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AFDC ELIGIBILITY: A CASE FOR FEDERAL STANDARDS

The Aid To Families With Dependent Children (AFDC) program, included in the Social Security Act of 1935, was designed by Congress to provide financial assistance to needy children in families lacking parental support. Forty-five states had poor laws and mothers’ pension statutes at that time, but their operation and effectiveness were hampered by the financial difficulties of the Depression. AFDC provides federal matching funds to those states that elect to participate if their assistance plans comply with certain requirements contained in the Act and the regulations promulgated pursuant to the Act by the Department of Health, Education and Welfare. However, the precise roles of the federal and state governments in the administration of the AFDC program have not always been clear.

The statutory scheme affords the states wide latitude in determining the “standard of need” and the level of financial benefits to be granted to recipi-

2. See House Comm. on Ways and Means, H.R. Rep. No. 615, 74th Cong., 1st Sess. 10 (1935). The House report emphasized that the program would enable these children to remain in their own homes rather than being placed in institutions. The Act itself clearly elaborates this purpose:
   [E]ncouraging the care of dependent children in their own homes or in the homes of relatives. . . .
   . . . 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 . . . [funds for AFDC are appropriated].
4. The federal government originally paid one-third of the states’ program costs, but this proportion has been amended several times since 1935. Under the current "matching formula," federal funding varies between approximately 50% and 80% of total state AFDC expenditures. See 42 U.S.C. § 603(a)(1)(A) (1970). For the most recent percentages of federal funding of the various state plans, see U.S. Dep’t of Health, Education and Welfare, Characteristics of State Plans For Aid To Families With Dependent Children 230 (1974 ed.).
5. See generally 45 C.F.R. §§ 200-304.30 (1976). The cooperative nature of the program was described by the Supreme Court in these terms:
   The AFDC program is based on a scheme of cooperative federalism . . . . It is financed largely by the Federal Government, on a matching fund basis, and
ents. Although those determinations are subject to certain statutory limitations, the Supreme Court generally has confirmed state financial determinations as valid exercises of the state fiscal autonomy envisioned by the Act. However, controversy over the roles of the federal and state governments regarding determination of non-financial eligibility requirements and the proper interpretation of the non-financial eligibility provisions contained in the Act continues.

These legal uncertainties stem from the interpretation of, and relationship between, two sections of the Act. Section 402(a)(10) provides: "[A]id to families with dependent children shall . . . be furnished with reasonable promptness to all eligible individuals." Although this language mandates assistance to all persons deemed eligible, it does not resolve the question of who in fact is eligible. Section 406(a) provides the statutory definition of dependent child:

The term "dependent child" means a needy child (1) who has

is administered by the States. States are not required to participate in the program, but those which desire to take advantage of the substantial federal funds available for distribution to needy children are required to submit an AFDC plan for the approval of the Secretary of Health, Education and Welfare . . . . The plan must conform with several requirements of the Social Security Act and with rules and regulations promulgated by HEW. King v. Smith, 392 U.S. 309, 316-17 (1968). Every state, plus the District of Columbia, Guam, the Virgin Islands and Puerto Rico, has elected to participate in the AFDC program.

6. See King v. Smith, 392 U.S. 309, 318 n.14 (1968), citing U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, HANDBOOK OF PUBLIC ASSISTANCE, pt. IV, § 3120 (1966) (current version contained in scattered sections of 45 C.F.R.). The HEW manual established that each participating state must determine the standard of need for eligible individuals, and that this standard may vary according to the economic conditions existing in each state. Also, the legislative history of the Act clearly shows that states may determine who is financially "needy" for purposes of AFDC eligibility. See H.R. REP. No. 615, 74th Cong., 1st Sess. 24 (1935); S. REP. No. 628, 74th Cong., 1st Sess. 36 (1935). The standard of need is that amount of money determined necessary to sustain a family for each month. The level of benefits actually paid by each state may be a percentage of the standard of need. See note 8 & accompanying text infra.

7. See, e.g., sections 402(a)(7) and (8), which require that states disregard a specified percentage of all earned income, as well as work expenses, in the state determination of need. This provision was intended as a work incentive. 42 U.S.C. §§ 602(a)(7)-(8) (Supp. V 1975). In addition, section 402(a)(23) requires that, effective July 1, 1969, all state standards of need be adjusted to reflect cost of living increases. 42 U.S.C. § 602(a)(23) (Supp. V 1975).

8. See, e.g., Jefferson v. Hackney, 406 U.S. 535 (1972) (upholding a Texas computation scheme designed to reduce the amount of benefits available to some recipients); Dandridge v. Williams, 397 U.S. 471 (1970) (upholding the state's right to impose a maximum ceiling on all AFDC grants regardless of the size of the family and its actual need); But see Shea v. Vialpando, 416 U.S. 251 (1974) (prohibiting states from placing ceilings on the deductible work expense allowance).

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 . . . in a place or 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-two and (as determined by the Secretary) a student regularly attending a school, college or university, or a course of vocational or technical training designed to prepare him for gainful employment.10

The difficulty in interpreting these sections has been whether the section 406 definition of eligible individuals, including the definition of “dependent child,” provides an exclusive federal definition, or whether the section implicitly gives states the power to define eligible individuals more narrowly than the section 406 definition or to impose additional conditions on eligibility not expressly contained in the Act. It is this author’s contention that an interpretation of section 406 as an exclusive federal definition, which states are not free to restrict, accurately reflects both the Act’s statutory scheme and purpose and the judicial interpretations of the Act, and that such a definition also results in a more precise delineation of the federal and state roles in the administration of the AFDC program.

I. THE HEW INTERPRETATION: “CONDITION X”

Charged by Congress with the administration of the AFDC program, the Department of Health, Education and Welfare (HEW) has promulgated regulations for measuring state AFDC plans against the statutory scheme.11 In interpreting sections 402 and 406 of the Act, the agency determined that section 402 contains the only requirements with which state plans must comply,12 and that section 402 does not implicitly incorporate the definitions of section 406 by reference.13 Section 402 was therefore interpreted by HEW as exhausting those statutory requirements that were mandatory in state plans, while section 406 was seen as providing merely the broadest range of plan coverage for which federal funds were available. Nevertheless, states were

13. See also 42 U.S.C. § 607 (1970) (the definition of dependent child was expanded to include children of unemployed fathers). Coverage is not automatic but is left optional with the states if they choose to comply with requirements set forth at 42 U.S.C. § 607(c), (d) (1970) (amended 1976).
not wholly free, under this interpretation of the Act, arbitrarily to restrict the class of eligible individuals.

To assure the reasonableness of state restrictions the agency promulgated the doctrine of "equitable treatment" or "Condition X."14 This doctrine was applied by the agency "to prohibit arbitrary exclusions of persons who come within the scope of . . . [section 406], where the criteria upon which the exclusion is based bear no reasonable relationship to the purpose or scheme of the federal statute."15 Imposition of "Condition X" was thus an agency-created exception to HEW's proposition that the only requirements mandatory upon the states are those expressly enumerated in section 402.16 Although there was no express authority for such a standard in the Act, HEW maintained that it was necessary to prevent restrictive state plan provisions from defeating the primary purpose of the Act: "to get money into the hands of needy people."17 Thus, in the absence of "Condition X," the HEW interpretation of the statutory scheme might have allowed approval of state plans that denied aid to the very persons the Act was intended to assist.

In reality, the application of "condition X" by HEW seldom has resulted in disapproval of state plans.18 The review standard, despite these "equitable" restrictions, has operated primarily to allow HEW's approval of state plans covering fewer individuals than would meet the eligibility criteria of

14. Although this standard was first codified in 1971, 45 C.F.R. § 233.20(a)(1) (1971), HEW had been examining state plans for several years before 1971 using "Condition X" as an internal standard of review. For an excellent discussion of the early operation of "Condition X", see Comment, supra note 12.


17. F. White, Equitable Treatment Under the Public Assistance Titles 5 (Nov. 5, 1963) (staff paper prepared for HEW Regional Attorneys' meeting). The author, noting that her views were not necessarily those of HEW, maintained that one basis of "Condition X" was the equal protection clause of the fourteenth amendment. Id. at 4-8. However, whether "Condition X" is viewed as statutorily or constitutionally based, it came to be known as the unspecified condition within section 402, and thus named 402 "(a)(x)." Id. at 8 n.9.

18. In one early case, HEW invalidated a Georgia quota system which contained racial limitations. In another, federal aid to Arizona was terminated because the welfare program denied benefits to Indians. In 1950, HEW invoked Condition X to warn states that federal matching funds would be terminated if state plans excluded illegitimate children. See Comment, supra note 12, at 1222-23; Comment, AFDC Eligibility Requirements Unrelated to Need: The Impact of King v. Smith, 118 U. Pa. L. Rev. 1219, 1223 (1970) [hereinafter cited as Comment, AFDC Eligibility Requirements]. One commentator has even suggested that HEW has acted politically in applying "Condition X"). See G. Steiner, Social Insecurity: The Politics of Welfare (1966).
section 406. However, while this agency interpretation allows states to aid fewer individuals than would qualify under the statutory definition, the statute is susceptible to an alternative interpretation.

II. THE EMERGENCE OF THE JUDICIAL INTERPRETATION:

King v. Smith

In its first interpretation of section 406 of the AFDC program, the Supreme Court held that the section imposed a mandatory definition of eligible individuals. In *King v. Smith*, it was alleged that an Alabama welfare regulation was violative of both the Social Security Act and the equal protection clause of the fourteenth amendment. The state regulation, known as the "man-in-the-house" rule, provided that a man who visited an AFDC home for the purpose of cohabiting with the mother, or who cohabited with the mother elsewhere, was deemed a "substitute father" of the children. The state argued that with such a "father," the children were ineligible under section 406, because the children were not "deprived of parental support or care." Thus, the mother's conduct precluded her admittedly needy children from coming within the section 406 definition of "dependent child."

Two state interests were asserted in justification of including "substitute fathers" within the definition of "parent": (1) To discourage illicit sexual relationships and illegitimate births, and (2) to equate the state treatment of families with informal "marital" relationships and families with traditional marital relationships. Contending that the state definition was violative of

19. 392 U.S. 309 (1968). This was also the first AFDC case to be given plenary consideration by the Supreme Court. It has only been since the mid-1960's that welfare recipients have been engaged in active efforts to assert their legal rights. See *The Nation*, May 8, 1967, at 582-85. See also Barrett, *The New Role of the Courts in Developing Public Welfare Law*, 1970 Duke L.J. 1.

20. Id. at 327. See Comment, *AFDC Eligibility Requirements*, supra note 18, at 1228.


   Under the regulations, an able-bodied man, married or single, is considered a substitute father of all the children of the applicant . . . mother if (1) he lives in the home with the mother for the purpose of cohabitation; or (2) if he visits frequently for the purpose of cohabiting with the mother; or (3) if he does not frequent the home but cohabits with the mother elsewhere. When "there appears to be a substitute father," the mother bears the burden of proving that she has discontinued her relationship with the man before her AFDC assistance will be resumed.


23. 392 U.S. at 318.
both "Condition X" and the equal protection clause of the fourteenth amendment, the plaintiff argued that the state regulation was not rationally related to the purpose of the AFDC program in that it arbitrarily created two classifications of needy children: (1) those whose mothers were engaged in illicit sexual relationships, and (2) those whose mothers were not engaged in illicit sexual relationships.\(^{24}\)

A three-judge district court panel invalidated the regulation.\(^{25}\) The court did not specifically consider the application of "Condition X," but did hold that such a denial of aid "bestow[ed] the benefits of the program upon some needy children and arbitrarily den[jied] them to others"\(^{26}\) in violation of the equal protection doctrine.\(^{27}\) The mothers' alleged sexual immorality was "unrelated to and in conflict with the purposes of the AFDC program."\(^{28}\)

Although the lower court holding had been based on constitutional grounds, and the parties' briefs filed with the Supreme Court had argued only the "Condition X" and constitutional issues, the Court chose to analyze the question on different statutory grounds. The Court first examined the section 406 definition of dependent child to determine whether Congress intended "parent" to include "substitute fathers." Relying in part on the legislative history of the Act, the Court found that "Congress intended the term 'parent' in section 406(a) . . . to include only those persons with a legal duty of support."\(^{29}\) As Alabama included no such duty in its definition of "substitute fathers," the Court concluded that the paramour-substitute father was not a parent within the meaning of section 406(a).\(^{30}\) Consequently, under this "federal definition," the plaintiff's children were dependent children and were

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24. Brief for Appellee at 20-21, King v. Smith, 392 U.S. 309 (1968). This classification was the basis of the appellee's "Condition X" argument. See Comment, AFDC Eligibility Requirements, supra note 18, at 1225.
27. Id. at 39.
28. Id. at 41.
29. 392 U.S. at 327. The Court relied on the stated purpose of the Act: "to provide programs for the economic security and protection of all children." The Court recognized the congressional intent to aid, through the AFDC program, those children who would not be assisted through other programs designed to provide work for the breadwinners of families. It was clear, the Court held, that AFDC was designed to aid children without a "breadwinner," "wage earner" or "father," and to describe the sort of breadwinner that it had in mind, Congress employed the word "parent." Id. at 328-29. See Comment, AFDC Eligibility Requirements, supra note 18, at 1228.
30. 392 U.S. at 327.
AFDC Eligibility

31. The Court stated:

In combination, these two provisions of the Act [Section 402(a)(10)—aid . . . to all eligible individuals, and section 406(a)—definition of dependent child] clearly require participating states to furnish aid to families with children who have a parent absent from the home, if such families are in other respects eligible.

Id. at 317. The Court went on to hold: “Alabama has breached its federally imposed obligation to furnish ‘aid to families with dependent children . . . with reasonable promptness to all eligible individuals . . . .’” Id. at 333.

32. In sum, Congress has determined that immorality and illegitimacy should be dealt with through rehabilitative measures rather than measures that punish dependent children, and that protection of such children is the paramount goal of AFDC. In light of the Flemming Ruling [a prohibition against state denials of assistance on the basis of unsuitable home conditions] . . . it is simply inconceivable . . . that Alabama is free to discourage immorality and illegitimacy by the device of absolute disqualification of needy children.

Id. at 325-26 (footnotes omitted).

33. For an excellent discussion of this concept, see W. Bell, Aid to Dependent Children (1965).

34. For a discussion of the correspondence between HEW and the State of Alabama regarding the validity of the “man-in-the-house-rule,” see Steiner, supra note 18, at 118; 392 U.S. at 326 n.23.

because they were not in school, despite the fact that section 406(a) specifically defines "dependent child" as including children of this age regardless of their school attendance. HEW argued that "the purpose of section 406 of the Social Security Act is to delineate the maximum scope of federal financial participation available to state AFDC programs and [the purpose] generally is not to set requirements with which those programs must comply." Therefore, under HEW's view of the statutory scheme, Colorado could include these children in its program but was not required to include them.

Recognizing that "King v. Smith . . . contains language which appears to suggest a result inconsistent with that urged by this brief," and agreeing that King had properly defined "parent," the HEW brief contended that the King analysis was not applicable to other definitional questions arising under section 406. Rather, HEW argued that King had established only "that one word of the definition of 'dependent child,' i.e., the term 'parent,' precludes a State definition that introduces a 'transparent fiction' . . . . In this one respect (but not in most others) a State departure from the Federal definition leads to a frustration of basic Congressional intent; . . ." The Colorado choice to exclude sixteen and seventeen-year-old children who were not in school did not, in HEW's view, similarly frustrate congressional intent; nor was it an arbitrary or unreasonable exercise of state discretion sufficient to violate "Condition X."

The three-judge district court agreed, relying heavily on HEW's amicus brief, that section 402 contained the strict requirements for state AFDC plans and that section 406 delineated only the maximum scope of federal financial participation. Employing this rationale, the court concluded that the Colorado exclusion was not an unreasonable or arbitrary restriction but was intended to maximize the self-sufficiency of families. The Digesualdo decision carefully focused on the Colorado regulation in light of the legislative history elaborated in the HEW brief. It was not clear whether the court considered its analysis generally applicable to section 406 eligibility questions.

38. Id. at 21.
39. Id. at 23.
40. Id. at 24.
41. Digesualdo v. Shea, Civ. No. C-1827, mem. op. at 11 (D. Colo. Mar. 1, 1971). The Court thus rejected plaintiff's equal protection argument. Moreover, implicit in the opinion is the Court's view that the Colorado regulation does not violate HEW's "Condition X". The Court found that the regulation was consistent with the goals of the AFDC program and served legitimate state interests. Id.
42. Id. at 6-10.
III. CONFIRMATION AND EXTENSION OF THE King ANALYSIS

Although a broad reading of the King decision suggests that a state may not define the class of eligible individuals more narrowly than as defined in section 406, Digesualdo suggests that King can also be read to have addressed only a single word within the section 406 definition. The Supreme Court apparently recognized these conflicting interpretations of King when it noted probable jurisdiction in Townsend v. Swank in 1971.

At issue in Townsend was an Illinois statute that denied assistance to eighteen, nineteen, and twenty-year olds attending college but provided AFDC benefits to persons within that age group attending high school or vocational school. This statute was in clear contrast to section 406 which specifically includes college students as well as high school and vocational school students as dependent children. The three-judge district court panel upheld the Illinois statute on the ground that section 406 does not "expressly and unequivocably require states to incorporate the federal definition of dependent children in their own programs." Thus, the district court adhered to the HEW position that section 406 delineates only the outer guidelines of federal financial participation, and that the states were free to restrict eligibility within these guidelines. The Supreme Court, however, reversed.

In HEW's amicus curiae brief, which essentially restated the view of the statutory scheme expressed in its Digesualdo brief, the agency argued that Illinois was not bound by the section 406 inclusion of eighteen to twenty-year-old children attending college, but instead could elect to exclude that group from coverage under its AFDC plan. Such an exclusion was also valid under "Condition X," HEW contended, because it was not unreasonable in light of the purposes of the AFDC program.

The Supreme Court, however, did not agree with HEW's interpretation of

44. 401 U.S. 906 (1971).
45. ILL. ANN. STAT. ch. 23, § 4-1.1 (Smith-Hurd 1968); see also Ill. Public Aid Reg. 150.
50. See Brief, supra note 49.
section 406, and made it clear that the \textit{King} analysis was appropriate in this situation:

Thus, \textit{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.\textsuperscript{51}

In applying the \textit{King} test, the Court first determined that students aged eighteen to twenty who attended college were eligible under section 406(a) of the Act. The Court then found no congressional authorization for states to exclude college students while including students attending high school or vocational school.\textsuperscript{52} Therefore, section 402(a)(10) required that AFDC benefits be granted to otherwise eligible college students within this particular age group.\textsuperscript{53} The Court concluded that because the Illinois statute restricted eligibility further than the section 406 definition, it was invalid.\textsuperscript{54}

Although \textit{Townsend} appeared clearly to establish the supremacy of the inclusive federal definition of eligibility, the Court noted probable jurisdiction in a case involving a similar eligibility issue within one month of the \textit{Townsend} decision.\textsuperscript{55} In \textit{Carleson v. Remillard},\textsuperscript{56} plaintiffs challenged a California regulation excluding from AFDC benefits the families of active duty military personnel whose fathers were away from home for extended periods of time.\textsuperscript{57} Specifically at issue was whether the state definition of "continued absence," which excluded absence due to military services, conflicted with

\textsuperscript{51} \textit{404 U.S.} at 286.

\textsuperscript{52} Section 406(a)(2)(B) of the Act, 42 U.S.C. § 606(a)(2)(B) (1970), provides for the inclusion of 18 to 20-year-olds in attendance at high schools, vocational schools or colleges. Each state has the option of including these 18 to 20-year-olds in their AFDC programs. However, the Court made clear that once a state exercised its option it must either provide aid to all or none of the 18 to 20-year-olds in this category.

\textsuperscript{53} \textit{404 U.S.} at 288.

\textsuperscript{54} \textit{404 U.S.} at 287-91.

In addition, the Court briefly alluded to the equal protection argument raised by appellees, concluding that "there is a serious question whether the Illinois classification can withstand the strictures of the Equal Protection Clause." \textit{Id.} at 291. The Court expressly rejected the HEW position that states may to some extent vary eligibility requirements from federal standards, limited only by "Condition X": "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 requirements of § 402(a)(10) that aid be furnished 'to all eligible individuals.'" \textit{Id.} at 286.


\textsuperscript{56} \textit{406 U.S.} 598 (1972).

\textsuperscript{57} Cal. Dep't. of Soc. Welfare Reg. EAS § 42-350.11.
the definition of that term in section 406(a) of the Act. The three-judge
district court panel invalidated the California definition\textsuperscript{58} and the Supreme Court affirmed.\textsuperscript{59}

HEW again filed an amicus curiae with the Supreme Court, but modified
the position it had taken in Townsend by distinguishing the definition struck
down in that case.\textsuperscript{60} The agency argued that in Townsend the eligibility of
the plaintiff students had been clear from the section 406 definition of
dependent child. However, the Carleson case involved merely a state's clarifi-
cations of the phrase "continued absence," which the Act had not defined.
Because the Act provided generally that a dependent child was one deprived
of parental care or support due to the "continued absence" of one parent, the
states were free to define or clarify the phrase subject only to "Condition
X."\textsuperscript{61} Under that standard, the agency had determined that California's
clarification of the phrase was a reasonable exercise of discretion consistent
with the purposes of the AFDC program. HEW noted that it long had
approved the state plans which excluded these children, because "Congress' failure to define the federal standard of continued absence may indicate that
the states were intended to have considerable discretion in determining what
sort of parental absence justifies AFDC assistance."\textsuperscript{62}

Again the Court rejected the agency's interpretation of the Act. In invali-
dating the state regulation the Court applied the King-Townsend analysis.
First, the Court looked to the plain meaning of the term "continued absence,"
concluding that it "accurately describes a parent on active military duty."\textsuperscript{63}
The Court then found no authorization in the legislative history of the Act
to construe "continued absence" as applicable to some absent parents but not

\textsuperscript{58} 325 F. Supp. 1272 (N.D. Cal. 1971). The court held that the Social Security Act does not permit states to exclude as a group dependent children whose parents are absent due to military service. The court maintained that the Act did not authorize the State to presume that absence due to military service was not "continued." Moreover, each case must be viewed in light of its particular facts before making a determination that the absence is "continued." Although it is not clear that the majority relied on a King analysis, it is clear that the dissenting judge urged adoption of HEW's position, and thus would have upheld the California regulation. 325 F. Supp. at 1276-77.

\textsuperscript{59} 406 U.S. 598 (1972).

\textsuperscript{60} See notes 49-50 & accompanying text supra. It should be noted that prior to the Townsend decision, HEW had filed an amicus curiae brief in Carleson reiterating its view that section 406 prescribes only the outer limits of federal matching. However, after Townsend, HEW filed a second brief, seeking to distinguish that case, presumably because of the Court's repudiation of their view of section 406. See 1 CENTER ON SOCIAL WELFARE POLICY AND LAW, MATERIALS ON WELFARE LAW III-25 (1972).

\textsuperscript{61} Brief for United States as Amicus Curiae, Carleson v. Remillard, 406 U.S. 598 (1972).

\textsuperscript{62} Id. at 14-15.

\textsuperscript{63} 406 U.S. at 602.
Since these "military orphans" met the federal standard of eligibility, the state could not deny them assistance by varying the federal requirements without express or clearly implied congressional authorization.

After Carleson, it appeared that the Supreme Court's position, accepting federal eligibility standards and rejecting HEW's position advocating state discretion, was clear: the only permissible definitional restrictions on eligibility were those established by the federal Act. However, complication of this straightforward scheme was imminent. In the year after the Carleson decision, an eligibility challenge involving a condition on, rather than a definition of, eligibility reached the Court.

IV. FEDERAL AND STATE WORK CONDITIONS

In 1967, Congress amended section 402 of the Social Security Act to condition eligibility for AFDC on registration for manpower services, training, and employment. Specific rules for, and exceptions to, these new conditions were enumerated in both the statute and the regulations promulgated pursuant to the statute. This federal enactment conditioned continued eligibility on the parent's registration in the federal work incentive (WIN) program. In addition, many states also conditioned eligibility on participation in similar state work programs.

One such state was New York, which, in 1971, enacted its own Work Rules. Although most recipients were required to register under both the federal and state programs, certain persons were required to register for the state program who were not required to participate in the federal WIN program. Failure to follow the New York rules rendered an individual

64. *Id.*
65. *Id.* at 600-01, 603-04. See note 54 *supra.*
67. The Secretary of Labor was designated to promulgate such regulations. 42 U.S.C. § 602(a)(19)(A) (Supp. V 1975).
68. As of 1973, 22 states had enacted supplementary work programs. Twenty-one of these programs were enacted prior to the passage of the WIN amendments. See New York State Dept' of Social Servs. v. Dublino, 413 U.S. 405, 412, 414 (1973).
69. N.Y. Soc. Serv. Law § 131(5) (McKinney 1970). This statute required AFDC recipients to register with local employment agencies and to accept any employment offered. In addition, the state law deems one to have refused employment if he or she (1) fails to file a statement with the local agency twice each month, attesting that the appropriate local employment office states that no suitable position is available, or (2) willfully fails to report for an employment interview or the result of a referral or employment. *Id.* § 131(5)(a)-(d).
70. As the WIN program was not in operation throughout the entire state, there were recipients living in areas of New York where there was no WIN program. However,
ineligible for AFDC regardless of that person's participation in the federal program. Furthermore, the New York program required, among other differences, more rigorous proof that the AFDC recipient was in fact actively seeking employment than was required under the WIN program.71

The New York statute was challenged in New York State Department of Social Services v. Dublino.72 The plaintiffs argued that under the King, Townsend and Carleson (King Trilogy) decisions, the imposition of work rules that were more demanding than the federal program restricted the class of eligible individuals to a greater extent than the WIN program. Since participation in WIN was the only federal condition on eligibility, and since there was no express congressional authorization for a more restrictive state condition, plaintiffs argued that compliance with the federal condition was sufficient, and, under section 402(a)(10), aid should be furnished to individuals otherwise eligible under section 406 who had registered under the WIN program. In the alternative, the plaintiffs contended that the federal program had preempted the New York program.73

The three-judge court did not reach the issue of whether the King Trilogy was applicable to the New York Work Rules, but found instead that the federal program had preempted the state program insofar as it restricted federal eligibility criteria.74 The Supreme Court, however, reversed this holding and remanded the case for a determination of whether the state and federal programs substantively conflicted.75

The Court framed the issue as whether federal WIN program participation, as a condition on eligibility contained in section 402(a)(19), barred a state from imposing complementary work requirements.76 Justice Powell's majority opinion reiterated the cooperative federal-state nature of the AFDC program. He recognized New York's interest in promoting the self-sufficiency of welfare recipients and in coping with the state's fiscal hardships as legitimate state interests which should not be interfered with "lightly." The opinion then examined the congressional intent behind the WIN amendments, and concluded that Congress did not intend WIN to preempt state work programs: "Far more would be required to show the 'clear mani-

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71. N.Y. SOC. SERV. LAW § 131(5)(a)-(d).
73. 348 F. Supp. 290, 295-97 (W.D.N.Y. 1972). Plaintiffs also contended that the New York rules violated the thirteenth amendment. Id. at 297.
74. Id. The district court found the plaintiffs' argument that the New York Work Rules violated the thirteenth amendment without merit. Id.
75. 413 U.S. 405 (1973).
76. Id. at 407.
festation of [congressional] intention' which must exist before a federal statute is held to 'supersede the exercise' of state action."\textsuperscript{77} Clearly holding for the state on the preemption issue, the Court did not reach the issue of a possible conflict between the WIN program and the state work rules under a \textit{King} Trilogy analysis. Instead, the Court remanded the case for a consideration of the issue of possible conflicts between the state and federal work programs\textsuperscript{78} and directed that "[t]he court below will take into account our prior decisions. . . . [I]f there is a conflict of substance as to eligibility provisions, the federal law of course must control."\textsuperscript{79}

The majority's failure expressly to apply the \textit{King} Trilogy to the New York Work Rules may have resulted from the Court's desire to limit its holding to the preemption question because there had been no factual finding by the district court on the issue of federal-state conflict. Nevertheless, the Court's evaluation of the preemption issue suggests the majority's belief that Congress did not intend the WIN program to be exclusive. Twenty-one states, the Court observed, had already conditioned AFDC eligibility on participation in similar work programs when the 1967 amendment to the Social Security Act enacted the WIN condition into section 402,\textsuperscript{80} and Congress did not indicate that it wished to restrict the operation of those programs. Furthermore, the Court noted that Congress did not intend the WIN program to operate in every district in a state, but only in those districts where significant WIN participation would be expected.\textsuperscript{81} Consistent with this reasoning, the Court may have believed not only that WIN did not preempt state work programs, but also that passage of WIN without mention of the pre-existing state programs implied congressional approval of these programs as conditions on AFDC eligibility.

However, the \textit{Dublino} Court may not have intended its resolution of the preemption issue to express any opinion on the validity of the state work

\textsuperscript{77} \textit{Id.} at 417. The Court held that "the Act allows for complementary state work incentive programs and procedures incident thereto—even if they become conditions for continued assistance.” \textit{Id.} at 422.

It must be noted here that the Court used "preemption" in a special sense. "This litigation does not involve . . . federal pre-emption of a wholly independent state program . . . . The State Work Rules . . . were promulgated as part of the implementation of AFDC, and are therefore not wholly independent of the federal program." \textit{Id.} at 411 n.9.

\textsuperscript{78} \textit{Id.} at 423 & n.29.

\textsuperscript{79} \textit{Id.} at 423 n.29, \textit{citing King, Townsend} and \textit{Carleson}. The decision on remand has not yet been rendered.

\textsuperscript{80} 413 U.S. at 414.

\textsuperscript{81} \textit{Id.} at 418.
rules under a *King* Trilogy analysis. Thus, the critical question of whether a conflict of substance had occurred between the state and federal work programs was left to the three-judge court to resolve on remand.

In their brief as amicus curiae in *Dublino*, HEW recognized the validity of the *King* Trilogy analysis as applied to definitional questions arising under section 406 of the Act, but argued that pursuant to the cooperative nature of the AFDC program, "the states have been left free to impose additional eligibility conditions unrelated to the specific federal definitions and . . . the [New York] Work Rules are consistent and in harmony with both the underlying purpose of AFDC assistance and the operation of the federal work incentive program." HEW thus drew a distinction between section 406 "definitional" restrictions, which it acknowledged were prohibited by the *King* Trilogy, and "additional eligibility conditions," arising independently of the Act, which HEW considered implicitly allowable where consistent with the purpose and operation of the AFDC program. HEW concentrated on showing that the New York program complemented rather than conflicted with the WIN program. This line of argument was apparently addressed to the preemption issue under appeal, but it may also have indicated the degree of congressional authorization HEW believed necessary to validate additional state conditions on eligibility under the *King* Trilogy test.

While the *Dublino* majority did not specifically address HEW's position, Justice Marshall in dissent, disputed its validity. Furthermore, while he did not feel that the majority had adopted HEW's view, he disagreed with the majority's inference that passage of WIN indicated congressional authorization for state conditions that could possibly restrict AFDC eligibility. He argued that Justice Powell's majority opinion had ignored the thrust of the
King Trilogy by allowing the state program to be upheld on the basis of scant congressional intent. Reiterating the Court's position in the King Trilogy cases, Justice Marshall maintained that before a state may vary eligibility requirements from the federal standard, a clear statement of congressional intent to allow such a deviation must be found. Thus, his argument was not that the majority had applied the wrong test, but merely that it had sustained the state program without sufficient congressional authorization.85 A finding that state work programs were not preempted, Justice Marshall believed, was quite different from a finding that they were affirmatively authorized as conditions on AFDC eligibility.

This latter finding, required under the Court's King Trilogy analysis, had not been made by the Dublino majority nor by the district court. Thus, regardless of the disagreement between the majority and dissent concerning the degree of congressional authorization actually required by the King Trilogy, both seem to agree that the same standard of review should apply to state conditions on eligibility as had been applied to state definitional restrictions.

In contrast to this reading of the Dublino opinion, HEW has interpreted the majority opinion as establishing a new standard for testing the validity of additional state conditions on eligibility that differs from the Court's earlier application of the King Trilogy standard to "definitional" issues arising under section 406.

V. AGENCY RECONCILIATION OF THE King TRILOGY AND Dublino

In an effort to reconcile the King Trilogy decisions with its view of the Dublino decision, HEW revised its regulations.86 Regulation 233.10, which previously embodied the "Condition X" doctrine,87 was revised to incorporate the agency position that Dublino authorized a different test for eligibility issues distinct from those before the Court in the King Trilogy cases. The regulation thus provides two standards: one applicable to "additional state conditions on eligibility" and a second applicable to "restrictive state definitions."

According to HEW, definitional issues arise when state eligibility provisions incorporate definitions which arguably conflict with the definition of de-

85. See id. at 432.
86. Until this time, HEW had not revised 45 C.F.R. § 233.10 (1971) to reflect the King Trilogy analysis.
87. 45 C.F.R. § 233.10(a)(1)(i), (ii) (1973) provided that states could "provide coverage on a broader or more limited basis. . . . [T]he eligibility conditions imposed must not exclude individuals or groups on an arbitrary or unreasonable basis, . . ." Id. See notes 12-18 & accompanying text supra.
dependent child in section 406. The standard applicable to these definitional provisions is the King Trilogy standard, restated by HEW as: "A state may provide more limited public assistance coverage than that provided by the Act only where the Social Security Act or its legislative history authorizes more limited coverage." 88

The second standard of review contained in the revised regulation applies to what HEW terms "additional state conditions on eligibility." This category, according to HEW, includes conditions imposed by a state outside the framework of the federal statute. The published notice of proposed rulemaking includes, as an example of this type of provision, a state requirement that mothers of dependent children who are concededly eligible under section 406 cooperate with state officials in locating and pursuing the absent parent to obtain child support payments. 89 HEW maintains that the standard of review applicable to such a "non-definitional" provision is dictated by the Dublino decision:

A State may impose conditions upon applicants for and recipients of public assistance which, if not satisfied, result in the denial or termination of public assistance, if such conditions assist the State in the efficient administration of its public assistance programs or further an independent state welfare policy, and are not inconsistent with the provisions and purposes of the Social Security Act. 90

The promulgation of separate standards of review applicable to "definitional" and "additional condition" restrictions was consistent with HEW's amicus brief in Dublino. HEW's revised regulation reflects the agency's belief that the Court accepted its position that states are free to impose additional conditions on eligibility consistent with the purpose and operation of the federal AFDC program. 91

VI. CONTINUED VITALITY OF THE KING TRILOGY DECISIONS

The revised HEW regulation is predicated on the Dublino decision's actually having created a different standard of review for additional state condi-

88. 45 C.F.R. § 233.10(a)(1)(ii)(A) (1976). This part of the regulation reflects the Court's presumption that the more inclusive federal definition is mandatory on the states, unless a clear showing of congressional intent to the contrary can be shown.
91. See note 83 & accompanying text supra. The Dublino majority had in fact recognized New York's interest in the efficient administration of its work program and in independent state welfare policies. See 413 U.S. at 413. However, the Court at this point was discussing the cooperative nature of AFDC in the context of possible federal preemption. It did not appear to recognize these interests as potentially offsetting federal statutory requirements. But see note 82 supra.
tions than the standard earlier applied to definitional questions. Had the Court intended such a dichotomy, the regulation correctly reflects the Court's intent. However, Justice Marshall's *Dublino* dissent contended that the *Dublino* majority had actually applied the *King* Trilogy standard to the New York condition but had relaxed the requirement of showing congressional authorization for such a restriction.\textsuperscript{92} Under Justice Marshall's view, the majority opinion had indicated merely that a state could add conditions of eligibility upon a "scant" showing of congressional authorization. On the other hand, HEW's interpretation of *Dublino* was that such "state action" was valid as long as the state provision furthered an independent state welfare policy consistent with the purposes of the Act.\textsuperscript{93} It was not entirely clear, therefore, whether *Dublino* had drawn a distinction between additional state conditions and restrictive definitions. Although the next case to reach the Court involved a section 406 definition, the Supreme Court's decision did shed some light on its view of HEW's two-standard approach.

*Burns v. Alcala*\textsuperscript{94} involved an Iowa welfare policy which denied aid to pregnant mothers on behalf of unborn children. Plaintiffs argued that their unborn children were "dependent children" within the section 406 definition. Therefore, applying the *King* Trilogy analysis, such children must be afforded assistance under section 402(a)(10), absent clear congressional authorization for states to limit coverage of their plans to children already born.\textsuperscript{95}

Under the agency regulation the issue in *Alcala* would seem to be definitional. Moreover, HEW had always approved state plans that included fetuses as eligible individuals, indicating that it believed such children to be within section 406.\textsuperscript{96} However, in its amicus brief, HEW strenuously maintained that the agency did not consider unborn children within the federal definition.\textsuperscript{97} Rather, the agency argued, its regulation authorizing inclusion

\begin{itemize}
  \item \textsuperscript{92} See notes 84, 85 & accompanying text *supra*.
  \item \textsuperscript{93} See notes 90, 91 & accompanying text *supra*.
  \item \textsuperscript{94} 420 U.S. 575 (1975).
  \item \textsuperscript{95} Id. at 577.
  \item \textsuperscript{96} HEW had been approving such plans on the basis of a regulation which provides in pertinent part:
    \begin{quote}
      "(2) Federal financial participation is available in:
      \begin{itemize}
        \item \ldots
        \item \ldots
        \item Payments with respect to an unborn child when the fact of pregnancy has been determined by medical diagnosis;
        \item \ldots"
      \end{itemize}
    \end{quote}
  \item \textsuperscript{97} 45 C.F.R. § 233.90(c)(2)(ii) (1976).
\end{itemize}

of such children at the state's option was based on the Secretary's "general discretionary rule-making authority under Section 1102 of the Act... The Secretary interprets his authority under that provision as extending to promulgation of regulations permitting payment of AFDC benefits on behalf of individuals other than 'dependent children'..."98 This option thus was justified by HEW as a reasonable exercise of the Secretary's administrative powers,99 rather than as a permissive restriction on the federal definition.

The Supreme Court, however, ruled that the issue was clearly definitional, and its resolution warranted only the application of the King Trilogy analysis. The Court, however, could find no basis for inclusion of unborn children in either the statutory language of section 406 or the congressional intent underlying that section. Therefore, unborn children were not eligible individuals and section 402(a)(10) did not require assistance for such children.100

Perhaps the most interesting aspect of Alcala was the Court's citation of authority for its enunciation of the King Trilogy standard. After stating the King Trilogy test, the Court cited King, Townsend, Carleson and Dublino.101 Even if Alcala involved only a definitional question, the concurrent citation of Dublino and the Trilogy cases is a strong indication that the Court did not consider Dublino a deviation from the earlier cases.102 Simply citing the King Trilogy cases clearly would have sufficed. The additional citation of Dublino, without qualification, did not portend well for HEW's interpretation of Dublino contained in its revised two-part regulation.

VII. A CASE FOR RESOLUTION: Lascaris v. Shirley

The divergence between HEW's interpretation of Dublino and the Supreme Court's concurrent citation of the King Trilogy and Dublino in
Alcala was evident. The proper standard applicable to state conditions on eligibility imposed in addition to the specific conditions enumerated in the Act, however, remained questionable in the absence of a clear Supreme Court pronouncement. The Court's opportunity to clarify this aspect of its Alcala opinion came in Lascaris v. Shirley. ¹⁰³

At issue in Shirley was a provision of the New York Social Services Law that conditioned AFDC assistance, to mothers otherwise eligible under sections 402 and 406, on cooperation with state officials in obtaining support payments for dependent children receiving AFDC. ¹⁰⁴ The Social Security Act contained no such condition on eligibility, although section 402(a)(17) did require participating states to develop and implement a program to secure such support from the deserting parent. ¹⁰⁵

The plaintiff's primary argument was that the King Trilogy test should be applied. Following this test the New York condition contravened the federal eligibility requirements of section 406 and, therefore, absent congressional authorization for such a condition, section 402 mandated the provision of AFDC assistance. The district court agreed and invalidated the New York statute to the extent it conditioned assistance on a recipient's cooperation in securing support payments. ¹⁰⁶ The court observed that New York had "engraft[ed] a condition on to the Congressionally prescribed initial AFDC eligibility requirements or on to the grounds for discontinuance of benefits," and it could find no authority in the language or the legislative history of the Act for such a condition. ¹⁰⁷ Therefore, section 402(a)(10) required New York to provide assistance even to "non-cooperating" recipients.

¹⁰⁴. N.Y. Soc. Serv. Law § 101-a (McKinney 1970). The state argued that under the New York law, only the mother's share of the AFDC benefits would be terminated as a result of her refusal to cooperate, and thus the child was not being penalized. The district court noted that this argument was "unrealistic" in that any payments made on behalf of only the children would necessarily go toward support of the terminated parent. Thus, termination of benefits to the parent would effectively reduce benefits to the child. See 365 F. Supp. 818, 822 (N.D.N.Y. 1973). Earlier cases had established that assistance to the child could not be denied as a result of the mother's non-cooperation. See, e.g., Doe v. Lavine, 347 F. Supp. 357 (S.D.N.Y. 1972); Doe v. Swank, 332 F. Supp. 61 (N.D. Ill. 1971), aff'd sub nom., Weaver v. Doe, 404 U.S. 987 (1971); Taylor v. Martin, 330 F. Supp. 85 (N.D. Cal. 1971), aff'd sub nom., Carleson v. Taylor, 404 U.S. 980 (1971).
¹⁰⁶. 365 F. Supp. 818 (N.D.N.Y. 1973). The district court here was considering this case for the second time. The Supreme Court had vacated and remanded an earlier decision for reconsideration in light of the then recently amended New York law. 409 U.S. 1052 (1972).
¹⁰⁷. 365 F. Supp. at 821.
Though application of the King Trilogy standard to an additional state condition on eligibility was significant of itself, the district court went on to assert that Dublino "supports rather than detracts from our decision here." The court found that the controversy in Shirley was the "very issue" which the Supreme Court had remanded in Dublino and, therefore, the King Trilogy standard should apply to this case just as the Supreme Court had directed application of that standard on remand in Dublino. The court also considered the cooperation condition quite different from the work rules at issue in Dublino. The WIN program addressed in Dublino and the 402(a)(17) requirement of a state program aimed at obtaining support payments had both been enacted by the 1967 amendments to the Social Security Act. However, the court observed, "[a] striking distinction between the two [programs] is that with respect to WIN. Congress made participation a condition of eligibility, while Congress has made no such provision in regard to [the section 402(a)(17) program]." Finally, while the Dublino decision had relied on HEW's consistent approval of state work requirements, HEW's position had vacillated regarding cooperation conditions. Therefore, the court found Dublino supportive of and consistent with the King Trilogy decisions. This was a direct repudiation of HEW's basis for its dual standard regulation.

In early 1975, Congress effectively overruled the district court's Shirley decision by amending section 402(a) of the Act to expressly condition federal eligibility for AFDC assistance on cooperation with a state in obtaining child support payments. In creating such a condition, Congress arguably acknowledged that only a specific amendment to the Act could lawfully allow the operation of a state program, such as that contemplated by the invalidated New York provision under 402(a)(17). This congressional action, however, did not moot the appeal from the Shirley district court decision, because the Supreme Court noted probable jurisdiction and decided the case prior to the effective date of the amendment.

108. Id. at 824.
109. Id. See note 79 & accompanying text supra.
110. 365 F. Supp. at 824 (footnote omitted).
111. The district court noted that the recent amendment to 45 C.F.R. § 233.90 (1973), allowing states to deny assistance to parents or caretakers refusing to cooperate, was not in the original amendment as proposed in 37 Fed. Reg. 26,737 (Dec. 19, 1972). Thus, the amendment was "a departure from the agency's past position," and it ran "counter to the construction placed on the Social Security Act by the courts." Therefore, the district court refused to accept HEW's asserted position. See 365 F. Supp. at 823-24, and cases cited at 822 nn.5, 7.
In its amicus brief to the Supreme Court, HEW urged the court to treat the New York provision as "non-definitional" and apply part (B) of its regulation to uphold the challenged state condition.\textsuperscript{114} The agency maintained that this additional state condition is "a reasonable administrative tool for accomplishing the statutory objective of establishing the paternity of and obtaining support for AFDC children."\textsuperscript{115} Further, HEW contended that the Act "allows for" this type of state condition, and that it is not in "violation of any specific provision" of the Act.\textsuperscript{116} Thus, the agency argued that its "Dublino" standard, contained in part (B) of its regulation, was satisfied, and consequently that the state condition should be upheld.

Noting the congressional resolution of the conflict, the Supreme Court rendered a per curiam opinion affirming the district court's judgment and citing as authority Townsend and Carleson.\textsuperscript{117} Although Shirley clearly involved an additional condition on eligibility, in the Court's view the applicability of the King Trilogy was apparent. Therefore, the Trilogy standard was applied even though HEW had maintained that this was a situation in which part (B) of its dual standard regulation would apply.\textsuperscript{118} Even the agency should now have to recognize the invalidity of its dual standards. The Supreme Court had made clear that the only standard by which non-financial eligibility restrictions—be they "definitional" or "conditional"—could be measured was that set forth in King, Townsend, Carleson, Dublino and Shirley.

\textbf{VIII. ADDITIONAL SUPPORT FOR FEDERAL STANDARDS}

Consideration of the legal and practical effects of a federal standard provides further support for this interpretation of the Supreme Court decisions. The judicial interpretation not only permits a consistent reading of all the Supreme Court cases, but its application also proves more manageable than the dual standard HEW regulation,\textsuperscript{119} and affects a more socially desirable result.

\textsuperscript{114} See note 90 & accompanying text supra.
\textsuperscript{115} Memorandum for the United States as Amicus Curiae at 6, Lascaris v. Shirley, 420 U.S. 730 (1975).
\textsuperscript{116} Id. at 7-8.
\textsuperscript{117} 420 U.S. 730, 732 (1975).
\textsuperscript{118} See note 90 & accompanying text supra. By recognizing that the challenged provision was an additional state condition on eligibility, and by affirming the district court's application and citation of the King Trilogy cases and analysis, the Court conclusively rejected the two-standard HEW regulation.
\textsuperscript{119} Although further consideration of the HEW regulation should terminate after Shirley, it has not been directly invalidated. In fact, one district court has upheld it, See NWRO v. HEW, Civ. No. 264-73 (D.D.C. Jan. 28, 1976), discussed in [1976]
The long-held agency interpretation of the Act, reflected in the "Condition X" doctrine and its subsequent codifications,\(^{120}\) views the Act as allowing states broad discretion in the administration of their AFDC programs. HEW believes that the only federal requirements are those expressly enumerated in section 402 and the general restrictions imposed by "Condition X." Indeed, the Act contains no language requiring the section 406 definition of "dependent child" to be mandatory on the states; section 406 is neither included in nor referred to in section 402. Although part (A) of the revised agency regulation adopts the King Trilogy standard for "definitional" restrictions, part (B) of the regulation retains HEW's statutory interpretation for "conditional" restrictions.\(^{121}\) Part (B) permits even those additional state conditions that operate to deny assistance to otherwise eligible needy children.

Since the King decision in 1968, however, the HEW and Supreme Court interpretations of the Act have differed. The Court has consistently held that the federal definition of "dependent child" in section 406 is mandatory on the states through section 402(a)(10), in the absence of clear congressional intent to allow state exclusions.\(^{122}\) This interpretation of the Act is consistent with the plain meaning of the Act's language and structure; if section 402 does not incorporate the federal definition of "dependent child," section 406(a) would have little meaning.\(^{123}\) In addition, had Congress not intended to impose section 406 on the states, it would not have delineated with specificity those needy children for whom the protections of the program were designed. Where Congress did intend for states to have an option, it specified such intent clearly, as in the case of eighteen to twenty-year-old students and children of unemployed fathers.\(^{124}\)

This interpretation is also preferable to HEW's insofar as it allows a consistent reading of all the Supreme Court cases. Despite HEW's conclusion to the contrary, the Court has never indicated that Dublino enunciated a rule

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\(^{120}\) See notes 12-18 & accompanying text supra.

\(^{121}\) See notes 88-90 & accompanying text supra. Since part (A) of the agency regulation accepts the King Trilogy decisions and is therefore consistent with the interpretation advocated in this Comment, the problems discussed are primarily relevant only to part (B).


\(^{123}\) See notes 9-10 & accompanying text supra.

\(^{124}\) See note 13 supra.
separate and distinct from that set forth in the *King* Trilogy. Rather, the Court has cited *Dublino* with *King*, *Townsend* and *Carleson* as if the tests were identical.\(^{125}\) This was made abundantly clear in *Shirley* when the Court applied the *King* Trilogy test to an “additional condition.” Thus, such a consistent reading provides a single standard applicable to both restrictive state definitions and additional state conditions.

On the other hand, application of part (B) of the agency regulation provides the potential for state abuse and tolerates uncertainty and inequity in the administration of the *AFDC* program. This is evidenced in the requisite initial determination of whether the challenged state plan provision is an additional condition on eligibility or a restrictive definition. This determination is often difficult, if not impossible, as many plan provisions could be characterized as either. As Justice Marshall pointed out in his dissent in *Dublino*,\(^ {126}\) the provision challenged in *Townsend*\(^ {127}\) could have been characterized either as an additional condition that eighteen to twenty-year-old students attend only high schools or vocational schools, or, as the Court held, as a restrictive definition. Justice Marshall thus considered HEW’s distinction dubious: “The United States suggests that, while states may not narrow the class of persons eligible for assistance under federal standards, they may impose additional conditions on eligibility in pursuit of independent state policies. This distinction will not withstand analysis, for its makes decision turn on meaningless verbal tricks.”\(^ {128}\)

Illustrative of this problem is a state provision requiring the relative caring for a dependent child to be over the age of eighteen before he or she can qualify for *AFDC* on behalf of a dependent child.\(^ {129}\) Such a provision results in the denial of assistance, for example, to a seventeen-year-old mother and her infant child. The state would maintain that this mother does not qualify as a “caretaker relative,” even though she is so defined by the Act.\(^ {130}\) If this provision were challenged, the issue could be whether a seven-

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\(^{125}\) See notes 101-02 & accompanying text *supra*.

\(^{126}\) 413 U.S. 405, 424-25 n.3 (Marshall, J., dissenting).

\(^{127}\) See text accompanying notes 45-54 *supra*.

\(^{128}\) 413 U.S. 405, 424-25 n.3 (Marshall, J., dissenting). Justice Marshall recognized that although the majority of the Court did not clearly reject HEW’s position, prior Court decisions, which were not overruled or limited by the majority, dictated rejection. It should now be clear that Justice Marshall foresaw not only the pending difficulties but their eventual resolution as well.


\(^{130}\) The term “caretaker relative” refers to the relative with whom a “dependent
teen-year-old mother is within the federal definition of an appropriate caretaker relative, or whether the state may impose this age condition in addition to its other eligibility requirements for AFDC. Therefore, the threshold question before the court would be whether to characterize the plan provision as a restrictive definition or as an additional condition. The uncertainty and the potential for abuse is apparent.

Because the requisite state showing to sustain a challenged provision varies significantly depending on which standard is applied, the characterization or label given a particular provision may effectively determine its validity. Due to the minimal state showing necessary to uphold the provision under part (B), this provision would likely be upheld if characterized as a condition. The state could argue that an independent policy is furthered by its determination that persons under the age of eighteen are neither sufficiently mature nor responsible to properly care for young children. Finally, this state provision could be viewed as not inconsistent with any specific provision or purpose of the Act, as there is no language in the Act regarding the age of caretaker relatives.

However, if this state plan provision were characterized as a restrictive definition, and part (A)’s King Trilogy analysis were applied, it is far more likely that the state could not sustain its burden and the provision would be invalidated. First, because the federal definition of an appropriate caretaker relative includes “mothers” regardless of age, it is clear that a seventeen-year-old mother comes within section 406. Second, there is no congressional authorization for states to select only certain mothers as appropriate. Therefore, under section 402(a)(10), the state must afford assistance to mothers under the age of eighteen.

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131. Although it is not the case that all state additional conditions will be upheld under part (B), it is true that this standard is more easily satisfied than the King Trilogy standard in part (A). The standard in part (B) requires only a showing that the state provision aids the state in the efficient administration of its AFDC program or furthers an independent state policy and is not in conflict with any specific purpose or provision of the Act. However, the part (A) standard requires an affirmative showing of congressional intent to allow the state provision.

132. The requirement, that the state plan provision not be in conflict with any provision or purposes of the Act embodies the original “Condition X” test and means not in conflict with any specific provision or purposes. Otherwise, part (A) of this regulation would be effectively incorporated into part (B) such as to render part (A) meaningless.

133. See note 132 & accompanying text supra.
One further example of how the initial characterization can affect the result is seen in a state provision prohibiting all AFDC applicants and recipients from advocating or participating, by overt acts, in movements proposing change in the form of the United States government by means not provided in the Constitution.\textsuperscript{134} A state defending this provision would predictably maintain that it is an additional condition on eligibility and that part (B) of the agency regulation is therefore applicable. Under this standard, the provision furthers a state interest in insuring the patriotism and non-criminal nature of AFDC recipients, and as there is no reference to this type of provision in the Act, there is no conflict. Thus, the provision would likely be upheld. However, if judged by the \textit{King} Trilogy standard, this same provision would likely be deemed invalid, because there appears to be no congressional authorization for the exclusion of "non-patriotic" individuals otherwise eligible within section 406.\textsuperscript{135} Hence, section 402 would mandate their eligibility. Such confusion regarding the proper characterization of a state restriction leads directly to uncertainty of results, and more importantly, allows the state to characterize any restrictive provision as a condition subject to the more lenient standard of part (B).

The "loyalty" example is indicative of yet another defect in the application of part (B) of the agency regulation. Although it may be argued that this particular condition is reasonable, virtually no controls exist over the states' ability to impose other conditions under the authority provided them in part (B) of the regulation. Thus, there is nothing to prevent a "creative" state legislature from conditioning eligibility on, for example, one's never having been convicted of a felony, or perhaps never having been convicted of any crime. Each of these additional conditions could be supported by similar state arguments—the state could advance an interest in not lending government support to criminals or irresponsible citizens. Again, there is no specific purpose or provision in the Act with which these conditions would conflict.\textsuperscript{136} Thus, by offering extremely limited guidelines for the proper scope and exercise of state discretion, part (B) provides the potential for unanticipated, but rather extreme, state restrictions on AFDC eligibility.

The difficulty and potential for abuse inherent in the initial characterization of state plan provisions, and the virtually unlimited state discretion permitted under part (B) for provisions characterized as "additional conditions,"

\textsuperscript{134} See U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, CHARACTERISTICS FOR STATE PLANS FOR AFDC 161 (1974).
\textsuperscript{135} See Affidavit of Nancy Duff Levy, Jan. 16, 1974, NWRO v. HEW, Civ. No. 264-73 (D.D.C. Jan. 28, 1976) in which the affiant states that there is no express or clearly implied congressional authorization for such a state provision.
\textsuperscript{136} See note 132 supra.
are likely to result in yet another problem—profusion of litigation. Is the particular plan provision in question an “additional condition” or a “restrictive definition?” What is an “independent state welfare policy” sufficient to uphold an additional condition? To what extent must the condition “assist the state in the efficient administration of its public assistance programs?” The agency has provided no guidelines for these determinations. They remain to be worked out by the courts, and there appear to be no quick and easy answers.

In contrast, application of the single standard mandated by the Supreme Court in *Shirley* largely alleviates these problems, and allows for greater predictability and presumably fewer lawsuits. Since the standard will apply to all plan provisions, there are no characterization problems. Moreover, the standard is easily applied, involving only an examination of the Act and its legislative history. This results in greater predictability, which in turn may sensitize state legislators to the parameters of their discretion and lead to a realignment of both current and contemplated plan provisions with the federal standard, and, ultimately, further reduce litigation.

In furtherance of the social purposes of welfare programs, adoption of the Court's *Shirley* decision results in a broader and more equitable distribution of welfare. Even within that group of needy children who lack parental support or care, the Court's interpretation offers assistance to a greater number of needy dependent children than does the agency interpretation. Moreover, a "federalized" standard of eligibility more equitably distributes welfare benefits. Under a single federal standard, AFDC assistance would be less dependent on one's geographical location, but rather would provide the potential for greater plan uniformity among the states, and thus for greater security for welfare recipients.137

Finally, the Court's "federalization" of the program in no way affects the states' broad latitude regarding fiscal determinations in the administration of their state programs.138 The cooperative-federalism nature of the AFDC program remains; the states retain their right to determine the standard of need and the percentage of this standard to be paid recipients,139 remain free to make these determinations in light of their own fiscal limitations,140 and

137. Even if part (B) of the regulation were uniformly rejected and states fully complied with the broad federal scope of eligibility, a recipient's residence would still affect the amount of assistance received and possibly his eligibility. See notes 6-8 & accompanying text supra, and notes 138-44 & accompanying text infra.

138. See notes 6-8 & accompanying text supra.


may choose among several alternative methods of computation. Only minimal federal restrictions have been placed upon the states in this regard. Thus, the states essentially retain control over financial eligibility, one of the two primary eligibility requirements.

IX. CONCLUSION

Rejection of the existing HEW regulation and acceptance of the judicial interpretation of the Act promises to offer HEW, states, and recipients some solution to the conflict and confusion which have plagued the AFDC program during the past few decades. Until Congress acts to provide some welfare reform, either through amendment of the existing program or through enactment of an entirely new system, expeditious implementation of the Court's directive is critical to the interests of all needy "dependent children." It has taken eight years of judicial decision to clarify the law; application of that law must be more timely.

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142. For example, the state determination of the standard of need must be made on an objective and equitable basis and the standard must apply uniformly throughout each state. 45 C.F.R. § 233.20(a)(1) (1976); See Boddie v. Wyman, 434 F.2d 1207 (2d Cir. 1970), aff'd, 402 U.S. 991 (1971). In addition, only current and actual income may be considered in determining an applicant's need. See Lewis v. Martin, 397 U.S. 552 (1970); 42 U.S.C. § 602(d)(7) (1970); 45 C.F.R. § 233.20(a)(3)(ii)(c) (1976). Further, the Act required that as of July, 1969, each state must have adjusted the amounts used to determine the standard of need to reflect changes in living costs. See 42 U.S.C. § 602(a)(23) (1970). This requirement has been interpreted to prohibit reduction of those amounts after the adjustment. Rosado v. Wyman, 397 U.S. 397 (1970).

143. An applicant must meet two basic requirements for eligibility: his or her family must include at least one dependent child, and that child, or children, must be "needy." Afforded broad discretion in determining whether an applicant is needy, the states thus retain control over one, if not the most important, aspect of AFDC eligibility.

144. At the time of this writing the newly elected Carter Administration has already begun a "welfare reform study" to investigate "every possible avenue for revising the present patchwork system." The Wash. Post, Jan. 27, 1977, § A, at 4, col. 3.

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