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Aid to Families with Unborn Dependent Children: May the States Withhold Benefits?

Aid to Families with Dependent Children (AFDC) is one of the categorical public assistance programs established by the Social Security Act of 1935. The program has been characterized as a scheme of "cooperative federalism"—a state need not participate in it, but if it does participate, the federal government provides funds pursuant to a formula delineated in the Social Security Act. Under this formula the state must assume a significant portion of the financial burden of the AFDC program. To be eligible for federal funding, a state must submit an AFDC proposal for approval by the Secretary of Health, Education, and Welfare (HEW). The state retains responsibility for establishing a mechanism to process applications and to verify need, and each state sets standards of need and the level of benefits for classes of eligible recipients. Eligibility for AFDC entitles the recipient to a monthly cash payment, rehabilitative services, and medical assistance if the state so provides.

5. See 42 U.S.C. §§ 603(a)(1)-(3) (1970). Section 603(a)(1) provides that the federal government will reimburse five sixths of the money a state expends, subject to limitations on maximum dollar amounts. Also, the federal government assumes 75 per cent of the administrative costs of the program.
6. See note 5 supra.
The AFDC program has been the focus of substantial controversy. Some critics have characterized it as "inadequate and inequitable."13 It may force spouses to leave home in order to make their families eligible for assistance,14 and a family with an unemployed wage earner that receives AFDC assistance may be financially better off than a family that is ineligible because its head holds a low-paying job.15 Moreover, families in which both parents are present are frequently ineligible for AFDC aid,16 although such families are often as needy as eligible families.17 Such cash payments as are made are often insufficient to meet the recipient's needs.18 Despite these inequities, states have not liberalized eligibility standards, but rather have attempted to limit eligibility in order to ease fiscal pressures.19

One such attempt is reflected in the recent plethora of federal cases concerning the question whether an unborn child is eligible for assistance under the AFDC program.20 Since AFDC benefits are

original statute enacted in 1935 did not include a provision for medical assistance. The present provisions are the result of the enactment of the Medicaid program in 1965. See Title 42, U.S.C. § 1396 (1970). For a general discussion of the Medicaid program, see Butler, The Medicaid Program: Current Statutory Requirements and Judicial Interpretations, 8 Clearinghouse Rev. 7 (May 1974). One who is not eligible for AFDC may still be eligible for aid under state programs supplemental to AFDC. These programs, often characterized as "general assistance," "general relief," or "home relief," provide minimal benefits as compared to AFDC. Because the supplemental programs receive no federal funds, they are not subject to federal statutory requirements, and the states have absolute control over the distribution of assistance, subject only to constitutional restraints. See A. LaFrance, M. Schroeder, R. Bennett & W. Boyd, Law of the Poor 265-66 (1973) [hereinafter Law of the Poor]; Bennett, supra note 4, at 76.

16. The Social Security Act permits states to expand the causes of deprivation of parental support or care to include unemployment of the child's father under designated conditions. 42 U.S.C. § 607 (1970). In states adopting this option, a family can be eligible for AFDC benefits although both mother and father are healthy and living together, if the father is unemployed within the meaning of the statute. In about half of the states, however, eligibility for AFDC requires the absence of a parent. Law of the Poor, supra note 12, at 262-63; Bennett, supra note 4, at 75.
17. Detroit Free Press, Dec. 5, 1974, § B, at 1, col. 1. It has been estimated that welfare programs aid only one fourth of those who are poor. R. Hurley, supra note 14, at 165-66 (statement of Senator Robert F. Kennedy).
19. Bennett, supra note 4, at 78.
20. Five federal courts of appeals and twelve district courts have held that the un-
available only to families that have a “dependent child,” the resolution of this question hinges upon the interpretation of section 406(a) of the Social Security Act, which defines the term “dependent child.” That section does not make explicit reference to the eligibility of unborn children under the AFDC program, nor does any other section of the Act. A regulation promulgated by the Health, Education, and Welfare Department does permit states to aid the unborn child and to receive federal funds for so doing, but

When used in this part—
(a) The term “dependent child” means a needy child (I) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and . . . a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment.

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the agency considers such aid to be at the option of states participating in the AFDC program.22

This note will examine whether the duty to provide aid to unborn children should be imposed on all states participating in the AFDC program. It will first consider the argument that denying such benefits violates the equal protection clause of the fourteenth amendment, but the bulk of the note will be devoted to an interpretation of the relevant provisions of the Social Security Act. The statutory analysis requires several steps. First, it is necessary to examine and interpret the cases in which the Supreme Court has analyzed the legitimacy of state-imposed eligibility conditions. The focus will then shift to the proper reading of the term "dependent children." The HEW regulation dealing with aid to the unborn child and the stated purposes of the Social Security Act are discussed in this context.

Pregnant mothers have alleged that the denial of AFDC benefits to unborn children contravenes the equal protection clause, resting their claim upon the state's failure to grant AFDC aid to them and their unborn children while it grants such aid to born children and their families. Although the Supreme Court in Roe v. Wade28 raised a major barrier to one aspect of this claim by holding that an unborn child is not a "person" for the purpose of asserting rights under the equal protection clause,24 that decision did not foreclose the rights of pregnant women. Thus, the court in Carver v. Hooker25 allowed pregnant mothers as a class to pursue an equal protection claim,26 basing its holding on the perceived harm to the pregnant mothers' health if AFDC benefits were denied them.27 In Alcala v. Burns,28 the court reached the same result by recognizing that "[t]he payments are made to the family and not the unborn child."29

Having been given the right to assert a claim, the pregnant mother must show that the classification granting AFDC aid only

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27. The court noted that "[i]f a pregnant woman does not ingest enough protein during the gestation period, then the developing fetus will satisfy its needs from the permanent protein stores of the mother's body; and this process can result in the physical deterioration of her muscles and bodily tissues." 369 F. Supp. at 210.
to born, needy children cannot be justified. Several justifications for the discrimination have been offered by states.30

First, it has been asserted that the limitation on aid discourages illegitimate births by placing the entire cost of an extramarital pregnancy on the unmarried woman.31 This justification, which is of course based on a moral judgment, may no longer be viable in light of the Supreme Court's decision in King v. Smith.32 The Court there emphasized that a state should not attempt to regulate such matters as immorality and illegitimacy by placing conditions on eligibility for assistance.33 Although King involved an issue of statutory construction, rather than a constitutional claim, the unacceptability of a rationale of discouraging illegitimacy as support for an interpretation of a statute may well be determinative of the acceptability of such a justification in a constitutional case as well. There is no reason why a state purpose that a court finds invalid and therefore unable to support a particular statutory interpretation should become valid as a justification for upholding a clearly worded statute in an equal protection case.

30. It is not clear what degree of scrutiny a court must apply to each justification. The court has employed two alternative standards in equal protection cases, depending on the particular classification being challenged. The court subjects statutes involving fundamental interests, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969), or suspect classifications, e.g., Graham v. Richardson, 403 U.S. 565 (1971); Loving v. Virginia, 388 U.S. 1 (1967), to strict scrutiny, while it accords minimal scrutiny to other statutes. E.g., Jefferson v. Hackney, 406 U.S. 595 (1972); Dandridge v. Williams, 397 U.S. 471 (1970). (The Court in Dandridge rejected the contention that the right to sustenance is fundamental. For critical commentary, see Dienes, To Feed the Hungry: Judicial Retrenchment in Welfare Adjudication, 58 CALIF. L. Rev. 555 (1970).) Under minimal scrutiny, a court will sustain a classification if it is rationally related to a legitimate governmental interest. E.g., Dandridge v. Williams, 397 U.S. 471, 486-87 (1970): "The Equal Protection Clause does not require that a state must choose between attacking every aspect of a problem or not attacking the problem at all . . . . It is enough that the State's action be rationally based and free from invidious discrimination." A court using such a standard might easily conclude that AFDC assistance to the needy unborn child is not required by the equal protection clause. If strict scrutiny were to be utilized, however, none of the asserted justifications for denying aid, see text at notes 31-38 infra, could sustain the classification. An intermediate standard of review has been used on occasion—its implications for aid to the unborn are unclear. See United States Dept. of Agriculture v. Moreno, 413 U.S. 528, 533-38 (1973); The Supreme Court, 1972 Term, (1973). See also Gunther, The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. Rev. 1 (1970). For a general discussion of equal protection analysis, see Developments in the Law—Equal Protection, 82 HARV. L. Rev. 1055 (1969).


A second justification, limiting the welfare rolls, also appears questionable in light of Supreme Court decisions that have consistently held that the goal of lower welfare costs must be achieved by means other than limiting the eligibility of individuals for public assistance.

The third justification given for denying AFDC benefits to pregnant women focuses on the usefulness of such a limitation in combating fraud. The fear is that a woman might continue to request and receive aid after her pregnancy had been terminated by an abortion. Caseworkers, however, should find it easy to investigate alleged attempts at fraud—for a start they need only inquire whether a pregnant woman who claimed benefits throughout her term in fact gave birth, or they could require periodic verification by a physician. Even if some abuse goes undetected, there is no reason to suspect that the amount of fraud would justify abandoning the program or even that it would exceed the level of welfare fraud generally.

The final claimed justification for denying aid to pregnant women rests on the limited objectives of the AFDC program: maintaining and strengthening the family unit and aiding needy children. Until the child is born, it is argued, the concern that a parent be in the home to raise the child does not come into play. Aid to unborn children thus is not necessary. However, there is strong evidence that proper prenatal care and nutrition are essential both for the child's post-partum development and for the general welfare of the family. Granting benefits to pregnant women thus would seem to further the objectives of the AFDC program.

In sum, none of the justifications that have been offered for denying AFDC benefits to pregnant women are convincing. Whether they are so weak as to compel a holding that states must provide such benefits, however, is unclear. Much depends on the level of scrutiny that should be applied in passing on the question, an issue that apparently has not yet been resolved.

38. See notes 129-37 infra and accompanying text.
39. Even if the equal protection argument does not prevail on its merits, it nonetheless serves as the basis for subject-matter jurisdiction in the federal courts over suits asserting statutory entitlement to AFDC benefits. Subject-matter jurisdiction in such cases is grounded on 42 U.S.C. § 1983 (1970), giving a cause of action, inter alia, to any person deprived of constitutional rights under color of state law, and 28 U.S.C. § 1343(3) (1970), providing for federal jurisdiction over suits brought "[t]o redress
In any case, the equal protection issue need not be decided if the Social Security Act itself extends benefits to unborn children, and many lower courts have avoided the constitutional question by so holding. The decisions are far from unanimous, however. The majority of courts have held that inasmuch as the Social Security Act does not explicitly exclude unborn children, states participating in the program must provide them with AFDC benefits. Conversely, a minority of courts have reasoned that since the Act does not explicitly include unborn children, the state need not grant them AFDC benefits. The split in authority thus centers on the extent of a state's discretion to withhold benefits from individuals whose eligibility for aid is unclear on the face of the Social Security Act.

Aspects of this issue have been considered by the Supreme Court in King v. Smith,1 Townsend v. Swank,2 Carleson v. Remillard,3 and New York State Department of Social Services v. Dublino.4

King was the Court's first pronouncement on statutory entitlement to AFDC benefits. Alabama promulgated a "substitute father" regulation that denied AFDC benefits to a family whenever the

the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . . . " The equal protection claim is necessary because the Supreme Court has not yet held that section 1343(3) can be utilized when a conflict with the Social Security Act is the only asserted basis for relief. See, e.g., Bass v. Rockefeller, 381 F. Supp. 945 (S.D.N.Y. 1971); Stogner v. Page, 1 CCH FED. L. REP. p 553.901 (N.D. III. 1970). The assertion of the constitutional claim, which clearly does come under section 1343(3), allows the federal court to adjudicate the statutory claim under the doctrine of pendent jurisdiction. See Hagan v. Lavine, 415 U.S. 528, 526 (1974); UMW v. Gibs, 383 U.S. 715, 725 (1966). Under Hagan, the constitutional claim must be neither "wholly insubstantial" nor "obviously frivolous." 415 U.S. at 536-37. The equal protection claim of plaintiff mothers in the federal cases concerned with the eligibility of the unborn child for AFDC benefits clearly would meet this standard.


Jurisdiction over the statutory claim might also be based on 28 U.S.C. § 1331 (1970), provided that the amount in controversy exceeds $10,000. It could be argued that the denial of AFDC benefits to the unborn child threatens immediate and personal damage to life and health that is likely to exceed $10,000. See Marquez v. Hardin, 339 F. Supp. 1364, 1370 (N.D. Cal. 1969).

40. See cases cited note 20 supra.
41. See cases cited note 20 supra.
44. 406 U.S. 598 (1972).
45. 413 U.S. 405 (1973).
mother “cohabitated” with any able-bodied male. The plaintiff in King challenged this regulation as conflicting with the terms of the Act; Alabama responded that the states have the right to define the term “parent” in section 406(a) of the Act as including a “substitute father.”

While recognizing that the states have considerable latitude in determining the level of benefits they grant to eligible classes, the Court found that section 402(a)(10) of the Act imposed a duty on the states to furnish aid to all eligible individuals, and that Alabama had breached that duty. Since the legislative history of the Act indicated a congressional purpose “to provide programs for the economic security and protection of all children . . . ,” the Court held that the term “parent” in section 406(a) included only those persons with a legal duty to support a particular child. Because the “substitute fathers” in the Alabama regulation had no legal duty of support, the children involved were “dependent children” within the meaning of the Act and had to be provided aid.

The King opinion did not reveal whether the approach the Court took there would govern other questions of eligibility under the Social Security Act. The Court’s subsequent decision in Townsend v. Swank, however, appeared to indicate that it would. Townsend involved a challenge to Illinois’ policy of denying eligibility for AFDC to individuals between the ages of eighteen and twenty-one enrolled in colleges or universities. The broader question was whether states could limit the eligibility of an individual who fell within the definition of “dependent child” in section 406(a) of the Act. Illinois argued that its exclusion of college students helped needy children to become employable and self-sufficient and ensured the fiscal integrity of the Illinois welfare program.

The Supreme Court held that, if individuals are eligible under

46. Alabama used “cohabitation” as a euphemism for “frequent” or “continuing sexual relations,” and did not require that the substitute father actually reside in the home or be the father of the children. 392 U.S. at 314.
47. 392 U.S. at 323-33.
49. 392 U.S. at 318-19.
51. 392 U.S. at 333.
52. 392 U.S. at 330 (emphasis original).
53. 392 U.S. at 333.
55. 404 U.S. at 283-85.
57. 404 U.S. at 291.
federal standards, a state may not exclude them from the AFDC program without clear evidence of congressional authorization or intent to allow the States to do so. Since the Act did not specifically exclude individuals aged eighteen to twenty-one and attending college from eligibility, Illinois' exclusion of that group was invalid under the King approach: "King v. Smith establishes that, at least in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause." Although the Court noted that legislative history supported its interpretation that children aged eighteen to twenty-one and attending college were covered by the Act, it is not clear whether this finding was essential to the Court's holding because it read King to require that states grant aid to all individuals apparently eligible on the face of the Act, absent explicit congressional authorization of their exclusion.

This broad interpretation of King was reiterated by the Supreme Court in Carleson v. Remillard, in which no legislative history spoke to the issue of eligibility involved—California's interpretation of the term "continued absence" of a parent, one of the criteria for eligibility under the Act, as not including absence due to military service. The Court examined the Social Security Act and its legislative history and found no congressional intent to deny eligibility in cases in which a parent is absent on military service. The Court relied on Townsend and King in holding that eligibility was to be measured by the federal standard; that is, individuals not excluded by the Act must be given aid unless states are specifically allowed to change the requirements for eligibility. Since the Court found no

58. 404 U.S. at 286.
59. 404 U.S. at 286. The supremacy clause, U.S. Const. art. VI, cl. 2, provides: "This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."
60. 404 U.S. at 287-91.
62. 406 U.S. at 599.
63. 406 U.S. at 603-04. The Court stated:
We cannot assume here anymore than we could in King v. Smith, ... that while Congress "intended to provide programs for the economic security and protection of all children," it also "intended arbitrarily to leave one class of destitute children entirely without meaningful protection." ..., We are especially confident Congress could not have designed an Act leaving uncared for an entire class who became "needy children" because their fathers were in the Armed Services defending their country.
64. 406 U.S. at 604.
evidence indicating a congressional intent to extend eligibility to the plaintiffs, Carleson broadened the King and Townsend holdings somewhat, in effect creating a presumption of eligibility. So long as an individual is arguably covered by the Act, his eligibility should be protected from state limitations by the King-Townsend-Carleson clear exclusion rule.

The consistency the Supreme Court showed in King, Townsend, and Carleson was apparently ended in New York State Department of Social Services v. Dublino,65 which casts some doubt on whether the King-Townsend-Carleson approach will be applied to eligibility requirements unrelated to need. In Dublino, the Court dealt with whether a state permissibly denied public assistance to an eligible recipient who refused to participate in a state work program supplemental to the federal Work Incentive Program (WIN).66 The majority opinion focused on whether WIN preempted the supplemental state work program, and concluded that it did not.67 The Court did not find an express congressional intent to allow states to require participation in local work programs, but it inferred such an intent from the limited operation of WIN and the omission of express preemptive language in the Social Security Act.68 The Court remanded the case to the district court to determine whether particular sections of the state supplemental work program at issue conflicted with the provisions of WIN.69 Citing King, Townsend, and Carleson, the Court noted that if there was a substantial conflict between the federal provisions and the state program, the federal law would control for the purpose of establishing eligibility.70

Although Dublino did not explicitly overrule King, Townsend, and Carleson, it may well have limited their application. Dublino departed from the earlier cases by upholding state conditions on eligibility that were not explicitly authorized by the Act. Moreover, the Court suggested that the earlier decisions dealt with situations in which the Social Security Act expressly granted eligibility to the plaintiffs,71 although those opinions rested on the fact that the Act had not expressly denied eligibility.72 In his dissent in Dublino, Justice Marshall noted that the majority opinion ignored the thrust of King, Townsend, and Carleson, and emphasized the need for a clear statement of legislative intent before a variation from federal

65. 413 U.S. 405 (1973).
67. 413 U.S. at 422.
68. 413 U.S. at 414-17.
69. 413 U.S. at 422-23.
70. 413 U.S. at 423 n.29.
71. 413 U.S. at 421-22.
72. See text at notes 46-61 supra.
requirements of eligibility for AFDC benefits would be permitted.\textsuperscript{73}

\textit{Dublino} perhaps should not be read as changing the basic thesis of \textit{King}, \textit{Townsend}, and \textit{Carleson} that state deviations from federal eligibility standards can be tolerated only if expressly allowed by the language and legislative history of the Social Security Act. Nevertheless, the cases do seem to present conflicting theories as to the proper construction of the Act. \textit{Dublino} reads the Act as delineating the outer limits of federal participation, within which states may further restrict eligibility; \textit{King}, \textit{Townsend}, and \textit{Carleson} interpret the Act to mandate state aid to individuals eligible under federal standards if the state elects to participate in the AFDC program. Federal courts dealing with the question of AFDC aid to the unborn have recognized this tension and have reached varied results.\textsuperscript{74}

It may be possible, however, to reconcile the four cases. In the first place, \textit{King}, \textit{Townsend}, and \textit{Carleson} revolved around section 406(a) of the Act,\textsuperscript{75} which sets out the qualifications an individual must have to be eligible for assistance. On the other hand, \textit{Dublino} concerned section 402(a)(19),\textsuperscript{76} one of the twenty-three different requirements listed in section 402(a) that a state program must meet in order to receive federal funding. Thus, the rule of construction developed in \textit{King}, \textit{Townsend}, and \textit{Carleson} may be limited to questions concerning the type of individual eligible for aid under the Act; in other words, those persons arguably eligible under federal standards must be assisted unless they fall under a state exclusion that Congress has specifically authorized. The \textit{Dublino} rule may be restricted to analyses of the validity of state procedural conditions for assistance: Such limitations will be permitted so long as they are not clearly disapproved of in the Act.

The dichotomy developed above seems to be consistent with the policies of the Social Security Act. Granting the states wide leeway in the administration of their AFDC programs—one aspect of the \textit{Dublino} holding—accords with the idea that the AFDC program is a joint federal-state effort that allows for significant state autonomy. The Act specifically gives the states a great degree of flexibility in determining the amount of benefits to be given an eligible recipi-

\textsuperscript{73} 413 U.S. at 432.

\textsuperscript{74} \textit{See}, e.g., Doe v. Lukhard, 363 F. Supp. 823 (E.D. Va. 1973), aff'd, 493 F.2d 54 (4th Cir. 1974), \textit{petition for cert. filed}, 42 U.S.L.W. 3075 (U.S. May 23, 1974) (No. 73-1763); Alcala v. Burns, 494 F.2d 743 (8th Cir. 1974), \textit{rend.}, 43 U.S.L.W. 4374 (U.S. March 18, 1975) [See \textit{Postscript}—Ed.]; Wilson v. Weaver, 499 F.2d 155 (7th Cir. 1974) (utilizing the traditional interpretation of \textit{King}, \textit{Townsend}, and \textit{Carleson} to hold that the unborn child is entitled to AFDC benefits); Wisdom v. Norton, 507 F.2d 750 (2d Cir. 1974); Poole v. Endsley, 371 F. Supp. 179 (N.D. Fla. 1974) (utilizing the \textit{Dublino} standard and concluding that assistance is not required).

\textsuperscript{75} 42 U.S.C. § 606(a) (1970).

Moreover, wide latitude with respect to state procedural conditions on eligibility is implicit in the Act. For example, states may demand verification of an individual's need for assistance, although the Act itself does not so provide. Similarly, states must create their own applications processes; the Act is silent on the subject. Finally, although the Act gives the states no explicit mandate to require recipients to submit to home visits by caseworkers as a condition for aid, the Supreme Court validated such a requirement in *Wyman v. James*.

In that case New York had permitted assistance to be terminated if the recipient refused to consent to a home visit by a caseworker. The Court refused to accept the argument that a home visit was a "search" within the fourth amendment, and allowed the condition to stand. There was no inquiry whether the federal statute permitted a home visit as a condition of eligibility; the Court simply cited a few provisions of the Social Security Act to demonstrate that the visits served a purpose that was consistent with the goals of the AFDC program. *Wyman* is consistent with *Dublino* in that it upheld a procedural condition on eligibility that was not specifically provided for in the Act.

Strong policy reasons mitigate in favor of restricting *Dublino* to the procedural area, however, and against extending it to substantive questions of eligibility. First, equitable considerations argue for mandatory federal eligibility standards. Compliance with state procedural conditions permissible under *Dublino* and under section 402(a) is a matter of choice. Administrative requirements do not drastically alter the basic reach of the AFDC program. On the other hand, substantive state eligibility prerequisites affect families on the basis of characteristics they are relatively powerless to change, such as the age of the dependent child and the absence of a parent. Significant state latitude in articulating new requirements will therefore lead to great variations among the states as to the classes of persons eligible to receive benefits.

Apart from the possible inequity of such a situation, the increasing federal financial and regulatory contributions to the AFDC program warrant less state discretion in fixing eligibility require-

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79. See *LAW OF THE POOR*, supra note 12, at 297; Comment, supra note 78, at 1313.
80. See *PAYMENTS MANUAL*, supra note 78, Item 201, at 3-21.
82. 400 U.S. at 310.
83. 400 U.S. at 317.
84. 400 U.S. at 315.
ments than the Dublino rule would allow. The relative share and absolute level of federal AFDC funding have risen consistently since 1935. Moreover, statutory provisions increasing federal supervision have proliferated since the enactment of the program. AFDC has evolved from a program with a strong state orientation to one deeply tinted with a federal bias. Mandatory federal guidelines for deciding the type of individual to receive aid is in keeping with this trend.

There is also a benefit to be gained from explicit criteria for interpreting the Social Security Act. In his dissent in Dublino, Justice Marshall noted that "[t]he policy of clear statement in Townsend serves a useful purpose. It informs legislators that, if they wish to alter the accommodations previously arrived at in an Act of major importance, they must indicate clearly that wish, since what may appear to be minor changes of narrow scope may in fact have ramifications throughout the administration of the Act." The requirement under King, Townsend, and Carleson of explicit authority for state alteration of eligibility requirements gives Congress notice of how its amendments to the Social Security Act will be read and stimulates it to give careful consideration to whether it desires state flexibility in setting eligibility requirements.

It might also be noted that if a Dublino presumption allowing state restrictions on all criteria for eligibility were to govern, a state might be able to implement limitations that contravene the purposes of the AFDC program as set out in section 401 of the Social Security Act. Thus, a state could exclude ten-year-old children from assistance because there is no specific mandate in the Act to aid them. This exclusion would be contrary to the intent of Congress to aid needy dependent children, and Dublino should not be read to allow it.

Inasmuch as the right of the unborn child to AFDC benefits involves a question of the eligibility of individuals under section 406(a), rather than a procedural limitation conditioning the receipt of welfare benefits pursuant to section 402, the King-Townsend-Carleson standard of interpretation of the Social Security Act is applicable. Unborn children are thus entitled to AFDC benefits if

86. 413 U.S. at 431. Adherence to the King rule would mean that any congressional expansion of eligibility under the AFDC program would be mandatory on the states, unless Congress specifically indicated that it wished the expansion to be optional.
they are arguably eligible for aid under federal eligibility standards, state exclusions notwithstanding. A discussion of their status under federal law occupies the balance of this note.

Beginning with a literal analysis of the statute, eligibility is conferred on needy dependent children who are deprived of the care and support of a parent and who are under the age of eighteen.99 Some lower courts have relied on the dictionary definition of the word “child,” which includes fetuses,94 in granting benefits to unborn children.92 Another court allowed unborn children to be excluded on the basis of the medical definition of the word “child.”92 Still other courts have found the term “dependent child” ambiguous.94 Perhaps the most that can be said with any assurance is that the term can be construed to include the unborn, and, more importantly, it does not clearly exclude them.

The legislative history of the Social Security Act and its amendments is similarly ambiguous. In 1972, Congress considered but did not pass a provision excluding the unborn child from the AFDC program.95 Different courts have drawn different conclusions from this congressional deliberation;96 its ambiguity is highlighted by indications that “the reason the legislation was not passed was because the Congress decided to deal only with the Adult Categories of Public Assistance . . . .”97 Again, the most that can be said is that in 1972 Congress was aware that federal funds were being used by some states to aid unborn children under the AFDC program.

Some courts have discerned a congressional purpose to aid the unborn from the provision for maternity and health care in the Child Health Act.98 This legislation does evidence a concern for the ade-

91. Among the definitions of the word “child” in Webster's Third New International Dictionary is “an unborn . . . human being.”
quacy of prenatal care, but the argument fails because of the legis­
lative chronology: Unborn children have been granted AFDC bene­
fits since 1946, 99 while the program for maternity and infant care
was not enacted until 1963.100 The only safe conclusion is that the
Child Health Act provides no evidence that there was ever an intent
to exclude the unborn child from the AFDC program.

In light of the ambiguity of the statute and its legislative his­
tory, reference must be made to other factors. One such factor is the
administrative interpretation of the HEW.101 HEW regulations per­
mit states to aid unborn children,102 thereby impliedly including that
group within the basic eligible group of “dependent children.” Aid
is not mandatory, however; matching federal funds are available to
states participating in the AFDC program whether or not their plans
include unborn children.103

The proper deference to be accorded the HEW regulation
is integral to the analysis of the unborn child’s eligibility. If the regula­
tion is deemed conclusive, then federal law itself allows states to ex­
clude unborn children, and the King-Townsend-Carleson line of
cases is inapplicable. If the regulation is totally disregarded, the eli­
gibility of the unborn child for assistance remains ambiguous un­
der federal law. Finally, one might defer to the regulation in so far
as it includes the unborn child within the term “dependent child,”
but disregard it to the extent that it allows the states to refuse to aid
unborn children.104

99. See DEPT. OF HEALTH, EDUCATION, AND WELFARE, HANDBOOK OF PUBLIC ASSIS­
tANCE ADMINISTRATION § 3412.6 (Nov. 4, 1946). The HEW administrative practice re­
garding the unborn developed out of an audit policy in 1941 regarding Wisconsin’s
AFDC program, which provided aid to the unborn child, and later evolved into a

that the language and purpose of the Child Health Act indicate an intent
provide maternaty aid in those provisions rather than under the AFDC program. See Wisdom
(M.D. Fl., cert. denied, 419 U.S. 890 (1974). However, there is no indication in statu­
tory language or legislative history that the Child Health Act provision for prenatal
care was to be the only means by which such care was to be encouraged. See 42 U.S.C.
§ 703 (1970); S. REP. No. 744, 90th Cong., 1st Sess. 191-99 (1967); (H.R. REP. No. 544,
supra note 13, at 124-30.

101. 42 U.S.C. § 1302 (1970) provides: “The Secretary ... shall make and publish
such rules and regulations not inconsistent with the Act as may be necessary to the
efficient administration with which the Secretary is charged.”

102. See note 22 supra.

103. The HEW contends that aid to the unborn child is optional because the de­

104. See Alcala v. Burns, 494 F.2d 745, 746 (8th Cir. 1974), revd., 43 U.S.L.W. 4374
1147, 1153 (N.D. Ill. 1973), affd., 499 F.2d 155 (7th Cir. 1974).
The Court has not followed a consistent approach toward interpreting HEW regulations in the welfare context. As a general rule, deference is traditionally given to the regulations of an administrative agency granted rulemaking authority to interpret an organic statute. The Supreme Court explicitly applied this rule of statutory construction in *Lewis v. Martin*, holding that California could not consider a dependent child's resources to include any income of a man assuming the role of a spouse, absent a showing of actual financial contribution, because there would otherwise be a conflict with an HEW regulation.

Where an HEW regulation has conflicted with statutory eligibility requirements, however, it has been ignored. Thus, in *Townsend v. Swank* the Court disregarded an HEW regulation that impliedly permitted states to alter their eligibility requirements from federal standards. The Court stated: "[T]he principle that accords substantial weight to interpretation of a statute by the department entrusted with its administration is inapplicable insofar as those regulations are inconsistent with the requirements of § 402(a)(10) that aid be furnished 'to all eligible individuals.'" In *Carleson v. Remillard* the Court dealt with an HEW regulation that approved state plans permitting the payment of federal AFDC funds to families in which the absence of a parent was due to military service. The regulation also approved state plans under which such families were not given assistance. The Court was influenced by the regulation to the extent that the HEW defined "continued absence" to include military absence. Based upon its decisions in *King* and *Townsend*, however, the Court rejected the validity of the regulation to the extent that it allowed states to withdraw the benefits at issue: "We search the Act in vain . . . for any authority to make 'continued absence' into an accordion-like concept, applicable to some parents because of 'continued absence' but not to others."

The Court's approach in *Carleson* is appropriate for the analysis of the unborn child's eligibility for public assistance benefits. Inasmuch as the HEW asserts that an unborn child is eligible under the Act as a "dependent child," its direction that states may disre-

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107. 397 U.S. at 559-60.
110. 404 U.S. at 286 (emphasis original).
112. 406 U.S. at 602.
113. 406 U.S. at 602.
gard the federal eligibility standard is invalid under King, Townsend, and Carleson. On the other hand, it would be inconsistent for the HEW to assert that the unborn are not eligible as "dependent children" and yet allow federal funds to be disbursed to state programs aiding the unborn, because section 403 allows funds to be extended only to eligible individuals. It is thus logical to infer that the unborn child is a "dependent child" within section 406(a) of the Act on the basis of the HEW regulation. States must therefore provide aid to the unborn under King, Townsend, and Carleson.

Another factor that might bear on the analysis of whether the unborn child falls within the term "dependent child" is the status of the unborn in other areas of the law. In Roe v. Wade the Supreme Court considered the status of an unborn child in the context of examining the constitutionality of legislation forbidding most abortions. Grounding its analysis on the individual's constitutional right to privacy, the Court upheld the right of a pregnant woman to obtain an abortion. Although it rejected the state's asserted interest in the protection of the fetus because the word "person" as used in the fourteenth amendment did not encompass the unborn child, the Court found the state's interest in the protection of the fetus "compelling" at the point of viability. Neither the exclusion of the unborn child from the protection of the fourteenth amendment nor the Court's conclusion that the state's interest in regulating abortions does not begin until viability precludes Congress from enacting legislation designed to aid the unborn child. Indeed, it might be argued that permitting a pregnant mother to receive AFDC assistance furthers the constitutional right to privacy developed in Wade. The Court in Wade concluded that that right was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." The state abortion statute at issue was invalid be-

114. See text at notes 46-64 supra.
119. U.S. Const. amend. XIV, § 1, provides in part: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."
120. 410 U.S. at 157-58.
121. 410 U.S. at 164-65. Once the fetus is viable, "the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe abortion . . . ." 410 U.S. at 164-65. "Viability" was not specifically defined, but the Court noted that it included fetuses "potentially able to live outside the mother's womb, albeit with artificial aid." 410 U.S. at 160.
122. 410 U.S. at 157.
cause it denied the pregnant woman the right to make that choice. If the needy pregnant mother cannot obtain assistance prior to giving birth, her choice whether to have the child is likewise impeded. It is not inconceivable that the inability of an impoverished woman to meet the costs of adequate prenatal medical care and nutrition would drive her to seek an abortion. The provision of AFDC aid to unborn children thus has the potential for promoting the freedom of personal choice that assumed importance in *Wade*.

Although the law has recognized the interests of unborn children in other areas, it has taken no consistent approach. A number of jurisdictions have recognized a right of recovery for the wrongful death of a stillborn child because of prenatal injuries. The unborn child has been recognized as a person for the purpose of acquiring property rights, and is permitted to be represented by guardians ad litem. The diversity of the law with respect to the unborn, however, suggests that each question concerning the legal status of the unborn child must be answered separately. It therefore is necessary to inquire whether substantial policy reasons mandate that the unborn child be included within the term “dependent child” in section 401 of the Social Security Act.

Section 401 states that the goal of the AFDC program is to encourage the care of needy dependent children by maintaining and strengthening the family unit. The extent to which the unborn child needs aid was conceded even in *Parks v. Harden*, a case that held in the district court against mandatory aid to the unborn child: “There can be no question that, in terms of need and dependency, many unborn children are in far more severe circumstances than born children, who, at least, have the possibility of an active mother capable of assisting in their care and support.”

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126. Section 401, 42 U.S.C. § 601 (1970), provides:

> For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part.

*See also King v. Smith*, 392 U.S. 309, 313 (1968).


128. 354 F. Supp. at 622.
Moreover, granting AFDC benefits to pregnant mothers, and thereby promoting prenatal care and nutrition, would contribute to the maintenance of the family unit. Overwhelming evidence shows that there is a severe problem of prenatal malnutrition in the United States, especially among poor families. A woman's nutritional needs rise dramatically during pregnancy, but the dietary supplements available to the middle-class mother are virtually unknown to the poor.

Malnutrition during pregnancy may have severe consequences at all stages of a child's health and development. Before birth, inadequate nutrition increases the likelihood of complications of pregnancy such as anemia, toxemia, threatened and actual miscarriages, premature births, and stillbirths. Children of mothers who had deficient prepartum diets have a higher susceptibility to illness during infancy and are more likely to die within a year of birth than children of mothers who had proper nourishment during pregnancy.

The effects of prenatal malnutrition extend to the child's later life, influencing his subsequent physical and psychological development. There is increasing medical evidence that a lack of protein prior to birth can cause severe brain damage that usually cannot be reversed by subsequent nutrition and medical care. In addition, a strong correlation exists between mental retardation and prenatal malnutrition.

Inasmuch as adequate prenatal diets and medical care frequently are financially unavailable to poor mothers, the receipt of AFDC benefits may be crucial to the well-being of the child both before and after birth. The health of a child is in turn important to the family's cohesiveness, which suggests that the eligibility for AFDC

130. Id.
benefits of the unborn child comes within the congressional policy as announced in section 401 of the Social Security Act.\footnote{139. See note 126 supra.}

\textit{Postscript:}

After this article was sent to press, the Supreme Court decided the case of Burns v. Alcala, 43 U.S.L.W. 4374 (U.S. March 18, 1975). The Court held by a seven-to-one margin that states need not grant AFDC benefits to unborn children, in effect following the HEW regulation quoted in note 22 supra.

The first step in the Courts opinion, which was written by Justice Powell, was to set forth the Court's approach to the statutory construction of the AFDC provisions of the Social Security Act. Justice Powell acknowledged that several lower courts that have examined the issue have interpreted \textit{King, Carleson,} and \textit{Townsend} to establish the rule that "persons who are arguably included in the federal eligibility standard must be deemed eligible unless the Act or its legislative history clearly exhibits an intent to exclude them from coverage, in effect creating a presumption of coverage when the statute is ambiguous." 43 U.S.L.W. at 4376. The Court rejected this rule, noting that it constituted a "departure from ordinary principles of statutory interpretation." 43 U.S.L.W. at 4376. Rather, it declared that the three cases "establish only that once the federal standard of eligibility is defined, a participating State may not deny aid to persons who come within it in the absence of a clear indication that Congress meant the coverage to be optional." 43 U.S.L.W. at 4376. After articulating this approach, the Court devoted the bulk of its opinion to a futile examination of the Social Security Act and its legislative history for evidence that Congress intended to include unborn children in the class eligible for AFDC benefits.

Apparently, then, the first step courts must take in determining the validity of substantive state limitations on AFDC eligibility is to search for affirmative evidence that Congress intended to benefit the plaintiff. Only when satisfied that the plaintiff is included under the Act will the Court reach the ultimate issue of the validity of the state limitation.

The Court based its approach on the \textit{King} trilogy. However, only two of the three cases fit comfortably within the Court's analysis. In \textit{King}, the "substitute father" case, there was evidence that Congress intended to aid all children who did not have a parent with a legal duty to support them. Since the evidence on inclusion was clear, the Court struck down the "substitute father" regulation with little hesitation. Similarly, in \textit{Townsend} there was legislative history that indicated that students aged 18 to 21 were intended to be covered by the Act, although that case ostensibly rested on the finding that...
the exclusion was not clearly authorized. In Carleson, however, there was absolutely no evidence in the Act or its legislative history that Congress intended to benefit children with parents who were absent due to military service. See text following note 64 supra. The Court bypassed the initial question of inclusion, contrary to its approach in Alcala, and went directly to the issue of whether Congress had explicitly authorized states to exclude such children from eligibility. Finding no such authorization, the Court struck down the state limitation.

In most cases the difference between the “presumption of coverage” approach the Court arguably took in Carleson and the neutral approach the Court took in Alcala will be of little significance. Usually the weight of the evidence will be either for or against inclusion. Only in cases in which there is no evidence of legislative intent (or, as in Alcala, in which the evidence gives rise to conflicting inferences) would the “presumption” approach yield different results. But it is in precisely such cases that there must be a presumption of some kind. By refusing to presume for the plaintiff, the Court in Alcala in effect presumed for the defendant. This choice may have been unfortunate. AFDC is a remedial program designed to aid needy children and their families. When issues of eligibility have arisen under other federal remedial legislation, such as Old Age Assistance, 42 U.S.C. §§ 301-06 (1970), federal courts customarily have construed eligibility criteria liberally and extended benefits to individuals who were not clearly covered. See, e.g., Haberman v. Finch, 418 F.2d 664 (2d Cir. 1969); Rasmussen v. Gardner, 374 F.2d 589 (10th Cir. 1967); Dieno v. Celebrezze, 347 F.2d 159 (9th Cir. 1965); Leitz v. Flemming, 264 F.2d 311 (6th Cir.), cert. denied, 361 U.S. 820 (1959); Schwing v. United States, 165 F.2d 518 (3d Cir. 1948). A similar pattern has prevailed in state court construction of workmen’s compensation laws. See, e.g., Green v. Burch, 164 Kan. 348, 189 P.2d 892 (1948); Boen v. Foster, 241 Miss. 520, 130 S.2d 877 (1961); Jones v. Loving, 363 P.2d 512 (Okla. 1961); Shubert v. Steelman, 214 Tenn. 102, 377 S.W.2d 940 (1964). Moreover, to hold that a group need not be given aid because it does not fall within federal eligibility standards and at the same time allow federal funds to be used by states that do decide to aid that group—as the Court held in Alcala—may do violence to the federal nature of the AFDC program. See text at notes 84-85 supra.

The Court’s holding with respect to the validity of a state’s refusal to grant aid to persons who are eligible under federal standards is more encouraging. The Court stated: “The State must provide benefits to all individuals who meet the federal definition of ‘dependent child’ and who are ‘needy’ under state standards, unless they are excluded or aid is made optional by another provision of
the Act.” 43 U.S.L.W. at 4375. Surprisingly, the Court cited Dublino as well as the King trilogy in support of this statement. In Dublino, it will be recalled, the Court upheld a state-imposed condition of eligibility that was not expressly authorized under the Social Security Act. See text at notes 65-73 supra. By requiring “a clear indication that Congress meant the coverage to be optional,” 43 U.S.L.W. at 4376, the Court in Alcala infused new life into King, Carleson, and Townsend and gave reason to hope that Dublino would perhaps be limited to state-imposed procedural requirements. See text at notes 71-87 supra. On the other hand, since the Court did not find that unborn children fell within the federal standard, the validity of a state refusal to grant aid to eligible individuals was not squarely placed in issue, and the future application of Dublino remains uncertain.

The bulk of the Court’s opinion was devoted to analyzing whether unborn children fell within the Act’s definition of “dependent child.” The Court correctly concluded that there was no explicit legislative history or statutory language that indicated that the unborn were included. However, the Court rejected the claim that the HEW regulation authorizing states to grant AFDC benefits to unborn, needy children was evidence that such children came under the Act. Instead, the Court accepted the HEW’s argument that “unborn children are not included in the federal eligibility standard and . . . the regulation authorizing federal participation in AFDC payments to pregnant women is based on the agency’s general authority to make rules for efficient administration of the Act. 42 U.S.C. § 1302.” 43 U.S.L.W. at 4377. The Court noted that the regulation appeared alongside “other rules authorizing temporary aid, at the option of the States, to individuals in the process of gaining or losing eligibility for the AFDC program.” 43 U.S.L.W. at 4377.

The other rules authorizing temporary aid, however, were promulgated pursuant to and were in accord with section 406(e) of the Social Security Act, 42 U.S.C. § 606(e) (1970), which defines “emergency assistance to needy families with children.” Emergency assistance is clearly stated to be within each state’s option, but it cannot be granted for more than 30 days. Assistance to pregnant women on behalf of their unborn children may exceed 30 days under the HEW regulation, as it is conditioned only on the determination of pregnancy by medical diagnosis. The “unborn children” regulation thus stands alone in this area as an instance of the HEW’s rule-making power under 42 U.S.C. § 1302 (1970). Seen in this light, “the agency’s assertion that it has never deemed unborn children to be within the eligibility provisions of § 406(a)” must be viewed “somewhat skeptically.” 43 U.S.L.W. at 4379 (Marshall, J., dissenting). The more persuasive view is that the regulation, and the long
administrative practice conducted pursuant to it, indicate that un-born children do come under the Acts definition of "dependent child."