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BENEFITS TO THE UNBORN UNDER THE AID TO FAMILIES WITH DEPENDENT CHILDREN PROGRAM: IS THERE LEGISLATIVE INTENT?

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Several federal courts have recently considered the question of whether the term "dependent child" as used in the Social Security Act[1] should be interpreted as including unborn children for purposes of the Aid to Families with Dependent Children[2] (AFDC) program. A majority view has emerged which concludes that a "dependent child" may be unborn,[3] but a strong minority has reasoned persuasively to the contrary.[4] The question is of great practical importance to those needy pregnant women who must have AFDC benefits in order to purchase enough food for adequate prenatal nutrition.[5] This comment will investigate the legal rationale of both these viewpoints in the light of recent United States Supreme Court decisions which have strengthened the role of the federal government in determining eligibility standards for the state administered AFDC programs.

The AFDC program is one of the categorical assistance programs established by the Social Security Act of 1935.[6] Its objective is to provide financial assistance to "needy children deprived of parental support" by reason of

1. 42 U.S.C. § 606(a) (1970). The statutory citations in this comment which refer to 42 U.S.C. §§ 601-610 correspond with the non-codified version of the Social Security Act contained within Title IV, sections 401-410.

2. 42 U.S.C. §§ 601-610 (1970).

3. Carver v. Hooker, 501 F.2d 1244 (1st Cir. 1974), *aff'g* 369 F. Supp. 204 (D.N.H. 1973), *petition for cert. filed*, 43 U.S.L.W. 3218 (U.S. Oct. 15, 1974); Wilson v. Weaver, 499 F.2d 155 (7th Cir. 1974), *aff'g* 358 F. Supp. 1147 (N.D. Ill. 1973) and Green v. Stanton, 364 F. Supp. 123 (N.D. Ind. 1973); Alcala v. Burns, 494 F.2d 743 (8th Cir. 1974), *aff'g* 362 F. Supp. 180 (S.D. Iowa 1973), *cert. granted*, — U.S. —, 95 S. Ct. 39, — L. Ed. 2d — (1974); Doe v. Lukhard, 493 F.2d 54 (4th Cir. 1974), *aff'g* 363 F. Supp. 823 (E.D. Va. 1973), *petition for cert. filed*, 43 U.S.L.W. 3075 (U.S. Aug. 18, 1974); Whitfield v. Minter, 368 F. Supp. 798 (D. Mass. 1973); Stuart v. Canary, 367 F. Supp. 1343 (N.D. Ohio 1973); Harris v. Mississippi State Dept. of Pub. Welfare, 363 F. Supp. 1293 (N.D. Miss. 1973); Tapia v. Vowell, Civ. No. 73-B-169 (S.D. Tex., Nov. 14, 1973) (preliminary injunction); Tillman v. Endsley, Civ. No. 73-1476-Civ-CF (S.D. Fla., Oct. 1, 1973) (preliminary injunction); Jones v. Graham, Civ. No. 73-L-235 (D. Neb., Sept. 5, 1973).

4. Wisdom v. Norton, Civ. No. 74-1402 (2d Cir. Oct. 11, 1974); Murrow v. Clifford, 502 F.2d 1066 (3d Cir. 1974); Mixon v. Keller, 372 F. Supp. 51 (M.D. Fla. 1974), *petition for cert. denied in advance of judgment in 5th Cir.*, — U.S. —, 95 S. Ct. 146, — L. Ed. 2d — (1974); Poole v. Endsley, 371 F. Supp. 1379 (N.D. Fla. 1974); Parks v. Harden, 354 F. Supp. 620 (N.D. Ga. 1973), *appeal docketed*, No. 73-1855, 5th Cir., April 16, 1973.

5. *E.g.*, Carver v. Hooker, 369 F. Supp. 204, 208 (D.N.H. 1973), *aff'd*, 501 F.2d 1244 (1st Cir. 1974).

6. 42 U.S.C. §§ 602-610 (1970).

death, desertion, incapacitation, or unemployment.[7] The program is financed primarily by the federal government through a matching fund scheme, while its administration is left solely to the states.[8] Although the states are not required to participate, all 50 have chosen to do so.[9] The federal government exerts strong control over the state administered AFDC programs by conditioning the use of federal money according to criteria set forth in the Social Security Act as well as by regulations promulgated by HEW in order to implement the Act.[10] The states are allowed to determine standards of need for prospective AFDC recipients, what state financing should be made available for a particular AFDC program, and the level of benefits that eligible families will be able to receive.[11]

In the recent cases in which the definition of "dependent child" has been in issue all of the plaintiffs were pregnant women who were unmarried or whose spouse was continually absent.[12] They generally had sought AFDC benefits in order to purchase food for adequate prenatal nutrition, but had been denied them by state welfare departments under the authority of a regulation promulgated by HEW which allows, but does not require, states to use federal money in their AFDC programs for benefits to unborn children.[13] The plaintiffs were generally limited in their pleadings

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7. *Id.* §§ 606(a), 607.

8. *Id.* §§ 603, 607.

9. CHARACTERISTICS OF STATE PUBLIC ASSISTANCE PLANS UNDER THE SOCIAL SECURITY ACT, GENERAL PROVISIONS—ELIGIBILITY, ASSISTANCE, ADMINISTRATION, Public Assistance Report No. 50, SRS-72-21203 (1971 ed.).

10. 42 U.S.C. §§ 601-610 (1970); 45 C.F.R. § 233.90 (1973).

11. King v. Smith, 392 U.S. 309, 334 (1968); *see* 42 U.S.C. § 602 (1970).

12. Doe v. Lukhard, 363 F. Supp. 823, 824 (E.D. Va. 1973), *aff'd*, 493 F.2d 54 (4th Cir. 1974); Alcala v. Burns, 362 F. Supp. 180, 182 (S.D. Iowa 1973), *aff'd*, 494 F.2d 743 (8th Cir. 1974). The prerequisites for a valid class action were met in Wilson v. Weaver, 358 F. Supp. 1147, 1151 (N.D. Ill. 1972), *aff'd*, 499 F.2d 155 (7th Cir. 1974); *accord*, Green v. Stanton, 364 F. Supp. 123, 124 (N.D. Ind. 1973), *aff'd*, 499 F.2d 155 (7th Cir. 1974); Harris v. Mississippi State Dept. of Pub. Welfare, 363 F. Supp. 1293, 1295 (N.D. Miss. 1973).

13. 45 C.F.R. §233.90(c)(2)(ii) (1973) This regulation states:

(a) Federal financial participation is available in:

. . .

(ii) Payments with respect to an unborn child when the fact of pregnancy has been determined by medical diagnosis.

For specific reference to state reliance on the regulation, see Stuart v. Canary, 367 F. Supp. 1343, 1344 (N.D. Ohio 1973); Harris v. Mississippi State Dept. of Public Welfare, 363 F. Supp. 1293, 1295 (N.D. Miss. 1973); Doe v. Lukhard, 363 F. Supp. 823, 826 (E.D. Va. 1973), *aff'd*, 493 F.2d 54 (4th Cir. 1974).

The plaintiffs in these cases generally asserted two theories of recovery. First, they alleged that the state practice of denying AFDC benefits for the unborn conflicted with 42 U.S.C. § 606(a) (1970) and was therefore invalid under the Supremacy Clause. Second, the state practice constituted a denial of "equal protection" of the laws which is guaranteed by the 14th amendment. Because the issue can be decided on the basis of the Supremacy Clause, "equal protection" was not considered. This avoided the necessity of convening a three-judge court. Swift & Co. v. Wickham, 382 U.S. 111 (1965).

to two particular allegations. The first was that the lack of proper prenatal nutrition is a major determinant of low infant birthweight, which is directly related to later susceptibility to disease, infant mortality, and neurological problems, such as retarded long-term learning capacity.[14] Second, absent AFDC benefits the plaintiffs would be unlikely to receive proper prenatal nutrition through other welfare assistance programs.[15] Nevertheless, denial of AFDC benefits in these cases was based solely on the fact that the children were not yet born. It was uncontradicted that they qualified in all other respects as needy dependent children.[16]

ELIGIBILITY STANDARDS FOR THE AFDC PROGRAM

Among the federal statutes that the states must follow if their AFDC program is to receive federal funding, the most important for eligibility purposes is Section 606(a) of the Social Security Act which provides that a "dependent child" means a

> needy child (1) who has been deprived of parental support or care by reasons of death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with . . . [an enumerated relative] . . . 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.[17]

The Supreme Court has recently held that families with a child meeting this definition must be given AFDC benefits, unless the basis for denying them has been expressly authorized by Congress. This rule was established in the cases of *King v. Smith*,[18] *Townsend v. Swank*,[19] and *Carleson v.*

But see Murrow v. Clifford, 502 F.2d 1066 (3d Cir. 1974); Doe v. Lukhard, 493 F.2d 54 (4th Cir. 1974).

14. Carver v. Hooker, 369 F. Supp. 204, 208 (D.N.H. 1973), *aff'd*, 501 F.2d 1244 (1st Cir. 1974); Stuart v. Canary, 367 F. Supp. 1343, 1346 (N.D. Ohio 1973); Alcala v. Burns, 362 F. Supp. 180, 182, 184 (S.D. Iowa 1973), *aff'd*, 394 F.2d 734 (8th Cir. 1974).

For a general discussion of prenatal nutrition see Shank, *A Chink in our Armor*, Nutrition Today, Summer, 1970, at 2-5.

15. Carver v. Hooker, 369 F. Supp. 204, 208 (D.N.H. 1973), *aff'd*, 501 F.2d 1244 (1st Cir. 1974)); Brief for Plaintiff at 9, Tapia v. Vowell, Civ. No. 73-B-169 (S.D. Tex., Nov. 14, 1973).

For a discussion of a proper prenatal diet see *Nutrition and Pregnancy, An Invitational Symposium*, 7 J. REPRODUCTIVE MED. 199, 204-209 (Nov., 1971).

16. Green v. Stanton, 364 F. Supp. 123, 124 (N.D. Ind. 1973), *aff'd*, 499 F.2d 155 (7th Cir. 1974); Harris v. Mississippi State Dept. of Pub. Welfare, 363 F. Supp. 1293, 1295 (N.D. Miss. 1973); Alcala v. Burns, 362 F. Supp. 180, 182 (S.D. Iowa 1973), *aff'd*, 494 F.2d 743 (8th Cir. 1974); Wilson v. Weaver, 358 F. Supp. 1147, 1149 (N.D. Ill. 1972), *aff'd*, 499 F.2d 155 (7th Cir. 1974).

17. 42 U.S.C. § 606(a) (1970).

18. 392 U.S 309 (1968).

19. 404 U.S. 282 (1971).

Remillard[20] which are commonly known as the *Eligibility Triology*, and is sometimes referred to as the *King-Townsend* test.[21]

This test provides a two-step analysis for determination of the legality of state standards for eligibility. First it must be determined if an individual is eligible within the definition of "dependent child" as contained within section 606(a). If eligibility is evident according to that standard, then the Social Security Act and its legislative history must be examined for any congressional authority for excluding persons so eligible. Absent such specific congressional authorization, a state exclusionary practice is invalid under the Supremacy Clause because it conflicts with the Social Security Act.[22]

Carleson v. Remillard[23] illustrates the application of the *King-Townsend* test. California had been denying AFDC benefits to families with dependent children when the cause of a parent's "continued absence" from home was due to military service. After a study of the language and legislative history of section 606(a), the Supreme Court determined that the term "continued

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20. 406 U.S. 598 (1972).

21. The Court in *Townsend* stated:

> Thus, *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 . . . .

Townsend v. Swank, 404 U.S. 282, 286 (1971). Prior to *King*, the definition of "dependent child" in section 606(a) was interpreted as merely explaining who *may* receive aid, and there was no absolute obligation upon the states to grant aid to all "dependent children." Whenever asked to approve a state AFDC program which had a more restrictive eligibility standard than section 606(a), HEW would apply what was called the Condition X doctrine. This policy formula, with *no strong statutory backing* from the Social Security Act, stated essentially that HEW would approve state plans containing eligibility requirements not expressly authorized by the Social Security Act "only if the classification affecting such [additional limitation] is a rational one in the light of the purposes of the public assistance programs." Comment, *Welfare's Condition X*, 76 YALE L.J. 1222 (1967). In practice HEW seldom disapproved a state plan even though many of them used eligibility requirements conflicting with Condition X. As a result many state eligibility standards which excluded "dependent children" eligible under federal AFDC standards were condoned. For a discussion of the impact of *King* see Comment, *AFDC Eligibility Requirements Unrelated to Need: The Impact of King v. Smith*, 118 U. PA. L. REV. 1219 (1970).

Essentially *King* was significant because it interpreted section 606(a) as being mandatory upon the states. Section 606(a) was interpreted in conjunction with section 602(a)(10) which provides that "all eligible individuals" shall receive AFDC benefits, giving HEW a much stronger hand. Although it was implied in Condition X that the states could deviate from section 606(a), *King* makes state variations from section 606(a) invalid absent congressional authorization. Townsend v. Swank, 404 U.S. 282, 286 (1971), *citing* King v. Smith, 392 U.S. 309, 317 (1968).

22. For other ways to state the *King-Townsend* test, see Brief for Appellant at 6-7, Brief for Appellee at 7-8, Parks v. Harden, 354 F. Supp. 620 (N.D. Ga. 1973), *appeal docketed*, No. 73-1855, 5th Cir., April 16, 1973.

Care should be maintained to avoid inverting the *King-Townsend* test so as to find eligibility for a certain category or children if there is no congressional authorization for exclusion. *See* Mixon v. Keller, 372 F. Supp. 51, 55 (M.D. Fla. 1974).

23. 406 U.S. 598 (1972).

absence" does encompass long absences because of military duty.[24] Thus, since there was no congressional authorization for this exclusion in the Social Security Act, the California practice was declared invalid under the Supremacy Clause.[25]

THE DILEMMA IN APPLYING THE KING-TOWNSEND TEST

The difficulties encountered by the federal courts in their attempts to determine whether the unborn come within the federal standards of eligibility for AFDC benefits has resulted to a large extent from the absence of clear congressional intent from any relevant statute or legislative history. Section 606(a), for example, makes no specific reference to the unborn.[26] Committee Reports out of both Houses of the 92d Congress approved a proposed amendment to section 606(a) which would have reworded the provision to clearly exclude the unborn from the definition of "dependent child."[27] The Senate-House Conference Committee, however, eliminated all provisions affecting welfare for families, thereby leaving the AFDC statutes unchanged.[28] The courts have not agreed on exactly what this means with respect to congressional intent concerning AFDC benefits for the unborn.[29]

Despite this, an HEW regulation permits federal financial assistance to state AFDC programs for payments of benefits for the unborn.[30] There are essentially two groups of regulations which explain when federal financial assistance is to be made available to the state administered AFDC programs. One group explains when federal money is to be made available with respect to "dependent children" as defined within section 606(a).[31] By indicating the limits of federal financial assistance in terms of section 606(a), these regulations actually perform a dual function of explaining federal AFDC eligibility requirements as well as setting the limits on when federal money is available. To the extent that these regulations explain federal eligibility re-

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24. *Id.* at 602.
25. *Id.* at 604.
26. 42 U.S.C. § 606(a) (1970).
27. H.R. REP. No. 92-231, 92d Cong., 2d Sess. 184 (1972) states:

> Your committee wants to make clear that an unborn child would not be included in the definition of a child. This will preclude the practice, now used in the AFDC program in some States, of finding that an unborn child does meet the definition, thereby establishing a "family" even before the child is born.

S. REP. No. 92-1230, 92d Cong., 2d Sess. 108 (1972) supplements this: "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 bill would make unborn children ineligible for AFDC."
28. Pub. L. No. 92-603, 86 Stat. 1329, *amending* 42 U.S.C. 301-1399 (1970).
29. *Compare* Wilson v. Weaver, 358 F. Supp. 1147, 1154-55 (N.D. Ill. 1972), *aff'd*, 499 F.2d 155 (7th Cir. 1974), *with* Stuart v. Canary, 367 F. Supp. 1343, 1344 (N.D. Ohio 1973).
30. 45 C.F.R. § 233.90(c)(2)(ii) (1973).
31. 45 C.F.R. § 233.90(c)(1)(i)-(vi) (1973).

quirements, state adherence to them is mandatory under the *King-Townsend* test.[32] It is significant that the definition of the term "child" is not discussed in this group of regulations.[33]

The second group of regulations explain when federal money is available to state AFDC programs at the option of the states.[34] The regulation regarding the unborn is located within this group which describes situations in which federal financial assistance is available to state AFDC programs even though the statutory elements of the definition of "dependent child" are not met.[35] The HEW contends that because the four special situations described by these regulations do not meet the statutory elements of a "dependent child," there is no statutory authority for requiring the states to provide benefits in these situations, and coverage may be provided at the states' discretion.[36]

The rationale behind these regulations is not supported by any specific evidence of congressional intent. They were promulgated by the HEW under the authority of a broad rule-making provision which authorizes the Secretary to issue rules and regulations that "may be necessary to the efficient administration" of the Social Security Act.[37] Federal financial participation has been made available in the situations described, even though they are not enumerated in 606(a), because of their "close relationship" to those situations discussed in that section.[38] The only difference is that they describe situations which are *anticipatory* of eligibility under the statutory definition of "dependent child."[39]

It is important to note, however, that no attempt has ever been made by HEW, despite unfavorable court rulings, to redefine the term "dependent

32. *See* Parks v. Harden, 354 F. Supp. 620, 623 (N.D. Ga. 1973), *appeal docketed*, No. 73-1855, 5th Cir., April 16, 1973.

33. Brief for HEW as Amicus Curiae at 15, Murrow v. Clifford, Civ. No. 114-73 (D.N.J, June 12, 1973).

34. 45 C.F.R. § 233.90(c)(2) (1973).

35. 45 C.F.R. § 233.90(c)(2)(ii) (1973).

36. Brief for HEW as Amicus Curiae at 18, Murrow v. Clifford, Civ. No. 114-73 (D.N.J., June 12, 1973).

37. 42 U.S.C. § 1302 (1970).

38. Brief for HEW as Amicus Curiae at 15, Murrow v. Clifford, Civ. No. 114-73 (D.N.J., June 12, 1973).

39. 42 U.S.C. § 606(a) (1970). For example, AFDC payments may begin up to 30 days before a child goes to live with a relative. 45 C.F.R. § 233.90(c)(2)(i) (1973). This is justified by the fact that additional furniture, clothes, and food will be necessary immediately upon the arrival of the child. Brief for HEW as Amicus Curiae at 15-16, Murrow v. Clifford, Civ. No. 114-73 (D.N.J., June 12, 1973). Eligibility under section 606(a) would clearly start when a child begins to live with a relative. The extension of benefits for the unborn prior to the time when section 606(a) coverage would clearly begin has a similar justification—the prospective need for items for the child after birth, as well as the mother's health needs during pregnancy, which may directly affect the health both of the child and of the mother after birth. *Id.* at 17; *see* 45 C.F.R. § 233.90(c)(2)(iii) (1973) (payments during absence of dependent child); 45 C.F.R. § 233.90(c)(2)(iv) (1973) (payments for person acting in place of relative).

child" as contained within section 606(a) to include the unborn.[40] HEW considers the AFDC payments for the unborn justified under the Social Security Act because they accomplish a goal consistent with the purposes of the Act by providing for child welfare.[41] Coverage was made optional because of the absence of specific congressional intent to mandate coverage for the unborn.[42]

It is not surprising that the courts have considered this regulation as being within the context of congressional approval[43] since Congress took no action which would have indicated disapproval of the practice until 31 years after it was initiated. Despite HEW's claims that the regulation technically does not extend federal eligibility standards, its actual effect has been to allow the eligibility of the unborn under state AFDC programs to be determined at each state's discretion.[44] The validity of this discretionary regulation is now doubtful, however, even though judicial deference is maintained toward administrative interpretations of statutes. This deference attaches only unless there are compelling reasons to the contrary.[45] According to the *King-Townsend* test clear evidence of congressional intent through relevant legislative history is a compelling reason to be considered toward the validity or invalidity of such regulations.[46] The remaining unsettled question, then, is whether

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40. *See* Parks v. Hardin, 354 F. Supp. 620, 625 n.5 (N.D. Ga. 1973), *appeal docketed*, No. 73-1855, 5th Cir., April 16, 1973; Brief for HEW as Amicus Curiae at 13, Murrow v. Clifford, Civ. No. 114-73 (D.N.J., June 12, 1973).

For examples of when the administrative practice was relied upon to interpret a dependent child to include the unborn, see Alcala v. Burns, 362 F. Supp. 180, 185 (S.D. Iowa 1973), *aff'd*, 499 F.2d 743 (8th Cir. 1974); Wilson v. Weaver, 358 F. Supp. 1147, 1154-55 (N.D. Ill. 1972), *aff'd*, 499 F.2d 155 (7th Cir. 1974).

41. *See* Brief for HEW as Amicus Curiae at 4-5, Murrow v. Clifford, Civ. No. 114-73 (D.N.J., June 12, 1973).

42. *Id.* at 13.

43. Harris v. Mississippi State Dept. of Pub. Welfare, 363 F. Supp. 1293, 1296 (N.D. Miss. 1973); Alcala v. Burns, 362 F. Supp. 180, 184-85 (S.D. Iowa 1973), *aff'd*, 494 F.2d 743 (8th Cir. 1974); Wilson v. Weaver, 358 F. Supp. 1147, 1154-55 (N.D. Ill. 1972), *aff'd*, 499 F.2d 155 (7th Cir. 1974).

44. As of 1971, 35 state plans did *not* provide for assistance on behalf of unborn children while 19 plans did provide the aid. These statistics appear in the HEW publication, CHARACTERISTICS OF STATE PUBLIC ASSISTANCE PLANS UNDER THE SOCIAL SECURITY ACT, GENERAL PROVISIONS—ELIGIBILITY, ASSISTANCE, ADMINISTRATION, Public Assistance Report No. 50 (1971 ed.), SRS 72-21203, at 8-115, item 3.

45. Red Lion Broadcasting v. F.C.C., 395 U.S. 367, 381 (1969); *see* Lewis v. Martin, 397 U.S. 552, 559 (1970). Due to language in *Townsend*, administrative regulations may be considered in determining eligibility standards, but are never controlling:

> We recognize that HEW regulations seem to imply that States may to some extent vary eligibility requirements from federal standards. However, the 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 requirement of § 402(a)(10) that aid be furnished 'to *all eligible* individuals.'

Townsend v. Swank, 404 U.S. 282, 286 (1971).

46. Townsend v. Swank, 404 U.S. 282, 286 (1971); *accord*, Wilson v. Weaver, 499 F.2d 155, 156 (7th Cir. 1974).

the proposed 1972 amendment constitutes clear evidence of congressional intent to exclude the unborn from AFDC eligibility.[47]

The Majority View

A majority of federal courts deciding cases on APDC assistance for the unborn have ruled that an unborn child is included within the section 606(a) definition of a "dependent child."[48] As a result, states within the jurisdictions of these courts *must* grant AFDC coverage for those unborn who definitely would be eligible as post-natal children.[49] This position was first taken in *Wilson v. Weaver*,[50] in which a federal court in Illinois interpreted section 606(a) in conjunction with Section 601 of the Social Security Act.[51] Section 601 states that the AFDC program was created

> 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. . . .[52]

It was determined that to include the unborn within the section 606(a) definition of a "dependent child" was consistent with the purposes of the AFDC program as stated within section 601.[53]

In similar cases it has been found that AFDC benefits for the unborn would contribute greatly to "maintain and strengthen family life" since they would help alleviate the serious consequences which children suffer after birth when the mother receives inadequate prenatal nutrition.[54] Several cases have taken notice of medical testimony which established the adverse consequences of inadequate prenatal nutrition, such as mental retardation in the child and a higher chance of infant mortality.[55] In conjunction with this

47. *Compare* Wilson v. Weaver, 400 F.2d 155, 157 (7th Cir. 1974) (majority view) *with* Mixon v. Keller, 372 F. Supp. 51, 55 (M.D. Fla. 1974) (minority view).

48. Cases cited note 3 *supra*.

49. *See* Townsend v. Swank, 404 U.S. 282, 286 (1971).

50. 358 F. Supp. 1147 (N.D. Ill. 1972), *aff'd*, 499 F.2d 155 (7th Cir. 1974).

51. *Id.* at 1154; *accord*, Green v. Stanton, 364 F. Supp. 123, 125 (N.D. Ind. 1973), *aff'd*, 499 F.2d 155 (7th Cir. 1974).

52. 42 U.S.C. § 601 (1970).

53. Although not clearly articulated within the *Wilson* opinion, the court in Alcala v. Burns, 362 F. Supp. 180, 184 (S.D. Iowa 1973), *aff'd*, 494 F.2d 743 (8th Cir. 1974), and subsequent cases linked the specific purpose "to maintain and strengthen family life" with AFDC benefits for the unborn.

54. Carver v. Hooker, 369 F. Supp. 204, 208 (D.N.H. 1973), *aff'd*, 501 F.2d 1244 (1st Cir. 1974); Stuart v. Canary, 367 F. Supp. 1343, 1346 (N.D. Ohio 1973); Alcala v. Burns, 362 F. Supp. 180, 184 (S.D. Iowa 1973), *aff'd*, 494 F.2d 743 (8th Cir. 1974).

55. *See generally* Birch, *Functional Effects of Fetal Malnutrition*, Hospital Practice 134 (March, 1971); *Vitamins and the Fetus: The Benefits of B^{12}*, Science News 122 (April 7, 1973).

medical testimony, it has been generally agreed that absent AFDC benefits, the needy pregnant women will not likely receive the proper prenatal nutrition through other welfare assistance programs.[56]

In addition to interpreting section 606(a) in conjunction with section 601, many courts have relied on the fact that the usual dictionary definition of the word "child" includes the unborn.[57] This was justified by the rule of statutory construction, which states that words used in a statute are to be given their usual and commonly understood meaning, unless it is plain from the statute that a different meaning is intended.[58] The degree of reliance upon this dictionary definition has varied with the different courts, but most of the cases requiring AFDC coverage for the unborn have at least mentioned it.[59]

Cases invoking the majority rule have also cited legislative history from the 92d Congress as authority. Failure to enact the amendments to section 606(a) which would have prohibited AFDC benefits to the unborn was interpreted as specific congressional approval of AFDC benefits for such children.[60] Second, the courts interpreted the legislative history from the 92d Congress in conjunction with the rule of statutory construction that deference must be maintained towards administrative interpretations of statutes unless there are compelling reasons for the contrary.[61] The fact that Congress did not challenge the HEW optional policy for 31 years, coupled with the unsuccessful 1972 challenge, was interpreted as congressional approval of interpreting the statutory definition of "dependent child" to include the unborn.[62] This congressional inaction was not interpreted, however, as representing approval for exclusion of the unborn from State AFDC programs under the guise of the HEW optional policy.[63]

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56. *E.g.*, Carver v. Hooker, 369 F. Supp. 204, 208 (D.N.H. 1973), *aff'd*, 501 F.2d 1244 (1st Cir. 1974).

57. Stuart v. Canary, 367 F. Supp. 1343, 1345 (N.D. Ohio 1973); Green v. Stanton, 364 F. Supp. 123, 126 (N.D. Ind. 1973), *aff'd*, 499 F.2d 155 (7th Cir. 1974); Harris v. Mississippi State Dept. of Pub. Welfare, 363 F. Supp. 1293, 1296 (N.D Miss. 1973).

58. Harris v. Mississippi State Dept. of Pub. Welfare, 363 F. Supp. 1293, 1296 (N.D. Miss. 1973); *see, e.g.*, Bailey v. Drexel Furniture Co., 259 U.S. 20, 36 (1922); DeGanay v. Lederer, 250 U.S. 376, 381 (1919).

59. Cases cited note 57 *supra.*

60. Harris v. Mississippi State Dept. of Pub. Welfare, 363 F. Supp. 1293, 1297 (N.D. Miss. 1973); Wilson v. Weaver, 358 F. Supp. 1147, 1154-55 (N.D. Ill. 1972), *aff'd*, 499 F.2d 155 (7th Cir. 1974).

61. Red Lion Broadcasting v. F.C.C., 395 U.S. 367, 381 (1969); *see* Lewis v. Martin, 397 U.S. 552, 559 (1970).

62. *E.g*, Alcala v. Burns, 362 F. Supp. 180, 184-85 (S.D. Iowa 1973), *aff'd*, 494 F.2d 743 (8th Cir. 1974).

63. Doe v. Lukhard, 363 F. Supp. 823, 829 (E.D. Va. 1973), *aff'd*, 493 F.2d 54 (4th Cir. 1974); Alcala v. Burns, 362 F. Supp. 180, 185 (S.D. Iowa 1973), *aff'd*, 494 F.2d 743 (8th Cir. 1974); Wilson v. Weaver, 358 F. Supp. 1147, 1154-55 (N.D. Ill. 1973), *aff'd*, 499 F.2d 155 (7th Cir. 1974).

Two majority view cases looked beyond the legislative history of the 92d Congress to support their position. The courts in *Carver v. Hooker*[64] and *Whitfield v. Minter*[65] considered legislative history surrounding the entire Social Security Act as indicative of congressional concern for prenatal care sufficient to imply that the policy considerations of Congress are inconsistent with exclusion of the unborn from the AFDC program.[66] Policy pronouncements surrounding Title V of the Social Security Act[67] were especially helpful in this regard. This section, also known as the Maternal and Child Health Care Act,[68] authorizes grants to states for the founding of inexpensive maternity clinics for low income families.[69] The objectives of the Act are to eliminate infant mortality and other adverse consequences which occur as results of inadequate prenatal medical care;[70] however, Title V does not authorize payments to be made directly to pregnant women for the purchase of prenatal medical care or the foods needed for adequate prenatal nutrition.

In applying the *King-Townsend* test, the majority view courts have also found it necessary to consider the question of congressional authorization for exclusion of the unborn from state programs.[71] At the time this litigation began, most of the states were excluding the unborn from their AFDC programs under the guise of the HEW optional policy. In *Wilson v. Weaver*,[72] the court clearly rejected the HEW position concerning what constitutes congressional authorization for such exclusion.[73] As amicus curiae, HEW distinguished sections 602 and 606(a) in Title IV of the Social Security Act.[74] Under this distinction, section 602 was interpreted as setting out administrative guidelines which the states *must* follow in administering their plans while section 606(a) was interpreted as giving the states the option of including or excluding certain types of needy "dependent children" who could be cov-

64. 369 F. Supp. 204 (D.N.H. 1973), *aff'd*, 501 F.2d 1244 (1st Cir. 1974).

65. 368 F. Supp. 798 (D. Mass. 1973).

66. Carver v. Hooker, 369 F. Supp. 204, 214-15 (D.N.H. 1973), *aff'd*, 501 F.2d 1244 (1st Cir. 1974).

67. 42 U.S.C. §§ 701-715 (1970); for legislative history see COMMITTEE ON WAYS AND MEANS REPORT, H.R. REP. No. 615, 74th Cong., 1st Sess. 12 (1935); S. REP. No. 628, 74th Cong., 1st Sess. (1935). The statutory citations in this comment which refer to 42 U.S.C. §§ 701-715 (1970) correspond with the non-codified version of the Social Security Act contained wtihin Title V, sections 501-515.

68. 42 U.S.C. §§ 701-715 (1970).

69. *Id.* § 708.

70. *Id.* § 701; *see* COMMITTEE ON WAYS AND MEANS REPORT, H.R. REP. No. 614, 74th Cong., 1st Sess. 12 (1935).

71. *See* Townsend v. Swank, 404 U.S. 282, 286 (1971); *accord*, Wilson v. Weaver, 499 F.2d 155, 156 (7th Cir. 1974).

72. 358 F. Supp. 1147 (N.D. Ill. 1972), *aff'd*, 499 F.2d 155 (7th Cir. 1974).

73. *Id.* at 1153-54; Brief for HEW as Amicus Curiae at 5-6, Wilson v. Weaver, 358 F. Supp. 1147 (N.D. Ill. 1972); *accord*, Doe v. Lukhard, 363 F. Supp. 823, 828, 829 (E.D. Va. 1973), *aff'd*, 493 F.2d 54 (4th Cir. 1974).

74. 42 U.S.C. §§ 601-610 (1970).

ered within the terms of the statute.[75] It was therefore reasoned that because coverage for the unborn was not even required by section 602, any policy which made coverage available would have to be on an optional basis.[76]

Under the *King-Townsend* test, the court in *Wilson* was correct in rejecting the HEW interpretation distinguishing section 602 and section 606(a). By the inter-relationship of section 606(a) and section 602(a)(10) the Supreme Court had held in *Townsend v. Swank*[77] that children meeting the criteria of section 606(a), must be given their AFDC benefits.[78] Prior to the *King-Townsend* test state programs had followed HEW regulations which implies that children who were eligible to receive AFDC benefits under section 606(a) could be excluded at the states' option.[79] The Supreme Court, however, has specifically invalidated such a practice.[80]

The Minority View

A minority of federal jurisdictions has taken the position that eligibility standards for the AFDC program were not intended to include the unborn.[81] Therefore, the programs in these states are not required to grant AFDC coverage to the unborn. Essentially, the courts adopting this view have found that there is no support either in the Social Security Act or in its legislative history for inclusion of the unborn within the section 606(a) definition of a "dependent child."[82] The basic rationale for this view is derived from a literal, rather than a broad interpretation of the Act as used by the majority view. In terms of the *King-Townsend* test, the minority view cases have not required evidence of congressional authority for the exclusion of the unborn because they are of the opinion that federal eligibility was never established.[83]

The foundation of the minority view is the construction of the word "child" as used in section 606(a) by examination of its use in the entire Social Security Act.[84] Followers of the minority view point out that many uses of the

75. Brief for HEW as Amicus Curiae at 5-6, Wilson v. Weaver, 358 F. Supp. 1147 (N.D. Ill. 1972).
76. *Id.* at 5.
77. 404 U.S. 282, 286 (1971).
78. *Id.* at 286; *accord*, Carleson v. Remillard, 406 U.S. 598, 600 (1972); King v. Smith, 392 U.S. 309, 333 (1968).
79. *See generally* Comment, *AFDC Eligibility Requirements Unrelated to Need: The Impact of King v. Smith*, 118 U. PA. L. REV. 1219 (1970); Comment, *Welfare's Condition X*, 76 YALE L.J. 1222 (1967).
80. Townsend v. Swank, 404 U.S. 282, 286 (1971).
81. Cases cited note 4 *supra*.
82. 42 U.S.C. § 606(a) (1970).
83. *See* Townsend v. Swank, 404 U.S. 282, 286 (1971).
84. Wisdom v. Norton, Civ. No. 74-1402 (2d Cir. Oct. 11, 1974); Murrow v. Clifford, 502 F.2d 1066 (3d Cir. 1974) (Rosenn, J., dissenting); Mixon v. Keller, 372 F. Supp. 51, 54-55 (M.D. Fla. 1974); Poole v. Endsley, 371 F. Supp. 1379, 1382 (N.D.

word "child" within the Social Security Act are reasonable only if they refer exclusively to post-natal children. For example, the statute requires that a child's income and resources are to be considered in establishing his actual need for assistance,[85] and obviously only a postnatal child can have income and resources. The statute also requires the state to attempt to establish the paternity of eligible children born out of wedlock,[86] but the paternity of an unborn child can not be established.

The language of the Social Security Act has also been used in support of the contention that Congress intentionally omitted any reference to unborn children in section 606(a). In *Mixon v. Keller*,[87] for example, the federal court stated that "[s]uch an omission from Title IV could only be intentional when one examines Title V of the Social Security Act where Congress specifically includes mention of pre-natal care . . . ."[88]

In contrast to the majority view's acceptance of the dictionary definition of "child,"[89] the minority view, exemplified in *Mixon*, has chosen judicial interpretation of the term: "[i]n normal conversational usage, 'child' does not mean fetus."[90] In *Parks v. Harden*[91] "child" was viewed in its normal legal definition, an approach which supports the minority view since an unborn child is usually referred to in legal terms as fetal, quick, or *in utero*.[92] In addition, the court noted in *Parks* that it was not aware of any precedent holding children to possess legal rights before birth.[93]

The legislative history from the 92d Congress has been viewed in two ways. One interpretation, exemplified in *Parks v. Harden*,[94] is that the congres-

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Fla. 1974); Parks v. Harden, 354 F. Supp. 620, 625 (N.D. Ga. 1973), *appeal docketed*, No. 73-1855, 5th Cir., April 16, 1973; *accord*, Wilson v. Weaver, 499 F.2d 155, 160 (7th Cir. 1974) (Pell, J., dissenting); *see, e.g.*, King v. Smith, 392 U.S. 309, 330 (1968).

85. 42 U.S.C. § 602(a)(7), (8) (1970).

86. 42 U.S.C. § 602(a)(17) (1970).

87. 372 F. Supp. 51 (M.D. Fla. 1974).

88. *Id.* at 54.

89. Stuart v. Canary, 367 F. Supp. 1343, 1345 (N.D. Ohio 1973); Green v. Stanton, 364 F. Supp. 123, 126 (N.D. Ind. 1973), *aff'd*, 499 F.2d 155 (7th Cir. 1974); Harris v. Mississippi State Dept. of Pub. Welfare, 363 F. Supp. 1293, 1296 (N.D. Miss. 1973).

90. Mixon v. Keller, 372 F. Supp. 51, 54 (M.D. Fla, 1974); *accord*, Wisdom v. Norton, Civ. No. 74-1402 (2d Cir. Oct. 11, 1974).

91. 354 F. Supp. 620, 623-24 (N.D. Ga. 1973), *appeal docketed*, No. 73-1855, 5th Cir., April 16, 1973.

92. *Id.* at 624.

93. *Id.* at 624-25. The abortion case of Roe v. Wade, 410 U.S. 113 (1973) was generally felt to be inapplicable with regards to the issue of AFDC benefits for the unborn. The issue of AFDC benefits for the unborn deals with a legislative enactment. Alcala v. Burns, 362 F. Supp. 180, 186 (S.D. Iowa 1973), *aff'd*, 494 F.2d 743 (8th Cir. 1974); *accord*, Carver v. Hooker, 369 F. Supp. 204, 210 n.23 (D.N.H. 1973), *aff'd*, 501 F.2d 1244 (1st Cir. 1974). *Contra*, Poole v. Endsley, 371 F. Supp. 1379, 1382 (N.D. Fla. 1974).

94. 354 F. Supp. 620 (N.D. Ga. 1973), *appeal docketed*, No. 73-1855, 5th Cir., April 16, 1973.

sional action merely recognizes the "unborn child program as optional in practice."[95] This passive view holds that the only way to change the optional nature of the program would be through an amendment similar to the one proposed in 1972.[96] On the other hand, the courts in *Mixon v. Keller*[97] and *Poole v. Endsley*[98] took a stronger position. These courts believed that the intent of the proposed amendment was to completely eliminate the long standing HEW practice of allowing optional AFDC coverage for the unborn, and that its failure to pass was not related to a reason which should prevent its intended result.[99] Essentially, these views differ only in degree; neither conflicts with the position that congressional recognition has not been extended to the unborn for mandatory coverage in the AFDC program.

The minority cases either have approved the HEW regulation or have rejected it as being without statutory support.[100] Both views accomplish the same effect of interpreting the regulation as failing to require the states to give coverage for the unborn in their AFDC programs. In approving the regulation *Parks* pointed out there are also AFDC programs in which state participation is not required.[101] Although not directly citing the statutory rule-making provision[102] as authority for the regulation, the court implicitly accepted it.[103] The court also found congressional approval for the regulation in the long period of congressional inaction to change the regulation.[104] Conversely, in *Mixon* and *Poole*, the courts found that the regulation was without statutory authority and therefore an illegal administrative expansion of the Social Security Act.

THE DETERMINATION OF CONGRESSIONAL INTENT

In all of the cases involving judicial inquiry into congressional intent concerning the meaning of "unborn child" within section 606(a), the inquiry

95. *Id.* at 625.
96. *Id.* at 625.
97. 372 F. Supp. 51 (M.D. Fla. 1974).
98. 371 F. Supp. 1379 (N.D. Fla. 1974).
99. Mixon v. Keller, 372 F. Supp. 51, 55 (M.D. Fla. 1974); Poole v. Endsley, 371 F. Supp. 1379, 1383 (N.D. Fla. 1974).
100. For approval of past application of HEW regulation, see Parks v. Harden, 354 F. Supp. 620, 625-26 (N.D. Ga. 1973), *appeal docketed*, No. 73-1855, 5th Cir., April 16, 1973; Murrow v. Clifford, Civ. No. 114-73 (D.N.J., June 12, 1973). For a finding of no statutory support for regulation, see Wisdom v. Norton, Civ. No. 74-1402 (2d Cir. Oct. 11, 1974); Mixon v. Keller, 372 F. Supp. 51, 54 (M.D. Fla. 1974); Poole v. Endsley, 371 F. Supp. 1379, 1383 (N.D. Fla. 1974).
101. Parks v. Harden, 354 F. Supp. 620, 623 (N.D. Ga. 1973), *appeal docketed*, No. 73-1855, 5th Cir., April 16, 1973.
102. 42 U.S.C. § 1302 (1970).
103. No other statutory support for the regulation was cited. The consequence of this interpretation is to allow HEW to set federal eligibility standards as part of its administrative duties. This would conflict with the *King-Townsend* test.
104. Parks v. Harden, 354 F. Supp. 620, 625 (N.D. Ga. 1973), *appeal docketed*, No. 73-1855, 5th Cir., April 16, 1973.

should have been limited to objective standards of determination. The underlying policy of the Social Security Act should have been considered only to the extent that it was helpful in determining congressional intent.[105]

Basing their rulings on subjectively determined humanitarian grounds and strong policy reasons, the majority-view courts have ruled in favor of needy expectant mothers. Despite the persuasive wisdom behind interpreting "dependent child" to include the unborn, there is no evidence of congressional intent to support such an interpretation.[106] The term "dependent child" should have been redefined by Congress through the proper channels of legislation, not through "judicial overreach" into a legislative function.[107] As the Supreme Court stated when it addressed another issue within the AFDC program, "the Constitution does not empower [the courts] to second-guess . . . officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients."[108] It is reasonable to assume that a certain amount of legislative clarity should be ascertainable in order to justify a judicial finding of congressional authorization for the expenditure of funds. By this standard of interpretation, courts would limit themselves to a determination of how Congress wanted to spend limited federal money for welfare.[109] They would thus avoid judging the appropriateness of a statute in handling a certain problem of poverty, or attempting to determine whether it fulfills the "economic and social objectives" intended by Congress.[110] A basic tenet of the separation of powers doctrine is that it is not a judicial function to determine the wisdom of a particular statute or of the policy which it represents.

The *Eligibility Triology* cases exemplify the type of reasonable clarity which should be required in the statutory language or legislative history in order to include certain unspecified groups within federal AFDC eligibility standards.[111] In *King v. Smith*,[112] the Supreme Court dealt with a state restriction

105. *See* Wisdom v. Norton Civ. No. 74-1402 (2d Cir. Oct. 11, 1974); Wilson v. Weaver, 499 F.2d 155, 159 (7th Cir. 1974) (Pell, J., dissenting).

106. *But see* Green v. Stanton, 364 F. Supp. 123, 126 (N.D. Ind. 1973), *aff'd*, 499 F.2d 155 (7th Cir. 1974) (mere "silence" of Congress toward the question of AFDC benefits for the unborn considered evidence of congressional intent to include the unborn in the AFDC program).

107. Parks v. Harden, 354 F. Supp. 620, 626 (N.D. Ga. 1973), *appeal docketed*, No. 73-1855, 5th Cir. April 16, 1973; *accord*, Wisdom v. Norton, Civ. No. 74-1402 (2d Cir. Oct. 11, 1974).

108. Dandridge v. Williams, 397 U.S. 471, 487 (1970) (applying the equal protection clause of the 14th amendment to certain state practices in the AFDC program). The general principle expressed with regard to the relationship of the courts and the other branches of the government in welfare law is applicable to the problem at hand.

109. *See id.* at 487.

110. *See id.* at 487.

111. *See* New York State Dept. of Social Serv. v. Dublino, 413 U.S. 405 (1973). The Court stated that the minority opinion's reliance on *King*, *Townsend*, and *Carleson* was unfounded.

> In those cases it was clear that state law excluded people from AFDC benefits whom the Social Security Act *expressly* provided would be eligible. The Court

on the meaning of the word "parent" as used in section 606(a). Alabama had defined "parent" to include a paramour of the mother.[113] This had the effect of denying AFDC benefits to needy children even though their actual fathers' parental support had ceased, because it was assumed that a mother's paramour was a "substitute" father.[114] The Court found Alabama's definition of "parent" to be inconsistent with the definition Congress had intended—a parent being one who has a "legal duty" to support a child.[115] Support for the holding was inferred from *positive legislative history*, as well as from a consideration of how the word "parent" has been used in other sections of Title IV of the Social Security Act.[116]

Townsend v. Swank[117] presented the Court with a clear conflict between a state statute and the plain language of section 606(a). Illinois had extended AFDC coverage to needy "dependent children" between the ages of 18 and 21 who were attending a high school or vocational school, but excluded those attending college.[118] Section 606(a) *expressly* extends coverage to persons in college. Positive legislative history also showed that the Illinois practice was contrary to the congressional intent to give the states the option of including in their AFDC programs persons in the 18 to 21 age category who were attending school.[119] Once the option was taken to include this age group, no distinction could be made on the basis of which type of school was attended.[120]

In *Carleson v. Remillard*,[121] the Court determined legislative intent behind the term "continued absence" as used in section 606(a). There was no statute or legislative history relating specifically to the California practice of denying AFDC benefits to otherwise eligible "dependent children" when the parent was absent because of military duty.[122] There was, however, a *positive policy* which could be derived implicitly from the goals of the Social Security Act.[123]

Under this standard of reasonable clarity in determining congressional intent federal jurisdictions which have adopted the majority view have not

found no room either in the Act's language or legislative history to warrant the state's additional eligibility requirements.

Id. at 421-22 (emphasis added).

112. 392 U.S. 309 (1968).
113. *Id.* at 313-14.
114. *Id.* at 314.
115. *Id.* at 329.
116. *Id.* at 327-30.
117. 404 U.S. 282 (1971).
118. ILL. REV. STAT. ch. 23, § 4-1.1 (Supp. 1974).
119. Townsend v. Swank, 404 U.S. 282, 287 (1971).
120. *Id.* at 287.
121. 406 U.S. 598 (1972).
122. *Id.* at 602.
123. *See id.* at 604; Carver v. Hooker, 369 F. Supp. 204, 213 n.28 (D.N.H. 1973), *aff'd*, 501 F.2d 1244 (1st Cir. 1974).

shown a sufficient basis for their interpretation of legislative intent regarding the question of AFDC benefits for the unborn. By examination of the Social Security Act and its legislative history it can be conclusively determined that Congress has not intended to use the AFDC program as a tool to alleviate the need for better prenatal care for the poor. Instead, it has chosen to do so through the Maternal and Child Health Care Act.[124] This warrants against interpreting the statutory definition of "dependent child" to authorize "maternity allowances" which is, in effect, what AFDC benefits to unborn children actually are.[125]

The legislative history of the Maternal and Child Health Care Act shows a desire to improve the level of prenatal care for the poor so as to avoid the adverse consequences of inadequate prenatal care.[126] An examination of records of the hearings on the original Social Security Act shows that Congress was aware of the alternative of "maternity allowances."[127] It is therefore reasonable to assume "that had Congress intended to provide direct payments to pregnant women, it would have made explicit provisions for such payments in Title V."[128]

The argument can be made that Titles V and IV of the Social Security Act should be construed together: Title V does provide for certain maternal health services such as education concerning proper prenatal nutrition, while Title IV provides the financial resources to purchase the proper food.[129] Such an interpretation is logical but is not supported by either the plain language or legislative history of the Social Security Act.

HEW's position is essentially that benefits should be extended to the unborn at the states' option; it does not claim that the unborn are technically "eligible" for AFDC benefits under federal standards.[130] Besides the lack of positive congressional authorization for such a position, it is unrealistic to say that an expectant mother who *receives* AFDC benefits is not "eligible." Receipt of AFDC benefits is synonymous with being "eligible." The HEW is playing semantics when it claims that the mother is not technically "eligible"

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124. 42 U.S.C. §§ 701-715 (1970).

125. *See* Wisdom v. Norton, Civ. No. 74-1402 (2d Cir. Oct. 11, 1974); Murrow v. Clifford, 502 F.2d 1066 (3d Cir. 1974) (Rosenn, J., dissenting). The minority view's examination of how the word "child" was used in other provisions of the Social Security Act is also persuasive. *See* King v. Smith, 392 U.S. 309, 330, 331 (1968) (similar method for construction of "parent").

126. COMMITTEE ON WAYS AND MEANS REPORT, H.R. REP. No. 615, 74th Cong., 1st Sess. (1935); *see* S. REP. No. 628, 74th Cong., 1st Sess. (1935).

127. Murrow v. Clifford, 502 F.2d 1066 (3d Cir. 1974) (Rosenn, J., dissenting), *citing Hearings on S. 1130, Senate Committee on Finance*, 74th Cong., 1st Sess. (1935).

128. Murrow v. Clifford, 502 F.2d 1066 (3d Cir. 1974) (Rosenn, J., dissenting).

129. Brief for the Plaintiff at 6, Tapia v. Vowell, Civ. No. 73-B-169 (S.D. Tex., Nov. 14, 1973).

130. *See* Townsend v. Swank, 404 U.S. 282, 286 (1971) (technical standards for eligibility).

under federal AFDC standards but may receive them anyway.[131] The *King-Townsend* test implies that if a person is not eligible for AFDC benefits, he may not receive them. On the other hand, if he is eligible, then a state may withhold benefits only pursuant to congressional authorization.[132] The language of the *King-Townsend* test does not support the HEW's postulation of a quasi-eligibility status which may be effected at the state's discretion.[133]

CONCLUSION

The courts of the majority view have enacted judicial legislation in an attempt to remedy what they view as inadequate legislation by Congress. Although it is not contended that the judicial remedy does not cure the problem, accomplishment through the courts of what Congress should have done is an improper judicial function: when the mandate of the law is followed, "the system works." This objective respect for the system of law should be followed in the area of welfare, despite the immediate crucial social problems of the poor. Congress is, in the long run, better equipped to solve the problems of the poor, and the courts should assist in the enforcement of such legislation, not in its creation.

131. *See* Brief for HEW as Amicus Curiae at 3-4, Murrow v. Clifford, Civ. No. 114-73 (D.N.J., June 12, 1973).

132. Townsend v. Swank, 404 U.S. 282, 286 (1971).

133. *See* Wisdom v. Norton, Civ. No. 74-1402 (2d Cir. Oct. 11, 1974). *But see* Doe v. Lukhard, 363 F. Supp. 823, 828 (E.D. Va. 1973) (agreeing with the rationale as contended, but disagreeing on the eligibility issue of the unborn).