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NOTES

THE ELIGIBILITY OF THE UNBORN CHILD UNDER AFDC

The Aid to Families with Dependent Children Program (AFDC)¹ is a categorical assistance program established by the Social Security Act of 1935.² The purpose of the program is to provide assistance to needy dependent children and the parents or relatives with whom they are living.³ All needy children who have been denied parental care and support and who satisfy certain age and educational criteria are eligible for assistance.⁴

There has recently been considerable litigation concerning the eligibility of unborn children under the AFDC program.⁵ In each

1. Aid to Families With Dependent Children, 42 U.S.C. §§ 601-44 (1970) [hereinafter cited as AFDC].

2. The other established programs are: Old-Age Survivors and Disability Benefits, 42 U.S.C. §§ 301-431 (1970), *as amended*, 42 U.S.C. §§ 430-31 (Supp. II, 1973); Aid to the Blind, 42 U.S.C. §§ 1201-06 (1970); Aid for the Permanently and Totally Disabled, 42 U.S.C. §§ 1351-55 (1970).

3. AFDC § 601.

4. *Id.* § 606.

5. Taylor v. Hill, 377 F. Supp. 495 (D.N.C. 1974); Wisdom v. Norton, 372 F. Supp. 1190 (D. Conn.), *rev'd*, 43 U.S.L.W. 2173 (2d Cir. Oct. 29, 1974); Mixon v. Keller, 372 F. Supp. 51 (M.D. Fla.), *cert. in advance of judgment denied*, 43 U.S.L.W. 3203 (U.S. Oct. 22, 1974); Poole v. Endsley, 371 F. Supp. 1379 (N.D. Fla.), *cert. in advance of judgment denied sub nom.* Mixon v. Keller, 43 U.S.L.W. 2173 (2d Cir. Oct. 29, 1974); Carver v. Hooker, 369 F. Supp. 204 (D.N.H. 1973), *aff'd*, No. 74-1079 (1st Cir. July 18, 1974), *petition for cert. filed*, 43 U.S.L.W. 3138 (U.S. Sept. 17, 1974) (No. 74-242); Whitfield v. Minter, 368 F. Supp. 798 (D. Mass. 1973); Stuart v. Canary, 367 F. Supp. 1343 (N.D. Ohio 1973); Green v. Stanton, 364 F. Supp. 123 (N.D. Ind. 1973), *aff'd sub nom.* Wilson v. Weaver, 499 F.2d 155 (7th Cir. 1974); Harris v. Mississippi State Dep't of Public Welfare, 363 F. Supp. 1293 (N.D. Miss. 1973); Doe v. Lukhard, 363 F. Supp. 823 (E.D. Va. 1973), *aff'd*, 493 F.2d 54 (4th Cir. 1974), *petition for cert. filed*, 42 U.S.L.W. 3699 (U.S. June 18, 1974) (No. 73-1763); Alcala v. Burns, 362 F. Supp. 180 (S.D. Iowa 1973), *aff'd*, 494 F.2d 743 (6th Cir. 1974), *cert. granted*, 43 U.S.L.W. 3187 (U.S. Oct. 15, 1974); Wilson v. Weaver, 358 F. Supp. 1147 (N.D. Ill. 1973), *aff'd*, 499 F.2d 155 (7th Cir. 1974); Parks v. Harden, 354 F. Supp. 620 (N.D. Ga. 1973).

case, a pregnant woman was seeking to enjoin her state of residence from denying benefits to her on behalf of her unborn child. The decisions have focused on the issue of whether unborn children come within the definition of "dependent child" as set forth in AFDC section 606.⁶ If unborn children are included, a state program denying AFDC benefits to the unborn would be invalid under the Supremacy Clause because the state is using federal funds.⁷ The source of the controversy is that no reference is made to unborn children in AFDC's definition of "dependent child."⁸ Consequently, a difficult question of statutory construction is raised. Thus far, fourteen of seventeen reported decisions have included unborn children within the statutory definition.⁹

6. AFDC section 606(a) defines the term "dependent child" as a "needy child (1) 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 (as determined by the State in accordance with standards prescribed by the Secretary) 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."

7. U.S. CONST. art. VI, § 2, provides that: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . 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." AFDC section 602(a)(10) directs that AFDC benefits be furnished "with reasonable promptness to all eligible individuals." Consequently, if unborn children are deemed to be eligible within the meaning of the statutory definition of "dependent child," a state program must conform to the federal standards by making benefits available to unborn children. Although all the unborn child cases have been decided under the supremacy clause by means of statutory construction, it should be noted that equal protection challenges were also raised in all of the cases. The courts, however, adhered to the general rule that "[a]ny doubt must be resolved in favor of [a] construction to avoid the necessity of passing upon the equal protection issue." *Townsend v. Swank*, 404 U.S. 282, 291 (1971).

8. See note 6 *supra*.

9. See cases cited note 5 *supra*. Only *Parks v. Harden*, 354 F. Supp.

Prior to the late 1960s, state welfare programs were reviewed almost exclusively by the Department of Health, Education, and Welfare (HEW).¹⁰ In recent years, however, litigants have turned to the federal courts as a forum for challenging state welfare programs.¹¹

620 (N.D. Ga. 1973), *Mixon v. Keller*, 372 F. Supp. 51 (M.D. Fla. 1974), and *Wisdom v. Norton*, 43 U.S.L.W. 2173 (2d Cir. Oct. 29, 1974), have disagreed. See also *Wilson v. Weaver*, 499 F.2d 155, 158 (7th Cir. 1974) (dissenting opinion).

10. To be eligible for state welfare funds, states must submit their plans to the Secretary of Health, Education and Welfare for approval. 42 U.S.C. §§ 301, 601, 1201, 1351 (1970). The Secretary may at any time during the administration of a state plan cut off funds if he finds that there has been substantial non-compliance with conditions imposed by statute or regulation. *Id.* §§ 304, 604, 1204, 1354. The state does have a right to a hearing. *Id.* It may in the event of an adverse decision avail itself of judicial review in the federal circuit courts. *Id.* § 1316. See Note, *Federal Judicial Review of State Welfare Practices*, 67 COLUM. L. REV. 84, 91 (1967).

11. Most challenges to welfare laws have been founded on 42 U.S.C. § 1983 (1970) which provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress." 28 U.S.C. § 1343(3) (1970) provides district courts with jurisdiction "[t]o redress the deprivation, under color of any State law, statute, ordinance or immunity secured by the Constitution of the United States." There has been considerable controversy concerning whether the incompatibility of a state law and the Social Security Act is a violation of 42 U.S.C. section 1983, or whether federal courts have sufficient subject matter jurisdiction over such a claim under 28 U.S.C. section 1343(3). In *Hagans v. Lavine*, 94 S. Ct. 1372 (1974), the Supreme Court affirmed the general rule that in order to bring an action under section 1983, a plaintiff has to allege a constitutional claim. If this claim is of sufficient substance to support federal jurisdiction, then a district court could hear as a matter of pendent jurisdiction the claim of conflict between federal and state law, without deciding whether the statutory claim was itself encompassed in section 1343. *Id.* at 1379. The Court also affirmed the right of a district court judge to decide the statutory claim without first having the constitutional claim decided by a three judge court. *Id.* at 1382. Though many of the unborn child decisions address these issues, the jurisdictional questions are beyond the scope of this Note.

Basic to this development has been a change in attitude towards the nature of public welfare. Although still not denominated a fundamental right,¹² welfare is no longer viewed as a mere gratuity furnished at the state's discretion.¹³ An alternative explanation for this increase, however, might be the greater availability of legal aid services and public neighborhood law offices.¹⁴

Much of welfare litigation has arisen from inconsistencies between state imposed eligibility requirements and those provided by the controlling federal act.¹⁵ Challenges made against eligibility requirements in respect to the AFDC program have been frequent and often successful, due to a strict rule for reviewing state welfare programs that has emerged from three Supreme Court cases.¹⁶ The

12. In *Dandridge v. Williams*, 397 U.S. 471 (1970), the Court, in reviewing a challenge to a state welfare program on equal protection grounds, stated: "[H]ere we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights . . ." *Id.* at 484.

13. See Note, *Social Welfare—An Emerging Doctrine of Statutory Entitlement*, 44 NOTRE DAME LAW. 603 (1969). "The traditional legal approach to the interest of the individual in government largesse, such as pensions and poor relief, has been to categorize whatever he was entitled to receive under a statutory programs as a 'gratuity' to which he had no 'vested right' and which could be granted, withheld or conditioned at the complete discretion of the legislature." *Id.* at 609; see *Goldberg v. Kelly*, 397 U.S. 254 (1970) (footnote omitted). "It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.'" *Id.* at 262 n.8.

14. See, e.g., Comment, *Neighborhood Law Offices: The New Wave in Legal Services for the Poor*, 80 HARV. L. REV. 805 (1970).

15. See, e.g., *Lopez v. Vowell*, 471 F.2d 690 (5th Cir. 1973), cert. denied, 411 U.S. 939 (1973) (invalidated a state welfare provision denying benefits to caretakers of needy dependent children if the caretakers were married and living with their spouses); *Lawson v. Brown*, 349 F. Supp. 203 (W.D. Va. 1972) (invalidated a state welfare provision that excluded children between the ages of 16-18 from AFDC eligibility if they did not attend school).

16. *Carleson v. Remillard*, 406 U.S. 598 (1972); *Townsend v. Swank*, 404 U.S. 282 (1971); *King v. Smith*, 392 U.S. 309 (1968). In *Townsend v. Swank*, an Illinois welfare provision excluded from AFDC eligibility children between the ages of 18-20 who attended colleges and universities. The Court held that this provision was in direct conflict with the definition of "dependent child" found in the Social Security Act. 404 U.S. at 285. In

rule was articulated by Mr. Justice Brennan in *Townsend v. Swank*:

[A]t 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.¹⁷

The authority for this rule is a provision of AFDC requiring that payments "shall be furnished with reasonable promptness to all eligible individuals."¹⁸

The *Townsend* rule has been the main authority cited in those decisions favoring inclusion of unborn children under the AFDC program.¹⁹ However, before courts could apply the rule, they first had to determine whether the definition of "dependent child" found in AFDC could be construed to encompass the unborn child. This has proven to be no easy task. Legislative history shows no evidence of congressional intent either to include or exclude unborn children.²⁰ Consequently, the courts have relied on other evidence of congressional intent for their decisions. Particular emphasis has been placed on an administrative policy which permits participating states the option of making payments to unborn children²¹

Carleson v. Remillard, the Court struck down a California welfare provision that excluded from AFDC eligibility any child whose father was absent due to military leave. 406 U.S. at 603. In *King v. Smith*, the Court invalidated an Alabama welfare provision that excluded from AFDC eligibility any mother cohabiting with a man not obligated by Alabama law to support her child. The Court held that such a "substitute father" did not come within the meaning of "parent" in the Social Security Act. 392 U.S. at 327.

17. 404 U.S. at 286.

18. AFDC § 602(a)(10).

19. See, e.g., *Green v. Stanton*, 364 F. Supp. 123 (N.D. Ind. 1973). The ultimate question is "whether congressional authorization for the exclusion of unborn children from eligibility for AFDC under the definition of 'dependent child' is 'clearly evidenced from the Social Security Act or its legislative history.'" *Id.* at 125.

20. AFDC "bespeaks no specific intent on the part of Congress in respect of either the exclusion or inclusion of the unborn child." *Carver v. Hooker*, 369 F. Supp. 204, 212 (D.N.H. 1973).

21. The court in *Parks v. Harden*, 354 F. Supp. 620 (N.D. Ga. 1973), presented the early history of this policy. The state of Wisconsin made payments available to children "from six months before to six months

"when the fact of pregnancy has been determined by medical diagnosis."²²

The courts which have favored inclusion of unborn children within the AFDC program have applied a dual standard in their interpretation of this policy. While they have accepted HEW's authorization of payment to unborn children as manifesting the will of Congress, they have also declared its optional aspect invalid.²³

As justification for this determination, the courts have adopted a syllogistic reasoning. They submit as their major premise the *Townsend* rule which mandates payments of AFDC benefits to all eligible individuals. Their minor premise is that unborn children are eligible through authorization of HEW. The conclusion, therefore, is that it is mandatory, and not at the state's option, that unborn children receive AFDC benefits.²⁴ Such reasoning, however, is based on the presupposition that HEW's optional policy permitting payment of AFDC benefits to unborn children automatically makes them eligible within the meaning of the *Townsend* rule and AFDC.

The courts that have found unborn children to be within the eligibility standards of the AFDC program have been able to justify this position because of the general policy that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications it is wrong."²⁵ Since Congress has acquiesced in the payment of benefits to unborn children

after the birth of the child' " under its state program. In 1941, an audit exception to these payments was waived by the Social Security Board with the understanding that exceptions also would not be taken to similar payments in the future. *Id.* at 625 n.5.

22. 45 C.F.R. § 233.90 (1973).

23. In *Doe v. Lukhard*, 363 F. Supp. 823 (E.D. Va. 1973), the court admitted: "As the present defendants and the *Parks* court note, it appears anomalous to rely on HEW interpretation of eligibility but not on HEW interpretation of the optional nature of the program." *Id.* at 828.

24. An argument was made by HEW that its authority for making such coverage optional is that the provisions of AFDC section 602 are mandatory on the states while the requirements of AFDC section 606 are not. *See* notes 7, 19 *supra*. The court in *Wilson v. Weaver*, 358 F. Supp. 1147 (N.D. Ill. 1973) rejected this argument, interpreting AFDC section 606 as defining "dependent child" for purposes of the entire AFDC subchapter of the Act. *Id.* at 1153.

25. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969).

for over thirty years, the courts reason that such payments are compatible with the intent of Congress.²⁶ Furthermore, Congress' recent failure to enact amendments to AFDC which would have expressly excluded the unborn is construed to be further evidence of its acknowledgement of the unborn child's eligibility.²⁷

However, it is still to be determined whether Congress' acquiescence is predicated only on the policy's optional aspect. If this is the case, it would seem that the unborn child should not be considered an eligible individual within the meaning of AFDC.²⁸ Consequently, further clarification of congressional intent is necessary. As was noted earlier, legislative history of the AFDC program provides little assistance.²⁹ Courts favoring mandatory eligibility for unborn children have therefore relied on two other indices of congressional intent.

The courts examined the overall goals of AFDC itself. In *King v. Smith*,³⁰ the Supreme Court declared the "paramount goal" of the AFDC program to be the protection of needy children.³¹ Courts de-

26. The court in *Wilson v. Weaver*, 358 F. Supp. 1147 (N.D. Ill. 1973), noted that "even if the unborn child was not within the contemplation of Congress at the time the Act was passed, HEW and its predecessors have authorized the payments of benefits on behalf of the unborn since at least 1941." *Id.* at 1154.

27. In 1972, Congress made substantial amendments to the Social Security Act. While no changes were made to the AFDC sections of the Act, the proposed amendments contained a provision that would have eliminated payment for unborn children even on an optional basis. "Regulations of the Department of Health, Education, and Welfare permit Aid to Families with Dependent Children payments for a child who has not yet been born. The Committee [Senate Committee on Finance] bill would make unborn children ineligible for AFDC." STAFF OF SENATE COMM. ON FINANCE, 92D CONG., 2D SESS., SUMMARY OF THE PRINCIPAL PROVISIONS OF H.R. 1 AS DETERMINED BY THE COMMITTEE ON FINANCE 94 (Comm. Print 1972).

28. In *Doe v. Lukhard*, 363 F. Supp. 823 (E.D. Va. 1973), the court stated that if an unborn child is not a child for purposes of AFDC section 606, then the policy of granting payments to unborn children is violative of AFDC section 603, which provides that the federal government may match payments made only to eligible individuals. *Id.* at 829.

29. See notes 20-27 *supra* and accompanying text.

30. 392 U.S. 309 (1968).

31. *Id.* at 325.

cluding in favor of including unborn children within the scope of AFDC felt that the word "child" should be interpreted in light of this goal.³² Since pre-natal nutrition and medical care are obviously essential to the unborn child's future well-being, these courts reasoned that the definition of "dependent child" should encompass the fetus.³³ Such reasoning, however, seems insufficient by itself to support a finding of eligibility. The *Townsend* rule is one of "statutory entitlement" rather than one of "statutory intent."³⁴ Consequently, the requirements of the *Townsend* rule cannot be satisfied by simply finding that a classification is consistent with the overall purpose of AFDC. Further evidence of congressional intent is necessary before unborn children could be conclusively determined to be eligible within the meaning of "dependent child" in AFDC.

As further evidence, the courts offered the dictionary definition

32. The court stated in *Wilson v. Weaver*, 358 F. Supp. 1147 (N.D. Ill. 1973): "[A]ny uncertainty about the meaning of the word child should be resolved in light of the broad remedial goals of the AFDC program, which are stated at . . . [AFDC] § 601." *Id.* at 1154 (footnote omitted).

33. However, it should be noted that these needs are provided for in 42 U.S.C. §§ 701-15 (1970). The court in *Mixon v. Keller*, 372 F. Supp. 51 (M.D. Fla. 1974), noted that "an omission from Title IV [AFDC §§ 601-44] could only be intentional when one examines Title V [42 U.S.C. §§ 701-15] of the Social Security Act where Congress specifically includes mention of pre-natal care and prospective motherhood and childbearing." *Id.* at 54.

34. The "statutory entitlement" theory was stated by the district court in *Smith v. King*, 277 F. Supp. 31 (M.D. Ala. 1967), *aff'd*, 392 U.S. 309 (1968): "Aid to Dependent Children financial assistance is a *statutory entitlement* under both the laws of Alabama and the federal Social Security Act, and where the child meets the statutory eligibility requirements, he has a right to receive financial benefits under the program." *Id.* at 38 (emphasis added). See Note, *Social Welfare—An Emerging Doctrine of Statutory Entitlement*, 44 NOTRE DAME LAW. 603 (1969). Before *King*, the test that was applied to state welfare programs was referred to as "Condition X," embodied in a regulation found in 45 C.F.R. § 233.10(a)(1)(ii) (1973), which reads: "The groups selected for inclusion in the plan and the eligibility conditions imposed must not exclude individuals or groups on an arbitrary or unreasonable basis, and must not result in inequitable treatment of individuals or groups in the light of the provisions and purposes of the public assistance titles of the Social Security Act." See Note, *Welfare's Condition X*, 76 YALE L.J. 1222 (1967).

of child, which encompasses both the born and the unborn.³⁵ In *Harris v. Mississippi State Department of Public Welfare*,³⁶ the court stated: "As a general rule words used in the statute are to be given their usual and commonly understood meaning, unless it is plain from the statute that a different meaning is intended."³⁷ However, dictionary definitions notwithstanding, it is questionable whether a fetus is included in the common day usage of the word "child."³⁸

There is a differentiation between the born and unborn child regarding constitutional rights. The Supreme Court in *Roe v. Wade*³⁹ held that the word "person" as used in the fourteenth amendment does not include the unborn.⁴⁰ Therefore, arguably, a state's exclusion of the unborn from AFDC benefits might survive an equal protection challenge. However, the unborn child cases have been decided on non-constitutional grounds and, therefore, *Roe* seems inapplicable. As an alternative approach, the legal status of the unborn child in reference to public welfare benefits could be analogized to the law of property where the unborn's right is recognized from the moment of conception.⁴¹ Regardless, arguments founded on either the legal or constitutional status of the unborn do not clarify what Congress intended by the word "child" and therefore are of questionable merit.

Parks v. Harden,⁴² *Mixon v. Keller*,⁴³ and *Wisdom v. Norton*,⁴⁴ the cases which held in favor of excluding unborn children from mandatory AFDC eligibility, focused their opinions on refuting the arguments offered in support of inclusion by the other courts.⁴⁵ An

35. *Webster's New International Dictionary* (2d ed. 1957) defines child as "an unborn or recently born human being."

36. 363 F. Supp. 1293 (N.D. Miss. 1973).

37. *Id.* at 1296.

38. "As a matter of semantics, there simply is no way to conclude that the word 'child' includes something else which is not a 'child,' namely an unborn child." *Parks v. Harden*, 354 F. Supp. 620, 623 (N.D. Ga. 1973).

39. 410 U.S. 113 (1973).

40. *Id.* at 157.

41. See Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME LAW. 349 (1971).

42. 354 F. Supp. 620 (N.D. Ga. 1973).

43. 372 F. Supp. 51 (M.D. Fla. 1974).

44. 43 U.S.L.W. 2173 (2d Cir. Oct. 29, 1974).

45. See notes 33, 38 *supra*.

affirmative argument made by *Mixon* was that certain provisions of AFDC are only logical if the term "child" is limited to born children.⁴⁶

Recognizing that congressional intent is unclear, perhaps a better analysis is that each decision turns on the interpretation given the *Townsend* rule by a particular court. The courts holding in favor of unborn children have opted for a reading of the rule that first examines the term "child" to determine whether such a term is broad enough to include coverage under AFDC, and secondly, requires a congressional showing of "specific exclusion" before the unborn could be denied benefits.⁴⁷ It might be argued that a different reading was given by the courts denying benefits. These courts seem to have interpreted the *Townsend* rule as requiring a finding of eligibility only upon a showing of "specific inclusion" of the class in either the legislative history or in AFDC itself.⁴⁸ *Wilson v. Weaver* stated that such an interpretation was clearly not the law.⁴⁹ The *Townsend* rule itself speaks of "specific exclusion" rather than "specific inclusion."⁵⁰ Therefore, it would seem that the approach in *Wilson* and other decisions favoring the inclusion of unborn children squares with the *Townsend* rule. Such an interpretation would also be consistent with the rule of construction that remedial legislation is

46. See, e.g., AFDC sections 602(a)(7) and (8), which require consideration of the child's income and resources in establishing the amount of assistance. AFDC section 602(a)(11) requires notice to law enforcement officials when the state furnishes aid to a "child who has been deserted or abandoned by his parent." *Mixon v. Keller*, 372 F. Supp. 51, 54 (M.D. Fla. 1974).

47. "Under color of *Townsend*, *King*, and *Carleson*, plaintiffs have advanced the theory of 'specific exclusion' saying that the fetus must be covered by the Social Security Act since unborns are not 'specifically excluded' by the Act. This construction does violence to the actual intent expressed by the Supreme Court in the above cases. The attempt to shift the burden to the defendant to prove that an item not expressly excluded is thereby included is inverted logic and will not stand." 372 F. Supp. at 55.

48. The court in *Alcala v. Burns*, 362 F. Supp. 180 (S.D. Iowa 1973), stated that: "Judge Smith in *Parks v. Harden*, when he searched the statute and legislative history, was looking for a very specific inclusion of 'unborn children' which he did not find." *Id.* at 185.

49. 358 F. Supp. 1147, 1152 (N.D. Ill. 1973).

50. 404 U.S. at 286.

traditionally interpreted broadly to effectuate its purposes, with exceptions narrowly construed.⁵¹ However, two recent Supreme Court decisions⁵² have raised some question as to the scope and meaning of *Townsend*. Conceivably the reasoning of *Parks*, *Mixon*, and *Wisdom* could find support in these two decisions.

In *Jefferson v. Hackney*,⁵³ the Supreme Court upheld Texas' method of computing AFDC benefits.⁵⁴ The Court's decision was consistent with a state's right to establish the standard of need and determine the level of benefits.⁵⁵ However, the effect of this particular scheme was a denial of benefits entirely to certain families whose income was less than their standard of need.⁵⁶ Consequently, an argument could be made that Texas' provision denied benefits to

51. *Peyton v. Rowe*, 391 U.S. 54 (1968).

52. *New York State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405 (1973); *Jefferson v. Hackney*, 406 U.S. 535 (1972).

53. 406 U.S. 535.

54. Texas' method was a variation of the ratable reduction method of limiting welfare payments. The Supreme Court, in *Rosado v. Wyman*, 397 U.S. 397 (1970), approved the use of ratable reduction under which a family eligible for AFDC payments has its standard of need reduced by multiplying the standard by a certain percentage. For example, a family with a \$200 standard of need residing in a state which uses a fifty percent reduction factor would be eligible for benefits of \$100. In the method challenged in *Rosado*, income was subtracted before applying the reduction factor. In *Jefferson*, Texas applied the factor first and then subtracted the income. Consequently, if the family in the hypothetical presented above had income of \$100, they would not be entitled to any benefits whatsoever. See generally, Note, 1 *FORDHAM URBAN L.J.* 322 (1972), Note, *What Remains of Federal AFDC Standards After Jefferson v. Hackney?*, 48 *IND. L.J.* 281 (1972).

55. "There is no question that states have considerable latitude in allocating their AFDC resources, since each state is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program." *King v. Smith*, 392 U.S. 309, 318-19 (1968) (footnotes omitted).

56. If a family had a standard of need of \$200 and an income of \$100, and if in Texas the percent reduction factor was fifty percent, the percentage reduction factor would be applied to the standard of need before subtracting income. In the above hypothetical this would result in a payment of \$0 even though the family had income (\$100) which was less than their standard of need (\$200).

individuals eligible under AFDC provisions and was therefore invalid according to *Townsend*. Yet the Court upheld the variance, placing emphasis on the fact that the eligibility requirements in controversy concerned the administration of a welfare program, which is more within the competence of the state than the judiciary.⁵⁷

More recently, in *Dublino v. New York Department of Social Services*,⁵⁸ the Court reviewed independent state work programs for AFDC recipients. The program provided conditions for eligibility in addition to those provided by the AFDC in its Work Incentive Program (WIN).⁵⁹ Since there was a conflict of conditions of eligibility, *Townsend* would appear to control. However, the Court approved the state program, finding a lack of congressional intent that would require its preemption by WIN.⁶⁰

The holdings of *Jefferson* and *Dublino* would seem to restrict the scope of *Townsend*. One interpretation of *Jefferson* is that it limits

57. "Section 402(a)(10) [AFDC § 602(a)(10)] also prohibits a State from creating certain exceptions to standards specifically enunciated in the federal Act. It does not, however, enact by implication a generalized federal criterion to which States must adhere in their computation of standards of need, income, and benefits. Such an interpretation would be an intrusion into an area in which Congress has given the States broad discretion, and we cannot accept appellants' invitation to change this longstanding statutory scheme simply for policy consideration reasons of which we are not the arbiter." *Jefferson v. Hackney*, 406 U.S. at 545 (citation and footnote omitted).

58. 413 U.S. 405.

59. The main question in this case was whether the WIN program was intended to pre-empt state independent work programs that would provide additional conditions of eligibility for AFDC recipients. The WIN program, AFDC section 630, was enacted as part of the 1967 amendments to the Social Security Act, whereby states were required to incorporate WIN into their Aid to Families With Dependent Children plans. See Note, *AFDC Eligibility Conditions Unrelated to Need: The Impact of Dublino*, 49 IND. L.J. 334 (1974).

60. "In sum, our attention has been directed to no relevant argument which supports, except in the most peripheral way, the view that Congress intended, either expressly or impliedly, to pre-empt state work programs. Far more would be required to show the 'clear manifestation of [congressional] intention' which must exist before a federal statute is held to 'supersede the exercise of state action.'" 413 U.S. at 417 (citation omitted).

Townsend to eligibility criteria unrelated to need.⁶¹ *Dublino* appears to prohibit the application of *Townsend* to cases concerning pre-emption of state welfare programs by federal programs.⁶² The unborn child cases, however, do not fall into either of the two categories affected by *Jefferson* and *Dublino* and therefore would still appear to be subject to *Townsend*.

Jefferson and *Dublino* appear to be more pertinent to the unborn child cases for their language than for their holdings. Both seem to concur in the interpretation given *Townsend* by *Parks, Mixon, and Wisdom*.⁶³ *Jefferson* speaks of AFDC prohibiting "a state from creating exceptions to standards specifically enunciated in the Federal Act."⁶⁴ *Dublino* distinguishes *King, Townsend, and Carleson v. Remillard*⁶⁵ stating: "In those cases it was clear that state law excluded people from AFDC benefits who the Social Security Act expressly provided would be eligible."⁶⁶

It is difficult, however, to discern the exact import of these two statements. If the Court is interpreting *Townsend* as requiring a finding of eligibility only upon a showing of "specific inclusion" of a class, then the *Townsend* rule is an inappropriate test to apply in the unborn child cases. The decisions have demonstrated that congressional intent concerning AFDC eligibility of the unborn is ambiguous at best.⁶⁷ Such an interpretation is difficult, however, to reconcile with the canon of construction that remedial statutes are to be construed broadly to give the benefit of doubt to the challeng-

61. Note, *What Remains of Federal AFDC Standards After Jefferson v. Hackney?*, 48 IND. L.J. 281, 286 (1972).

62. In *Green v. Stanton*, 364 F. Supp. 123 (N.D. Ind. 1973), the court presented the following analysis of *Dublino*: "Thus the Court held merely that the WIN program was not intended to *pre-empt* state work incentive legislation, thereby invalidating even complimentary state provisions in their entirety, including provisions not in actual conflict with the Social Security Act. . . . The instant case, unlike *Dublino* . . . does not involve a question of pre-emption. The exclusion of unborn children from eligibility for AFDC involves a 'conflict of substance' with the federal requirement that aid be furnished to 'all eligible individuals.'" *Id.* at 127.

63. See notes 47-49 *supra* and accompanying text.

64. 406 U.S. at 545.

65. 406 U.S. 598 (1972); see note 16 *supra*.

66. 413 U.S. at 421.

67. See notes 19-46 *supra* and accompanying text.

ing class.⁶⁸ In light of this, perhaps the Court was only distinguishing *Townsend* on its facts, and not discussing its proper application. If this is indeed the case, then the approach of *Parks*, *Mixon*, and *Wisdom* to the *Townsend* rule finds no support in either *Townsend* itself or *Jefferson* and *Dublino*. Consequently, the courts that have favored the inclusion of unborn children would seem justified in their holding even though it appears that only the broadest interpretation would permit a finding of mandatory eligibility for the unborn.

The unborn child cases illustrate the difficulty of a rule such as *Townsend* which allows courts the power of broad construction. Given wide discretion, different courts will reach different conclusions regarding the persuasiveness of the evidence. The unborn child cases also point to the problem of ambiguously drawn legislation which often forces courts to redefine statutes with questionable authorization from Congress. The conclusion to be drawn is that in the absence of a rule that would require a showing of specific eligibility, controversies similar to the unborn child cases are apt to reoccur. The Supreme Court has granted certiorari in *Alcala v. Burns*.⁶⁹ Hopefully the Court will provide more specific guidelines for the review of state welfare programs, thereby resolving the *Townsend* controversy and allowing courts to more effectively deal with the difficult task of statutory construction.

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68. See text accompanying note 51 *supra*.

69. 43 U.S.L.W. 3187 (U.S. Oct. 15, 1974).