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The Choice between Living with Family Members and Eligibility for Government Benefits Based on Need: A Constitutional Dilemma

Lucy Billings

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I. INTRODUCTION

1986 is a year of hunger. Although measured civilian unemployment is at its lowest point in the past five years, more than eight million members of the work force remain out of work. Many more individuals are no longer eligible for unemployment benefits. Hundreds of thousands, perhaps millions, of Americans are homeless, wandering the streets in search of temporary heat, shelter, and food. Thousands more have recently lost their homes and belongings in floods. For all these men and women, and for all their children, hunger and malnutrition are very real facts of life.

The major response of the United States government to hunger and malnutrition is the Food Stamp Program. Every month the program helps over twenty million Americans obtain a minimally adequate diet. Food stamp allotments are determined on the basis of a "household," meaning an individual or group of individuals who live together and who customarily purchase and prepare food together for home consumption. Because a group of individuals will receive more food stamps if it consists of several households rather than just one, Congress has taken steps to prevent a group of individuals from arbitrarily defining itself as several households when in fact only one household exists. Among these steps is 7 U.S.C. section 2012(i)(2), which provides that "parents and children, or siblings, who live together shall be treated as a group of individuals who customarily purchase and prepare meals together

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for home consumption even if they do not do so."[1] Although the statute allows unrelated groups to obtain separate household status while living together and thereby to obtain greater benefits,[2] the statute makes no similar exception for parents and children or siblings.

Section 2012(i)(2) has been challenged in New York,[3] Pennsylvania,[4] Florida,[5] and Texas.[6] In the Texas case, *Lyng v. Castillo*, the United States District Court ruled that the statute unjustifiably discriminates against families and enjoined the United States Department of Agriculture from enforcing the statute against the plaintiffs. The Supreme Court took jurisdiction of the government's direct appeal from the district court and reversed. The following discussion of the statute's background and the constitutional and other legal issues that it raises will reveal that the Supreme Court's reversal was based on superficial and shortsighted analysis. It will also encompass issues not raised in *Castillo*.

The discussion of the constitutional issues raised by the statute includes analysis of the equal protection claims that arise from the statute's discrimination based on family association. This analysis focuses on consideration of the fundamental nature of the individual interest involved and the application of the proper level of scrutiny, concluding that section 2012(i)(2) can pass neither the heightened level of scrutiny required in cases involving infringement of a fundamental right nor the less exacting "rational basis" test. In addition to discriminating on the basis of family association, the statute imposes an irrebuttable presumption that infringes on due process rights. The statute also imposes penalties based on family association, thus infringing on the first amendment rights to family association and privacy. The discussion concludes with examination of the statute's delegation of authority to private parties and the resulting violation of the doctrine of separation of powers.

In addition to these constitutional issues, problems of statutory integrity plague section 2012(i)(2). An examination of the inconsistencies and seemingly irreconcilable conflicts between section 2012(i)(2) and other statutes implementing government entitle-

1. 7 U.S.C. § 2012(i)(2) (1982).
2. *Id.*; 7 C.F.R. § 273.1(a)(1) (1985).
3. Moody v. Lyng, No. 86 Civ. 3088 (S.D.N.Y. filed Mar. 24, 1986).
4. Robinson v. Block, No. 84-4229 (E.D. Pa. filed Mar. 25, 1985).
5. Tripp v. Block, No. 85-1203-Civ.-T-17 (M.D. Fla. filed July 25, 1985).
6. Lyng v. Castillo, 106 S. Ct. 2727 (1986).

ment programs suggests possible interpretations that will mitigate its harsh effects in some situations.

This Article concludes that the statute not only does great harm to those most desperately in need of aid but also fails to achieve its purposes of preventing fraud and reducing administrative burdens. Less hurtful means of accomplishing these goals must be available.

II. BACKGROUND

A. *The Challenged Statute and Related Provisions*

The Food Stamp Program, established pursuant to the Food Stamp Act of 1977, as amended,[7] is designed to "permit low-income households to obtain a more nutritious diet through normal channels of trade by increasing food purchasing power for all eligible households that apply for participation."[8] By establishing the Food Stamp Program, Congress intended to alleviate the "hunger and malnutrition" that attends the "limited food purchasing power of low-income households."[9]

The Food Stamp Program is a cooperative state-federal program in which the federal government issues food stamps to states that choose to participate. Each state, in turn, distributes food stamps to eligible households that apply for assistance.[10] The federal government reimburses a participating state for at least fifty percent of the state's administrative costs and pays one hundred percent of benefit costs.[11]

The maximum amount of benefits that an eligible household is entitled to receive under the Food Stamp Program is an allotment equal to the cost of the "Thrifty Food Plan,"[12] reduced by assumed economies of scale according to household size. The maximum allotment as of October 1986 for a household of four was seventy-five cents per person per meal.[13] For households that have some income, the maximum food stamp allotment is reduced by thirty percent of household income, with additional statutory

7. 7 U.S.C. §§ 2011-29 (1982).
8. *Id.* § 2011.
9. *Id.*
10. *Id.* §§ 2011-16.
11. *Id.* § 2025(a).
12. *Id.* § 2012(o).
13. 51 Fed. Reg. 36,043, 36,044 (1986).

deductions.[14]

The Thrifty Food Plan is the least costly of four food plans developed by the United States Department of Agriculture. The budget constraints of the Thrifty Food Plan are those determined by the Department of Agriculture in its Economy Food Plan. The Department describes is Economy Food Plan as a "nutritionally adequate diet for use when the cost of food must be lower than the average of food expenditure of low-income families. It is essentially for emergency use."[15] The Federal Agriculture Research Service of the Department of Agriculture has acknowledged that food stamp allotments are inadequate to assure nutritional adequacy among recipients.[16]

The statute challenged in *Lyng v. Castillo* and its companion cases mentioned above[17] is a central provision of this program, which is "essentially for emergency use" yet supports twenty million Americans. The statute has been challenged because it limits eligibility for food stamps when related adults and their families are thrown together by economic necessity or natural disaster.

Participation in the Food Stamp Program is "limited to those households whose income or other financial resources, held singly or in joint ownership, are determined to be a substantial limiting factor in permitting them to obtain a more nutritious diet."[18] The Food Stamp Act defines "household" in economic terms. A household is "an individual . . . or group of individuals who live together and customarily purchase food and prepare meals together for home consumption."[19] All members of a household must apply for food stamps as a unit and must verify the information needed for application purposes. In determining eligibility and benefit levels, the income and resources of all household members are pooled. Food stamp benefit levels are then calculated, and the requisite amount of stamps is issued to the household members as a unit.[20]

Under the Food Stamp Act, individuals are free to choose their own living arrangements and to share food expenses and cooking responsibilities with whomever they wish. They may estab-

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14. 50 Fed. Reg. 36,641-42 (1985).
15. 45 Fed. Reg. 21,998, 22,000 (1980).
16. *Id.* at 22,001.
17. *See supra* notes 3-5.
18. 7 U.S.C. § 2014(a).
19. *Id.* § 2012(i).
20. *Id.* §§ 2014, 2020(e)(2)-(11), (15), (16), (20); 7 C.F.R. § 273.2 (1985).

lish food stamp households separate from other residents of their homes by buying and cooking food separately.[21] The Department of Agriculture's regulations establish a procedure by which individuals are to verify their household composition:

> *Household Composition.* State agencies shall verify factors affecting the composition of a household, if questionable. Individuals who wish to be a separate household from those with whom they reside shall be responsible for proving a claim that they are a separate household to the satisfaction of the State agency. Individuals described in Section 273.1(a)(1)(iv), who wish to be a separate household, shall also be responsible for obtaining the cooperation of the individuals with whom they reside in providing necessary income information to the State agency, and for providing (at State agency request) a physician's statement that they cannot purchase and prepare their own meals.[22]

Despite this verification procedure, section 2012(i)(2) conclusively presumes that siblings (even if the siblings are adults with their own families) or parents and children (even if the children are adults with their own families) that have the same residence are a single household for food stamp purposes. This presumption holds even if the separate families do not purchase and prepare food together, do not or even cannot, under law, intermingle income,[23] and cannot claim an obligation of support. In contrast, a group of unrelated families residing together is not subject to this irrebuttable presumption.

In effect, the statutory presumption that siblings and that parents and children comprise food stamp households vests such persons with veto power over the eligibility of their relatives for food stamp assistance. When even one brother, sister, child, or parent refuses to cooperate in the application process by failing to verify his or her income and resources, all members of the presumed household are foreclosed from participating in the Food Stamp Program. Thus the statutory presumption inevitably forecloses affected persons from securing even the rudiments of an adequate diet.

Moreover, even if a brother, sister, parent, or child can secure the cooperation of putative household members in verifying income, the policy is to pool the income of all household members,

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21. 7 U.S.C. § 2012(i); 7 C.F.R. § 273.1(a)(1)(ii).
22. 7 C.F.R. § 273.2(f)(2)(i).
23. *See, e.g.*, 42 U.S.C. § 1383a(b)(1) discussed *infra* text accompanying notes 109-10.

even if the income of some relatives is legally inaccessible to the others. Neither brothers and sisters nor adult children and parents can claim mutual support obligations; indeed some relatives can be legally prohibited from voluntarily making their income accessible.[24]

B. Effects of the Statute

The key purpose of the Food Stamp Program is to promote the health of the American people by encouraging adequate nutrition. Without a federally supported program, a national policy for meeting the nutritional needs of the poor would be difficult to maintain. All states, counties, and cities that administer the federal Food Stamp Program must comply with the federal statutory definition of "household." The government's implementation of the statutory provision has been detrimental to many individuals who are on the verge of homelessness, suffer serious health problems, and are destitute. To the extent that the Food Stamp Program reflects the basic right to a decent diet, section 2012(i)(2) arbitrarily obstructs many individuals' access to that right.

Unlike most other public assistance programs, the Food Stamp Program is available to the working poor, the unemployed and the unemployable, and their families. The program also provides a nutritional "safety net" for American workers who could lose their jobs—temporarily or permanently—due to trade deficits, a surge in inflation, recession, or a host of other factors beyond their control. The most efficient way to increase the amount of food available to the poor and the homeless is to help them gain access to established federal entitlement programs, among which the Food Stamp Program is of critical importance.

Section 2012(i)(2) significantly affects these persons' ability to meet the most basic need of human subsistence—without which nothing else has any value—and affects fundamental family relationships and family integrity. In practice, this statute can produce both harsh and unfair results. For example, in the Florida case, *Tripp v. Block*,[25] an adult couple and their young children had been receiving food stamps while residing in a rented mobile home; when the home was condemned, they were forced to move into the wife's parents' house. Although the two families were not sharing food or cooking facilities, the young family lost all of its food

24. *See, e.g., id.*

25. No. 85-1203-Civ.-T-17 (M.D. Fla. filed July 25, 1985).

stamps when the wife's stepfather refused to provide verification of his income to Florida food stamp administrators. In *Lyng v. Castillo*[26] several families lost all or part of their food stamp benefits when adult children or siblings were forced to reside together. Thus the Food Stamp Program penalizes families that turn to their relatives for shelter in times of economic hardship.

The irony of the penalty is especially poignant in Utah, where church and community leaders counsel needy people to turn to their relatives first for economic assistance. In a recent report on hunger in Salt Lake County, over one-third of the families interviewed had moved in with relatives.[27] These families repeatedly told the interviewers that they lost or suffered reductions in food stamp benefits when they moved in with relatives and that consequently they had to move out and seek shelter elsewhere. Moving out resulted in restoration of benefits at the expense of critical emotional support from relatives.[28]

The phenomenon that these cases and reports illustrate—that families move in with relatives to avoid homelessness—is pervasive. The fact that public housing is not available for many such families is compellingly illustrated by the situation in New York City. The City of New York reported that in fiscal 1985 it housed, referred, or encountered almost 145,000 homeless persons in approximately 70,000 households.[29] Many others went uncounted because they did not stay long enough to be recorded in official shelter and "welfare hotel" statistics or because they were in private shelters or on the streets. Thus, the official statistics are all the more alarming. Such a large number of homeless persons points out the critical shortage of affordable housing. In addition to the homeless families discussed above, all of whom may at some point try to relieve their homelessness by doubling up with relatives, the housing shortage in New York City has already caused an estimated 230,000 families that are unable to secure their own accommodations to double up.[30]

The New York City Housing Authority, which for many years firmly enforced regulations prohibiting doubling up, now concedes

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26. 106 S. Ct. 2727 (1986).

27. M. DUNFORD, K. FOX & G. BAILEY, WE ARE THE WORLD, TOO! HUNGER IN SALT LAKE COUNTY 36 (Crossroads Urban Center 1986).

28. *Id.*

29. City of New York, Mayor's Management Report (Sept. 1985); C. FELSTEIN & S. KNEPPER, HOUSING NEED AND HOUSING PRODUCTION IN NEW YORK CITY 9 (Pratt Inst. 1985).

30. N.Y. Times, Jan. 12, 1986, § 8, at 1.

that 35,000 households, twenty percent of households in public housing projects, are doubling up, and it has taken no action against the greatly increasing incidence of these double households.[31] The lack of available housing, public or private, is all too clear, as illustrated by the 175,000 applicants on Housing Authority waiting lists.[32] Because Housing Authority tenancies are relatively highly prized, and because tenants experience greater contact with on-site management than do low income tenants in privately owned housing, public housing tenants are less likely to accommodate another household for fear (although perhaps no longer warranted) of endangering their own tenancies. Thus, low income households residing in private housing are probably taking in others who lack shelter in even greater proportion than are similar households residing in public housing.

This phenomenon is not limited to crowded cities. For example, natural disasters may cause homelessness in rural areas. Flooding caused by record heavy rains in 1985 left severe housing shortages in West Virginia. A study conducted by the West Virginia Governor's Office reported that the floods displaced 6258 persons.[33] According to the Governor's Office, most of these disaster victims were forced to take refuge with family members and friends. Under section 2012(i)(2), those families able to find shelter with other family members were foreclosed from obtaining food stamps on their own.

Lyng v. Castillo provides another example of a common type of doubling up in American families: that experienced by migrant farmworkers. The Castillo family consists of a mother, a father, and their children who spent the summer of 1984 picking crops in Michigan. When they returned to their native area of Brownsville, Texas, they were forced to take up residence with Mrs. Castillo's adult daughter, Petra Sosa, because the costs of the trip back to Texas had depleted their savings. Although the Castillo and Sosa families were separate economic and living units, the Castillos were denied eligibility to receive food stamps as a separate household because they resided with an adult child who already received food

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31. V. Bach, L. Seabrook, Housing: Problem Analysis and Policy Directions 1 n.3 (Community Service Society, May 1986); M. STEGMAN, D. HILLSTROM, HOUSING IN NEW YORK: STUDY OF A CITY, 1984, at 172 (1985); C. FELSTEIN & S. KNEPPER, *supra* note 29, at 9, 10.

32. C. FELSTEIN & S. KNEPPER, *supra* note 29, at 9.

33. Office of Emergency Services, Governor's Summary of Flood Disaster by Residences, County and Community (Nov. 17, 1985).

stamps. Section 2012(i)(2) was the sole cause of the Castillo family's ineligibility.[34]

The case in Pennsylvania, *Robinson v. Block*,[35] illustrates another facet of the hardship caused by section 2012(i)(2). A mother and son had been receiving food stamps until the benefits were terminated because the mother, who was residing with her sister, could not obtain information concerning her sister's income and other circumstances. The mother tried in every way possible to obtain the verification, but she had no control over her sister, who did not want to report her income or living arrangements to the County Assistance Office.

The case in New York, *Moody v. Lyng*,[36] provides another example of the problem. In September 1983 the amount of food stamps available to a mother and two minor daughters was drastically reduced because the local food stamp agency included her disabled adult son in her household. The son received Supplemental Security Income benefits, which under the Social Security Act were for his exclusive use. At an administrative hearing, the mother explained that as her son's representative payee she always used these benefits for his needs only. She testified that when she shopped for food, she only used her son's money for the food he chose for himself. Her son ate separately and did not share his food with the rest of the family. Similarly, the food the mother purchased for herself and her two daughters was not shared with her son. Section 2012(i)(2) left the mother with one of two unsatisfactory choices: to use for her two daughters money intended exclusively for her disabled son or to deny her two minor children and herself the minimum nutrition that the Food Stamp Program was intended to provide.

The operation of section 2012(i)(2) thus may result in denial of food stamps, which in turn may cause malnutrition. Malnutrition poses tremendous risks to infants, children, and adults. An infant's health may be compromised by poor maternal nutrition, which increases risks such as prematurity and low birth weight. The low birth weight baby faces thirty times the normal likelihood of dying before the age of one. Low birth weight accounts for more than one-half of infant deaths in the United States and seventy-five percent of deaths to babies under one month old; it is the

34. Fourth Amended Complaint, Joint Appendix at 19-20, 26, Lyng v. Castillo, 106 S. Ct. 2727 (1986).

35. No. 84-4229 (E.D. Pa. filed Mar. 25, 1985).

36. No. 86 Civ. 3088 (S.D.N.Y. filed Mar. 24, 1986).

eighth leading cause of death in the United States.[37]

A child deprived of adequate nutrition during the critical years of brain growth is at risk of cognitive and other developmental deficits.[38] Other risks from inadequate nutrition during childhood include delayed growth or stunting, defined as height below the fifth percentile for a given sex and age; wasting, defined as weight below the fifth percentile for age or height;[39] and increased vulnerability to environmental toxins, including lead, which can affect the brain and compound the direct effects of malnutrition on intellectual development.[40] As at all ages, malnutrition in childhood can weaken resistance to infection. Poorly nourished youngsters are at risk of more frequent colds, ear infections, and other infectious diseases.[41] Resulting absences from school and curtailment of childhood activities may further compound the developmental hazards of poor nutrition.

Malnutrition also causes loss of function in young and middle aged adults. The manifestations of such loss of function may include reduced productivity at work and impaired social function. Adults of all ages may suffer infection and deficiency diseases associated with malnutrition. Old age heightens the risks of malnutrition; the impact of food on health maintenance and disease prevention is particularly crucial at this stage of life.[42]

As explained above, the purpose of the Food Stamp Program is to prevent the serious problems associated with malnutrition by providing a minimally adequate diet. The direct conflict between the program's purpose and the operation of section 2012(i)(2) implicates constitutional issues that must be addressed.

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37. PHYSICIAN TASK FORCE ON HUNGER IN AMERICA, HUNGER IN AMERICA: THE GROWING EPIDEMIC 99 (1985) [hereinafter cited as PHYSICIAN TASK FORCE] (citing UNIVERSITY OF NORTH CAROLINA—CHILD HEALTH OUTCOMES PROJECT, MONITORING THE HEALTH OF AMERICA'S CHILDREN: TEN KEY INDICATORS (1984)).

38. PHYSICIAN TASK FORCE, *supra* note 37, at 101 (citing Stock, Smythe, Moody & Bradshaw, *Psycho Social Outcome and C.T. Findings After Gross Undernourishment During Infancy: A 20-Year Developmental Study*, 24 DEVELOPMENTAL MED. & CHILD NEUROL. 419 (1982)).

39. PHYSICIAN TASK FORCE, *supra* note 37, at 101 (citing UNIVERSITY OF NORTH CAROLINA—CHILD HEALTH OUTCOMES PROJECT, *supra* note 37).

40. PHYSICIAN TASK FORCE, *supra* note 37, at 101 (citing McHaffey & Vanderveen, *Nutrient-Toxicant Interactions: Susceptible Populations*, 29 ENVTL. HEALTH PERSPECTIVES 81 (1979); Ziegler, *Absorption and Retention of Lead by Infants*, 12 PEDIATRIC RES. 29 (1978)).

41. PHYSICIAN TASK FORCE, *supra* note 37, at 101 (citing Chandra, *Interactions of Nutrition, Infection and Immune Response*, 68 ACTA PAEDIATRICA SCANDINAVIA 137 (1979)).

42. *See* PHYSICIAN TASK FORCE, *supra* note 37, at 102.

III. The Constitutional Issues Raised by 7 U.S.C. Section 2012(i)(2)

Section 2012(i)(2) requires that siblings or parents and children who have the same residence be treated as a single household for purposes of receiving food stamps, except when a parent or sibling is elderly or receiving certain disability benefits. Thus the statute imposes penalties based on family association. Viewed this way, contrary to the Supreme Court's recent opinion,[43] section 2012(i)(2) violates both the equal protection and due process guarantees of the United States Constitution. The persons affected by the statute, in spite of their great need, are denied food stamps because they reside with certain family members. The statute, by denying benefits to persons who cannot secure the cooperation of their relatives in the verification process, has the further effect of giving relatives veto power over food stamp eligibility.

It is not disputed that food stamp allotments may be computed on the basis of the income and resources of all persons living together who have or can obtain access to each other's income and resources. Rather, it is the computation of food stamp allotments on the basis of income and resources that are not available to meet an applicant's needs that raises the equal protection and due process claims. Furthermore, absolute denial of food stamps to otherwise eligible persons residing with relatives who refuse to cooperate in a food stamp application violates due process and is an unconstitutional delegation of public power to a private party.

A. Discrimination Based on Family Association: A Denial of Equal Protection

A family's eligibility for food stamps and its food stamp allotment are determined based not only on the family's income and resources, but also on the income and resources of resident siblings, parents, and children; their resident siblings, parents, and children; and any persons with whom any of these relatives have chosen to purchase and prepare food. This extended measurement of income and resources takes place even though the family applying for food stamps has no control over or access to the income and resources of its resident relatives or the income and resources of those relatives' households. This determination does not take place, however, when a family resides with persons other than a

43. *See* Lyng v. Castillo, 106 S. Ct. 2727 (1986).

family member's siblings, parents, or children.

In *Moore v. City of East Cleveland*, the Supreme Court stated that "when the government intrudes on choices concerning family living arrangements, this Court must carefully examine the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."[44] Section 2012(i)(2) has intruded on choices concerning family living arrangements by disqualifying families that were otherwise eligible to receive food stamps.

In *Lyng v. Castillo*, however, the Supreme Court refused to accord close relatives the special constitutional consideration mandated by *Moore*. Further, in concluding that the statutory classification is unlikely to influence decisions concerning living arrangements, the Court dismissed out of hand the contention that section 2012(i)(2) burdens the fundamental right of family association.[45] The Court therefore rejected the heightened level of scrutiny applied by the district court and found that the classification embodied in section 2012(i)(2) was "rationally related" to the "legitimate governmental interests" of promoting efficiency and preventing fraud.[46] The Court consequently held that section 2012(i)(2) does not discriminate against families in violation of the right to equal protection guaranteed by the due process clause of the fifth amendment.[47]

As Justice Marshall's dissenting opinion pointed out, however, the majority's analysis is strained.[48] Not only is the majority's cursory consideration of the applicability of a heightened level of scrutiny inadequate, but its conclusion that the statutory classification passes a rational basis test is grounded in the quicksand of its attempt to distinguish *United States Department of Agriculture v. Moreno*,[49] a decision striking down a similar statutory scheme involving nonrelatives.

The equal protection analysis applies to the class of persons who are denied food stamps because they live with a sibling, parent, or child whose income and resources are counted in determining eligibility even though they do not purchase or prepare food with the relative. This basis for denial of benefits gives rise to an

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44. Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977).
45. Lyng v. Castillo, 106 S. Ct. 2727, 2729-30 (1986).
46. *Id.*
47. *Id.* at 2729.
48. *See id.* at 2732-33 (Marshall, J., dissenting).
49. 413 U.S. 528 (1973).

equal protection claim because persons who do not live with a sibling, parent, or child, but are in otherwise identical circumstances, are not subject to having the income or resources of any of those relatives counted, as long as they do not purchase or prepare food together.

The first step in analyzing an equal protection claim is to determine the proper standard of review. Three standards have been used. First, the rational basis standard allows statutory classifications to stand if they bear a rational relationship to a permissible governmental interest.[50] Second, the strict scrutiny standard, which is applied when the classification involves a fundamental interest or a suspect class, allows classifications to stand only if they are necessary to promote a compelling governmental interest.[51] Finally, the Supreme Court articulated a third standard in *Craig v. Boren*, which allows classifications that are substantially related to an important governmental interest.[52] The nature of the individual interest involved in family living arrangements necessarily requires a higher level of scrutiny than the rational basis test the Court used in *Castillo*.

1. The Nature of the Individual Interest Involved—The automatic inclusion within the same economic unit of certain relatives living together is a classification drawn on the basis of familial relationships. The law has long recognized the fundamental importance of such relationships. In 1944 the Supreme Court held that government could not intrude on the relationship between parent and child except "to guard the general interest in youth's well being."[53] More recently, in *Moore v. City of East Cleveland*[54] the Court dealt directly with the right of the family to live together. In *Moore* a city ordinance allowed only certain types of relatives to live together in a single dwelling. Inez Moore, who lived with her son and two grandchildren who were cousins, was prosecuted because she had a family that did not comply with any of the ordinance's defined "family units."[55] In striking down the ordinance as unconstitutional, the Court stressed the right of family members to live together, concluding that "[w]hen a city under-

50. Dandridge v. Williams, 397 U.S. 471, 485 (1970).
51. Dunn v. Blumstein, 405 U.S. 330, 337 (1972).
52. Craig v. Boren, 429 U.S. 190, 204 (1976).
53. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).
54. 431 U.S. 494 (1977).
55. *Id.* at 496-97.

takes such intrusive regulation of the family . . . the usual judicial deference to the legislature is inappropriate."[56]

Although *Moore* was a due process rather than an equal protection case, the individual interest in family association involved in the ordinance's definition of a family unit is similar to that involved in the Food Stamp Program's definition of a household. Moreover, in its due process analysis the Court in *Moore* recognized the fundamental nature of the interest involved and adopted a test consistent with a heightened level of scrutiny: "when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests" and measure the "extent to which they are served by the challenged regulation."[57]

As recently as 1984 the Supreme Court reaffirmed its belief that familial rights are fundamental. In *Roberts v. United States Jaycees* the Court stated that "[p]rotecting [familial] relationships from unwarranted state interference . . . safeguards the ability independently to define one's identity that is central to any concept of liberty."[58]

In *Lyng v.Castillo* the Court failed to address *Moore*. The reason for this failure is entirely unclear, but as Justice Marshall observed, it may be attributable to the fact that section 2012(i)(2) does not use criminal sanctions, as did the challenged ordinance in *Moore*, but rather the loss of benefits to influence family living decisions.[59] Such a distinction is invalid when the loss of benefits is a serious threat to survival.[60]

2. *Application of Heightened Scrutiny*—In equal protection analysis, as in due process analysis, a fundamental interest triggers a higher level of scrutiny than the rational basis test. The purpose of the Food Stamp Act is to "safeguard the health and well-being of the nation's population."[61] Its legislative history shows that the purpose of the classification that automatically includes certain relatives in the same economic unit is to reduce fraud.[62] The classi-

56. *Id.* at 499.

57. *Id.*

58. Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984) (citations omitted).

59. 106 S. Ct. at 2733 (Marshall, J., dissenting).

60. *See id.* (citing Goldberg v. Kelly, 397 U.S. 254, 262 (1970); Shapiro v. Thompson, 394 U.S. 618, 627 (1969)).

61. 7 U.S.C. § 2011 (1982).

62. S. REP. No. 504, 97th Cong., 2d Sess. 24-27, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 1641, 1662-64 [hereinafter cited as SENATE REPORT].

fication, however, places many households in the position of having to choose between sheltering their family members together and being able to feed them. Even though relatives may be unwilling or unable to provide for all a family's needs, they are often willing to provide temporary shelter in times of hardship. In such cases the classification does not reduce fraud. In fact, the classification contravenes the purpose of the Food Stamp Act by forcing persons without alternative shelter to go without food, when persons with more resources could rearrange their living situations so as to obtain more food stamps.[63]

Reducing fraud is a legitimate governmental interest, but to withstand the heightened scrutiny suggested in *Moore* the classification must be *necessary* to reduce fraud. The government must show that families are more likely to commit fraud than are unrelated persons and that no less intrusive means of preventing fraud exists. With no such indication, the classification merely forces the poorest of families to choose between nutrition and shelter. Certainly other means of avoiding fraud that do not cut so deeply into the rights of family members to cohabitate are available.[64]

In *Lyng v. Castillo*,[65] however, the Supreme Court refused to apply a heightened level of scrutiny. The Court found that the statutory classification does not burden a fundamental right because it is unlikely to influence anyone's decision concerning living arrangements.[66] Even without heightened scrutiny, the Supreme Court was wrong. Although the *Castillo* record may have been inadequate to establish that section 2012(i)(2) does in fact interfere with family living arrangements, the statute should not have withstood even the rational basis level of scrutiny.

3. Application of the Rational Basis Standard—In *United States Department of Agriculture v. Moreno*[67] a statutory classification scheme similar to section 2012(i)(2) was challenged on equal protection grounds. The statute challenged in *Moreno* deemed persons ineligible for food stamps if the household in which they lived contained any unrelated persons.[68] The government argued it had a legitimate interest in avoiding fraud that was advanced by the

63. *See infra* note 76 and accompanying text.
64. *See infra* text accompanying notes 148-58.
65. 106 S. Ct. 2727 (1986).
66. *Id.* at 2729-30.
67. 413 U.S. 528 (1973).
68. *Id.* at 530.

statutory classification.[69] The Supreme Court found that even if it were to accept as rational the government's assumption that unrelated household members were more likely to commit fraud than related household members, it "still could not agree with the government's conclusion that the denial of essential food assistance to all otherwise eligible households containing unrelated members constitutes a rational effort to deal with these concerns."[70]

In *Lyng v. Castillo* the Supreme Court attempted to distinguish *Moreno.* The Court focused on the complete disqualification imposed by the provision invalidated in *Moreno* and found no such disqualification in *Castillo.*[71] This is a distinction without a difference because the ultimate effect of section 2012(i)(2) can be a complete loss of benefits. As the Court itself acknowledged, the Castillo family was in danger not only of suffering a reduction in benefits, but also of losing them entirely.[72] Assuming that the *Castillo* record did not adequately demonstrate complete disqualification, its pending companion cases do so with stark clarity. *Robinson v. Block*[73] and *Tripp v. Block*[74] both illustrate the complete disqualification that results when a relative refuses to comply with verification procedures.[75] Similarly, complete disqualification may result when a relative who agrees to comply is found to have too high an income.

As in *Moreno,* a classification that denies benefits to relatives living together "excludes from participation in the Food Stamp Program, *not* those persons who are 'likely to abuse the program,' but, rather, *only* those persons who are so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility."[76] The *Castillo* Court quoted this passage without comment in its attempt to distinguish *Moreno.* One can only wonder why the Court found a distinction in a quotation that so aptly illustrates the striking similarity of the two cases.

The statute challenged in *Moreno* provided that *unrelated* persons living together could not be eligible for food stamps on an individual basis. Under section 2012(i)(2) *related* persons living to-

69. *Id.* at 535.
70. *Id.* at 535-36.
71. *Castillo,* 106 S. Ct. at 2730 n.3.
72. *Id.* at 2729.
73. No. 84-4229 (E.D. Pa. filed Mar. 25, 1985).
74. No. 85-1203-Civ.-T-17 (M.D. Fla. filed July 25, 1985).
75. *See supra* text accompanying notes 25, 35.
76. *Moreno,* 413 U.S. at 538 (emphasis in original), *quoted in Castillo,* 106 S. Ct. at 2730 n.3.

gether cannot be eligible for food stamps on an individual basis. The constitutional protection afforded to the sanctity of the family dictates that a classification which discriminates against family members living together cannot be allowed to stand after a similar classification that discriminated against unrelated persons living together was struck down.

B. An Irrebuttable Presumption Based on Family Association: A Denial of Due Process

Automatically including family members in the same economic unit does not allow them the freedom—allowed all other persons—to choose their own living arrangements or to share food expenses or cooking responsibilities with whomever they wish. Section 2012(i)(2) mandates that siblings or parents and children residing together cannot be considered separate households regardless of social and economic relationships, regardless of dietary requirements, regardless of arrangements for the purchase and preparation of food, and regardless of ability to obtain cooperation from the relative in application, verification, or distribution of food stamp allotments. The only exception is for a parent or sibling who is elderly or is receiving certain disability benefits.[77]

Section 2012(i)(2) irrebuttably presumes that certain relatives having the same residence in fact share income and resources and are thus one household. An irrebuttable presumption that siblings or parents and children having the same residence are "living together" for purposes of defining food stamp households deprives the words "living together" of any substantial meaning; it misrepresents the situation of relatives forced under one roof by circumstances outside their control but living entirely separate lives, socially, economically, and on the basis of dietary requirements. While the right to equal protection involves family-based discrimination, such irrebuttable presumptions about family life impinge on the right to due process.[78]

Not all irrebuttable presumptions, however, are constitutionally infirm. Otherwise any statutory classification could be attacked as an implicit irrebuttable presumption. The Supreme Court has recognized that generalized conclusions about substantive policy are properly a legislative function.[79] The Court, never-

77. 7 U.S.C. § 2012(i)(2) (1982); 7 C.F.R. § 273.1(a)(3) (1985).
78. *See* Lyng v. Castillo, 106 S. Ct. 2727, 2733 (1986) (Marshall, J., dissenting).
79. *See* Weinberger v. Salfi, 422 U.S. 749, 772-73 (1975).

theless, has preserved the irrebuttable presumption doctrine for cases in which special substantive rights are at issue.[80] In such cases substantive challenges have been based more commonly on the equal protection clause or on a specifically relevant constitutional provision.[81]

The procedural aspect of the irrebuttable presumption doctrine remains nonetheless. The government need not consider individual facts at all, but once it does so it may not preordain the result by denying claimants the opportunity to be heard concerning their particular situations. In *United States Department of Agriculture v. Murry*,[82] cited with approval in *Weinberger v. Salfi*,[83] the Supreme Court held that the government could not base the Food Stamp Program's structure on individual current monthly need and then, by foreclosing the eligibility of anyone claimed on another's income tax return for the previous year, deny households the opportunity to show need. The distinction between permissible presumptions or value judgments concerning substantive policy and impermissible evidentiary or procedural presumptions in factual determinations is analogous to the distinction between legislative and adjudicative facts. Whereas no individual adjudicatory process is required to determine generalized, legislative facts, adjudicative facts cannot be determined against a claimant without the right to present and examine evidence.[84]

In administering the Food Stamp Program, the government has elected to engage in fact-finding regarding claimants' individual living situations. Food stamp eligibility is determined on a household basis, and the facts of individual living situations must be analyzed to determine the composition of each household. This burden is not lifted for households subject to the automatic inclusion of certain relatives, because nonrelatives' interactions with the relatives must be examined to determine household composition. Due process requires that the examination extend to the relatives' interactions with each other.

Section 2012(i)(2), in creating the irrebuttable presumption

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80. *Id.* at 770-71.

81. *See, e.g.*, Plyler v. Doe, 457 U.S. 202 (1982) (denial of public education to alien children violates equal protection); Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919 (1983) (Congress' veto of an alien's deportation suspension violated the separation of powers doctrine).

82. 413 U.S. 508 (1973).

83. 422 U.S. 749, 772 (1975).

84. *See* K. DAVIS, ADMINISTRATIVE LAW §§ 15.2, 16.14 (2d ed. 1982); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-32, at 1092-97 (1978).

that all siblings and all parents and children who reside together customarily purchase and prepare food together for home consumption, denies the right to a hearing on the issue. The presumption is often contrary to fact, seriously limiting the ability of genuinely needy persons to provide an adequate diet for their households. Thus, the statute fails to meet procedural due process requirements.

Because the statute's irrebuttable presumption substantially impinges on the fundamental right to freely choose family living arrangements, it is also subject to the substantive due process analysis of the irrebuttable presumption doctrine preserved in *Weinberger v. Salfi*.[85] This constitutional analysis is similar to that applicable under the equal protection clause. Prior to *Salfi* the Supreme Court had sustained many challenges to irrebuttable presumptions on the ground that it is a denial of due process to irrebuttably presume facts that may actually be contrary to fact.[86] *Salfi* clearly indicated that the rational basis test applies to irrebuttable presumption cases in which nonfundamental interests such as a "non-contractual claim to receive funds from the public treasury"[87] are at stake. More is at stake, however, when a presumption affects the right to choose family living arrangements.

Although the Supreme Court found no such effect in *Castillo*, section 2012(i)(2) can impose a severe burden on persons' rights to choose family living arrangements. By arbitrarily treating all siblings or parents and children as members of the same household for purposes of food stamp benefits, whether or not they are actually purchasing and preparing food together, the statute forces a food stamp applicant to accept either a denial of or reduction in the amount of food stamps or a complete prohibition against living with a brother, sister, parent, or child—a choice that is not only difficult, but constitutionally burdensome.

The Court's failure to recognize this burden in *Castillo* can best be attributed to its unreasonably narrow view of the choice imposed. The Court considered it "exceedingly unlikely that close relatives would choose to live apart simply to increase their allotment of food stamps, for the cost of separate housing would almost certainly exceed the incremental value of the additional stamps."[88] This superficial and unrealistic analysis constitutes the sole sup-

85. 422 U.S. 749, 771-72 (1975).
86. *See, e.g.*, Vlandis v. Kline, 412 U.S. 441 (1973); Bell v. Burson, 402 U.S. 535 (1971).
87. *Salfi*, 422 U.S. at 772.
88. *Castillo*, 106 S. Ct. at 2730.

port for the Court's determination that reduction in or loss of benefits is "exceedingly unlikely" to interfere "directly and substantially" with choices concerning family living arrangements.[89] In reality, many persons faced with a choice between living with relatives and receiving essential food assistance are forced to give up living with a close relative and to seek temporary shelter with more distant relatives, friends, or impersonal agencies. This is due to nutritional hardships imposed not only on those who must leave but on those relatives who have taken them in. If they choose to live with a close relative who either will not or cannot share food, the statute will force them to pay a nutritional penalty for exercising their constitutionally protected right to live with their families. Thus, section 2012(i)(2) does interfere "directly and substantially" with family living arrangements.

Choices concerning family life and living arrangements must be accorded greater constitutional protection than a "non-contractual claim to receive funds from the public treasury."[90] The statute challenged in *Weinberger v. Salfi* required that a marriage giving rise to eligibility for widows' benefits must have lasted nine months, unless other conditions were met.[91] This statutory requirement was upheld because it neither impinged on either party's right to enter the marriage nor affected the parties once they had entered the marriage. The effect of the durational requirement occurred only after the marriage had ended. The nutritional penalty persons pay when they reside with family members, in contrast, directly impinges on choices concerning family living arrangements as or shortly after they are made. The differences between the interests of family members at stake in *Salfi* and those implicated by automatic inclusion of family members in an economic unit are clear grounds for distinguishing *Salfi* and holding section 2012(i)(2) unconstitutional.

C. Penalties Based on Family Association: A Denial of Equal Protection and Due Process and a Violation of Privacy

Section 2012(i)(2) penalizes food stamp applicants and recipients based on family associations. Solely on the basis of family status, it denies individuals a meaningful opportunity to establish or verify their separate households. It thus violates rights to family

89. *Id.* at 2729-30.
90. *Salfi*, 422 U.S. at 772.
91. *Id.* at 754 n.2.

association and privacy guaranteed by the first, ninth, and fifth amendments as well as rights to due process and equal protection guaranteed by the fifth amendment.[92] The Supreme Court has struck down a number of laws that penalized free choice of family living arrangements, even though it has upheld virtually identical restrictions that had no such impact. Particularly illustrative are *Village of Belle Terre v. Borass*[93] and *Moore v. City of East Cleveland.*[94] *Belle Terre* upheld a suburban zoning ordinance preventing unrelated persons from living together in groups, such as "hippie communes." Conversely, *Moore* struck down a virtually identical ordinance that prevented a grandmother from living with her two grandsons. The Court in *Moore* distinguished the *Belle Terre* ordinance on the grounds that it exempted related persons from its impact.[95]

Moreover, in *United States Department of Agriculture v. Moreno,*[96] a case involving a statute analogous to the *Belle Terre* ordinance, the Court struck down a Food Stamp Act provision denying benefits to households containing unrelated persons, including so-called "hippie communes." In the context of a program "established . . . in an effort to alleviate hunger and malnutrition among the more needy elements of our society,"[97] the Court found the restriction insufficiently justified by any governmental purpose.[98]

The relationship between *Belle Terre* and *Moore* is analogous to the relationship between *Moreno* and *Castillo.* Both *Belle Terre* and *Moreno* involved statutory schemes that burdened the living arrangements of nonrelatives, while the statutes in *Moore* and *Castillo* burdened the living arrangements of relatives. Looking at the outcomes of *Belle Terre* and *Moore,* one would have expected the Court to uphold the food stamp provision burdening nonrelatives in *Moreno* and strike down section 2012(i)(2) in *Castillo.* Yet precisely the opposite occurred. The asserted justification for the scheme upheld in *Castillo* is the same as that in *Moreno*: preventing fraud, rationing public resources, and simplifying program administration. If this restriction of living choices could not be justi-

92. *See* Griswold v. Connecticut, 381 U.S. 479, 482-85 (1965).
93. 416 U.S. 1 (1974).
94. 431 U.S. 494 (1977).
95. *Id.* at 498.
96. 413 U.S. 528 (1973).
97. *Id.* at 529.
98. *Id.* at 534-38; *see supra* text accompanying notes 67-70.

fied in *Moreno,* a case in which no familial interests were at stake, it can pass neither the heightened scrutiny mandated by the Court's family choice cases nor the rational basis test applied in *Moreno.* If the Supreme Court is willing to protect the association rights of unrelated persons such as the "hippie communes" in *Moreno,* it should be even more willing to protect the traditional values of family association by guaranteeing the right of family members to live together.[99]

The simple answer to the dilemma posed by section 2012(i)(2) is that persons victimized by its provisions move out of their relatives' homes. Yet this response is not at all simple, not only because of practical economic and environmental constraints but also because of the importance of the interests implicated. The family and relationships between family members occupy a place of central importance in our nation's history and are a fundamental part of the values that underlie our society.[100] Accordingly, our legal system views the separation of family members from one another as a serious matter requiring close and careful scrutiny.[101] Laws that burden the family relationships of the poorest of the poor are uniquely unfair.[102] When families already have critical problems, increased burdens may strain their fabric to the breaking point. Few justifications will support such severe intrusion.

D. Delegation of Government Powers to Private Parties: A Denial of Due Process and a Violation of Separation of Powers

Section 2012(i)(2) raises other constitutional issues as well, although they do not directly relate to rights of family association. The rigid policy of treating the families of any siblings and of any parents and children having the same residence as a single household gives each of those individuals veto power over their relatives' eligibility for food stamps. When one sibling or a parent or adult child or a member of that individual's family fails to cooperate in an application, the statute considers the whole "household" to be failing to cooperate and denies food stamps not only to that individual's siblings, children, and parents, but also to the families of

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99. The Court indirectly rejected this contention, concluding that "[c]lose relatives are not a 'suspect' or 'quasi-suspect' class and that section 2012(i)(2) does not burden a fundamental right." *Castillo,* 106 S. Ct. at 2729.

100. *Moore,* 431 U.S. at 503-04.

101. *See* Zablocki v. Redhail, 434 U.S. 374 (1978) (invalidating a state law that unduly burdened the right of the poor to marry).

102. *Id.* at 387.

siblings, children, and parents who are willing to do everything in their power to comply with the program's requirements.[103] The statute thus allows a private party to control the food stamp eligibility of the families of his or her siblings, adult children, and parents. Because the siblings, parents, or adult children of food stamp applicants are under no obligation to cooperate in the application process, section 2012(i)(2) delegates to a private party the governmental power to determine eligibility for food stamps in violation of rights guaranteed both by the due process clause of the fifth amendment and by the principle of separation of powers embodied in articles I, II, and III of the United States Constitution.

Nor does the due process clause countenance the administrative overreaching embodied in section 2012(i)(2), which creates a conclusive presumption not only of available income, but also of ineligibility when a relative refuses to cooperate with the food stamp agency. The presumption places an unconscionable burden on food stamp applicants who, through no fault of their own, are unable to prove their relatives' eligibility. Such a policy is so arbitrary and capricious as to violate due process.

Applicants for public assistance are obliged to furnish complete information regarding factors that affect eligibility—when the information is within the applicants' control. In *Van Lare v. Hurley* the Supreme Court applied these principles to a public assistance law that reduced the shelter allowance to families receiving Aid to Families with Dependent Children because of ineligible "lodgers" living in the household and invalidated the law, stating:

> Another . . . justification asserted is that the shelter allowance is reduced to prevent lodgers, who by definition are ineligible for welfare, from receiving welfare benefits. The regulations, however, do not prohibit lodgers from living in welfare homes. The lodger may stay on after the allowance is reduced, and the State takes no further action. The only victim of the state regulations is thus the needy child who suffers reduced benefits.[104]

The analogy to the situation posed by section 2012(i)(2) is striking. Just like the ineligible lodger who may stay on following a reduction in benefits, the uncooperative relative cannot be forced either to cooperate in the application process or to provide financial support. Only the needy applicant, who has relied either on relatives to provide shelter or has extended shelter to relatives, is the

103. *See* 7 C.F.R. § 273.2(d) (1985).
104. Van Lare v. Hurley, 421 U.S. 338, 347-48 (1975).

victim.

Furthermore, many courts have invalidated policies that deny public assistance to children because of the refusal of their relatives to disclose income information to public assistance authorities. The courts found such policies arbitrary and capricious, given the goals of public assistance laws.[105] For example, the Eighth Circuit Court of Appeals in *Rosen v. Hursh* reversed the lower court's finding that a state agency was justified in denying aid to the family because of the lack of information concerning the income of relatives.[106] This decision was based on the conflict between the state agency's practice and the federal statute and on the consequent denial of due process. More recently, New York State's highest court ruled in *Allen v. Blum* that public assistance could not be denied on grounds of a recipient's refusal to accept employment unless the recipient's failure to report for employment was "willful."[107] This decision was also based on due process considerations. Food stamp applicants who, without any fault of their own, are unable to prove their relatives' eligibility, are not willfully withholding information. A presumption that denies eligibility because of the acts of others is at least as arbitrary as the practice that was invalidated in *Allen*.

IV. Statutory Conflicts Affecting Families with Children Receiving Social Security Benefits

The facts of *Lyng v. Castillo* did not force the Court to deal with the full range of circumstances in which section 2012(i)(2) will limit food stamp benefits. Section 2012(i)(2) also discriminates against disabled persons who reside with their parents. Although the provision grants separate household status to disabled persons who reside with their siblings or disabled parents who reside with their children, disabled children living with their parents are never permitted to qualify for benefits as a separate household. As *Moody v. Lyng* illustrates, this limitation discriminates against both the disabled children and their parents who reside with them.[108]

Denying separate household status to disabled children,

105. *See, e.g.*, Nolan v. DeBaca, 603 F.2d 810 (10th Cir. 1979).

106. Rosen v. Hursh, 464 F.2d 731, 734 (8th Cir. 1972).

107. Allen v. Blum, 58 N.Y.2d 954, 956, 447 N.E.2d 68, 69, 460 N.Y.S.2d 520, 521 (1983).

108. *See supra* text accompanying note 36.

whether young or old, is contrary to Congress' own intent in passing the Omnibus Budget Reconciliation Act of 1982, which included the statutory amendments at issue. Congress cannot be presumed to have adopted the amendments for the purpose of forcing food stamp recipients to violate the Social Security Act. Nevertheless, by denying separate household status to disabled persons who reside with their parents and perhaps, therefore, with siblings, section 2012(i)(2) deems Social Security income received by disabled children to be available to purchase food for other family members. As a result, section 2012(i)(2) is inconsistent with the intent and purpose of Title XVI of the Social Security Act, the Supplemental Security Income ("SSI") program, which was intended to provide, at the very least, a minimal level of subsistence for disabled individuals. It is similarly inconsistent with Title II of the Social Security Act, the Old-Age, Survivors, and Disability Insurance ("OASDI") program, which provides insurance benefits to children of deceased workers. Section 2012(i)(2) encourages representative payees to violate these SSI and OASDI provisions that hold them criminally responsible should they allow payment to be used for the benefit of anyone other than the beneficiary.

In view of this statutory conflict, which is amplified below, two forceful arguments concerning section 2012(i)(2) can be made. First, the statute must be construed to exempt disabled children receiving SSI or OASDI from the automatic inclusion requirement, just as it exempts disabled siblings and parents. Second, this exemption should extend to nondisabled children receiving OASDI benefits. Indeed, the failure to so construe section 2012(i)(2) raises a constitutional due process issue.

A. Statutory Prohibitions Against Considering a Child's Social Security Benefits as Family Income

1. Criminal Penalties for Improper Use of Social Security Benefits—Section 2012(i)(2) conflicts with statutory prohibitions that make it a criminal offense to use certain Social Security benefits for persons other than the intended beneficiary. The Social Security Act provides that the benefits of children who cannot responsibly manage their entitlement may be paid to a "representative payee," who is then responsible to assure that the funds are used for "the use and benefit" of the child beneficiary.[109] To

109. 42 U.S.C. § 405(j) (Supp. III 1985); 20 C.F.R. § 404.2040(a) (1986).

protect the rights of child beneficiaries, 42 U.S.C. section 408(e) provides, with regard to OASDI, that:

> Whoever . . . having made application to receive payment under this subchapter for the use and benefit of another and having received such a payment, knowingly and willfully converts such a payment, or any part thereof, to a use other than for the use and benefit of such other person . . . shall be guilty of a felony and upon conviction thereof shall be fined not more than $5000 or imprisoned for not more than five years, or both.[110]

Title 42 U.S.C. section 1383a(b)(1) is the comparable provision of the SSI program. Considering a child's Social Security benefits to be income available to the entire family conflicts with the congressional mandate.

It appears that Congress has never considered this conflict between the Social Security Act and section 2012(i)(2). In light of the severe criminal penalties involved, courts cannot ignore the obvious inconsistencies in the statutory scheme. In attempting to resolve the conflict, courts should consider the analysis applied in analogous cases concerning inclusion of a child's OASDI benefits in family income for purposes of determining eligibility and grant levels for other government benefit programs.

In the mid-1970s courts established that states, in determining public assistance benefits, could not consider OASDI benefits paid to a child beneficiary via a representative payee to be income available to support the child's family[111] or parents.[112] On passage of the Deficit Reduction Act ("DRA") in 1984,[113] however, the United States Department of Health and Human Services ("HHS") issued a regulation requiring state agencies to include OASDI benefits received by minor beneficiaries in calculating family income when determining the needs of a family assistance unit for the Aid to Families with Dependent Children ("AFDC") program.[114] In practice, the HHS regulation is to AFDC what section 2012(i)(2) is to the Food Stamp Program. Although section 2012(i)(2) cannot be challenged as violative of a governing statute in the way the HHS regulation can, the claims concerning the legality of the HHS regulation in light of section 408(e) are nevertheless instructive.

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110. 42 U.S.C. § 408(e) (1982).

111. Howard v. Madigan, 363 F. Supp. 351, 353-54 (D.S.D. 1973).

112. Johnson v. Harder, 383 F. Supp. 174, 180-81 (D. Conn. 1974), *aff'd*, 512 F.2d 1188 (2d Cir.), *cert. denied*, 423 U.S. 876 (1975).

113. Pub. L. No. 93-369, 98 Stat. 494 (1985).

114. 45 C.F.R. § 206.10(a)(1)(vii) (1985).

Acceptance of the theory that the DRA allows a child's OASDI to be considered family income has been limited, with the possible exception of *Cunningham v. Toan,*[115] to decisions tempered more by the political climate than by serious attention to legislative history. For example, in *Shonkwiler v. Heckler* the court relied on the belief that both Congress and the public interest demanded a reduction in welfare benefits.[116] Similarly unable to support the regulation with more than a scant mention of congressional purpose, the court in *Creaton v. Heckler* relied on the argument that the Secretary of HHS is entitled to substantial deference in deciding how to enforce the DRA.[117]

Because section 408(e) shows that Congress intended OASDI payments "for the use and benefit" of the child, courts seeking to uphold the HHS regulation have been forced to distort the meaning of that phrase. Because the legislative history contains no affirmative support for their views, these courts have resorted to noting that section 408(e) fails to specifically prohibit the use of a child's Social Security benefits to support other family members.[118] This reasoning, which would require Congress to list an infinite number of things it did not intend, promotes a conservative fiscal policy without regard to the actual words of the statute.

Inclusion of a child's OASDI benefits in the combined available income of an AFDC family substantially reduces its AFDC allotment. This often forces such a family to spend a substantial portion of OASDI benefits for the support of family members other than the named beneficiary.[119] One court observed that given these facts one "would be hard put to classify the result as 'clearly advantageous' to the minor child."[120] This common sense reasoning is supported by the statutory language and legislative history of the OASDI program, which states that OASDI benefits are intended to replace the support lost by a child when his or her income producing parent dies. The HHS regulation is contrary to the intent of the law because it deems benefits that are meant for the exclusive use of the insured's child to be "available" to the entire

115. 762 F.2d 63 (8th Cir. 1985).

116. 628 F. Supp. 1013, 1017-18 (S.D. Ind. 1985).

117. 625 F. Supp. 26, 29 (C.D. Cal. 1985).

118. *See, e.g.,* Oliver v. Ledbetter, 624 F. Supp. 325, 330 (N.D. Ga. 1985); *Creaton,* 625 F. Supp. at 29-30.

119. White Horse v. Heckler, 627 F. Supp. 848 (D.S.D. 1985).

120. Frazier v. Pingree, 612 F. Supp. 345, 348 (M.D. Fla. 1985).

AFDC household.[121]

Cunningham v. Toan,[122] a leading case supporting the HHS regulation, is a limited exception. In *Cunningham* the court ruled that when minor parents receive OASDI benefits through a representative payee living in the same household, those benefits should be considered family income for the named OASDI recipients and their children for purposes of determining AFDC grant levels.[123] *Cunningham* is, therefore, an extremely limited holding: minor parents' OASDI benefits should be considered income available for the support of their own children. Because parents have a legal obligation to support their children, *Cunningham* does not support deeming a child's OASDI income available to family members with whom the child lives, but to whom the child owes no legal obligation of support.

Not only are the HHS regulation and the Food Stamp Program statute, section 2012(i)(2), contrary to the legislative purpose of the Social Security Act, but they also affirmatively compel representative payees to commit criminal acts. Because any representative payee who uses a child's Social Security benefits to provide for the entire family can be held criminally liable for violating section 408(e) or 1383a(b)(1), both the HHS regulation and section 2012(i)(2) create a policy that not only encourages representative payees to commit a criminal offense, but also assumes that they will. Courts have held that the HHS regulation is invalid because no such intent can be imputed to Congress.[124] The view that Congress did not intend to allow Social Security benefits to support a beneficiary's family members is bolstered by the fact that after passing the DRA Congress strengthened penalties for violation of sections 408(e) and 1383a(b)(1).[125]

Courts seeking to support the HHS regulation have evaded this evidence by noting that the DRA allows a child's income to be included in the assistance unit "notwithstanding" section 405(j), the section that authorizes OASDI payments to representative payees.[126] These courts speculate that this language reflects a congressional intent to include OASDI benefits in family income for

121. *White Horse*, 627 F. Supp. at 852.
122. 762 F.2d 63 (8th Cir. 1985).
123. *Id.* at 65.
124. *See* Gorrie v. Heckler, 624 F. Supp. 85, 90 (D. Minn. 1985).
125. Pub. L. No. 98-460, § 16(c)(1), (2), 98 Stat. 1794, 1810-11 (1984).
126. *See, e.g.*, Oliver v. Ledbetter, 624 F. Supp. 325, 330 (N.D. Ga. 1985).

AFDC purposes.[127] The severe criminal penalties imposed for violation of sections 408(e) and 1383a(b)(1) make such speculation extremely inappropriate. A specific statute is not subject to repeal by implication.[128] Moreover, even if the phrase "notwithstanding 405(j)" could be construed to grant a limited exemption from section 408(e) for purposes of the HHS regulation, no such exemption is granted for food stamp provisions.

2. *The Anti-Alienation Provisions*—Furthermore, any exemption from section 408(e) does not relieve the AFDC or food stamp recipients of the need to comply with the anti-alienation provisions of the Social Security Act, 42 U.S.C. sections 407 (OASDI) and 1383(d) (SSI).[129] The anti-alienation provisions impose "a broad bar against the use of *any* legal process to reach . . . Social Security benefits."[130] In *Gorrie v. Heckler*[131] the court, citing *Philpott v. Essex County Welfare Board,*[132] invalidated the HHS regulation because it was a legal process that coerced a representative payee to use a child's OASDI benefits to support the entire family. Such coercion was held to "reach" Social Security benefits in violation of the anti-alienation provision.[133] Similarly, when the Food Stamp Program's section 2012(i)(2) reaches children's Social Security benefits it conflicts with the Social Security Act's anti-alienation provisions.

The anti-alienation provision of section 407 covers much more than the improper use of benefits dealt with under section 408(e). Logically then, it would be difficult to claim that the reference in the DRA to section 405(j), the section authorizing payments to representative payees, in any way affects section 407. In any event, Congress put this question beyond dispute when it strengthened section 407 by specifically providing that:

> No other provision of law, enacted before, on, or after [the date of the enactment of this section], may be construed to limit, supersede or otherwise modify the provision of this section except to the extent that it does so by specific reference to this section.[134]

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127. *Id.*

128. Frazier v. Pingree, 612 F. Supp. 345, 348 (M.D. Fla. 1985); *see also* White Horse v. Heckler, 627 F. Supp. 848, 852, 855 (D.S.D. 1985).

129. 42 U.S.C. §§ 407, 1383(d) (1982).

130. Philpott v. Essex County Welfare Bd., 409 U.S. 413, 417 (1973) (emphasis added).

131. 624 F. Supp. 85, 90 (D. Minn. 1985).

132. 409 U.S. 413, 415 (1973).

133. *Gorrie*, 624 F. Supp. at 90.

134. 42 U.S.C. § 407(b).

The passing reference made to section 405(j) in the DRA can hardly be considered an express reference to section 407.

B. The Constitutional Prohibition Against Considering a Child's Entitlement Family Income

In addition to considering the problems of integrity and coherence posed by the statutory conflicts, Congress and the courts must deal with the constitutional problems inherent in those conflicts. *Gorrie v. Heckler* recognizes the constitutional conflicts posed by considering a child's Social Security income available to the child's family. The court analogized a child's federal statutory right to receive such benefits to the state law contract right to receive child support: either independent source of support is a constitutionally recognizable property right.[135]

Most significantly, the court in *Gorrie* grappled with the kinds of factual realities that were glossed over in *Lyng v. Castillo*. Minor children whose income is considered available to a household applying for public assistance are faced with the choice of moving out of their home, refusing to help support their siblings or parents, or surrendering their individual benefits to support others. Because the overwhelmingly predictable result in most cases is that such children will surrender a significant amount of their benefits, the imposition of this "choice" constitutes a deprivation of a recognizable property right without due process of law.[136]

Gilliard v. Kirk[137] discusses the unconstitutionality of such a taking in the child support context. Children have access to their support income only through their caretakers, who act as trustees in administering the children's money.[138] A child has the right to receive the full amount of child support ordered by the court because a support order is based on a calculation of the total amount necessary to meet a child's basic needs.[139] The direct result of provisions like the HHS regulation addressed in *Gilliard* or the food stamp provision, section 2012(i)(2), is that children are unable to enforce their caretakers' fiduciary obligation to spend support payments for their exclusive use and benefit[140] or the similar obliga-

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135. 624 F. Supp. at 90 (citing 42 U.S.C. § 402(d) (1982); Mathews v. Lucas, 427 U.S. 495, 507 (1976); Jimenez v. Weinberger, 417 U.S. 628 (1974)).

136. *Gorrie*, 624 F. Supp. at 91.

137. 633 F. Supp. 1529 (W.D.N.C. 1986).

138. *Id.* at 1553.

139. *Id.*

140. *See* Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (right to exclude

tion of a representative payee under the Social Security Act.[141]

Under the *Gilliard* analysis, because the "choice" offered by section 2012(i)(2) deprives children of their right to exclude others from their property, the provision so reduces the property's value as to constitute a "taking."[142] The Supreme Court has explained that the deprivation of such a property right constituted a taking "not because [the] property vanished in thin air. It was because the government for its own advantage destroyed the value of [property rights]."[143] The taking accomplished by the government by means of section 2012(i)(2) should be subject to procedural due process. The statute, however, does not afford that protection.

Affording procedural due process would only provide for a determination of a caretaker's actual use of a child's income. If it were determined that a caretaker was using a child's income to support other family members, procedural due process would not remedy the fact that both section 2012(i)(2) and the HHS regulation would permit the attribution of the child's income to other family members. Thus, children deprived of their income by their caretakers are subject to governmental perpetuation of that misconduct. Courts have recognized the unfairness of such situations in holding that misconduct "directing the onus of a parent's misconduct against his [or her] children does not comport with fundamental conceptions of justice."[144] A procedural due process approach, therefore, fails to redress the violation of a child's substantive rights. A determination of the actual use of the child's income is material only to the family member payee's rights and not to the child's rights.[145]

Beyond this, neither section 2012(i)(2) nor the HHS regulation should require a caretaker to break one law to honor another. The imposition of such contradictory obligations exposes the irrationality of the law and hence its failure to comport with the substantive

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others is generally "one of the most essential sticks in the bundle of rights commonly characterized as property"); *Gilliard*, 633 F. Supp. at 1554 (regulatory requirement that a child share support with half-siblings constitutes taking under the fifth amendment).

141. *See* 42 U.S.C. §§ 408(e), 1383(a)(4) (1982).

142. *Gilliard*, 633 F. Supp. at 1554; *cf.* Moore v. City of East Cleveland, 431 U.S. 494, 520 (1977) (Stevens, J., concurring) (zoning ordinance prohibiting a homeowner from living with grandchildren constitutes taking without due process); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (regulations diminishing property value violate due process).

143. Armstrong v. United States, 364 U.S. 40, 48 (1960).

144. Plyler v. Doe, 457 U.S. 202, 220 (1982); *see also* Weber v. Aetna Casualty, 406 U.S. 164, 175 (1972) (visiting condemnation of child illegitimacy on the head of an infant is illogical and unjust).

145. *Gilliard*, 633 F. Supp. at 1558.

due process rights of caretakers.[146]

C. *Definition of Children*

The foregoing reasoning would protect a family's eligibility for food stamps from being adversely affected by a child's Social Security income. In addition, a further claim of protection can be made with specific reference to adult children with any income regardless of the source. The Department of Agriculture has defined children living with their parents as any offspring, whether under the age of majority or not.[147] Congress, however, has indicated no intent that its definition of "children" in section 2012(i)(2) diverge so extremely from the common use of the word in all other statutes, including those enacted for public assistance purposes. In all such statutes "children" means persons under the age of majority.

V. Conclusion: Achieving Legitimate Governmental Purposes Without Intruding on Fundamental Rights

The automatic inclusion of relatives in an economic unit not only applies to those siblings, parents, and children who do purchase and prepare food together, but also ensnares those who do not. This classification is based on the presumption that such relatives are not "likely to be actual separate households."[148] Yet this presumption is often contrary to reality and therefore overinclusive, inflexible, and arbitrary. Ironically, when this presumption is invalid, its effect falls most heavily on the neediest families, evidencing the failure of the presumption to serve its intended purpose of preventing fraud.

On the other hand, many less onerous provisions exist to deal with fraud in the Food Stamp Program. The existence of alternatives to the challenged ordinance or statute was a persuasive factor in *Moore*,[149] *Moreno*,[150] and *Murry*.[151] In the Food Stamp Program there is a heavy thicket of protections against fraud. Any household that commits a fraudulent act in order to receive food stamps is disqualified from receipt of benefits for at least six months and

146. *Id.* at 1555.
147. 7 C.F.R. § 273.1(a)(3)(ii) (1985).
148. Senate Report, *supra* note 62, at 25.
149. 431 U.S. at 500 n.7.
150. 413 U.S. at 536-38.
151. 413 U.S. at 517 n.2 (Stewart, J., concurring).

is permanently disqualified on the third violation.[152] The value of the fraudulently obtained food stamps may also be recovered,[153] and such transgressions are punishable as felonies with severe penalties.[154] Moreover, the Food Stamp Program incorporates an elaborate system both for state agency reporting and for error reduction plans. Under these plans states face federal sanctions, including loss of funding, if they do not reduce program errors.[155] Thus, state agencies are not only empowered but obliged to prevent the problem that the household presumption seeks to correct. Some households try to manipulate the rules to obtain more food stamps, and this type of fraud may be difficult to detect.[156] In attempting to solve this problem, however, Congress has not only visited on innocent households the sins of the few, but has also ignored existing, less intrusive alternatives. The fact-finding process in every food stamp case is capable of revealing which relatives in the residence do in fact belong to a single economic unit.

Section 2012(i)(2), nevertheless, denies families that reside with certain relatives the opportunity it grants to all other families to present evidence of their household circumstances. Both food stamp eligibility and the amount of food stamps actually alloted are based on a detailed, even grueling examination of these circumstances.[157] The administering agency must interview household members and obtain documentary proof of all facts on which eligibility is based.[158] Only then is a household issued any food stamps.

This thorough investigation of the affairs of all household members is required. That requirement belies any argument that section 2012(i)(2), which operates to require investigation of more family members and their relatives, is for administrative convenience. Not all putative households composed of siblings or parents and children are composed of two persons or groups of persons who, but for operation of the statutory presumption, would both be receiving food stamps. Often it is the income and resources or the unwillingness to succumb to the application process of one person or group that renders the combined household ineligible.

By artificially including all such persons in a food stamp

152. 7 U.S.C. § 2015(b) (1982).
153. *Id.* § 2022(b)(1); 7 C.F.R. § 273.16 (1985).
154. 7 U.S.C. § 2024(b).
155. *Id.* § 2025(c), (d); 7 C.F.R. §§ 275, 276.
156. *See* SENATE REPORT, *supra* note 62, at 25-28.
157. 7 U.S.C. §§ 2014(c)-(g), 2015(c), 2017(a), 2020(e)(2), (3); 7 C.F.R. § 273.
158. 7 C.F.R. § 273.2(d), (e), (f).

household, the presumption actually adds to the administrative burden by adding more persons, incomes, resources, expenses, and sets of circumstances to the already long list of items to be investigated. Giving family members the chance to show that they are not eating together should serve the governmental interest in preventing fraud just as well as the same procedure does in cases involving nonrelatives, and it should result in fewer administrative burdens.

Existing procedures should be employed to remove the terrible dilemma that section 2012(i)(2) imposes on so many impoverished families on the brink of homelessness and starvation. These families should not be forced to choose between shelter and nutrition. They must be allowed to meet the needs of family members whom they are responsible to support; the needs of relatives whom they are not responsible to support must not be permitted to usurp that duty. Nor can these families be required to relinquish shelter provided by relatives, considering the acute shortage of affordable housing.

Lyng v. Castillo failed to present many significant considerations: the weighty constitutional separation of powers and due process claims; the solutions available through statutory analysis, interpretation, or classification, as well as the administrative mechanisms already in place; and the actual, compelling facts that show section 2012(i)(2) does interfere with family living arrangements. Given any one of these, and certainly when taken together, the government must not be allowed to saddle families in this position with the misery of hunger and malnutrition.