFDC on fulfillment of certain work requirements, thus "put[ting] federal welfare policy on the slippery slope toward workfare."³⁸ Although in the end Kennedy failed to provide AFDC benefits to more Americans, he did propagate the ideal of the New Deal that welfare reform meant more than getting people off public assistance—it also meant providing the impoverished with the means to get out of poverty.

Johnson's "War on Poverty" was the next step in the ideological movement from welfare to workfare. As the emphasis of the 1967 Amendments on moving recipients from welfare to work reflects, the War on Poverty inevitably signaled a war on AFDC recipients. The goal of AFDC to keep mothers out of work and at home with their children³⁹ was losing support with most politicians as the

32. GILENS, *supra* note 13, at 181-82.

33. Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (repealed 1996).

34. See GILENS, *supra* note 13, at 182; see also Sanger, *supra* note 16, at 476.

35. See *supra* text accompanying note 11.

36. See Susan Bennett & Kathleen A. Sullivan, *Disentitling the Poor: Waivers and Welfare "Reform,"* 26 U. MICH. J.L. REFORM 741, 746-47 (1993).

37. *Id.*

38. Michel, *supra* note 27, at 131.

39. See *supra* note 16 and accompanying text.

welfare caseloads grew rapidly⁴⁰ and particularly as society came to accept the role of women in the workforce.⁴¹ As employers gradually opened their doors to more women, policymakers' expectations that AFDC recipients should be self-sufficient grew, and politicians consequently transformed AFDC from a program focused on support to a program focused on work.⁴² Though the War on Poverty theoretically propagated Roosevelt's legacy and Kennedy's conception of welfare,⁴³ it abandoned those ideals to satisfy the concerns of the public that AFDC recipients should turn to work and not welfare for economic support.

President Reagan's attack on the American welfare state solidified the transformation of AFDC from welfare to workfare.⁴⁴ As the Reagan administration pushed for even stronger work requirements for recipients and less funding for the program, the message became clear: single mothers need to rely on employment, and not the government, to support themselves and their children.⁴⁵ Thus, the perception of AFDC's purpose had changed significantly since its beginnings in the 1930s. Whereas Roosevelt, Kennedy, and even Johnson had envisioned a large, generous welfare state that would provide Americans with sufficient economic support in order to eliminate poverty in the long run, by the time Reagan completed his two terms in the White House, the mood had drastically shifted. Politicians and the public no longer saw AFDC as a program for the destitute who had befallen an unfortunate fate. Instead, it appeared to have become a program of dependence that single mothers used to avoid working to support themselves and particularly their children.⁴⁶ It is this perception of AFDC and its recipients that set the stage for the extensive reform of the program in the 1990s.

40. See *supra* text accompanying note 29.

41. See GILENS, *supra* note 13, at 178-79.

42. See *id.* at 179; Sanger, *supra* note 16, at 476-77.

43. See *supra* text accompanying note 28.

44. See GILENS, *supra* note 13, at 181-82.

45. See, e.g., *id.*; Sanger, *supra* note 16, at 476.

46. See Tonya L. Brito, *From Madonna to Proletariat: Constructing a New Ideology of Motherhood in Welfare Discourse*, 44 VILL. L. REV. 415, 426 (1999) (arguing that today's conception of welfare recipients as divorced or single mothers who refuse to become self-sufficient emerged during the Reagan administration).

C. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996

The transformation of AFDC from a program of welfare to a program of workfare culminated in the passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).⁴⁷ PRWORA is particularly significant legislation in terms of welfare reform, because it replaced individual entitlement to public assistance with block grants to the states.⁴⁸ Consequently, Americans are no longer "entitled" to receive public assistance, and the states have much more discretion in their administration and funding of welfare programs.⁴⁹ To signal the nature of this dramatic reform of AFDC, Congress renamed the program Temporary Aid to Needy Families (TANF).⁵⁰ Congress also imposed the most stringent restrictions on AFDC recipients to date,⁵¹ while simultaneously delegating significant eligibility and benefit decisions to the state and local level.⁵² As President Clinton observed, the passage of

47. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 7 U.S.C., 8 U.S.C., 21 U.S.C., 25 U.S.C., and 42 U.S.C.).

48. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 601(b) (2000). Specifically, § 601(b) states that PRWORA "shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part." *Id.*; see also Kay P. Kindred, *Of Child Welfare and Welfare Reform: The Implications for Children When Contradictory Policies Collide*, 9 WM. & MARY J. WOMEN & L. 413, 413 (2003) (noting the significance of PRWORA's end to individual entitlement).

49. See U.S. GEN. ACCOUNTING OFFICE, WELFARE REFORM: DATA AVAILABLE TO ASSESS TANF'S PROGRESS 6, <http://www.gao.gov/new.items/d01298.pdf> (Feb. 2001); McCluskey, *supra* note 16, at 808.

50. See McCluskey, *supra* note 16, at 808.

51. One such restriction is the five-year lifetime limit, which precludes states from using federal TANF funds (though not other federal funds, nor state or local funds) to provide public assistance to any individual who has already received a cumulative of over five years of welfare throughout her lifetime (with a few exceptions). *Id.* Other restrictions include work requirements, which condition states' receipt of federal TANF funds on the combined work activity of their TANF recipients, a restriction that the state consequently passes on to those recipients. Kindred, *supra* note 48, at 413; McCluskey, *supra* note 16, at 808.

52. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 49, at 6. One eligibility requirement that is now in the hands of the states mandates that recipients engage in educational work, job training, and/or public service work, if employment is unavailable. See GILENS, *supra* note 13, at 183. Examples of benefits that are at the states' discretion are benefits to unwed teenage minor parents, as well as benefits subject to family cap and child exclusion laws. *Id.*

PRWORA marked "the end of welfare as we know it"⁵³ and the beginning of a public assistance program centered on getting Americans off welfare and back to work.

Explicit in PRWORA's emphasis on ending entitlement to welfare and in its imposition of strict work requirements were the underlying goals of the policymakers who passed the legislation. The most prominent goal of PRWORA was to re-establish the importance of marriage and family as a way to reduce Americans' dependency on welfare.⁵⁴ This goal is particularly evident in the congressional findings that national politicians used to justify the passage of PRWORA.⁵⁵ In these findings, Congress notes that: "(1) Marriage is the foundation of a successful society. (2) Marriage is an essential institution of a successful society which promotes the interests of children. (3) Promotion of responsible fatherhood and motherhood is integral to successful child rearing and the well-being of children."⁵⁶ As a corollary, PRWORA also sought to reduce the number of out-of-wedlock births and, consequently, single-parent (particularly single-mother) families,⁵⁷ emphasizing the detrimental impact of these social trends on families as well as society.⁵⁸ In sum, policymakers used PRWORA to isolate and eliminate what they saw as the root of American over-dependency on TANF: the social dissolution of the nuclear family.

53. President Clinton first coined this phrase, which has commonly become associated with the 1996 welfare reform. See, e.g., Thomas B. Edsall, *The Special Interest Gambit: How Clinton Is Changing the Democratic Discourse*, WASH. POST, Jan. 3, 1993, at C1.

54. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 601(a)(2) (2000). For discussions of PRWORA's emphasis on marriage and family as the key to self-sufficiency for welfare recipients, see Kindred, *supra* note 48, at 414; Harry Murray, *Dorothy Day, Welfare Reform, and Personal Responsibility*, 73 ST. JOHN'S L. REV. 789, 803 (1999).

55. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 101, 110 Stat. 2105, 2110-12 (1996).

56. *Id.* at § 101(1)-(3), 110 Stat. at 2110.

57. 42 U.S.C. § 601(a)(3)-(4) (2000). In fact, PRWORA took this goal so seriously that it "created a bonus of up to \$100 million per year for states that substantially reduced rates of out-of-wedlock births and that did not increase abortion rates in the process." Tim Ransdell & Shervin Boloorian, Pub. Policy Inst. of Cal., *Federal Formula Grants and California: TANF and Welfare Programs* 15, <http://www.ppic.org/content/other/1202TANFandWelfare.pdf> (Dec. 2002).

58. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 101(5)-(6), (8), 110 Stat. 2105, 2110-11 (1996).

Aside from attacking welfare dependency as a product of single parenthood, policymakers also focused more broadly on ways that PRWORA could reduce the number of people on public assistance. The concern that arose in earlier decades that far too many Americans were dependent on welfare⁵⁹ surfaced again in the 1996 reform. A Senate proceeding in late 1995 that concerned the pending welfare reform bill stressed that entitlement to public assistance had bred dependency and that only by creating incentives for people to work rather than rely on welfare could policymakers hope to reduce AFDC caseloads.⁶⁰ Indeed, one of the central tenets of PRWORA was that Americans must learn to view public assistance as "temporary," a fact most evident in the retitling of AFDC as TANF.⁶¹ The extensive work requirements that TANF imposed on states and recipients⁶² also exemplify Congress's desire to decrease the number of welfare recipients. Thus, PRWORA was not just a national effort to strengthen the American family; it was also an attempt to reduce the number of Americans who receive public assistance.

Finally, and most subtly, PRWORA was yet another attempt to reform welfare in order to reduce poverty among Americans. The early 1980s and early 1990s saw the highest rate of poverty since the mid-1960s,⁶³ reflective of the fact that the income disparity between the rich and the poor grew at a faster rate during the 1980s and 1990s than it had since World War II.⁶⁴ Though Congress intended the Family Support Act of 1988 to solve much of this problem,⁶⁵ it became evident to Republicans and Democrats alike that more drastic welfare reform was necessary.⁶⁶ According to the government, the solution to the recent rise in poverty was PRWORA

59. See discussion *supra* Part I.B.

60. 141 CONG. REC. S19,086-87 (daily ed. Dec. 21, 1995).

61. Other federal government publications also underscore this theme of temporariness. See, e.g., *id.*; U.S. GEN. ACCOUNTING OFFICE, *supra* note 49, at 6.

62. See *supra* notes 51-52 and accompanying text.

63. By the early 1990s, the poverty rate was slightly above 15%. GILENS, *supra* note 13, at 20 fig. 1.3.

64. *Id.* at 20.

65. See *supra* text accompanying notes 33-34.

66. See GILENS, *supra* note 13, at 182.

and particularly the reorganization of AFDC into TANF.⁶⁷ Indeed, PRWORA's heavy emphasis on work suggests that the purpose of the legislation was not only to reduce the number of recipients of public assistance but also to lift people out of poverty.⁶⁸ Although the focus of the 1996 reform was clearly on promoting family values and decreasing dependency on welfare, policymakers passed PRWORA, like it did most other welfare reform legislation, ultimately to achieve the goal that has its roots in the creation of the American welfare state in the 1930s: the reduction of poverty among Americans.

As the above discussion illustrates, the welfare program in the United States has undergone a serious transformation since its inception during the New Deal. At the time that Roosevelt created ADC in the 1930s, he envisioned a program that would act as a net of financial support to needy Americans and that would eventually be so successful that it would necessitate the end of its own existence. Yet the economy made Roosevelt's ideals more of a dream, and his successors struggled for decades to create a system that provided for indigent Americans while also fostering self-sufficiency and a strong work ethic among welfare recipients. PRWORA has attempted to end this struggle by cementing the concepts of work, family, and marriage as the solution to eradicating dependency on TANF and to reducing poverty. However, PRWORA brought with it several other significant changes in the administration of public assistance and, in doing so, allowed the states to adopt measures of "welfare reform" that are so far removed from the ideals on which PRWORA and the American welfare state were built. The remainder of this Note discusses one of these measures—family cap laws—and how their implementation has failed to further the goals they are supposed to achieve.

67. See Am. Civil Liberties Union, *Letter to the Senate Finance Committee Urging Opposition to Personal Responsibility and Individual Development for Everyone Act of 2003 (PRIDE)*, <http://www.aclu.org/PoorRights/PoorRights.cfm?ID=13521&c=154> (Sept. 10, 2003) (noting that "PRIDE [The Personal Responsibility and Individual Development for Everyone Act of 2003] adopts poverty reduction as a primary purpose of TANF").

68. See sources cited *supra* note 7 for a discussion of the link between employment and the reduction of poverty.

II. FAMILY CAP LAWS

In the 1962 amendment to the Social Security Act,⁶⁹ Congress created a provision that empowers the Secretary of the United States Department of Health and Human Services (HHS) to grant a state's request to implement "any experimental, pilot, or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives" of the Act.⁷⁰ If the Secretary grants the state's request, it is considered a waiver, because the Secretary has waived the state's mandatory compliance with the federal rules of administration of public assistance programs as set forth in the Social Security Act.⁷¹ States have used this provision over the years to create new approaches to old problems within the welfare system, but one waiver in particular has become quite controversial—family cap, or child exclusion, laws. These provisions deny TANF families the incremental increase in benefits they normally receive under TANF for each child in their household.⁷² The following Part of this Note provides a brief review of these laws and explains the states' purposes in implementing them.

A. A Brief Synopsis of Family Cap Laws

Though often used interchangeably, the terms "family cap" and "child exclusion" have subtle differences. Under a strict interpretation of these terms, family cap laws place a ceiling on the amount of TANF benefits that any family can receive, regardless of the number of children in that family, whereas child exclusion laws provide benefits to families but refuse to increase the amount of those benefits if the mother gives birth to another child while on TANF.⁷³ Evident in the blurred line that separates these two types

69. See *supra* text accompanying notes 22-23.

70. 42 U.S.C. § 1315(a) (2000).

71. See, e.g., Bennett & Sullivan, *supra* note 36, at 742 (describing this provision of the Social Security Act as a "waiver").

72. See discussion *infra* Part II.A.

73. See Susan Frelich Appleton, *Standards for Constitutional Review of Privacy-Invasive Welfare Reforms: Distinguishing the Abortion-Funding Cases and Redeeming the Undue-Burden Test*, 49 VAND. L. REV. 1, 39-42 (1996) (distinguishing between family cap and child exclusion laws).

of laws, the differences between family cap and child exclusion laws are more conceptual than practical. Conceptually speaking, these laws may implicate constitutional issues differently,⁷⁴ but in practice they have a similar effect: a denial of TANF benefits that are proportional to the size of the family. Thus, though family cap and child exclusion laws have slightly different applications to TANF families, the analysis in this Note applies to both types of legislation and, for convenience, will refer to them collectively as family cap laws.

While all family cap laws rest on the same pretext—that TANF families should not receive an increase in benefits when the mother gives birth to an additional child—they vary considerably among the states that apply them. As of February 2003, twenty-three states had implemented some form of family cap legislation under waiver from the Secretary of HHS.⁷⁵ Most of these states have the simplest form of family cap laws—a complete denial of an increase in cash benefits for additional children.⁷⁶ A few states with family cap laws still grant an increase in cash benefits to the family when the additional child is born, but that increase is less than the proportional amount of benefits the family would receive for that child if the family had the child *before* they started to receive TANF.⁷⁷ Finally, a few states replace an increase in cash benefits with vouchers that families can use to buy only particular items, such as food or clothing.⁷⁸ These three approaches characterize the

74. One constitutional difference is that, under an equal protection analysis, family cap laws “treat[] all similarly situated families alike,” but child exclusion laws “discriminate among families of identical size and need” on the basis of the timing of the children’s birth. *Id.*; see also Risa E. Kaufman, *State ERAs in the New Era: Securing Poor Women’s Equality by Eliminating Reproductive-Based Discrimination*, 24 HARV. WOMEN’S L.J. 191, 200 n.47, 208 (2001) (discussing the same constitutional distinction between family cap and child exclusion laws).

75. U.S. Dep’t of Health & Human Serv., Admin. for Children and Families, Office of Family Assistance, *Temporary Assistance for Needy Families (TANF): Fifth Annual Report to Congress*, ch. 12, <http://www.acf.hhs.gov/programs/ofa/annualreport5/chap12.htm> (Feb. 2003).

76. State Policy Documentation Project, *Summary of Policy Issues: Reproductive Health Provisions and Teen Requirements*, <http://www.spdp.org/reprexpl.htm#famcap> (Oct. 13, 1999).

77. *Id.*

78. Anna Marie Smith, *The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview*, 8 MICH. J. GENDER & L. 121, 176 (2002) (discussing the voucher systems that several different states use).

types of family cap provisions that states have generally implemented.

Aside from the different approaches to the basic application of family cap provisions, there are other variations in family cap laws among the states that use them. One of the more common provisions is the grace period, which essentially is a "softener" that prevents the application of the family cap law to mothers who give birth to their children shortly after receiving TANF.⁷⁹ Many states also provide for rape or incest exemptions within their state provisions, though some states, like California and Florida, set strict standards that require the mother to prove rape or incest before the exemption will apply.⁸⁰ Some states also provide exemptions for mothers who bear children because their contraception failed.⁸¹ In addition to the few exemptions described here, there are many other benefits and restrictions that states often impose on families who are subject to family cap laws.⁸² In general, however, all family cap provisions essentially function in the same manner—they deny some kind of benefit to families who give birth to children while receiving TANF.

Whether to impose family cap restrictions on welfare recipients has always been an issue for the states to resolve. TANF delegates much more authority to the states than AFDC, however, and thus the 1996 reform has significantly limited federal authority over family cap laws. Before the passage of PRWORA, a state would request the Secretary of HHS to grant it a special waiver to

79. See NOW Legal Def. and Educ. Fund, *Background on Child Exclusion Proposals*, <http://www.nowdef.org/html/issues/wel/childep.shtml> (Apr. 2000); State Policy Documentation Project, *supra* note 76. Most states have a ten-month grace period, although at least Nebraska has a shorter grace period of three months. NEB. REV. STAT. § 43-504(2) (2003); NOW Legal Def. and Educ. Fund, *supra*; State Policy Documentation Project, *supra* note 76.

80. CAL. WELF. & INST. CODE § 11450.04(b)(1) (West 2001); FLA. STAT. ch. 414.115(2)(a) (2000); Smith, *supra* note 78, at 177; NOW Legal Def. and Educ. Fund, *supra* note 79.

81. California, at least, only provides this exemption for families whose failed contraception was not due to human mistake but instead was a surgically imposed method that failed, such as an intrauterine device, Norplant, or sterilization. CAL. WELF. & INST. CODE § 11450.04(b)(3) (West 2001); State Policy Documentation Project, *supra* note 76.

82. For further examples of state variations of family cap laws, see Smith, *supra* note 78, at 174-77; NOW Legal Def. and Educ. Fund, *supra* note 79; State Policy Documentation Project, *supra* note 76.

implement a family cap law;⁸³ thus, the process was state initiated and federally approved.⁸⁴ In the late 1980s, however, this process began to change,⁸⁵ and states eagerly accepted President Bush's "invit[ation] ... to submit waiver requests to 'promote experiments with welfare reform.'"⁸⁶ With the passage of PRWORA and the establishment of TANF as a block-grant program, the federal government further extended this invitation by allowing states to implement family cap laws without any federal approval and with "almost complete discretion."⁸⁷ Thus, the states now have the freedom to create and define any family cap provision they wish, so long as it does not otherwise violate the Social Security Act, and the federal government has essentially relinquished its authority over these highly controversial laws.

B. The Principles Behind Family Cap Laws

Beginning largely in the 1980s,⁸⁸ states began to use family cap laws as a means of welfare reform. In implementing these laws, states have several objectives in mind, including: reducing the incentives for welfare mothers to bear children while on public assistance; encouraging self-sufficiency and discouraging dependency on the government; and, by the time of PRWORA, promoting marriage and family values. In essence, states view family cap laws as one way to solve the perceived problems that have plagued the public assistance program in America for years.

One of the goals of family cap laws is to provide welfare mothers with appropriate incentives to bear fewer children,⁸⁹ to assume

83. Social Security Act of 1988 § 1115, 42 U.S.C. § 1315(a) (2000); *supra* notes 70-71 and accompanying text.

84. See Smith, *supra* note 78, at 168-69; NOW Legal Defense and Education Fund, *supra* note 79; State Policy Documentation Project, *supra* note 76.

85. ANN HORVATH & H. ELIZABETH PETERS, WELFARE WAIVERS AND NON-MARITAL CHILDBEARING, (Joint Ctr. for Poverty Research Working Paper 1999) No. 128, <http://www.jcpr.org/wp/Wpprofile.cfm?ID=133>.

86. Bennett & Sullivan, *supra* note 36, at 742.

87. NOW Legal Defense and Education Fund, *supra* note 79.

88. See *supra* text accompanying notes 85-86.

89. Yvette Marie Barksdale, *And the Poor Have Children: A Harm-Based Analysis of Family Caps and the Hollow Procreative Rights of Welfare Beneficiaries*, 14 LAW & INEQ. 1, 4-5 (1995); Am. Civil Liberties Union, *Background Briefing: The Civil Liberties Issues of Welfare Reform* (Apr. 14, 2004), <http://www.aclu.org/ReproductiveRights/Reproductive>

responsibility for themselves and their families,⁹⁰ and to avoid dependency on public assistance.⁹¹ These incentives are largely interwoven. Presumably, family caps will dissuade women on TANF from having children, because these women will recognize that they will no longer receive additional public assistance to help pay for those children.⁹² Instead, family caps encourage recipients to take responsibility for their lives, their children's lives, and their financial situation, enabling them to cut the chains of dependency on welfare. Inherent in this line of reasoning is the idea "that poor women make reproductive decisions in an entrepreneurial profit-seeking manner, and that negative financial incentives constitute the best remedies."⁹³ Hence, states design family cap laws to encourage indigent women to make "appropriate" decisions as to bearing children while receiving public assistance.

Another goal of family cap laws is to promote the traditional social values of marriage and family. As was evident when Congress debated and passed PRWORA, policymakers in the 1980s and 1990s became increasingly concerned with the moral values that the American welfare system was propagating.⁹⁴ Family cap laws proved to ease some of their concern. By discouraging women on TANF from having children they cannot financially support, the presumption is that family cap laws will thereby decrease the incidence of out-of-wedlock births among welfare recipients.⁹⁵ Thus, family cap laws appear to be a way to reinforce the idea that

Rights.cfm?ID=9041&c=146; NOW Legal Def. and Educ. Fund, *supra* note 79.

90. See *C.K. v. Shalala*, 883 F. Supp. 991, 1014 (D.N.J. 1995) (recognizing New Jersey's family cap law as rationally providing AFDC recipients with an incentive to assume personal responsibility).

91. Edward M. Wayland, *Welfare Reform in Virginia: A Work in Progress*, 3 VA. J. SOC. POL'Y & L. 249, 292 (1996).

92. See *C.K.*, 883 F. Supp. at 1014 (acknowledging that family cap laws promote self-sufficiency and may discourage women from having children they cannot afford).

93. Smith, *supra* note 78, at 174; see also Susan Frelich Appleton, *When Welfare Reforms Promote Abortion: "Personal Responsibility," "Family Values," and the Right to Choose*, 85 GEO. L.J. 155, 159 (1996) (explaining that a common perception of AFDC recipients was that of single mothers who repeatedly had children in order to receive more public assistance from the state).

94. See *supra* notes 54-58 and accompanying text.

95. Appleton, *supra* note 73, at 159; Barksdale, *supra* note 89, at 15.

marriage and two-parent families promote personal responsibility among welfare recipients.⁹⁶

States have adopted family cap laws largely in response to the “welfare crisis” of the latter part of this century.⁹⁷ As AFDC caseloads boomed and single-motherhood became an acceptable societal norm that was apparently ousting marriage from the values of welfare recipients,⁹⁸ policymakers grasped for some instrument to reform the failing system. One of the instruments they found was family cap legislation. Through family cap laws, states can regulate their public assistance programs in such a way as to discourage the supposed abuse of and dependency on AFDC that had engulfed recipients in the past. With PRWORA’s devolution of authority over waiver programs like family cap laws from the federal to state level, family cap legislation became an even more attractive means for welfare reform. Yet two questions still remain. The first question is whether family cap laws unconstitutionally burden welfare recipients, which the next Part discusses. The question that follows is—even if the courts do view these laws as constitutional—are family cap laws truly an effective way for states to reform the American welfare system? This Note will strive to answer this question in its final section.⁹⁹

III. CHALLENGES IN THE COURTS TO FAMILY CAP LEGISLATION

As implementation of family cap laws spread quickly through the United States during the 1980s and 1990s, opposition to the legislation quickly mounted, and opponents took to the courts for resolution. In particular, opponents of family cap laws have argued that state family cap legislation is unconstitutional under the unconstitutional conditions doctrine—a doctrine that the Supreme

96. Appleton, *supra* note 73, at 159.

97. Numerous scholars have referred to the recent developments in America’s public assistance program as evidencing a perceived “welfare ‘crisis.’” See, e.g., Nan S. Ellis & Cheryl M. Miller, *Welfare Waiting Periods: A Public Policy Analysis of Saenz v. Roe*, 11 STAN. L. & POL’Y REV. 343, 343 (2000) (labeling PRWORA as a response to the late twentieth-century “welfare ‘crisis’”); Joel F. Handler, *The “Third Way” or the Old Way?*, 48 U. KAN. L. REV. 765, 781 (2000) (pointing to AFDC as being at “the center of the contemporary ‘welfare crisis’”).

98. See discussion *supra* Part I.B.

99. See discussion *infra* Part IV.

Court developed to assess the constitutionality of conditions that the government places on receipt of a government benefit. Yet historically this doctrine has been of little assistance in challenging government restrictions on benefits, because over the years the Supreme Court has refined the application of the doctrine to public assistance cases such that it has adopted a position quite deferential to the states in their administration of benefits. Several recent decisions by federal and state courts illustrate this deference well. Even more importantly, these recent challenges to family cap laws demonstrate that opponents of the legislation cannot rely on the unconstitutional conditions doctrine to argue that these laws should be overturned. Instead, these challenges indicate that opponents must turn away from the courts (and toward the legislatures, as the last part of this Note addresses) in order to have family caps eliminated as a means of welfare reform.

A. The History of the Unconstitutional Conditions Doctrine

The unconstitutional conditions doctrine reflects the judiciary's assertion that government control often must heed to individuals' rights. The courts created the doctrine during the *Lochner* era in response to the government's overwhelming regulation of commerce among the states.¹⁰⁰ Under the doctrine, the government cannot place a condition on any benefit that it provides, even if it is under no obligation to provide those benefits, if that condition violates an individual's constitutional right.¹⁰¹ The affected constitutional right, however, must be one that hinges on the individual's "exercise of autonomous choice."¹⁰² Thus, the *Lochner*-era courts

100. 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, 644 (1995).

101. See Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989); see also Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185, 1193-94 (1990) (discussing the principle behind the doctrine). Because the doctrine considers the effect of the conditional benefit on the individual's constitutional right, the courts review these cases under the strict scrutiny standard. Sullivan, *supra*, at 1422.

102. Sullivan, *supra* note 101, at 1426. Examples of constitutional rights that involve the "exercise of autonomous choice" include an individual's First Amendment right to speech or the exercise of religion, a business's right to participate in interstate commerce, and a state's

used the doctrine to prohibit the government from placing any such unconstitutional conditions on the states' rights to engage in commerce.

The rigorous application of substantive due process that characterized the *Lochner* courts' handling of economic liberty cases soon dissipated, but the courts held onto the unconstitutional conditions doctrine and began to apply it to individual rights cases.¹⁰³ As the New Deal ushered in an era of extensive social and economic legislation, the necessity for the unconstitutional conditions doctrine escalated.¹⁰⁴ The Court subsequently applied the doctrine in two significant cases, *Speiser v. Randall*¹⁰⁵ and *Sherbert v. Verner*,¹⁰⁶ and thereby affirmed that the doctrine did indeed protect from governmental intrusion an individual's right to exercise choice.¹⁰⁷ Moreover, in *Sherbert*, the court applied the unconstitutional conditions doctrine to a public assistance case for the first time.¹⁰⁸ Thus, the stage was finally set for the Court to fully consider the application of the doctrine to government-imposed conditions on receipt of public assistance.

From the late 1960s on, the Court decided a number of cases that involved conditions that states had imposed on welfare recipients.¹⁰⁹

right to self-govern.

103. Friedman, *supra* note 100, at 645.

104. *Id.*

105. 357 U.S. 513 (1958). In *Speiser*, the Court held that a state could not condition a veteran's receipt of a property-tax exemption on his recitation of a loyalty oath, because it violated the veteran's First Amendment right to exercise his choice of speech. *Id.* at 518-19; Sullivan, *supra* note 101, at 1433.

106. 374 U.S. 398 (1963). In *Sherbert*, the Court applied the unconstitutional conditions doctrine to an individual's First Amendment right to exercise her religion freely, holding that the state acted unconstitutionally when it failed to give unemployment benefits to a woman who had lost her job due to her refusal to work on the Sabbath. *Id.* at 410; Sullivan, *supra* note 101, at 1434.

107. Sullivan, *supra* note 101, at 1433-34.

108. Baker, *supra* note 101, at 1186.

109. See Forbath, *supra* note 7, at 1862. One of the most important decisions involving the unconstitutional conditions doctrine is *Shapiro v. Thompson*, 394 U.S. 618 (1969). In *Shapiro*, the Court applied the doctrine to a state restriction requiring welfare recipients to live in the state for at least one year prior to applying for welfare benefits. *Id.* at 622. The Court found the restriction unconstitutional, because it penalized "the fundamental right of interstate movement" and because the government had not adequately asserted a compelling interest in the restriction. *Id.* at 634, 638; Baker, *supra* note 101, at 1209; Sullivan, *supra* note 101, at 1434.

Many of these decisions sharply limited permissible governmental restrictions, establishing "a no-strings, no-stigma, national right to welfare."¹¹⁰ In the 1970 case of *Dandridge v. Williams*,¹¹¹ however, the Court upheld an important restriction on AFDC recipients—the family cap.¹¹² In deciding *Dandridge*, the Court declined to use strict scrutiny review and instead declared that economic and social welfare legislation would now be subject only to a reasonable basis standard of review¹¹³—and under this standard, Maryland's family cap legislation was constitutional.¹¹⁴ The Court also upheld significant governmental restrictions in *Maher v. Roe*¹¹⁵ and *Harris v. McRae*¹¹⁶ by asserting that the government could choose to extend Medicaid coverage for a woman's expenses for childbirth but not for expenses for abortion without violating a woman's constitutional procreative rights.¹¹⁷ Clearly, though the precedent of *Sherbert* suggested that the unconstitutional conditions doctrine may protect welfare recipients from restrictions on their access to public assistance, *Dandridge*, *Maher*, and *Harris* reflect the Court's willingness to defer to the government's judgment and uphold conditions on the receipt of welfare as constitutional.

The Supreme Court developed the unconstitutional conditions doctrine as an instrument to keep governmental regulation of economic rights in check. The Court has since developed the doctrine far past its roots, coming to apply it to cases in which a government condition infringes upon an individual's constitutional right to choose a given course of action. The line of cases detailed above explains the evolution of the doctrine in reference to conditions—including family cap legislation—that restrict receipt of public assistance, and it indicates that the Court is not eager to

110. Forbath, *supra* note 7, at 1862.

111. 397 U.S. 471 (1970).

112. At issue in *Dandridge* was Maryland's family cap law, which set the maximum benefit that any family of any size could receive at \$250 per month; the plaintiffs argued the case as an equal protection claim. *Id.* at 474, 483; Barksdale, *supra* note 89, at 21-22.

113. Baker, *supra* note 101, at 1210.

114. Barksdale, *supra* note 89, at 22.

115. 432 U.S. 464 (1977).

116. 448 U.S. 297 (1980).

117. Barksdale, *supra* note 89, at 22-23. Part of the Court's rationale was that the government was simply choosing not to fund abortions and that it was not *conditioning* the woman's receipt of Medicaid on her procreative choices. *Id.* at 23.

find the conditioning of such benefits unconstitutional. Yet these earlier cases did not assure the federal and state governments that the more complex family cap laws of the 1980s and 1990s would withstand constitutional challenge, and opponents of family cap legislation soon forced the judiciary to pick a side in the constitutional debate.

B. Point and Counterpoint in the Constitutional Debate over Family Cap Laws

Undaunted by the Court's decision in *Dandridge* and the "unconstitutional conditions" cases that followed it, opponents of family cap legislation waged a new attack on the laws in the 1990s. They developed a theme for their challenges in court: they argued that family cap laws infringe on a woman's constitutional rights to privacy and procreation. Opponents assert that states with family cap laws do more than refuse to subsidize a woman's procreative rights; instead, they harm welfare recipients by penalizing their decision to bear children while receiving welfare.¹¹⁸ Thus, by implementing these laws, the government is trying to control the reproductive choices of TANF recipients.¹¹⁹ Under this characterization of family cap laws, courts should apply strict scrutiny review to the legislation, and in doing so, they will find the laws unconstitutional.¹²⁰ Thus, opponents of family cap legislation assert that the laws are clearly unconstitutional, because they infringe upon a woman's right to choose when to procreate.

The federal and state government responded to the opposition by staunchly defending the constitutionality of family cap laws, largely referring back to the same arguments advanced (and usually sanctioned) in cases like *Dandridge*, *Maher*, and *Harris*. The government asserts that family cap laws are rationally related to

118. Barksdale, *supra* note 89, at 24-26; Friedman, *supra* note 100, at 650.

119. See Appleton, *supra* note 73, at 23; Barksdale, *supra* note 89, at 28-29. One scholar asserts that family caps "unleash[] the power of the legislature to oppressively control the constitutional rights of the poor who depend upon government largesse for survival." Barksdale, *supra* note 89, at 28.

120. Appleton, *supra* note 73, at 23; Barksdale, *supra* note 89, at 25-26.

the purposes they are set out to achieve.¹²¹ Specifically, the goals of family cap laws are to reduce the number of "children born into a dependent situation," to increase recipients' ability to work outside the home, and thereby to promote personal responsibility among TANF recipients.¹²² The government also claims that because the Constitution does not provide an economic right to welfare, the states have tremendous latitude in administering public assistance programs.¹²³ This position harkens back to the Court's decision in *Dandridge* and calls for deferential review of welfare legislation.¹²⁴ A third argument is perhaps the most provocative—that the government can choose *not* to subsidize certain behaviors without violating the individual's corresponding constitutional right.¹²⁵ This argument is reminiscent of the Court's holdings in *Maher* and *Harris* and equates family cap laws with mere refusals to subsidize rather than with penalties or burdens.¹²⁶ With each of these arguments—and much precedent to support them—the government has aggressively defended its implementation of family cap legislation.

C. The Judicial Response

Opponents of family cap legislation challenged the constitutionality of the laws in several recent cases, with the federal and state governments firmly maintaining that the laws do indeed meet the constitutional requirements of equal protection and due process. As the Supreme Court had not issued a decision on the constitutionality of family cap legislation since the time of *Dandridge*,¹²⁷ the issue was ripe for litigation. That litigation began in the federal and state

121. *See* N.B. v. Sybinski, 724 N.E.2d 1103, 1109 (Ind. App. 2000) ("The State asserts that the family cap is rationally related to its legitimate interest in altering the cycle of welfare dependency.").

122. N.B., 724 N.E.2d at 1109.

123. *See* Bennett & Sullivan, *supra* note 36, at 764.

124. *See supra* notes 111-13 and accompanying text.

125. *See* Barksdale, *supra* note 89, at 28-29.

126. *See id.* at 24-26; *supra* note 117 and accompanying text.

127. *Dandridge v. Williams*, 397 U.S. 471 (1970); *see supra* notes 111-14 and accompanying text.

courts in New Jersey, and it arose again in Indiana.¹²⁸ As the courts, one by one, made their decisions, it became clear that the courts were unwilling to depart from the legacy of *Dandridge*, *Maher*, and *Harris*.

Opponents first attacked the New Jersey family cap law under the Federal Constitution in *C.K. v. New Jersey Department of Health and Human Services*.¹²⁹ In *C.K.*, the court rejected the plaintiffs' contention that the HHS Secretary violated due process and equal protection by granting New Jersey's request for a family cap waiver, finding that the Secretary's decision to grant the waiver was not "arbitrary or capricious."¹³⁰ The court also found that the state's family cap "is rationally related to a legitimate governmental purpose"¹³¹ and that it did not unduly burden a welfare recipient's procreative choice but instead simply refused to subsidize that choice.¹³² Lastly, the court rejected the plaintiffs' characterization of the New Jersey law as a child exclusion law that discriminates among AFDC families according to the timing of their children's births, choosing to instead characterize the law as a family cap similar to the one sanctioned in *Dandridge*.¹³³ As a result, the federal circuit court agreed with the government that New Jersey's family cap legislation is constitutional.

Seven years later in *Sojourner A. v. New Jersey Department of Human Services*, opponents in New Jersey challenged the state's family cap law as amended post-PRWORA, this time on the basis that it violated due process and equal protection under the state constitution.¹³⁴ The Supreme Court of New Jersey disagreed, finding that the state's purposes of decreasing welfare dependency and increasing self-sufficiency were legitimate and that the family cap law rationally achieved those goals.¹³⁵ The court also inter-

128. See *C.K. v. N.J. Dep't of Health & Human Servs.*, 92 F.3d 171 (3d Cir. 1996); *Sojourner A. v. N.J. Dep't of Human Servs.*, 828 A.2d 306 (N.J. 2003); *N.B. v. Sybinski*, 724 N.E.2d 1103 (Ind. App. 2000).

129. 92 F.3d 171, 177-78 (3d Cir. 1996).

130. *Id.* at 187-88.

131. *Id.* at 194.

132. See *id.* at 194-95.

133. See *id.* at 192. See *supra* notes 73-74 and accompanying text for further information on the constitutional distinction between family cap and child exclusion laws.

134. 828 A.2d 306, 308 (N.J. 2003).

135. See *id.* at 311, 316.

preted the provision as a refusal to subsidize and found that it did not unduly burden a woman's right to make her own procreative choices.¹³⁶ Largely basing its opinion on the circuit court's decision in *C.K.*, the state supreme court refused to sustain opponents' second constitutional challenge to the state's family cap provision.

Opponents of family cap legislation have also attempted to challenge family cap laws under the unconstitutional conditions doctrine in Indiana. In *N.B. v. Sybinski*, plaintiffs challenged an Indiana provision that provides for an exemption that does *not* deny an increase in TANF benefits for a child born to a family already receiving assistance *if* the child is not living with that family but rather with another caretaker.¹³⁷ The Indiana appellate court found that the provision did not impact welfare recipients' fundamental right of family association, because it did not require (nor coerce, as the plaintiffs' contended) TANF families to give their child to a friend or relative in order to gain access to full public assistance benefits.¹³⁸ The court also found that Indiana had asserted legitimate state interests in implementing this provision—increasing personal responsibility among welfare recipients and reducing dependency on the government—and that the law was rationally related to those interests.¹³⁹ As a result, the Indiana court upheld the state provision as constitutional.

These decisions by the New Jersey and Indiana courts strongly support the states' implementation of family cap laws and leave opponents with little hope of asserting a successful constitutional challenge against the government in the future. In *C.K.*, *Sojourner A.*, and *N.B.*, the courts did not question the government's objectives in instituting family cap laws; instead, they accepted the goals of decreasing welfare dependency and increasing self-sufficiency as the states' only purposes in implementing family cap laws.¹⁴⁰ The

136. *See id.* at 315-17.

137. *See* 724 N.E.2d 1103, 1106 (Ind. App. 2000).

138. *See id.* at 1108-09.

139. *Id.* at 1109-11.

140. *See* Linda Kelly, *Reproductive Liberty Under the Threat of Care: Deputizing Private Agents and Deconstructing State Action*, 5 MICH. J. GENDER & L. 81, 103 (1998) (noting that the district court in *C.K.* accepted the state's assertion that family caps aim to encourage personal responsibility and the values of marriage and family). In particular, the courts failed even to consider the possibility that states were attempting to control the procreative choices of women on welfare through family cap legislation. *See* Jill Elaine Hasday,

courts also ignored the issue of “the normative validity of subjecting women receiving ADC (or now TANF) to forms of interventionist and instrumental regulation wholly at odds with the norms governing the rest of family law. It was simply a moot issue.”¹⁴¹ Like the Supreme Court’s holdings in *Maher* and *Harris*, the courts in *C.K.*, *Sojourner A.*, and *N.B.* reiterated that the government did not burden or penalize a woman’s procreative choice merely because it did not subsidize it.¹⁴² The New Jersey and Indiana courts were far from receptive to the plaintiffs’ claims that family cap laws are unconstitutional, and there is no doubt that these decisions, along with the Supreme Court’s decision in *Dandridge*, have dissuaded many opponents of family cap laws from pursuing litigation in the courts.¹⁴³ Considering the judiciary’s reluctance to find that family cap laws unconstitutionally burden welfare recipients, opponents of family cap legislation have but one choice left—abandon the litigious strategy and persuade policymakers that family caps are ineffective tools of welfare reform. By turning their efforts to the legislators, opponents of family caps may have their only chance at convincing the government that these laws simply do not work and need to be abolished.

IV. THE LEGISLATIVE FOCUS

By leaving behind the battle over the constitutionality of family cap laws, opponents of this legislation can focus on a more attainable and feasible goal: persuading policymakers that family cap laws should no longer be used because they are an ineffective way to reform the American welfare state. This argument stems from three separate but linked analyses: that family cap laws do not meet their own goals; that they do not meet the goals of PRWORA; and, most significantly, that they do not meet the goals of the American welfare system. This Note has already considered the

Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations, 90 GEO. L.J. 299, 384 (2002) (criticizing the New Jersey courts’ decisions as ignorant of the true motives and consequences of family cap legislation).

141. Hasday, *supra* note 140, at 384.

142. See Susan Frelich Appleton, *Assisted Suicide and Reproductive Freedom: Exploring Some Connections*, 76 WASH. U. L.Q. 15, 26 n.82 (1998).

143. See Hasday, *supra* note 140, at 383.

objectives of family cap laws,¹⁴⁴ of PRWORA,¹⁴⁵ and of the American welfare system.¹⁴⁶ The remaining analysis addresses how well family cap laws serve these purposes and concludes that this legislation fails to meet most, if not all, of these goals.

A. Meeting Their Own Goals

In implementing family cap laws, states have recited two primary goals that they feel family caps can achieve, at least in part. The first of these objectives really involves three intertwined goals: to encourage TANF mothers to have fewer children, to assume personal responsibility, and to escape dependency on public assistance.¹⁴⁷ The second objective is to promote the values of marriage and family among TANF recipients, which in turn will reduce the incidence of out-of-wedlock births.¹⁴⁸ Analysis reflects, however, that family cap laws do not logically achieve these goals.

Family cap laws do not provide welfare mothers with incentives to bear fewer children, to assume personal responsibility, or to avoid dependency on public assistance. As to the first incentive—to bear fewer children—studies “almost universally agree” that women on welfare do *not* bear additional children in order to increase their benefits.¹⁴⁹ Additionally, welfare families, on average, have the same number of children as the average American family.¹⁵⁰ Hence, the decrease in benefits under family cap laws for additional

144. See discussion *supra* Part II.B.

145. See discussion *supra* Part I.C.

146. See discussion *supra* Part I.A-B.

147. See *supra* notes 89-93 and accompanying text.

148. See *supra* text accompanying notes 94-96.

149. See Wayland, *supra* note 91, at 295. Wayland cites an impressive string of studies that support this conclusion. See *id.* at 295 n.281. He notes, in particular, two studies that lend enhanced credibility to the conclusion that welfare benefits do not affect women's childbearing decisions. The first study is that of Mary Jo Bane and David T. Ellwood, the former Clinton administration officials who left office in protest of the welfare reform of the 1990s and who are widely respected scholars of welfare law. See *id.* at 295; see also *Mr. Clinton's Welfare Harvest*, WASH. POST, Sept. 12, 1996, at A26 (reporting the resignations and departures of appointed Clinton administration officials in response to the 1996 welfare reform bill). The second study is that of Charles Murray, who Wayland describes “as one of the most influential conservative critics of the welfare system” and who admitted that public assistance programs do not cause most of the births to single-mother recipients. Wayland, *supra* note 91, at 295 & n.282.

150. See *id.* at 296; Friedman, *supra* note 100, at 657-58; Smith, *supra* note 78, at 170-71.

children does not persuade TANF women to have smaller families, because an increase in benefits apparently is not one of the reasons that women on welfare have children and because these women do not have larger families in the first place.¹⁵¹

The second and third incentives that family cap laws aim to provide to welfare mothers also appear misplaced. These incentives—for women receiving TANF to assume personal responsibility and to avoid dependency on welfare—presume that women rely on public assistance benefits because they are readily accessible and that their dependency will end only when the government forces these women to “take responsibility” by supporting themselves and their families. Yet these presumptions overstate the availability of benefits and overshadow the reality that most welfare recipients are temporary, not long-term, recipients who have come to rely on TANF due to significant lifestyle changes.¹⁵² Such lifestyle changes result in women falling back on public assistance due to insufficient low-wage work, divorce, inadequate child support, and a number of other factors.¹⁵³ Once on welfare, most recipients must rely on other income sources, such as employment, to supplement the meager

151. An important corollary to this point is that statistical studies are inconclusive as to whether family cap laws actually reduce the number of children born to women on public assistance. Some studies show an increase in abortion rates and a decrease in fertility rates in states that have family cap laws. See HORVATH & PETERS, *supra* note 85; NOW Legal Def. and Educ. Fund, *Update on Recent Child Exclusion Developments*, <http://www.nowldef.org/html/issues/wel/chexdv.shtml> (last visited Apr. 13, 2004). Other studies show that family cap laws have no effect on fertility rates. See Mary R. Mannix et al., *Welfare Litigation Developments Since the Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 31 CLEARINGHOUSE REV. 435, 447 (1998), available at <http://www.welfarelaw.org/artcommw.html>; Smith, *supra* note 78, at 171-72.

152. See Friedman, *supra* note 100, at 658-59. Lifestyle changes that result in dependence on welfare often involve a single-parent who newly assumes sole responsibility for a child, whether due to divorce or simply due to the birth of a child into a single-parent household. *Id.*

153. See, e.g., Susan L. Thomas, “Ending Welfare as We Know It,” or Farewell to the Rights of Women on Welfare? A Constitutional and Human Rights Analysis of The Personal Responsibility Act, 78 U. DET. MERCY L. REV. 179, 184 (2001) (noting that divorce, inadequate child support, and low-wage work are often the causes of poverty and welfare dependence among women); Laura M. Vogel, *Children in Poverty: Welfare and Work Together Can Make a Difference*, 3 KAN. J.L. & PUB. POL’Y 173, 175-76 (1994) (emphasizing that low-wage work, poor health care coverage, insufficient child support, and expensive day care contribute to women becoming dependent on public assistance).

welfare benefits they receive.¹⁵⁴ Thus, women generally do not avoid responsibility by depending on welfare; instead, they use welfare as one of several crutches to support themselves and their families.¹⁵⁵ The government misinterprets women's dependency on welfare as a semi-permanent avoidance of responsibility rather than what it truly is—a temporary use of a financial safety net in difficult financial times. As a result, family cap laws cannot solve the dependency problem and increase personal responsibility among TANF recipients.¹⁵⁶

Family cap laws also do not promote marriage and family values among welfare recipients. The idea that a reduction in benefits will encourage marriage and two-parent families rests on several assumptions, all of which are flawed. The first assumption is that women will be more likely to marry or stay married to men with whom they bear children, in part because they can better support their children in a two-income household than in a single-parent household receiving minimal government benefits. This idea, however, assumes that women will enter or stay in marriages purely due to economic considerations, when non-economic factors actually play a significant role in women's decisions to divorce or not to marry in the first place.¹⁵⁷ The second assumption is that when the government denies them benefits, women will turn to marriage as a financial solution rather than to other alternatives,

154. See, e.g., KATHRYN EDIN & LAURA LEIN, MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK 42-45 (1997) (analyzing the budgets of welfare-reliant mothers and finding that work and family resources account for over thirty percent of their income); Lisa A. Crooms, *The Mythical, Magical "Underclass": Constructing Poverty in Race and Gender, Making the Public Private and the Private Public*, 5 J. GENDER RACE & JUST. 87, 101 n.61 (2001) (citing a study that found that over forty percent of women on welfare use welfare benefits in conjunction with employment to support their families).

155. See Friedman, *supra* note 100, at 658-59.

156. Indeed, Laura M. Friedman asserts that the "[f]amily [c]ap does nothing to help welfare mothers become self-supporting" and, moreover, "[w]ithholding necessary funds simply plunges the entire family further into poverty and dependency." *Id.*

157. See generally Friedman, *supra* note 100, at 656 n.109 (noting that "[d]ecisions about childbearing, marriage, and living arrangements are very complex" and that "[t]hey surely are not unaffected by economic incentives, but they are affected by a host of other factors as well"). For instance, women may not even have the option to marry; many scholars note that poor men are often reluctant to enter into a marriage and a family without adequate and secure employment. See Crooms, *supra* note 154, at 114-15; Smith, *supra* note 78, at 187-90. Many women also choose to leave their marriages when domestic violence occurs. See Crooms, *supra* note 154, at 127-28.

such as finding a job (or even a second job), securing cheaper day care, or cutting corners on housing, clothing, and food expenditures.¹⁵⁸ For various reasons, however, women may not want to use marriage as their financial crutch when they can no longer receive adequate TANF benefits,¹⁵⁹ a very real possibility that undermines the ability of family cap laws to promote marriage and family values. The third assumption is that family caps will reduce the incidence of out-of-wedlock births, because presumably, poor women will not have children if they have less money with which to provide for them. Yet this assumption ignores the fact that many people "want to be parents and to share their lives with a child," regardless of their financial situation,¹⁶⁰ and that there is no indication of any association between women's procreative decisions and the receipt of public assistance benefits.¹⁶¹ Consequently, each of the presumptions on which the government bases its "marriage and family values" rationale for family cap laws is ill-founded, and thus, family cap laws logically cannot promote these objectives.

Family cap laws simply cannot achieve the goals that policy-makers envisioned when implementing these laws. They do not provide incentives for women on welfare to have fewer children, assume personal responsibility, or escape dependency on public assistance. In addition, family cap laws do not promote traditional social values of marriage and family among welfare recipients. Family cap legislation fails to meet its own ends, because the presumptions in which its objectives are rooted are plagued with inconsistencies. Essentially, family caps do not begin to reach their own goals, because the logical link between the laws and their purposes is wholly absent.

158. See EDIN & LEIN, *supra* note 154, for an excellent discussion of the economic sacrifices that indigent mothers make on a regular basis in order to sustain their household.

159. See *supra* note 157. Women may also divorce or not marry in order to avoid an unhappy and unloving marriage.

160. Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719, 739-40 (1992).

161. See *supra* note 149.

B. Meeting the Goals of PRWORA

When Congress broadened the states' power under section 1115 of the Social Security Act to establish pilot or experimental projects for welfare reform, it anticipated that states would quickly begin to implement programs, like family cap laws, that would further promote the objectives of PRWORA.¹⁶² As discussed earlier, policymakers saw PRWORA as the tool for achieving three primary goals: emphasizing the role that stable marriages and families can have in reducing welfare dependency, reducing welfare caseloads, and decreasing the rate of poverty among Americans.¹⁶³ In designing family cap laws as "experimental" programs under section 1115 of the Social Security Act, states have attempted to meet these objectives of PRWORA. Yet a closer examination of the ways in which family cap laws affect the goals of PRWORA reveals that these laws fail to achieve, and indeed frustrate, the purposes of the 1996 welfare reform.

Family cap legislation fails to advance one of the central goals of PRWORA—to reduce dependency on welfare by promoting marriage and family values among welfare recipients. As explained in the previous section, family cap laws, in practice, do not encourage welfare recipients to marry or stay married and to maintain "stable" family relationships, because the presumptions behind this objective are seriously flawed.¹⁶⁴ Consequently, family cap laws fail to justify the use of such a marriage- and family-based initiative as an instrument in the reduction of welfare dependency. In addition, even government studies indicate that dependence on welfare has *not* contributed in any significant way to the "fall" of the traditional nuclear family.¹⁶⁵ As a result, the government's use of family cap legislation to attack the "lack" of family values among TANF recipients simply cannot solve the problem of welfare dependency and thus fails to achieve one of PRWORA's ultimate goals.

162. See *supra* text accompanying notes 85-87.

163. See discussion *supra* Part I.C.

164. See *supra* notes 157-61 and accompanying text.

165. See Martha F. Davis, *The New Paternalism: War on Poverty or War on Women?*, 1 GEO. J. ON FIGHTING POVERTY 88, 90 (1993) (citing government studies that defeat the stereotype that impoverished Americans lack family values).

Family cap laws also fail to reduce significantly the number of Americans on public assistance. Of course, family caps do reduce either the benefits paid out to recipient families or the number of children who receive benefits, depending on the structure of the specific state law.¹⁶⁶ They do not encourage self-sufficiency, however, or an improved work ethic among welfare recipients, because the underlying presumption that Americans rely on TANF out of laziness or a lack of motivation is simply wrong.¹⁶⁷ For most recipients, reliance on welfare stems from temporary economic necessity, and a family cap law that reduces the benefits they receive only exaggerates their economic plight.¹⁶⁸ As a result, family cap laws work only to reduce the number of children who receive benefits or the amount of benefits that a TANF recipient family can receive, and they do not serve the greater purpose of PRWORA to decrease welfare caseloads by promoting personal responsibility.

Finally, family cap laws cannot achieve what is arguably the most important goal of PRWORA—reducing the number of Americans who live in poverty. Though family cap laws clearly have undertones that stress the importance of work as a means off public assistance and out of poverty, they simply do not promote self-sufficiency among recipients.¹⁶⁹ Instead, they only perpetuate the cycle of poverty that plagues the indigent class of Americans by withholding significant, albeit minimal, benefits from families who find themselves in dire economic situations.¹⁷⁰ By receiving a

166. See discussion *supra* Part II.A for a brief overview of the differences among various family cap and child exclusion laws throughout the country.

167. See *supra* notes 152-55 and accompanying text.

168. See Catherine R. Albiston & Laura Beth Nielsen, *Welfare Queens and Other Fairy Tales: Welfare Reform and Unconstitutional Reproductive Controls*, 38 HOW. L.J. 473, 508 (1995) (denouncing the stereotype of “the welfare queen” who has children merely to receive public assistance and arguing that family caps serve only to push recipients further into poverty); *supra* note 156.

169. See *supra* notes 152-55 and accompanying text for discussions of the failure of family cap laws to promote personal responsibility among recipients.

170. See Friedman, *supra* note 100, at 661-62 (“[TANF] families can barely clothe and feed their children on the pre-Family Cap benefits they receive. The denial of additional funds often means the family will become homeless because there is not enough money to pay rent.”); NOW Legal Def. and Educ. Fund, *supra* note 79 (labeling child exclusion laws as programs that “increase, rather than alleviate, hardship for poor families,” because they “den[y] incremental benefit increases that are needed to raise an additional child at a bare subsistence level”).

stagnant amount of income to support a larger family, poor families who are subject to the family cap will find themselves struggling even harder to support themselves. By implementing family cap legislation, states only frustrate PRWORA's war on poverty, because they deny welfare recipients the means they need to support themselves.

Though one of the intentions of the 1996 welfare reform was to encourage states to use pilot projects like family cap laws to meet the long-term goals of PRWORA, the reality of these laws simply makes that purpose unattainable. Family cap laws cannot reduce dependency on public assistance by promoting marriage and family, because the assumption that marriage is a solution to welfare dependency is not logical. Family cap laws, furthermore, can only minimally reduce the number of TANF recipients, because they do not address the real source of dependency on welfare—economic necessity, not a lack of personal responsibility. Most importantly, family cap laws do not even begin to tackle the poverty problem. By denying recipients increased benefits for additional children born, family cap laws only contribute to the causes of poverty among Americans today.

C. Meeting the Goals of the American Welfare System

The previous two sections discussed whether family cap laws achieve their own purposes and the purposes of PRWORA, but the most important analysis remains: whether family cap laws achieve the objectives of the American welfare system. As the welfare program has developed throughout the twentieth century, its goals have likewise evolved. President Roosevelt's vision that ADC could provide a safety net for the indigent and eventually lift all Americans out of poverty¹⁷¹ did not perish with the New Deal but instead persisted in the coming decades; indeed, remnants of this ideal are even evident in the welfare reform of the 1990s.¹⁷² Yet as welfare caseloads grew dramatically from the early 1960s through the late 1970s, policymakers found that these goals were simply no longer

171. See *supra* note 7 and accompanying text.

172. See *supra* notes 63-68 and accompanying text.

sufficient to guide the structure of the American welfare system.¹⁷³ Reform became essential to the survival of the public assistance program in America, and that reform came largely through the rhetoric of personal responsibility, self-sufficiency, and "workfare." Thus, a second primary goal of the welfare system emerged: promoting work and self-sufficiency among welfare recipients in order to reduce caseloads. Though family cap laws developed as one tool in the reform of the welfare system, they completely fail to achieve any of the goals that lie at the heart of the American welfare system.

Family cap laws do not achieve the traditional goals of the American welfare system to provide a safety net to poor Americans and, eventually, to reduce the number of Americans in poverty. Family cap laws do not support the notion that TANF should serve as security to protect the indigent from poverty, because they force welfare women to support their children with fewer benefits at their disposal.¹⁷⁴ Thus, family cap laws eliminate, rather than provide, a safety net for poor Americans. Without this safety net it only becomes more likely that people who slip into poverty will not rebound to economic security. Once impoverished, the indigent only face greater struggles in states that have implemented family cap laws, because the denial of additional benefits to care for newborn children will only perpetuate the cycle of poverty and welfare dependency.¹⁷⁵ In the states that use family caps as a means of "welfare reform," the goal of the American welfare system to provide a security net for poor Americans and eventually lift them out of poverty is impossible to achieve.

Family cap legislation also cannot meet the more modern goal of the American welfare system to promote self-sufficiency and employment among public assistance recipients. As discussed earlier, this objective assumes that welfare women depend on TANF and avoid work and personal responsibility because they can, and that with less "incentive" to rely on welfare, women will finally

173. See discussion *supra* Part I.B-C.

174. See, e.g., Bennett & Sullivan, *supra* note 36, at 743-44, 747 ("Some features of the approved state projects [that restrict the distribution of benefits] depart drastically from the core values of the AFDC program.").

175. See *supra* notes 168, 170 and accompanying text.

become self-sufficient.¹⁷⁶ Yet logically, family cap laws do not serve this purpose, because dependence on welfare is generally a temporary phenomenon that occurs when lifestyle changes drain financial resources, not a permanent situation that is the product of irresponsibility.¹⁷⁷ Because family cap laws improperly assume the causes of welfare dependency, they cannot function to increase personal responsibility and build stronger work ethics among recipients. As a result, family cap laws do not serve one of the central purposes of the American welfare system.

The American welfare system has permitted states to implement experimental programs that frustrate, rather than advance, its long-term goals. The New Dealers saw public assistance as a means to an end of eradicating poverty. Subsequent administrations continued to embrace this goal, albeit to a lesser degree, while they formulated another approach to attack poverty and welfare dependency that centered on promoting work and personal responsibility. The recent onslaught of family cap legislation erases much of the hope that those goals are attainable. Instead of providing Americans with the security they need to lift themselves out of poverty, and instead of providing tools to the indigent to find work and become self-sufficient, family cap laws propagate American dependency on welfare. In essence, they fail to deliver on the most important purpose of the American welfare system—to keep Americans out of poverty.

D. Counterarguments and Statistical Data

The above analysis finds that family cap laws are ineffective in meeting the goals they were intended to achieve. Proponents of family cap legislation, however, might point to statistical data to demonstrate that family cap laws do have a logical basis and do indeed achieve the goals they were designed to meet. Though these statistics might be persuasive facially, deeper analysis of this data reveals that available studies do not, in fact, undermine the argument presented above.

176. See *supra* text accompanying note 152.

177. See *supra* notes 152-56 and accompanying text.

Advocates for family cap legislation assert that the laws work to reduce the number of Americans on public assistance. To the contrary, studies indicate that the nation's continuing preoccupation with increasing caseloads and expenditures for welfare recipients¹⁷⁸ is, in fact, largely unfounded. One study shows that although the number of families on AFDC rose by thirty-seven percent between 1975 and 1995, the cumulative amount of benefit payments made to families during that same period *decreased* by fifteen percent (with adjustments for inflation).¹⁷⁹ This data reflects that by 1995, the United States was "spending less money (in terms of real purchasing power) and spreading it more thinly to cover considerably more poor people. The consequence, of course, is that average AFDC benefits have fallen dramatically."¹⁸⁰ Without a true welfare "problem" to solve, the government's goal of reducing welfare caseloads simply remains unattainable.

Proponents of family cap laws might also argue that women on welfare have fewer children when they are subject to a family cap restriction. Yet studies do not uniformly support this proposition; at best, family cap laws may only slightly reduce the fertility rate among welfare recipients.¹⁸¹ Statistics reveal, furthermore, that higher welfare benefits do *not* lead to larger welfare families,¹⁸² suggesting that the size of TANF families is largely *not* a function of the amount of benefits they receive. Additionally, there is a *negative* correlation between the length of time a woman receives welfare and the number of children she has, such that "[t]he longer a woman remains on welfare, the less likely she is to give birth."¹⁸³ This data suggests that a decrease in benefits due to application of a family cap law will not have a significant impact on the childbear-

178. See discussion *supra* Part I.B; *supra* text accompanying note 29.

179. GILENS, *supra* note 13, at 19.

180. *Id.*

181. See sources cited *supra* note 151. Additionally, the fertility rate among welfare recipients is *not* higher than the rate among non-welfare recipients, and in many cases, it is actually lower. See Note, *Dethroning the Welfare Queen: The Rhetoric of Reform*, 107 HARV. L. REV. 2013, 2020 (1994) [hereinafter *Dethroning the Welfare Queen*].

182. See *Dethroning the Welfare Queen*, *supra* note 181, at 2020; sources cited *supra* note 149.

183. Roger J.R. Levesque, *Looking to Unwed Dads to Fill the Public Purse: A Disturbing Wave in Welfare Reform*, 32 U. LOUISVILLE J. FAM. L. 1, 24 n.100 (1994).

ing decisions of women on welfare,¹⁸⁴ because welfare mothers are already having fewer children *without* being subject to family cap restrictions. As a result, statistics do not support the government's proposition that family cap laws will reduce the number of children born to women on welfare.

In addition, proponents of family cap laws might counter this Note's analysis by emphasizing that family cap laws are encouraging TANF recipients to marry and to maintain cohesive nuclear families. Yet one available study actually indicates that the American welfare system has *no* significant impact on the structure of families who receive welfare.¹⁸⁵ There is, however, very little statistical data on this issue, which raises the question of why the federal government and the states have failed to release any data that support their asserted rationale for implementing family cap laws. On the whole, there are statistics that validate proponents' claims that family cap laws promote marriage and family values among welfare recipients.

Finally, proponents might claim that family cap laws are forcing welfare recipients to work in order to support their families, which in turn allows them to escape poverty and simultaneously reduces TANF caseloads. To the contrary, the federal government's own statistics do not document that this phenomenon is occurring.¹⁸⁶ Studies also suggest that many welfare recipients do work in order to support their families.¹⁸⁷ As a result, the government's assertion that family cap laws are increasing welfare recipients' participation in the workforce remains unsupported.

On the whole, it is clear that studies do not support any likely counterargument that proponents might wage against this Note's

184. See *id.* at 23-24 (arguing that "[t]he underlying assumptions of the link between behavior [of poor Americans] and financial incentives are unsound").

185. See David T. Ellwood & Mary Jo Bane, *The Impact of AFDC on Family Structure and Living Arrangements*, 7 RES. LAB. ECON. 137, 143 (1985), quoted in Allison B. Smith, Note, *The Breakdown of the American Family: Why Welfare Reform is Not the Answer*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 761, 785 (1997).

186. See U.S. Dep't of Health & Human Serv., Admin. for Children and Families, Office of Family Assistance, *supra* note 75, at <http://www.acf.hhs.gov/programs/ofa/annualreport5> (showing no data on the effect of family cap laws on work participation rates among welfare recipients).

187. See, e.g., EDIN & LEIN, *supra* note 154, at 44 (finding that forty-six percent of welfare-reliant mothers work as a "survival strategy"); Crooms, *supra* note 154, at 101.

analysis of family cap laws. In reality, the welfare caseloads have not increased dramatically over the years, thus making it difficult for family cap laws to significantly reduce the number of Americans on public assistance. Recent research also does not fully support the proposition that women on welfare have fewer children when subject to a family cap restriction. Additionally, studies are scarce as to whether family cap laws do, in fact, promote marriage and family values among recipients and as to whether the laws encourage recipients to work. Consequently, the available statistical data does not support the government's assertion that family cap laws can achieve their intended goals, and it does not challenge the conclusion that family cap laws are an ineffective means of welfare reform.

CONCLUSION

Traced back to the era of the New Deal, the roots of the current public assistance program in America reflect the idea that public assistance should be an economic safety net that saves people from indigency and ultimately empowers them to find their way out of poverty. Though the system has evolved throughout the twentieth and twenty-first centuries, several of its purposes have remained over the years—namely, to move people off public assistance and to eradicate poverty. Other goals that digress from these ideals developed in the last few decades, especially with the passage of PRWORA. In particular, the goals of promoting work, personal responsibility, and stronger marriage and family values among welfare recipients recently emerged at the forefront of the political debate over welfare reform. In adopting this more conservative approach to welfare reform, states have turned to various legislative instruments, such as family cap laws, to achieve these goals. In theory, family cap laws promote self-sufficiency, provide a disincentive for dependency on welfare, and strengthen family values; in practice, this link is nonexistent.

Opponents of family cap legislation have failed to persuade the courts that the unconstitutional conditions doctrine renders family cap laws violative of due process and equal protection, under either the federal or various state constitutions. The Supreme Court

refused to find Maryland's family cap law unconstitutional in *Dandridge*, and the state courts that have subsequently addressed the issue appear reluctant to declare unconstitutional laws that both the Congress and the states have deemed necessary and useful means of reforming the welfare system. The decisions in *C.K.*, *Sojourner A.*, and *N.B.* illustrate this reluctance.

Without any indication that the courts will be willing to reconsider their consistent affirmance of the states' implementation of family cap laws, only one viable avenue of attack remains for opponents to challenge this legislation: the legislature itself. As illustrated in Part IV, an assessment of the goals of family cap legislation, PRWORA, and the American welfare system reveals that family cap laws fail to adequately meet any of the objectives that allegedly justify their implementation. They do not promote self-sufficiency, personal responsibility, or a stronger work ethic. They do not strengthen marriages or family values. At best, they only minimally reduce the number of people receiving welfare. Most importantly, they do not live up to the ideal upon which the American welfare system was founded and upon which it is ultimately still based—reducing, if not eliminating, poverty among indigent Americans. Though many of the recent structural changes to TANF are admirable attempts to transform a clearly failing system, family cap legislation is simply not an effective method of achieving that change. The only realistic effect that family cap laws have on welfare recipients is increased hardship and suffering. If the courts are unwilling to recognize the arguably “unconstitutional conditions” that family cap laws place on welfare recipients, perhaps the state legislatures will be willing to reconsider the implementation of legislation that fails to achieve the very purposes on which it is premised.

The legislative approach that this Note advocates is a realistic way for opponents of family cap legislation finally to succeed in overturning this ineffective method of welfare reform. This proposal does not ignore the reality that the intense partisanship that dominates Congress today makes it unlikely that the national government will pass a law that prohibits states from implementing family cap laws under the waiver provision of section 1115 of the Social Security Act. Legislative challenges to family cap laws,

however, can and should reach far beyond the national government, for it is the states that are ultimately in control of the implementation of these laws. By focusing their efforts at the state legislative level, opponents of family cap laws can dramatically increase the likelihood of a legislature repealing a family cap law, because it is much more likely that an *individual state*, as opposed to a federal legislature, will consist of a cohesive block of politicians and voters that will agree with this Note's assessment of the ineffectiveness of family cap laws. Harkening back to the roots of family cap legislation—section 1115 of the Social Security Act—state legislatures need to start reconsidering whether family cap laws still qualify as an “experimental, pilot, or demonstration project which, in the judgment of the Secretary [of the Department of Health and Human Services], is likely to assist in promoting the objectives” of the Social Security Act.¹⁸⁸ Section 1115 permits the Secretary of HHS to grant waivers only for those projects that are “likely to assist in promoting the objectives” of the American welfare system.¹⁸⁹ This Note demonstrates that family cap laws no longer qualify as such an experimental project, because they clearly do not achieve *any* of the goals they were intended to serve, particularly any of the goals of the American welfare system.

In eliminating family cap legislation, states can replace those laws with reform measures that actually promote personal responsibility, strengthen families, reduce the welfare rolls, and reduce poverty. Heightened access to employment, childcare, and transportation is one example of a reform that would serve these goals. With affordable childcare and transportation, employment might actually become a realistic alternative to welfare for many Americans.¹⁹⁰ Another reform that would serve these goals is a raise

188. Social Security Act of 1988 § 1115, 42 U.S.C. § 1315(a) (2000).

189. *Id.*

190. See Joel F. Handler, “Ending Welfare As We Know It”: The Win/Win Spin or the Stench of Victory, 5 J. GENDER RACE & JUST. 131, 169-73 (2001) (summarizing recent proposals by the Clinton and Bush administrations and congressional representatives to reform wage laws and welfare programs to increase access to employment, job training, childcare, and transportation, and recommending similar reforms in order to increase self-sufficiency and decrease poverty among welfare recipients); see also *Welfare Reform: Building on Success, Hearing on Welfare Reform Before the Sen. Fin. Comm.*, 108th Cong. (2003) (statement of Margy Waller, Visiting Fellow, Brookings Institution Center), 2003 WL 11716251 (arguing that proposed TANF reauthorization legislation would hinder the

in the minimum wage or, alternatively, the adoption of living wage legislation. By ensuring that employment pays not only more than welfare but also enough to sustain a single-parent-headed household, reformation of wage laws would increase recipients' ability *and* motivation to support their families through work, which would in turn reduce welfare caseloads, strengthen and improve family relationships, and, eventually, work to eliminate poverty in the United States.¹⁹¹ These measures are only two examples of reforms that states could use to actually achieve the goals that family cap laws were supposed to meet—and there are countless others. Unless state legislators begin to truly reassess current welfare reform laws like family cap legislation, however, the goals of PRWORA, and especially the American welfare system, will remain unattainable. It is time for the states to experiment with a new method of welfare reform, because family cap laws simply are not getting it done.

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flexibility that states currently have in providing significant services like education, job training, childcare, and transportation that support indigent Americans and help them out of poverty).

191. See Peter Edelman, *The United Nations Convention on the Rights of the Child: Implications for Welfare Reform in the United States*, 5 GEO. J. FIGHTING POVERTY 285, 287 (1998) (citing the living wage as an issue that PRWORA has made even more important due to the reform's significant cutbacks in spending for public assistance programs); Pearson Liddell, Jr. et al., *Welfare Reform in Mississippi: TANF Policy and Its Implications*, 11 AM. U. J. GENDER SOC. POL'Y & L. 1107, 1129 (2003) (asserting that "provid[ing] a standard of living that at least meets the poverty income level for working TANF recipients" must be an essential part of better welfare reform efforts).

* I would like to thank Jenn Komoroski for her incredible guidance and feedback on my Note, and Jim Langan for all of his suggestions and edits. I would also like to thank my parents for their support, and Sullivan Gastley for her patience. Most importantly, I would like to thank Kerrin Wolf for discussing and revising my Note with me for countless hours. I could not have written this Note without him.