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Constitutional Law -- The Conclusive Presumption Doctrine

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The dissent's view that the Court treated the substantive area with hostility seems justified.[59] Whether future opinions will attempt to limit the "injury in fact" construction of *Warth* to exclusionary zoning cases is conjectural, though it is likely in light of the trend of cases prior to *Warth* and the peculiarly volatile consequences of applying this trend in a zoning context. The impact of *Warth* on zoning litigation is not likely to be severe. State courts are becoming increasingly receptive to problems of economic exclusion, and arguably every plaintiff that has litigated this issue in the federal courts to date would have found a more favorable forum in state court. *Warth* may have a larger impact in the area of equal protection, given the constraints it places on bringing cases in federal court that raise this issue in an economic context.

It might be noted that *Warth* was the wrong case to appeal if the goal were to establish an economic equal protection doctrine. There should have been a history of repeated project denials and plaintiffs who would have been able to live in the projects had they been built.[60] The consequences of bringing *Warth* before the Court are a number of restrictive precedents in both standing law and the use of the equal protection doctrine that if followed will have an adverse impact on creative developments in both these areas. Unfortunately, given the context of *Warth* in the series of standing decisions and the restrictions it imposes on future zoning cases, it is not at all certain that the Court will reassess its holding in the near future.

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Constitutional Law—The Conclusive Presumption Doctrine

From 1972 to 1974, the conclusive presumption doctrine[1] surfaced as a viable vehicle for Supreme Court invalidation of legislation. The doctrine requires nearly perfect conformity between the results of the

59. 95 S. Ct. at 2216.
60. *See* the Court's discussion. *Id.* at 2209 n.16.

1. "Conclusive presumption" will be used interchangeably with "irrebuttable presumption." *See* Simson, *The Conclusive Presumption Cases: The Search for a Newer Equal Protection Continues*, 24 CATHOLIC U.L. REV. 217, 220 (1975), where the internal inconsistency of the terminology is described.

means used and the legislative ends intended to be attained.[2] Its use has generated concern both on and off the Court due to its capacity, when applied, to strike down almost any legislative classification, a concern reminiscent of the fears generated by the old substantive due process decisions.[3] In *Weinberger v. Salfi*[4] the Court declined to apply conclusive presumption analysis[5] and called on another line of cases utilizing a "mere rational relationship" test to validate subsections 216(c)(5) and (e)(2) of the Social Security Act (Act).[6]

Plaintiffs Salfi and her daughter applied for Social Security insurance benefits upon the death of Salfi's husband of nearly six months, a wage earner covered by the Act.[7] The definitions of "widow" and "child" in subsections 216(c)(5) and (e)(2) deny benefits, in the absence of other enumerated factors, to surviving wives and stepchildren whose legal relationships to the wage earner were in existence for less than nine months.[8] After being denied benefits initially and on reconsideration, plaintiffs brought suit in district court challenging the constitutionality of the classifications. The district court applied conclusive presumption analysis and found for the plaintiffs.[9] On appeal, the Supreme Court reversed.[10] The high Court first rejected conclusive presumption analysis and decided that only one constitutional claim was available to the *Salfi* plaintiffs.[11] The Court held that the plaintiffs' only assertable claim was that the eligibility requirement was "not so rationally related to a legitimate legislative objective that it can be used to deprive them of benefits available to those who do satisfy that test."[12] The majority, however, concluded that the duration-of-relationship requirement is a rationally based prophylactic rule, insulating the system from abuse.[13]

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2. *See* Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534, 1534-36 (1974); text accompanying notes 17 and 42 *infra*.

3. Vlandis v. Kline, 412 U.S. 441, 463-69 (1973) (Rehnquist, Burger, and Douglas, JJ., dissenting); Simson, *supra* note 1, at 226-27. The doctrine is strongly criticized in Note, 87 HARV. L. REV, *supra* note 2. One problem is that any statute can be rephrased as an irrebuttable presumption. Simson, *supra* note 1, at 225-26; Note, 87 HARV. L. REV., *supra* note 2, at 1549.

4. 422 U.S. 749 (1975).

5. *Id.* at 771-73. The Court analyzed a jurisdictional issue at length before reaching the merits. *Id.* at 756-67.

6. 42 U.S.C. §§ 416(c)(5), (e)(2) (1970).

7. Salfi v. Weinberger, 373 F. Supp. 961, 963 (N.D. Cal. 1974).

8. Social Security Act, 42 U.S.C. §§ 416(c), (e) (1970).

9. Salfi v. Weinberger, 373 F. Supp. 961 (N.D. Cal. 1974).

10. 422 U.S. at 785.

11. *Id.* at 771-72.

12. *Id.* at 772.

13. *Id.* at 777.

An understanding of *Salfi* is aided by an examination of other Supreme Court decisions that have applied or rejected conclusive presumption analysis. In *Salfi*, the majority distinguished three conclusive presumption cases that the district court had relied upon.[14] In the first of those cases, *Stanley v. Illinois*,[15] the State denied unwed fathers a hearing on fitness to raise their children while allowing all other parents a hearing when their custody was challenged.[16] The Court found that the statutory scheme constituted an irrebuttable presumption that unwed fathers are unfit to raise their children and declared it unconstitutional.[17] The presumption was held unconstitutional because the legislative presumption that *all* unwed fathers are unfit parents was unreasonable.[18]

The embryonic irrebuttable presumption analysis of *Stanley* took on additional form in *Vlandis v. Kline*.[19] In *Vlandis* the Supreme Court held that

> [S]ince Connecticut purports to be concerned with residency in allocating the rates for tuition and fees in its university system, it is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, *when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination.*[20]

The invalidated statute[21] had conclusively presumed that married students were not bona fide residents if they were living outside of the state at the time of application and that single students were not bona fide residents if they had lived outside of the state at any time during the previous year.[22]

The third case relied upon by the district court, *Cleveland Board of Education v. LaFleur*,[23] represents the culmination of the major irrebuttable presumption cases. The challenged rule in *LaFleur* required a pregnant school teacher to quit her job and to go on leave without pay five months before the anticipated birth.[24] The school board claimed

14. *Id.* at 771-72.
15. 405 U.S. 645 (1972).
16. *Id.* at 649-50.
17. *Id.* at 656-59.
18. *Id.* at 654-59.
19. 412 U.S. 441 (1973).
20. *Id.* at 452 (emphasis added).
21. CONN. GEN. STAT. ANN. § 10-329(b) (Supp. 1975).
22. 412 U.S. at 442-43.
23. 414 U.S. 632 (1974).
24. *Id.* at 634. The regulations further stated that, "A teacher on maternity leave is not allowed to return to work until the beginning of the next regular school semester which follows the date when her child attains the age of three months." *Id.* at 634-35.

that one of the purposes of the rule was to keep unfit teachers out of the classroom.[25] The Court invoked the conclusive presumption doctrine to invalidate the rule since the presumption that teachers within five months of childbirth are physically unfit is "not necessarily or universally true."[26]

Another Supreme Court case mentioned in *Salfi* was *United States Department of Agriculture v. Murry*.[27] *Murry* applied conclusive presumption analysis to invalidate a provision of the Food Stamp Act that was designed to prevent non-needy households from abusing the system.[28] The statute prohibited issuance of food stamps to households that included a person claimed as a tax dependent by a non-needy household.[29] Although not specifically reciting the "universally true" test, the Court did cite *Vlandis* and *Stanley*[30] in finding the statute unconstitutional because of its presumption that the households affected by the statute were in fact non-needy.[31] Oddly, in *Salfi*, the Supreme Court cites *Murry* as authority for the proposition that "Congress may not invidiously discriminate among . . . claimants . . . on the basis of criteria which bear no rational relation to a legitimate legislative goal."[32] The *Salfi* majority's interpretation of *Murry* as a "rational relation" case, rather than a conclusive presumption case, made it unnecessary to distinguish the Court's application of the more stringent standard in *Murry*.

The conclusive presumption approach had also been specifically rejected in other Supreme Court decisions prior to *Salfi*. In *Mourning v. Family Publications Service, Inc.*[33] a regulation promulgated under the Truth in Lending Act was challenged as an unconsitutional conclusive presumption. The regulation made the disclosure requirements of the act applicable whenever a loan was to be repaid in more than four installments.[34] Since the act requires disclosures by those who extend credit to consumers and impose a charge for financing,[35] the regulation

25. *Id.* at 641. The other purpose was to maintain continuity of classroom instruction. The Court concluded that the rules had "no rational relationship to [that] valid state interest." *Id.* at 643.

26. *Id.* at 646.

27. 413 U.S. 508 (1973).

28. *Id.* at 511-14.

29. Food Stamp Act of 1964, § 5(b), 7 U.S.C. § 2014(b) (1970). The tax dependent had to be eighteen years of age for the statute to apply.

30. 413 U.S. at 513-14.

31. *Id.* at 511, 514.

32. 422 U.S. at 772.

33. 411 U.S. 356 (1973).

34. *Id.* at 362; 12 C.F.R. § 226.2(k) (1975).

35. 411 U.S. at 361; Truth in Lending Act, 15 U.S.C. § 1631 (1970).

was attacked as creating an irrebuttable presumption that credit payments in more than four installments involve a finance charge.[36] The Court rejected this argument, saying:

> The rule was intended as a prophylactic measure; it does not presume that all creditors who are within its ambit assess finance charges, but rather, imposes a disclosure requirement on all members of a defined class in order to discourage evasion by a substantial portion of that class.[37]

In *Marshall v. United States*[38] the Court, applying the rational relationship test, upheld provisions of the Narcotic Addict Rehabilitation Act of 1966 that excluded addicts with two or more felony convictions from rehabilitative commitment in lieu of penal incarceration.[39] The dissenting justices thought that the rule amounted to a conclusive presumption which was not necessarily true, that is, that multiple felony offenders are less likely to be cured by treatment.[40]

Another rejection of irrebuttable presumption analysis came in *Sosna v. Iowa*,[41] a case which, like *Vlandis*, involved a residency requirement. The challenge in *Sosna* was to a statute that required the petitioner in a divorce action to have resided in the state for a year prior to commencing the proceedings.[42] The Court held that a reasonable durational residency requirement in this situation was permissible, citing language from *Vlandis*.[43] The Court drew a distinction between a requirement which causes delay (*Sosna*) and one which causes total deprivation (*Vlandis*).[44]

The Supreme Court decided *Salfi* against this backdrop of cases that either applied or specifically rejected conclusive presumption analysis, as well as a line of equal protection cases.[45] Under conclusive presumption analysis, the goal of the statute must be exactly the result obtained by implementation of the means adopted. That is, the classifi-

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36. 411 U.S. at 363.
37. *Id.* at 377.
38. 414 U.S. 417 (1974).
39. 18 U.S.C. § 4251(f)(4) (1970).
40. Justices Douglas and Brennan concurred with Justice Marshall's dissent. 414 U.S. at 430.
41. 419 U.S. 393 (1975).
42. *Id.*; IOWA CODE ANN. § 598.6 (Supp. 1975).
43. 419 U.S. at 409-10.
44. *Id.*
45. The Court has based its conclusive presumption reasoning on due process, though the commentators have argued that it really is, or should be, a type of equal protection analysis. *See generally* Simson, *supra* note 1; Note, 87 HARV. L. REV., *supra* note 2, at 1546-48; Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449 (1975).

cation that creates the alleged presumption must be neither overinclusive nor underinclusive. Such exactness is virtually impossible to attain by statutory classification; only individualized hearings, which are mandated when the Court decides that a statute is an unconstitutional irrebuttable presumption, can theoretically attain such precision.[46]

The problem, then, in conclusive presumption cases is not that the avowed purpose is illegitimate, but, rather, that the means employed to reach that end are imperfect. The doctrine has been applied when legislative means infringe important individual rights, and when the governmental interest advanced is, by comparison to those rights, insubstantial.[47] The cost and administrative difficulty of individual hearings is generally to be considered in assessing the weight of the governmental interest,[48] but this consideration standing alone does not prevent application of the fatal irrebuttable presumption analysis.[49]

In *LaFleur* and *Stanley*, the individuals' interests were very strong (freedom of choice in family matters, and custody of children, respectively) and the governmental interest sought to be advanced by classification rather than individualized hearings was comparatively weak. In *Mourning* (right to extend credit), *Marshall* (right to civil rehabilitation), and *Sosna* (right to divorce), the individuals' interests were not as significant. Furthermore, the statutes and regulations involved in the latter cases merely infringed upon the individuals' interests rather than depriving them of their rights. As a result, the conclusive presumption doctrine was not applied.

The statute in *Salfi* can be read as constituting an irrebuttable presumption that those widows who married wage earners within nine months of their decease married to obtain Social Security benefits rather than to enjoy the "traditional benefits of marriage."[50] Moreover, the statute completely deprives the individual of the right to receive bene-

46. A possible exception to the requirement of extreme precision is found in Murry, 413 U.S. at 514, where the Court found the presumption to be "often contrary to fact."

47. *Id.* at 518 (Marshall, J., concurring); text following note 49 *infra*. This is not unlike Marshall's "sliding scale" analysis which he has articulated in a number of concurring and dissenting opinions. *See, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98-110 (1973). *See also* Vlandis v. Kline, 412 U.S. at 458-59 (White, J., concurring).

48. *See, e.g.*, Salfi v. Weinberger, 422 U.S. at 781-82; Vlandis v. Kline, 412 U.S. at 451.

49. *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. at 646; Vlandis v. Kline, 412 U.S. at 451; Stanley v. Illinois, 405 U.S. at 656.

50. 373 F. Supp. at 965.

fits.[51] Nevertheless, the Court felt that irrebuttable presumption analysis was inappropriate because the only right the plaintiffs claimed was a right to non-contractual social welfare benefits.[52] The *Salfi* majority, by categorizing *Murry* as a "rational relation" case could ignore the fact that that case applied conclusive presumption analysis to a type of social welfare.[53] Instead, the Court relied on *Dandridge v. Williams*,[54] a case applying a rational relationship test to validate social welfare legislation which set a maximum limit on welfare grants regardless of the size of the family receiving the benefits.[55]

The individuals' rights affected in *Salfi* were not substantial enough to trigger conclusive presumption analysis.[56] Nevertheless, the statute could still have been invalidated under the rational relation test as applied. *Salfi* did not follow the extremely deferential approach of *Dandridge*.[57] The approach taken was similar to that of *Jiminez v. Weinberger*,[58] another social welfare case, in which, although the Court claimed to apply a "mere rationality" test,[59] the statute fell. The judicial scrutiny in *Jiminez* and *Salfi* apparently involved what the commentators have termed "rationality with bite."[60] *Dandridge* was distinguished in *Jiminez* because the governmental interest in *Dandridge* was much stronger; a finding of unconstitutionality would have threatened the entire program.[61] In *Jiminez*, not only was the governmental interest less compelling, it was apparent that the critical determination

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51. *Id.*
52. 422 U.S. at 771-72.
53. *See* text accompanying and following note 32 *supra*.
54. 397 U.S. 471 (1970).
55. 422 U.S. at 769-70.
56. *Id.* at 771-72. This insubstantiality was accentuated by comparison with the magnitude of the difficulty of administering individual hearings. *See id.* at 781-82 & n.13.
57. The depth of the analysis the Court applied in *Salfi* was reflected, perhaps, by the verbalized requirement that the statute be "*so* rationally related . . . ." (emphasis added). *Id.* at 772. *See* text accompanying note 12 *supra*.
58. 417 U.S. 628 (1974).
59. *Id.* at 632. The challenged statute denied Social Security benefits to illegitimate children born after the wage earner became disabled unless they could inherit under state law or were legitimized or were illegitimate only because of some formal defect in their parents' marriage. The Court said the law was unconstitutional if "the classification [was] justified by no legitimate state interest, compelling or otherwise." The Court did recognize a legitimate governmental interest, but did not defer to legislative discretion in effectuating that interest. Rather, the majority found no reasonable relation between the classification and its purpose. *Id.* at 636.
60. The premier article concerning intermediate scrutiny is Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). In connection with Gunther's article, see Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), a recent example of "rationality with bite."
61. 417 U.S. at 633.

could have been made more accurately by individualized hearings than by the statutory scheme.[62] In contrast, the *Salfi* plaintiffs failed to show that individualized hearings or any rule other than the nine month requirement could more effectively filter out sham marriages.[63]

The weakest part of the *Salfi* opinion is the distinguishing of *Vlandis* on the grounds that "the Social Security Act does not purport to speak in terms of the bona fides of the parties to a marriage, but then make plainly relevant evidence of such bona fides inadmissable."[64] On the contrary, that would seem to be precisely the Act's effect. The Court even states that the purpose of the nine month requirement as revealed in the legislative history is to insulate the system from those who marry with the intent to defraud the Social Security system.[65] Whether or not the Act literally speaks of the bona fides of the parties should not matter; in fact, the statute in *Vlandis* did not refer, literally, to the bona fides of the party claiming residency.[66]

The only logical interpretation of the language quoted above is that the Act *is* concerned with the bona fides of the parties and that "plainly relevant" evidence means "objective" evidence. Thus, the basis for sustaining the *Vlandis* challenge, but not the *Salfi* challenge, should have been the existence of objective evidence bearing on the bona fides of the parties in *Vlandis*, and the Court would have adequately explained the different results. The correctness of the result in *Vlandis* does not explain the application of conclusive presumption analysis in that case. The Court should have admitted that unless the challenged statute in *Vlandis* is viewed as infringing the right to travel, which it was not,[67] the individual interest was not sufficient to invoke the conclusive presumption doctrine. Arguably, the Supreme Court ought to have accorded *Vlandis* the same level of scrutiny as *Salfi* and *Jiminez*, as all three cases involved a type of non-contractual public benefit, (Social Security in *Salfi* and *Jiminez*, reduced tuition in *Vlandis*). The statute in *Vlandis* could still have been declared unconstitutional under the

62. The critical determination was whether or not the child was, in fact, dependent. A hearing on dependency would be less likely to exclude dependents or include non-dependents than the challenged statute. *Id.* at 634-38.

63. 422 U.S. at 782-84. See especially *id.* n.15.

64. *Id.* at 772. Justice Rehnquist probably meant: The Social Security Act does not (1) purport to speak in terms of the bona fides of the parties to a marriage *and* (2) then make plainly relevant evidence of such bona fides inadmissable. *See also id.* at 803 (Brennan and Marshall, J.J., dissenting).

65. *Id.* at 777-80. *Accord*, 373 F. Supp. at 965.

66. CONN. GEN. STAT. ANN. § 10-329(b) (Supp. 1975).

67. If the right to travel was in the contemplation of the Court, they did not express it. 412 U.S. 441.

rational relation test because objective criteria existed that could have been easily utilized to make a more accurate determination of residency.[68]

Thus the meaning of *Salfi* is twofold. First, in the area of Social Security, the individual interest affected, even when there is a total deprivation of benefits, will be insufficient to trigger conclusive presumption analysis. This will be particularly true when the rule has a prophylactic effect, insulating the system from substantial abuse, since the governmental interest will be correspondingly great. Secondly, the Court may find a given classification to be rationally related to the legislative goal in spite of a fairly close examination of the statute. The factor crucial to such a finding is the unavailability of other methods that would clearly yield a more accurate result. Other means were not proven to be available in *Salfi*; the statute was therefore validated as a legitimate exercise of legislative discretion. To deprive Congress of the power to enact statutes, albeit admittedly imperfect, to protect public welfare systems from abuse when other effective means are unavailable would be, indeed, to quote from an earlier opinion of Mr. Justice Rehnquist, "an attack upon the very notion of lawmaking itself."[69]

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Constitutional Law—The First Amendment Status of Commercial Advertising

In the 1942 case of *Valentine v. Chrestensen*,[1] the United States Supreme Court stated that the Constitution does not prohibit regulation of "purely commercial advertising."[2] Although the statement was not the basis for the Court's decision in that case, it spawned the widely accepted doctrine[3] that "commercial speech" is not protected by the first

68. Such criteria included voter registration, driver's license, car registration, property ownership, place of filing tax returns, and year-round homes. *Id.* at 448.

69. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. at 660 (Rehnquist, J., dissenting).

1. 316 U.S. 52 (1942).

2. *Id.* at 54.

3. *Cf.* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 384-85 (1973); Talley v. California, 362 U.S. 60, 71 (1960) (dissent); Breard v.