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COMMENTS

THE CLOUDED ISSUE IN PUBLIC WELFARE: RIGHT v. PRIVILEGE

JUDITH HARRIS BROWN

Since early in our history, and indeed in the prior history of England, provisions have been made for some sort of "relief" for certain limited categories of financially needy people.¹ Traditionally, only the "worthy" poor were sought to be aided by public charity.² Until 1935, public assistance in the United States followed the local funding and control patterns established in England,³ in some instances complete with "workhouses" or "poorhouses."⁴ Consistent with the English pattern, American public moneys expended for the support of the needy have been considered gratuities in which the recipients have no inherent rights. Therefore, the dispensers of such gratuities were free to apply moral standards as well as standards of need in determining which poor persons qualified for assistance.

The passage of the Social Security Act in 1935⁵ provided the first federal statutory right to subsistence (however limited) for certain categories of persons. Under certain titles of the Act, (*e.g.*, Old Age, Survivors, and Disability Insurance,⁶ and Unemployment Insurance⁷) benefits are not income tested, and such benefits are financed through employer-employee or employer contributions.⁸ Recipients of funds under the "insurance" titles are

1. See generally W. BELL, AID TO DEPENDENT CHILDREN (1965); J. BROWN, PUBLIC POOR RELIEF 1929-1939 (1940); E. LEONARD, THE EARLY HISTORY OF ENGLISH POOR RELIEF (1965); Wedemeyer & Moore, *The American Welfare System*, 54 CALIF. L. REV. 326 (1966).

2. W. BELL, AID TO DEPENDENT CHILDREN 3-19 (1965); LEYENDECKER, PROBLEMS AND POLICY IN PUBLIC ASSISTANCE 45-48 (1955); Wedemeyer & Moore, *The American Welfare System*, 54 CALIF. L. REV. 326, 327-28 (1966).

3. F. PIVEN & R. CLOWARD, REGULATING THE POOR 45-66 (1971).

4. *Id.* at 47.

5. Act of Aug. 14, 1935, ch. 531, 49 Stat. 620, as amended in scattered sections of 42 U.S.C. (1970).

6. 42 U.S.C.A. §§ 401-29 (1969 and Supp. 1973), §§ 430-31 (Supp. 1973).

7. 42 U.S.C.A. §§ 501-03 (1969), § 504 (Supp. 1973).

8. Federal Insurance Contributions Act, 26 U.S.C. §§ 3101-26 (1970); Self-Employment Contributions Act, 26 U.S.C.A. §§ 1401-03 (1967 and Supp. 1973); Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-09 (1970). For a general overview of the workings of Old Age, Survivors, and Disability Insurance (OASDI) and Unemployment Insurance, see SUBCOMMITTEE ON FISCAL POLICY, JOINT ECONOMIC COMMITTEE, 92D CONG., 2D SESS., STUDIES IN PUBLIC WELFARE, PAPER NO. 2, HANDBOOK OF PUBLIC INCOME TRANSFER PROGRAMS, at 23-41, 50-73 (1972).

treated as claimants of benefits as of right. Funds dispersed under the income-tested titles (e.g., Old Age Assistance (OAA), Aid to the Blind (AB), Aid to the Permanently and Totally Disabled (APTD), Aid to Families with Dependent Children (AFDC)) are obtained through the general tax revenues of the federal government and participating states. Recipients of such funds are treated as "applicants" for and "recipients" of "assistance," a telling distinction between claims on "earned" and "unearned" or "charitable" funds.

In recent years, both legal and social scholars have advanced the notion that, in keeping with the general increase in state involvement in the affairs of the lives of its citizens through the distribution of funds, licenses, and other benefits, citizens, in order to maintain their dignity, independence, and privacy, should be accorded certain procedural and substantive rights to such government largess.⁹ It has been observed that, especially with reference to dispensations affecting the making of one's living (both individual and corporate), such rights, as prior to any statutory law, have already developed with reference to many categories of recipients.¹⁰ Until recently, however, such rights, at least in practice, were not extended to the poor.¹¹

This discussion will note recent developments in the substantive and procedural rights of the poor to subsistence, primarily through the examination of Supreme Court decisions in AFDC cases.¹²

AID TO (FAMILIES WITH) DEPENDENT CHILDREN

In keeping with the long tradition of providing only for the "worthy" poor, Congress clearly indicated that states participating in the Aid to Dependent Children title of the Social Security Act of 1935¹³ were free to include

9. F. PIVEN & R. CLOWARD, REGULATING THE POOR 306 n.17 (1971); Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143 (1958); Reich, *The New Property*, 73 YALE L.J. 733 (1964).

10. E.g., *Sherbert v. Verner*, 374 U.S. 398 (1963) (state cannot deny unemployment insurance benefits on grounds that interfere with freedom of religion); *Willner v. Committee on Character & Fitness*, 373 U.S. 96 (1963) (right to a hearing prior to denial or revocation of an occupational license); *Lynch v. United States*, 292 U.S. 571 (1934) (right to continuation of war-risk insurance contract); *City of Owensboro v. Cumberland Tel. & Tel. Co.*, 230 U.S. 58 (1913) (a government franchise is property protected by the Constitution); *Copper Plumbing & Heating Co. v. Campbell*, 290 F.2d 368 (D.C. Cir. 1961) (right to equal opportunity to seek government contracts).

11. See Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965); Sparer, *The Role of the Welfare Client's Lawyer*, 12 U.C.L.A.L. REV. 361 (1965).

12. Court decisions involving the adult assistance programs, Old Age Assistance (OAA), Aid to the Blind (AB), and Aid to the Permanently and Totally Disabled (APTD) are purposely omitted from the major discussion since the 1972 amendments to the Social Security Act have federalized the cash assistance portions of these programs, effective January 1, 1974. 42 U.S.C.A. §§ 1381-85 (Supp. 1973).

13. Act of Aug. 14, 1935, ch. 531, §§ 401-06, 49 Stat. 627, as amended 42 U.S.C.A. §§ 601-44 (1969 and Supp. 1973).

“moral character” requirements as a part of their overall eligibility requirements.¹⁴ Over the years, the various state plans¹⁵ have denied assistance to children not living in “suitable homes,”¹⁶ and several attempts were made to exclude illegitimate children and siblings of illegitimate children from eligibility for benefits under the Act.¹⁷ Although federal administrators attempted to discourage such provisions over the years,¹⁸ the action of the Louisiana legislature in 1960 culminated in a firm stand by HEW, supported by the Congress, against denial of benefits to children because of the acts of their parents. The Louisiana legislation barred assistance under Aid to Dependent Children (now Aid to Families with Dependent Children—AFDC¹⁹) to all children living in a home in which an illegitimate child had been born subsequent to the initial receipt of public assistance.²⁰ Arthur S. Flemming, then Secretary of HEW, issued a ruling stating that, as of July 1, 1961:

[A] State plan . . . may not impose an eligibility condition that would deny assistance with respect to a needy child on the basis that the home conditions in which the child lives are unsuitable, while the child continues to reside in the home. Assistance will therefore be continued during the time efforts are being made either to improve the home conditions or to make arrangements for the child elsewhere.²¹

Congress then amended the Social Security Act to enforce the Flemming Ruling²² and to extend federal assistance to children in foster homes and institutions.²³ Shortly thereafter, a “loophole” was inserted allowing states to deny AFDC to children in “unsuitable homes” provided that the state granted other “adequate care and assistance” (under a general welfare program).²⁴ Enlightened federal legislation and regulations notwithstanding,²⁵

14. H.R. REP. NO. 615, 74th Cong., 1st Sess. 24 (1935); S. REP. NO. 628, 74th Cong., 1st Sess. 36 (1935).

15. Under the provisions of the Social Security Act, states participating in the state-option titles are required to file for the approval of the federal administrative agency a “state plan” conforming to the provisions of the act and to federal regulations. *See, e.g.*, 42 U.S.C. § 601 (1970) (AFDC).

16. *See* King v. Smith, 392 U.S. 309, 337-38 (1968) (appendix to Douglas, J., concurring opinion).

17. W. BELL, AID TO DEPENDENT CHILDREN 29-136 (1965).

18. *Id.* at 51, 72-74.

19. 42 U.S.C. § 601 (1970).

20. LA. REV. STAT. ANN. § 46:233(D)(10) (Supp. 1973).

21. State Letter No. 452, Bureau of Public Assistance, Social Security Administration, Dept. of Health, Education, and Welfare (Jan. 17, 1961).

22. 42 U.S.C. § 604(b) (1970).

23. 42 U.S.C. § 608 (1970).

24. Act of July 25, 1963, Pub. L. No. 87-543, tit. I, Part A, § 107(b), 76 Stat. 189, as amended, 42 U.S.C. § 604(b) (1970).

25. Federal emphasis on the provision of rehabilitative aid to the needy through federal-state programs, relegating thereby the enforcement of community morals to other means, has steadily increased since 1962. States participating in AFDC are now required to provide several services of this nature to recipient families, *e.g.*, family planning services. 42 U.S.C. § 602(a)(15) (1970).

many states continued their efforts to reduce the welfare rolls,²⁶ and in some instances, state regulations had the effect of discriminating against Blacks and other minorities.²⁷

By the early 1960's, decisions of the Vinson Court and the early Warren Court had removed some of the legal disabilities of racial minorities,²⁸ and paved the way for the activists of the late fifties and early sixties to bring racial equality closer to a practical reality. An aid to this activist period was the enactment of the Civil Rights Act of 1964.²⁹ Amid the furor of activism to overcome racial discrimination, other minorities found their voices and demanded relief from other types of discrimination. It is not surprising that racial minorities often found themselves comprising major portions of other minorities, including the minority of the poor.³⁰

THE POOR—ACQUIRING A VOICE

Hampered by an obvious lack of funds, education, sophistication and voting power, it is no wonder that the poor of the modern era remained submerged as a group for so long. With little influence upon state legisla-

26. F. PIVEN & R. CLOWARD, REGULATING THE POOR 133-45 (1971).

27. *Id.* at 133-45. See also W. BELL, AID TO DEPENDENT CHILDREN 42-46 (1965).

28. Warren Court decisions: e.g., *Watson v. City of Memphis*, 373 U.S. 526 (1963) (desegregation of public recreation); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (desegregation of public accommodations); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Brown v. Board of Educ.*, 349 U.S. 294 (1955) (2d decision); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (1st decision) (school desegregation cases). Vinson Court decisions: e.g., *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948) (school desegregation cases); *Henderson v. United States*, 339 U.S. 816 (1950); *Morgan v. Virginia*, 328 U.S. 373 (1946) (transportation cases); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (restrictive covenants in property deeds). Note that the Vinson Court decisions cited above are actually anomalous to the generally strong anti-libertarian tone of the Vinson Court. See, e.g., *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *Dennis v. United States*, 341 U.S. 494 (1951); *Feiner v. New York*, 340 U.S. 315 (1951). In another well-known case the Court asserted its views by denying certiorari, *United States v. Rosenberg*, 195 F.2d 583 (2d Cir.), cert. denied, 345 U.S. 965 (1953). In addition, the Court vacated Justice Douglas' stay of execution. *Rosenberg v. United States*, 346 U.S. 273, 313, 322, 324 (1953).

29. 42 U.S.C.A. §§ 1981 to 2000h-6 (1970 and Supp. 1973).

30. E.g., in 1970, racial minorities comprised 40 percent of the total poor population. The following data were extracted from an OEO publication:

	Number	Percent
Total Poor	25,522,000	100 %
Blacks	7,650,000	30 %
Persons of Spanish Origin	2,177,000	8.5%
Other Non-Whites	392,000	1.5%
Total Minorities	10,219,000	40.0%

OFFICE OF PLANNING, RESEARCH AND EVALUATION, OFFICE OF ECONOMIC OPPORTUNITY, THE POOR 1970: A CHARTBOOK. For a detailed analysis of racial, geographic, educational, etc. characteristics of the poor see U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SERIES P-60, No. 76, 24 MILLION AMERICANS—POVERTY IN THE UNITED STATES 1969 (1970).

tures,³¹ these people have had to be content with legislative “handouts,” often only to find the “offering” removed from their grasp by restrictive regulations and statutes. Passage of the Federal Social Security Act of 1935³² improved the lot of many, but it too had serious limitations, some of which have previously been noted. The limited influence of the poor on Congress and the state legislatures, and on federal and state administrative agencies, has left them only one forum—the courts. But going to court costs money, which the poor do not have. By the early sixties, however, funds of private organizations began to be used in attempts to gain access to the civil docket of the courts on behalf of the causes of the poor.³³ President Johnson’s “War on Poverty” extended many federal benefits to the poor, not the least important of which was the Office of Economic Opportunity and its legal services projects. Today, most civil legal representation of the poor is still provided by the OEO and privately or community funded legal aid groups.

Even with legal representation, the poor initially found it difficult to obtain a federal court hearing.³⁴ In *Damico v. California*,³⁵ however, the Supreme Court took notice of these difficulties and ordered a federal district court in California not to abstain, but to hear a suit challenging the constitutionality of a California AFDC regulation under the provisions of the Civil Rights Act,³⁶ any failure to exhaust “administrative remedies” notwithstanding. Prior to the *Damico* decision, the Warren Court had already gained a reputation for protecting the civil rights of minorities³⁷ and the rights of the

31. Indeed, the Texas Constitution provides: “The following classes of persons shall not be allowed to vote in this State, to wit: All paupers supported by any county” TEX. CONST. art. VI, § 1. A similar provision is contained in the Election Code. TEX. ELECTION CODE ANN. art. 5.01 (1967). Although these provisions are almost certainly invalid as in violation of the equal protection clause of the fourteenth amendment, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 666 (1966), they would apply, in any case, only to persons receiving county general assistance, and not to persons receiving assistance through a federal-state or federal program.

32. Act of Aug. 14, 1935, ch. 531, 49 Stat. 620, *as amended* in scattered sections of 42 U.S.C. (1970).

33. *E.g.*, American Civil Liberties Union (ACLU), and the NAACP Legal Defense Fund (LDF). The decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), forced the criminal courts to provide counsel for indigent defendants. Public provision of counsel for indigents in the civil courts is not required.

34. *E.g.*, *Smith v. Board of Comm’rs*, 259 F. Supp. 423, 424 (D.D.C. 1966), where Judge Holtzoff held that the court had no power to enjoin welfare officials from using “harsh, oppressive, illegal, and humiliating methods” in determining eligibility for assistance.

35. 389 U.S. 416 (1967).

36. *Id.* at 417. 42 U.S.C. § 1983 (1970) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

37. *E.g.*, *Watson v. City of Memphis*, 373 U.S. 526 (1963) (desegregation of public recreation); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (desegre-

accused,³⁸ including a strong line of cases giving indigent defendants equal rights with the wealthy before the criminal courts.³⁹ In addition, the Social Security Act itself had long before been validated by the Supreme Court,⁴⁰ and the Warren Court had handed down two important decisions concerning the Social Security retirement benefits (OASDI)⁴¹ and Unemployment Compensation⁴² titles. Thus, in 1968, when the landmark welfare case of *King v. Smith*⁴³ was decided against Alabama's particular version of the "suitable home" restriction, the result was consistent with prior decisions of the Warren Court.⁴⁴

KING V. SMITH—A STATUTORY RIGHT TO AFDC BENEFITS

The Chief Justice delivered the opinion of the Court, which held that Alabama's "man-in-the-house" or "substitute father" rule, denying assistance to children whose mother "cohabits" with any man, was inconsistent with the Social Security Act:⁴⁵

gation of public accommodations); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Brown v. Board of Educ.*, 349 U.S. 294 (1955) (2d decision); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (1st decision) (school desegregation cases).

38. *E.g.*, *Mempa v. Rhay*, 389 U.S. 128 (1967); *Washington v. Texas*, 388 U.S. 14 (1967); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Massiah v. United States*, 377 U.S. 201 (1964).

39. *E.g.*, *Patterson v. Warden*, 372 U.S. 776 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Hamilton v. Alabama*, 368 U.S. 52 (1961); *Griffin v. Illinois*, 351 U.S. 12 (1956).

40. *Helvering v. Davis*, 301 U.S. 619 (1937) (old age benefits); *Standard Mach. Co. v. Davis*, 301 U.S. 548 (1937) (unemployment insurance).

41. *Flemming v. Nestor*, 363 U.S. 603 (1960). This decision upheld the constitutionality of 42 U.S.C. § 402(n) (1970), which denied OASDI benefits to an otherwise qualified alien who was deported under the Immigration and Nationality Act, 8 U.S.C. § 1251(a) (1970), on any ground specified in 42 U.S.C. § 402(n) (1970), including Communist Party membership. Mr. Nestor was deported in 1956 for having been a member of the Communist Party from 1933 to 1939, a period of time when such membership was *not illegal*, and his Social Security benefits were subsequently terminated. Justice Black's dissent correctly characterizes this decision as approving an *ex post facto* law and bill of attainder. 363 U.S. 603, 622 (1960). This decision tends to lose its apparent incongruity with the civil libertarian character of the Warren Court if it is recognized that this Court also had another characteristic aspect: that of denying certain first amendment rights in cooperation with the anti-Communist "witch-hunting" mood of some members of the Congress. *See, e.g.*, *Scales v. United States*, 367 U.S. 203 (1961); *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961); *Konigsberg v. State Bar*, 366 U.S. 36 (1961); *Nelson v. County of Los Angeles*, 362 U.S. 1 (1960); *Uphaus v. Wyman*, 360 U.S. 72 (1959); *Barenblatt v. United States*, 360 U.S. 109 (1959).

42. *Sherbert v. Verner*, 374 U.S. 398 (1963). This decision found unconstitutional the denial of unemployment benefits to an otherwise qualified person who refused, for religious reasons (Miss Sherbert was a Seventh-day Adventist), to accept employment which required her to work on Saturdays; such denial being a violation of the first amendment free exercise clause.

43. 392 U.S. 309 (1968).

44. *But see* discussion of *Flemming v. Nestor*, 363 U.S. 603 (1960) at note 41 *supra*.

45. *King v. Smith*, 392 U.S. 309, 333 (1968).

Congress has made at least this one determination: that destitute children who are legally fatherless cannot be flatly denied federally funded assistance on the transparent fiction that they have a substitute father.⁴⁶

The Court in *King* also discussed the nature of the AFDC program⁴⁷ stating in part:

The AFDC program is based on a scheme of cooperative federalism. . . . It is financed largely by the Federal Government on a matching fund basis, and is administered by the States. States are not required to participate in the program, but those which desire to take advantage of the substantial federal funds available for distribution to needy children are required to submit an AFDC plan for the approval of the Secretary of Health, Education, and Welfare (HEW). . . .

. . . There is no question that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program.⁴⁸

King's holding that a state may not enforce AFDC eligibility requirements which contravene the provisions of the Social Security Act⁴⁹ has spawned a line of entitlement cases invalidating various attempts of the states to minimize the number of eligible recipients by adding to the federal statutory eligibility scheme. In 1970, the Court, in *Lewis v. Martin*,⁵⁰ held invalid a California statute presuming the income of a MARS (adult male person assuming the role of spouse to the mother although not legally married to her) to be available to a child when determining whether such a child was "needy."⁵¹ Relying directly upon *King*, the Court upheld an HEW regulation⁵² defining the Social Security Act's use of the term "parent" which is contrary to the California statute.⁵³ The next year, a unanimous Court in *Townsend v. Swank*⁵⁴ disapproved an Illinois statute which denied AFDC eligibility to college students between the ages of 18 and 21 years, while allowing eligibility to vocational or high school students in the same age range.⁵⁵ The Social Security Act specifically states that the program for 18-21 year olds includes students regularly attending a school, college or university.⁵⁶ Thus, the Illinois statute and regulation could not stand under the supremacy clause.

46. *Id.* at 334.

47. *Id.* at 316.

48. *Id.* at 316, 318-19 (citations omitted).

49. This decision alone invalidated similar "substitute father" provisions in 18 states and Washington, D.C., in addition to Alabama. *King v. Smith*, 392 U.S. 309, 337-38 (1968) (appendix to Douglas, J., concurring opinion).

50. 397 U.S. 552 (1970).

51. *Id.* at 560.

52. 45 C.F.R. § 233.90 (1972).

53. Note that Chief Justice Warren and Justices Black and Burger dissented, preferring to await the outcome of pending negotiations between HEW and the State of California. 397 U.S. 552, 560, 563 (1970) (dissenting opinions).

54. 404 U.S. 282 (1971).

55. *Id.* at 283-85.

56. 42 U.S.C. § 606(a)(2)(B) (1970).

The continuing vitality of this line of cases is demonstrated by a 1972 case, *Carleson v. Remillard*.⁵⁷ The Court, again unanimous, held a California regulation, defining a parent's absence from the home for military duty as a temporary absence which would not qualify a dependent child for AFDC assistance, to be in violation of the Social Security Act and HEW regulations. The Social Security Act defines a dependent child as one whose parent is "absent" from the home⁵⁸ and the HEW regulation interpreting the Act includes absence for military duty.⁵⁹ Thus it is clear that the states may not vary their AFDC eligibility requirements from the federal standard.⁶⁰

SHAPIRO V. THOMPSON AND THE CONSTITUTIONAL RIGHT
TO AFDC BENEFITS

The second major Supreme Court welfare decision, *Shapiro v. Thompson*,⁶¹ held that state residence requirements for AFDC recipients are unconstitutional. This entitlement case was decided in 1969 on equal protection grounds.⁶²

The fourteenth amendment provides that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws."⁶³ In the first Supreme Court interpretation of this clause in 1873, Justice Miller said, "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."⁶⁴ Since that time a long series of decisions has disproved Justice Miller's statement and upheld the proposition that the clause forbids "invidious" distinctions under color of law among citizens of any state.⁶⁵ Some of the distinctions since held to be in violation of the clause are those discriminating against other (than black) races,⁶⁶ malapportioning voting districts,⁶⁷ de-

57. 406 U.S. 598 (1972).

58. 42 U.S.C. § 606(a) (1970).

59. 45 C.F.R. § 233.90(c)(1)(iii) (1972).

60. *E.g.*, *Lopez v. Vowell*, 471 F.2d 690 (5th Cir.), *cert. denied*, — U.S. —, 93 S. Ct. 1903, 36 L. Ed. 2d 401 (1973) (Texas regulation denying aid to caretaker of needy dependent children if caretaker is living with spouse violates 42 U.S.C. § 606 (1970); *Meyers v. Juras*, 327 F. Supp. 759 (D. Ore.), *aff'd mem.*, 404 U.S. 803 (1971) (State may not require mother to cooperate in obtaining support from absent father as a condition of eligibility for AFDC).

61. 394 U.S. 618 (1969).

62. Note that Chief Justice Warren's dissent in this case, joined by Justice Black, strongly indicated that two of the leaders of constitutional criminal justice reform were unwilling to venture into similar territory to protect the rights of welfare recipients. *Id.* at 644-45.

63. U.S. CONST. amend. XIV, § 1.

64. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1873).

65. *Jones v. State Board of Educ.*, 279 F. Supp. 190 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969), *petition for cert. dismissed*, 397 U.S. 31 (1970).

66. *Yick Wo v. Hopkins*, 18 U.S. 356 (1886).

67. *Baker v. Carr*, 369 U.S. 186 (1962).

nying newspaper staff access to public records,⁶⁸ requiring a loyalty oath of new employees only,⁶⁹ and requiring payment of a poll tax as a prerequisite to voting.⁷⁰ Equal protection decisions recognize the necessity and the right of a state to classify its citizens for various purposes,⁷¹ and to treat some differently from others.⁷² The usual method of determining the validity of such a classification has been to see if it meets the test of including all (and only those) persons who are similarly situated with respect to the purpose of the law.⁷³

Two standards of review have evolved from this rationale. The first, the "traditional" standard, requires only that there be a rational justification for the challenged action and that it create no "invidious" distinction.⁷⁴ When invoking the "traditional" standard, a court will not inquire beyond the state's assertion of rationality into its factual bases.⁷⁵ The second standard of review, a strict standard requiring the state to justify its actions in terms of a "compelling state interest" has been invoked where the challenged action is based upon an inherently "suspect" classification, such as race or alienage,⁷⁶ or where the classification inhibits the exercise of a fundamental right.⁷⁷ The strict standard is a much more active one, and looks to the underlying purpose of the action in question.

Shapiro struck down the one-year residence requirements of the Delaware, Pennsylvania, and the District of Columbia welfare assistance laws. The Court, speaking through Mr. Justice Brennan, held the rationale of the statute to be impermissible, and the class of people who are indigent to constitute a "suspect classification," invoking a strict standard of review of contested legislation requiring a compelling state interest to be shown in justification of such a rule.⁷⁸ The *Shapiro* decision appeared to extend the area in which the Court would invoke strict review.⁷⁹ Indigents as a class had not previously been considered a "suspect" category, and the "right" to welfare benefits previously had not been recognized as fundamental.

68. *Providence Journal Co. v. McCoy*, 94 F. Supp. 186 (D.R.I. 1950), *aff'd*, 190 F.2d 760 (1st Cir.), *cert. denied*, 342 U.S. 894 (1951).

69. *Hosack v. Smiley*, 276 F. Supp. 876 (D. Colo. 1967), *aff'd*, 390 U.S. 744 (1968).

70. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

71. *Borden's Farm Prods. Co. v. Baldwin*, 293 U.S. 194 (1934).

72. *James v. Valtierra*, 402 U.S. 137, 142 (1971).

73. *See New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573 (1938). *See also, Goesart v. Cleary*, 74 F. Supp. 735 (E.D. Mich. 1947), *aff'd*, 335 U.S. 464 (1948).

74. *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

75. *United States v. Constantine*, 296 U.S. 287, 298-99 (1935) (Cardozo, J., dissenting); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130 (1810).

76. *See Korematsu v. United States*, 323 U.S. 214, 216 (1944).

77. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 667 (1966).

78. *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969).

79. The strict standard was applied despite the dissents of Chief Justice Warren and Justices Black and Harlan. 394 U.S. 618, 644, 655 (1969).

The Right to Due Process—Goldberg v. Kelly

The notion of a "right" to welfare benefits was furthered, but was not expressly held to be such, in the next major "welfare" case, *Goldberg v. Kelly*,⁸⁰ decided in early 1970. Drawing from the writings of Professor Reich,⁸¹ Justice Brennan opined that "[i]t may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.'"⁸² Thus rejecting the contention that welfare benefits are a privilege and not a right, the Court held that prior to a hearing in which the recipient has the opportunity to be represented by counsel, to present oral arguments and evidence, and to cross-examine witnesses is a violation of due process.⁸³ In so holding, the Court applied the traditional "balancing" test of due process which is closely akin to the compelling interest test of equal protection. In both tests, the court has wide discretion to determine whether the interests of the state outweigh the interests of the individual in deciding whether equal protection or due process have been violated.⁸⁴ Subsequent cases clearly show the limited application the Burger Court is willing to make of *Shapiro* and *Kelly* to the causes of welfare recipients.

The "Right" to Freedom from Unwarranted Search—Wyman v. James

First, in *Wyman v. James*,⁸⁵ Justice Blackmun, writing for the Court, denied Ms. James' assertion that New York caseworker visitation statutes and regulations were unconstitutional, finding them not in violation of the fourth or fourteenth amendments. The Court's thesis was that, welfare payments being a gratuity and not a right, compulsory caseworker visits do not violate due process—there being no due process right involved.⁸⁶ Further, the Court held that there was no fourth amendment search and seizure violation since the visitation in itself is not forced or compelled, and that the beneficiary's denial of permission is not a criminal act.⁸⁷ If consent to the visitation is withheld, no visitation takes place. The only result of this course of action would be termination (or refusal) of a "gratuity," *i.e.*, AFDC assistance.⁸⁸

80. 397 U.S. 254 (1970).

81. Reich, *Individual Rights & Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965); Reich, *The New Property*, 73 YALE L.J. 733 (1964).

82. *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970).

83. *Id.* at 264. *Wheeler v. Montgomery*, 397 U.S. 280 (1970), the companion case to *Goldberg v. Kelly*, reached the same result with regard to Old Age Assistance (OAA) benefits.

84. Note that the new Chief Justice and Justices Black and Stewart dissented from the decision in *Goldberg v. Kelly*, 397 U.S. 254, 271, 282, 285 (1970).

85. 400 U.S. 309 (1971).

86. *Id.* at 314.

87. *Id.* at 317-18. *Quaere*: Would the plaintiffs have prevailed had they asserted a statutory violation, *i.e.*, the home visit requirement establishes an eligibility requirement beyond that of "need" and "dependency" as defined by the Social Security Act; see *Townsend v. Swank*, 404 U.S. 282 (1971); *Lewis v. Martin*, 397 U.S. 552 (1970); *King v. Smith*, 392 U.S. 309 (1968).

88. *Wyman v. James*, 400 U.S. 309, 317-18 (1971).

This reasoning apparently removed the case from the mandate of *Camara v. Municipal Court*⁸⁹ where the Court held the fourth amendment applicable to administrative searches of the home.⁹⁰ In *Camara*, the refusal of the search itself was a criminal act.⁹¹ The majority opinion in *James* made light of the fact that a recipient or potential recipient could be criminally prosecuted if the caseworker making the search (visit) found evidence of fraud⁹² or child abuse.

Both Justices Douglas and Marshall (Justice Brennan joining) dissented vigorously. In comparing the plight of Ms. James to that of a businessman in *See v. City of Seattle*,⁹³ Douglas stated that, "It is a strange jurisprudence indeed which safeguards the businessman at his place of work from warrantless searches but will not do the same for a mother in her *home*,"⁹⁴ and Marshall:

I find no little irony in the fact that the burden of today's departure from principled adjudication is placed upon the lowly poor. Perhaps the majority has explained why a commercial warehouse deserves more protection than does this poor woman's home. I am not convinced⁹⁵

Perhaps the only remaining vitality of *Shapiro* is the narrow area of residence requirements for indigents desiring aid.⁹⁶ It is evident that a view of welfare benefits as an inherent or property right (*Shapiro* and *Kelly*) which should be accorded the active review of the "compelling interest" equal protection test (*Shapiro*) will not be seen again in opinions of the present court except in dissent.

CHALLENGES TO STATE-DETERMINED LEVELS OF AFDC BENEFITS

ROSADO V. WYMAN *et al.*

The more narrow application of constitutional rights in the *James* case is demonstrative of the prevailing attitude of the Court in the last series of cases

89. 387 U.S. 523 (1967).

90. *Id.* at 528-34.

91. *Id.* at 527.

92. *Wyman v. James*, 400 U.S. 309, 323 (1971).

93. 387 U.S. 541 (1967) (companion case to *Camara*).

94. *Wyman v. James*, 400 U.S. 309, 331 (1971) (Douglas, J., dissenting) (dissent's emphasis).

95. *Id.* at 347 (Marshall, J., dissenting).

96. Later in the same year as the *James* holding, a further decision was reached with regard to citizenship and alien residence requirements for assistance in welfare programs other than AFDC. In *Graham v. Richardson*, 403 U.S. 365 (1971), a unanimous Court held, under the compelling interest test, both Arizona and Pennsylvania citizenship/alien residence requirements to be in violation of equal protection. *Id.* at 376. In view of his attitude as expressed in *James*, however, Justice Blackmun's statement for the Court in *Graham v. Richardson* that "this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege'" is astonishing. *Id.* at 374.

to be discussed. These decisions are founded on the frequently quoted lines of *King v. Smith*.⁹⁷

There is no question that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program.⁹⁸

These cases deal primarily with attacks upon the *substance* of the laws and regulations of the welfare system, *i.e.*, state methods of determining the various standards of need and levels of AFDC assistance. In 1967, Congress amended the AFDC provisions of the Social Security Act to require state plans to provide:

[B]y July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted.⁹⁹

Thus, the "considerable latitude" of each state in setting need standards and benefit levels appeared to have been somewhat narrowed by the Congress. It remained for the Court to determine just what Congress meant to accomplish via the cost of living provision. In the following cases, state statutes and policies setting out levels of need and benefits are attacked on the bases of being in violation of the Social Security Act and in violation of the equal protection clause of the fourteenth amendment. The first two cases in this series, *Rosado v. Wyman*¹⁰⁰ and *Dandridge v. Williams*,¹⁰¹ were decided on the same day, April 6, 1970. In the first case, *Rosado*, the constitutional question was rendered moot while still at the district court level,¹⁰² and the Supreme Court dealt only with the New York statute. Although striking down the New York statute, which substituted a flat grant and maximum allowance system for a previous system which had made allowances for special needs, as having "in effect, impermissibly lowered its standard of need by eliminating items that were included prior to the enactment of § 402,"¹⁰³ Justice Harlan, writing for the majority, also drew some pertinent conclusions as to Congress' purpose in passing the cost of living provision. Based on very sparse legislative history, he concluded that Congress did not intend to effect an actual increase in AFDC benefits,¹⁰⁴ but that Congress' twofold purpose was

97. 392 U.S. 309 (1968).

98. *Id.* at 318-19 (citations omitted).

99. 42 U.S.C. § 602(a)(23) (1970).

100. 397 U.S. 397 (1970).

101. 397 U.S. 471 (1970).

102. 304 F. Supp. 1350, 1354, 1356 (E.D.N.Y. 1969).

103. 397 U.S. 397, 416 (1970). "§ 402" referred to in the quotation is codified at 42 U.S.C. § 602(a)(23) (1970).

104. *Rosado v. Wyman*, 397 U.S. 397, 413 (1970).

[f]irst, to require States to face up realistically to the magnitude of the public assistance requirement and lay bare the extent to which their programs fall short of fulfilling actual need; second, to prod the States to apportion their payments on a more equitable basis. Consistent with this interpretation of § 402(a)(23), a State may, after recomputing its standard of need, pare down payments to accommodate budgetary realities by reducing the percent of benefits paid or switching to a percent reduction system, but it may not obscure the *actual* standard of need.

. . . .
 . . . It has the effect of requiring the States to recognize and accept the responsibility for those additional individuals whose income falls short of the standard of need as computed in the light of economic realities and placing them among those eligible for the care and training provisions.¹⁰⁵

Justice Harlan had previously discussed maximum benefits and ratable reductions¹⁰⁶ as being within the statute, but with reference to ratable reductions he concluded that “[i]n the event that there is some income that is first deducted, the ratable reduction is applied to the amount by which the individual or family income falls short of need.”¹⁰⁷

Congress Did Not Abolish Maximum Grants—Dandridge v. Williams

In *Dandridge v. Williams*,¹⁰⁸ the Court moved on to direct consideration of the legality of maximum grants. Under challenge in this case was a Maryland regulation which imposed a maximum on the amount of assistance payable to any one family, regardless of its size. The district court first held that this regulation violated both the Social Security Act and the equal protection clause.¹⁰⁹ After reconsideration on motion, the district court reversed its holding as to the statutory violation only.¹¹⁰ Williams argued that the per-family ceiling on assistance denied aid to eligible children contrary to the requirement of the Social Security Act that “aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals,”¹¹¹ an argument similar to that approved in *King*. The Court in its opinion by Justice Stewart, however, discussed the above-quoted “great latitude” dictum of *King*¹¹² and then proceeded to assert that the major emphasis of the AFDC statutes is on the family unit rather than the individual child.¹¹³ It concluded that the effect of the Maryland regulation is

105. *Id.* at 412-13 (court’s emphasis).

106. A “ratable reduction” is a state method of meeting its budgetary limitations on the total amount of assistance actually paid by setting benefit levels at a stated percentage of the standard of need. *Rosado v. Wyman*, 397 U.S. 397, 409 & n.13 (1970).

107. *Id.* at 409 n.13.

108. 397 U.S. 471 (1970).

109. *Williams v. Dandridge*, 297 F. Supp. 450 (D. Md. 1968).

110. *Id.* at 451.

111. 42 U.S.C. § 602(a)(10) (1970) (emphasis added).

112. *Dandridge v. Williams*, 397 U.S. 471, 478 (1970).

113. *Id.* at 479.

that all children, even those in very large families, receive some aid and that the federal statute requires nothing more.¹¹⁴

In deciding the equal protection issue, the Court relegated *Shapiro* and its strict standard of review to a footnote where it was summarily distinguished on the basis that it "found state interference with the constitutionally protected freedom of interstate travel."¹¹⁵ With *Shapiro* thus brushed aside, the Court applied the traditional "rational relation" test and declined to inquire into the governmental interests which Maryland had urged in justification of its regulation. The Court recognized that this traditional equal protection standard had been enunciated in cases involving state regulation of business or industry, and that "[t]he administration of public welfare assistance, by contrast, involves the most basic economic needs of impoverished human beings."¹¹⁶ Even so, the strict standard of review was reserved to cases involving a classification "infected with a racially discriminatory purpose or effect"¹¹⁷ or one which interferes "with a constitutionally protected freedom."¹¹⁸ That the *Dandridge* decision effectively displaced the *Shapiro* rationale is obvious. The next major case in this group, *Jefferson v. Hackney*,¹¹⁹ may have even abandoned the *Dandridge* concession of affording strict equal protection review to classifications "infected with a racially discriminatory purpose or effect."¹²⁰

States May Pay Benefits Below the Standard of Need; States Need Not Maximize Eligibility For Benefits—Jefferson v. Hackney

The *Jefferson* case involves Texas' method of complying with the cost of living provision of the 1967 amendments to the Social Security Act. The revised Texas policies made an upward revision of the standard of need in all four categories of public assistance (AFDC, OAA, APTD, AB), and abolished maximum grants for AFDC only.¹²¹ To maintain expenditures within the Texas constitutional maximum, a percentage reduction factor is applied after computation of the standard of need and prior to the subtraction of non-exempt income.¹²² The petitioners asserted that Texas' specific applica-

114. *Id.* at 481.

115. *Id.* at 484 n.16.

116. *Id.* at 485.

117. *Id.* at 485 n.17.

118. *Id.* at 484 n.16.

119. 406 U.S. 535 (1972). A forewarning of the probable outcome of *Jefferson* was given by *Ward v. Winstead*, 314 F. Supp. 1225 (N.D. Miss. 1970), *appeal dismissed*, 400 U.S. 1019 (1971), which held, *inter alia*, that a 70 percent reduction factor used by Mississippi to compute AFDC benefits does not violate the Social Security Act, and that application of a reduction factor to AFDC while paying 100 percent to recipients in adult categories does not violate equal protection. *Id.* at 1233, 1238.

120. *Dandridge v. Williams*, 397 U.S. 471, 485 n.17 (1970).

121. Texas State Dep't of Public Welfare, Executive Letter No. 430, Feb. 28, 1969.

122. *Jefferson v. Hackney*, 406 U.S. 535, 537, 539 (1972).

tion of the reduction factor violated the Social Security Act and equal protection, and that the use of different reduction factors for the different programs also violated equal protection.¹²³ Petitioners proposed an alternative application of the reduction factor which would cause more families to be eligible for assistance. The following examples illustrate the differences between the Texas method of computing grants and the petitioners' proposed alternative method, assuming a family with an established monthly need of \$200, and with \$150 in non-exempt income:

TEXAS PLAN		PETITIONERS' PROPOSAL	
(AFDC) Family need	\$200	(AFDC) Family need	\$200
Application of 25% reduction factor	× .75	Less non-exempt income	—150
Equals 75% of need	\$150	Unmet need	\$ 50
Less non-exempt income	150	Application of 25% reduction factor	× .75
Unmet need (cash payment)	\$ 0	Equals 75% of unmet need (cash payment)	\$37.50

The above example points out petitioners' contention that adoption of their proposal would increase the number of families eligible for *some* cash assistance, which carries with it eligibility for important services (*e.g.* Medicaid, child care, family planning) not available to families who do not qualify for cash assistance.

Mr. Justice Rehnquist delivered the majority opinion.¹²⁴ In rejecting petitioners' claim that the Texas method of applying a reduction factor to the state-determined standard of need violates the Social Security Act, the Court compared the Texas application of the reduction factor with petitioners' proposal, recognized that the Texas system operates as a disincentive to bettering one's financial position in opposition to the intent of the Social Security Act,¹²⁵ and determined that Texas has a choice between lowering all benefits (increasing the reduction factor) and providing incentives to increase earned income.¹²⁶ The majority termed the choice as one between two "competing policy considerations" and determined that "[s]triking the proper bal-

123. At the time the Supreme Court was considering *Jefferson*, Texas was paying OAA at 100 percent of need, AB and APTD at 95 percent, and AFDC at 75 percent of need, in accordance with Texas State Dep't of Public Welfare, Forms Manual, Form 36, FMR 402, effective Sept. 1, 1969. Texas is presently paying all adult categories at 100 percent of need while AFDC remains at 75 percent in accordance with Texas State Dep't of Public Welfare, Forms Manual, Form 36, FMR 567 effective Oct. 1972. In March of 1973, Texas instituted an AFDC single figure needs allowance for each family size, eliminating the individual calculation of the various needs of each family. A maximum grant for AFDC families was re-established at the same time. Texas State Dep't of Public Welfare, Executive Letter No. 564 Dec. 11, 1972 and Supp. No. 1, Jan. 18, 1973. The single figure needs allowance has been alleged to be in violation of 42 U.S.C. § 602(a)(23) (1970) in a class action suit, Houston Welfare Rights Organization, Inc. v. Vowell, C.A. No. 73-H-296 (S.D. Tex., filed Mar. 7, 1973).

124. Chief Justice Burger and Justices Blackmun, Powell, and White joined in the majority opinion. *Jefferson v. Hackney*, 406 U.S. 535 (1972). (Douglas & Marshall, JJ., dissenting, joined by Brennan & Stewart, JJ.).

125. *Id.* at 541.

126. *Id.* at 541.

ance between [them] is of course not the function of this Court."¹²⁷ After quoting the *King* "latitude" dictum,¹²⁸ the Court concluded:

So long as the State's actions are not in violation of *any specific provision* of the Constitution or the Social Security Act, appellants' policy arguments must be addressed to a different forum.¹²⁹

The Court denied petitioners' claim that the Social Security Act mandated an increase in benefits, citing *Rosado*, and again, the *King* discussion.¹³⁰

The opinion then dealt with another aspect of the petitioners' statutory challenge, based upon an interpretation of *Rosado* "that Congress also intended [the cost of living provision] to increase the total number of recipients of AFDC, so that more people would qualify for the subsidiary benefits that are dependent on receipt of AFDC cash assistance."¹³¹ (Petitioners' proposed alternative would have accomplished this goal.) The Court denied this claim on the ground that the legislative history (admittedly meager) of the Act indicated an opposite intention,¹³² thus also severely limiting the effect of the *Rosado* holding as to legislative intent.

In denying petitioners' claim of violation of the equal protection clause, *Dandridge* provided the rationale for refusing a strict standard of review in welfare cases, and the Court in *Jefferson* further found the racial discrimination claim¹³³ put forth by the petitioners as unproven and therefore *not subject to strict review*.¹³⁴

Although he did not find it necessary to reach the constitutional issue to formulate his dissent, Mr. Justice Marshall very pointedly indicated his disagreement with the majority treatment of this issue:

127. *Id.* at 541.

128. *Id.* at 541.

129. *Id.* at 541 (emphasis added).

130. *Id.* at 542.

131. *Id.* at 543.

132. *Id.* at 543-44.

133. *Id.* at 546. The following statistics were included in the opinion:

<i>Program</i>	<i>Year</i>	<i>Percentage of Negroes and Mexican-Americans</i>	<i>Percentage of White-Anglos</i>	<i>Number of Recipients</i>
OAA	1969	39.8	60.2	230,000
	1968	38.7	61.3	
	1967	37.0	63.0	
APTD	1969	46.9	53.1	4,213
	1968	45.6	54.4	
	1967	46.2	53.8	
AB	1969	55.7	44.3	14,043
	1968	54.9	45.1	
AFDC	1969	87.0	13.0	136,000
	1968	84.9	15.1	
	1967	86.0	14.0	

Id. at 548 n.17.

134. *Id.* at 548-49.

I do not subscribe in any way to the manner in which the Court treats the [constitutional] issue.

. . . .
 . . . In *Dandridge v. Williams, supra*, on which the Court relies for the proposition that strict scrutiny of the State's action is not required, the Court never faced a question of possible racial discrimination The Court reasons backwards to conclude that because appellants have not proved racial discrimination, a less strict standard of review is necessarily tolerated. In my view, the first question that must be asked is what is the standard of review and the second question is whether racial discrimination has been proved under the standard. It seems almost too plain for argument that the standard of review determines in large measure whether or not something has been proved.¹³⁵

The two key aspects of this decision are: (1) to uphold a statutory claim against a state's AFDC provisions, it must be shown that the state's actions violate a *specific provision* of the Social Security Act; and (2) *racial discrimination must be proven* in order to obtain a strict review of a state's action with reference to the equal protection clause. The philosophy of the majority of the Court now seems to be one of removing itself as completely as possible from the "welfare rights" issues.¹³⁶

CONCLUSION

As this survey of Supreme Court decisions indicates, a nucleus of rights of the poor has been established through AFDC litigation. The entitlement cases, led by *King v. Smith*,¹³⁷ have firmly limited the eligibility requirements for AFDC to those set out by federal statute, namely, need and dependency. The *Goldberg v. Kelly*¹³⁸ decision requires that persons declared ineligible for benefits be accorded the due process right to an evidentiary hearing prior to the termination of benefits.

The net effect of the first 5 years of Supreme Court determination of welfare rights issues may be measured by weighing the later decisions against the earlier ones. In all of these controversies, the basic conflict is between the claim of the poor to a right to state-provided subsistence, and the claim of the state to the right of allocating its resources according to its own priorities. Within this context, the major decisions indicate first an advance, and then a retreat, in terms of the cause of the poor.

135. *Id.* at 575-76 (dissenting opinion).

136. The Court has since vacated and remanded *Villa v. Hall*, 406 U.S. 965, *vacating and remanding mem.* 490 P.2d 1148 (Cal. 1972), *on remand*, 500 P.2d 887 (Cal. 1972), which had held a reduction scheme similar to Texas' (although deductions are made from a statutory maximum rather than from a ratably reduced standard of need) to be in violation of 42 U.S.C. § 602(a)(23) (1970); see Note, 4 ST. MARY'S L.J. 111 (1972). See also, *Goodwin v. Wyman*, 330 F. Supp. 1038 (S.D.N.Y. 1971), *aff'd mem.*, 406 U.S. 964 (1972).

137. 392 U.S. 309 (1968).

138. 397 U.S. 254 (1970).

Under the entitlement decisions, the poor are assured of the right to eligibility for assistance provided by federal statute, without interference from state restrictions. The states may not limit their AFDC expenditures through means designed to deny aid to certain categories of needy and dependent children. Under these decisions, however, there is no assurance to the poor that their right to assistance will not be restricted by future acts of Congress.

*Shapiro v. Thompson*¹³⁹ introduced two crucial constitutional propositions; the status of the poor as a "suspect classification" when an equal protection issue is raised and the notion of the right to subsistence as a fundamental right. *Goldberg v. Kelly*¹⁴⁰ furthered the fundamental right thesis, and the states were limited in their methods of dealing with the poor. Later cases have, however, dealt harsh blows to these emerging constitutional concepts.

Some more-recent cases have also nullified any positive effect Congress may have intended for the cost of living provision of the 1967 amendments to the Social Security Act. *Rosado v. Wyman*,¹⁴¹ while holding that states must, under this provision, raise need standards, negated any benefit of this holding by declaring that states were under no obligation to raise *payment* levels, and indeed could lower them if they would only perform the mechanical function of raising need levels before reducing benefits on a percentage basis. *Dandridge v. Williams*¹⁴² capitalized on the maximum grant reference in the cost of living provision to settle the long disputed legality of maximum grants under the federal requirement of providing aid to all eligible individuals. The states may now freely use grant maximums to limit their welfare expenditures. *Jefferson v. Hackney*¹⁴³ completed the task of rendering the provision meaningless, in terms of its being of any tangible benefit to the poor. Under the *Jefferson* decision, the states expressly may manipulate their calculations of need and benefits in a manner that will reduce the number of persons statutorily eligible for AFDC. Clearly, there are no effective federal restrictions on state determinations of benefit levels.

Dandridge and *Jefferson*, along with *Wyman v. James*¹⁴⁴ were also important decisions with reference to the prior advances in constitutional protection of the rights of the poor. In *Dandridge*, under the gratuity theory, the compelling interest test of equal protection was held to be inapplicable to poor people trying to maintain themselves at a bare subsistence level, except in cases of racial discrimination. In *Jefferson* the Court regressed even further than it had in *Dandridge*, refusing to apply the compelling interest

139. 394 U.S. 618 (1969).

140. 397 U.S. 254 (1970).

141. 397 U.S. 397 (1970).

142. 397 U.S. 471 (1970).

143. 406 U.S. 535 (1972).

144. 400 U.S. 309 (1971).

test of equal protection to discrimination among different categories of poor people and to allegations of racial discrimination. With regard to racial discrimination, *overt* discrimination must be proved or there is no necessity to inquire beyond a rational basis for the state's action. *James*, which treated no statutory issues¹⁴⁵ was openly decided on the basis that welfare benefits are a gratuity. The rationale of *James* is clearly in conflict with the principle underlying the *Kelly* decision.

What then is the basis for welfare benefits? Is it a fundamental right to subsistence? Or is it a gratuity which may be bestowed by statute? It appears that the basic concept of entitlement to subsistence as an inherent or property right glimmered briefly in *Shapiro* and *Kelly*, but faded in the face of the strong gratuity concept underlying both the *Dandridge* and *James* decisions. Perhaps it will reappear at some future time, but for the present, it is expected that the theory will be advanced only in dissent.

145. See *Quaere* note 86 *supra*.