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ARTICLES

FEDERALISM AND DUE PROCESS: SOME RUMINATIONS

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INTRODUCTION

There was a time not so long ago when the phrase "states' rights" was anathema, calling up visions of schoolchildren being denied adequate educational facilities, a governor standing in the schoolhouse door, and armed police and troops keeping the public order. Now the scene has shifted, and the phrase is uttered in different quarters, with calls for a "sagebrush rebellion" and protection of states' natural resources against demands for national needs. Whether it appears in political or social contexts, the local-national tension inheres in the structure of this country. The pendulum seems now to be swinging toward the local end of the arc. A purpose of this article is to seek whether some such similar swing appears in constitutional adjudication. As one writer has pointed out,[1] the structure of the Constitution of the United States of America recognizes the existence of separate sovereigns—the United States and the several states. Furthermore, the Tenth Amendment reserves to the states those powers not specifically delegated to the national government. And the Fourteenth Amendment, by prohibiting denial of due process of law or equal protection of the laws by the several states, recognizes their power to act in spheres uncontrolled by the United States. An additional purpose of this article is to examine briefly whether a shift in judicial interpretative modes may suggest renewed recognition of the constitutional structure of federalism.

MODES OF INTERPRETATION

It used to be that fashions in constitutional interpretation were phrased in such terms as "strict construction" and "liberal

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1. P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 172 (1975).

construction." Sometimes the opposed modes were stated as "judicial self-restraint" versus "judicial activism;" Justice Frankfurter was suggested as a model of the former, and Justice Douglas as exemplary of the latter. Much of the time, supporters and critics applied terminology as shorthand for evaluation of particular results. A classic statement critical of uncritical admiration of "activism" is that of Judge Learned Hand: "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not."[2]

Most recently, there have appeared multi-syllabic Latin-based labels, which suggest a measure of subjectivity not apparent in the earlier phrases. Today, the modes are called respectively, "interpretivism" and "noninterpretivism." The former, akin to "judicial self-restraint," contends that the judiciary is bound by standards specifically stated or clearly implicit in the Constitution.[3] The latter, as suggested by the negative prefix, takes the position that the Court ought to so interpret the Constitution as to relate it to evolving societal values.[4]

Consider, with regard to these positions, a statement made by Justice Powell[5] in a speech during the 1976 annual meeting of the American Bar Association:

> The present Court, mindful of preserving the vitality of democratic processes, may be more deferential to the legislative judgments, it is more likely to give some weight to federalism, and it is more conventional in demanding compliance with jurisdictional and standing requirements.[6]

That sounds more like "self-restraint" and "interpretivism" than their opposites; it suggests attention to constitutional structure and text. The discussion which follows will consider these ideas in two rather narrow contexts chosen out of that large and complex area called constitutional law: substantive due process and irrebuttable presumptions.

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2. L. HAND, THE BILL OF RIGHTS 73 (1958).

3. *See, e.g.*, Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L.J. 405 (1977).

4. *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 88-89 (1980) [hereinafter cited as ELY]; Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

5. The New York Times, Nov. 23, 1980, § 4 at E7, col. 5, reported that the title "Mr. Justice" had been quietly dropped in favor of "Justice." It was asserted to be "an advance effort to accommodate a woman among the ranks. . . ."

6. *What the Justices Are Saying*, 62 A.B.A.J. 1454, 1455 (1976) [hereinafter cited as *Justices*].

SUBSTANTIVE DUE PROCESS

Elsewhere in his speech before the American Bar Association, Justice Powell remarked: "Few would deny that the Warren Court, in a fifteen-year span, vastly expanded the role of the judiciary by construing the Constitution in dramatically bold and unprecedented ways."[7] Certainly one of those areas was "substantive due process." Condemned by Justice Black as applications of "natural law" which gave vent to the subjective preferences of judges,[8] the idea that the due process clauses in the Constitution may be construed to create individual rights ("substantive" law) rather than to guarantee that procedure is "due" (fair) has been around almost as long as the Constitution. For example, a separate opinion by Justice Chase in *Calder v. Bull*,[9] contained this language:

> The purposes for which men enter into society will determine the *nature* and *terms* of the *social* compact; and as *they* are the foundation of *legislative* power, *they* will decide what are the *proper* objectives of it. . . . There are certain *vital* principles in *our free Republican governments*, which will determine and over-rule an *apparent and flagrant* abuse of *legislative* power; . . . or to take away that security for *personal liberty*, or *private property*, for the protection whereof the government was established.[10]

To which Justice Iredell replied, setting the stage for the continuing debate: "The ideas of natural justice are regulated by no fixed standard. . . ."[11]

Calder v. Bull concerned an "ex post facto" attack on civil legislation which the Court rejected, so the decision is not as important to "substantive due process" as are the ideas expressed in the opinions. Implicit, however, are the separate elements involved in the concept. From the first, the Constitution has been recognized as containing grants of specified powers from the people to the United States,[12] and the Court early assumed the ultimate power of interpretation.[13] Limitations on the exercise of sovereign powers appear in the due process clauses of the Fifth and Fourteenth Amendments. The Court's power to interpret extends likewise to the amendments. The result of a determination that a person possesses a "substantive due process" right is to limit the power of a

7. *Id.*
8. Griswold v. Connecticut, 381 U.S. 479, 511 (1965) (Black, J., dissenting).
9. 3 U.S. (3 Dall.) 386 (1798).
10. *Id.* at 388 (emphasis in original). *See* ELY, *supra* note 4, at 210-11 n.41.
11. Calder, 3 U.S. (3 Dall.) at 399.
12. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).
13. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

state to act for what it conceives to be the general welfare. Hence, the presence of federalism.

a. *So-called "Economic Rights"*

Although not the first of the cases which established substantive due process rights in the economic sphere,[14] *Lochner v. New York*[15] may be the most prominent. The New York legislature had passed legislation which made it a crime to employ a baker for more than 60 hours in one week. Although Mr. Lochner, the employer, was convicted of having done so, and required to pay a fine, most of the opinion considered the problem from the point of view of the employee and his liberty under the Fourteenth Amendment. The Court recognized the police power of the state, and its capacity to act for the general welfare, but stated that the conflict was between the individual's right to make a contract for his labor and the state's power to prevent him from contracting beyond a certain number of hours. The individual won. The question, said the Court, could be answered simply: "There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker."[16] The state's action was unreasonable, unnecessary, and arbitrary.[17]

Although the *Lochner* case struck down hours-of-labor legislation for bakers, *Muller v. Oregon*[18] approved Oregon legislation limiting the hours of labor of women in laundries and factories to

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14. Allgeyer v. Louisiana, 165 U.S. 578 (1897) appears to be the first instance of the Court holding a state law unconstitutional on the basis of substantive due process. It is also the beginning of a series of cases which came to be described by the Court as "the Allgeyer-Lochner-Adair-Coppage constitutional doctrine."

15. 198 U.S. 45 (1905).

16. *Id.* at 57.

17. A result of this approach was the refusal of a majority of the Court to recognize a state power to affect the unequal bargaining power of employers and employees. Coppage v. Kansas, 236 U.S. 1 (1915), held unconstitutional a law designed to protect labor organizing activities on the ground that the police power could not be used to affect inequalities which resulted from exercising contract and property rights. The *Coppage* decision relied on Adair v. U.S., 208 U.S. 161 (1908), a Fifth Amendment due process case invalidating a federal law which prohibited interstate railroads from requiring employees not to join unions. The opinion spoke of the equal rights of employer and employee to contract.

18. 208 U.S. 412 (1908). The sex-based distinction approved in 1908 is in marked contrast to the treatment of the same subject today. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973). But the problem of "interpretivism" versus "noninterpretivism" persists in a new context—equal protection of the laws rather than due process of law. It has been recognized that some modern equal protection analytical methods do not differ from those employed in "substantive due process." *See, e.g.*, Karst, *Invidious Discrimination and the Return to the Natural-Law-Due-Process Formula*, 16 UCLA L. REV. 716 (1969).

ten hours per day. The basis for the Court's conclusion was recognition of the differences between males and females, justifying "protection" of women which would not pass constitutional muster for men. The Court asserted that the liberty of contract which it had found to be a substantive right growing out of the due process clause "is not absolute and extending to all contracts. . . ."[19]

Cases in the 1930's, such as *Nebbia v. New York*,[20] or *West Coast Hotel Co. v. Parrish*,[21] suggested an easing by the Court in its examination of the power of states in economic legislation. By 1955, the Supreme Court was prepared to reject out-of-hand a due process attack on state regulation of business activity. *Williamson v. Lee Optical Co.*[22] concerned Oklahoma legislation which prohibited the fitting of eyeglass lenses or the duplicating of such lenses by others than licensed opthalmologists or optometrists or on their prescriptions. The Court took a very deferential approach to the state's action, recognizing that it was the province of the state legislature to determine rationally how to correct what it saw to be a police power problem. The opinion of the Court, delivered by Justice Douglas, contained this language: "The day is gone when this Court uses the Due Process of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."[23] The day, in truth, was gone for "business and industrial conditions," but for other interests it dawned again hardly a decade later.

b. *So-called "Noneconomic Rights"*

It is important to recall that the words in both due process clauses are "life, liberty, or property." There is nothing in those words to suggest that the "liberty" of the person which is protected against deprivation without due process of law is somehow divided between "economic" interests and all others. Consider *Lynch v. Household Finance Corp.*,[24] a procedural due process case which concerned an attack on a state statute that permitted garnishment without a judicial hearing. The precise question before the Court was whether United States District Courts had

19. Muller, 208 U.S. at 421.

20. 291 U.S. 502 (1934) (upholding a minimum-sale-price-of-milk regulation).

21. 300 U.S. 379 (1937) (affirming a state's power to fix minimum wage rates for females).

22. 348 U.S. 483 (1955).

23. *Id.* at 488 (citing, *inter alia*, the *Nebbia* and *Parrish* cases).

24. 405 U.S. 538 (1972).

jurisdiction under 28 U.S.C. § 1343(3), concerning deprivation of "rights . . . secured by the Constitution. . . ." The district court did not reach the merits, construing the word "rights" to mean only "personal" as opposed to "property" rights.[25] The opinion of the Court rejected that distinction, adding this language:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. . . .[26]

Be that as it may, the dichotomy has been practiced. It may be that it has always been there. *United States v. Carolene Products Co.*[27] illustrated the deferential Court review of state regulation in the economic sphere, justifying that approach partly on the basis of a presumption that the legislative branch has acted constitutionally. What has since become famous as "footnote 4"[28] suggested that the Court's application of the presumption might be less broad when legislation appeared on its face to run afoul of some "specific" prohibition. Among such were listed the First Amendment guarantees of freedom of speech and religion. And the footnote cited as precedent, among others, the case of *Meyer v. Nebraska*.[29]

In *Meyer*, the Court faced the question whether a state could prohibit teaching in any language other than English. The Nebraska statute was an outgrowth of experiences in World War I; a teacher was convicted of violating the statute by teaching German. The Court defined the "liberty" protected by the Fourteenth Amendment as including "not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children. . . ."[30] The statute was found to unconstitutionally interfere with three different liberties: the jobs of teachers of modern languages, the acquisition of knowledge by children in schools, and the freedom of parents to determine how their children should be

25. *Id.* at 542.
26. *Id.* at 552.
27. 304 U.S. 144 (1938).
28. *Id.* at 152.
29. 262 U.S. 390 (1923).
30. *Id.* at 399. The Court cited a number of cases in support, among them *Allgeyer* and *Lochner*.

educated.[31] In two other instances, in the first half of the twentieth century, the Court found substantive rights created by the word "liberty." *Pierce v. Society of Sisters*[32] invalidated an Oregon statute which required that all children attend public schools. The Court followed the lead of the *Meyer* decision in holding that the statute interfered with the freedom of parents to direct the education of their children. In 1942, the Court decided *Skinner v. Oklahoma*,[33] invalidating a statute which required sterilization of persons convicted three times of a certain category of crime. The Court included the ability to procreate as a part of Fourteenth Amendment "liberty."

A short ten years after the *Lee Optical Co.* case[34] had upheld the power of a state to limit the fitting of eyeglasses to certain callings in the face of a "substantive due process" attack, the Court denied states the power to prohibit the use of contraceptive devices. *Griswold v. Connecticut*[35] gave constitutional recognition to a "right of privacy" which apparently had been created in a Law Review article written three-quarters of a century earlier.[36] At the very beginning of the opinion of the Court, Justice Douglas, who had written for the Court in *Lee Optical Co.*,[37] rejected that approach as the basis for decision. "We do not," he wrote, "sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch *economic problems, business affairs, or social condition.*"[38] The issue was regarded as involving a personal interest and, therefore, somehow different. But the problem was that the Constitution does not explicitly mention anything like a "right of privacy." There are six opinions; the opinion of the Court well illustrates the "noninterpretivist" mode.

The Court stated that it was following the principle established by the *Pierce*[39] and *Meyer*[40] cases. It stated, furthermore, that the specific guarantees of the Bill of Rights "have penumbras, formed by emanations from those guarantees that help give them life and substance."[41] The First, Third, Fourth, Fifth, and Ninth Amendments and their emanations, taken together, create zones of

31. *Id.* at 401.
32. 268 U.S. 510 (1925).
33. 316 U.S. 535 (1942).
34. 348 U.S. 483 (1955).
35. 381 U.S. 479 (1965).
36. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).
37. 348 U.S. 483 (1955).
38. 381 U.S. at 482 (emphasis added).
39. 268 U.S. 510 (1925).
40. 262 U.S. 390 (1923).
41. 381 U.S. at 484.

privacy.[42] Therefore, the state may not, by regulation, invade this area of protected freedom. It is not clear from the opinion (or the other five) what particular bases exist for the right of privacy; what is clear is that the limitation on state action is contained in the language of the Fourteenth Amendment. Since no equal protection issue was raised, the limitation must be found in the words "due process." And since the case did not raise questions about "life" or "property," that process of elimination leaves "liberty." The *Griswold* case, then, is "substantive due process" in an area other than business or economics. The consequence is that a state has power to act to protect the general welfare by prohibiting one from fitting eyeglasses without "proper" training, but it lacks power to tell one that he cannot use contraceptives.

Roe v. Wade,[43] the so-called abortion decision, is at the root of another present social conflict—that between the "pro-life" and "pro-choice" forces. It is significant for the purposes of this article, however, for what it asserts about the basis for the right of privacy. The United States District Court, following the lead of the concurring opinion of Justice Goldberg in the *Griswold* case,[44] based its conclusion on the Ninth Amendment, but the opinion of the Court, delivered by Justice Blackmun, felt it to "be founded in the 14th Amendment's concept of *personal liberty* and restrictions upon state action. . . ."[45] Professor John Hart Ely calls *Roe v. Wade* "the clearest example of noninterpretivist 'reasoning' on the part of the Court in four decades. . . ."[46]

If that is so, it is appropriate to seek now whether Justice Powell's 1976 remarks[47] about giving more deference to legislatures and recognition to the principles of federalism are mirrored in "substantive due process" decisions. It is difficult to say, but there may be some evidence in a few cases which emphasizes family relations. The uncertainty results partly from a mixing of due process and equal protection analysis and partly from the manner in which a majority of the Court may characterize the state's activity. Illustrative is *Village of Belle Terre v. Boraas*,[48] a case concerning the local sovereign's capacity to zone real property and objection thereto based upon assertion of violation of personal liberties. The village had restricted use of a portion of the land to one-family

42. *Id.*
43. 410 U.S. 113 (1973).
44. 381 U.S. at 486.
45. 410 U.S. at 153 (emphasis added).
46. ELY, *supra* note 4, at 2.
47. *Justices*, *supra* note 6.
48. 416 U.S. 1 (1974).

dwellings, and defined "family," in part, as meaning no more than two persons unrelated by blood, adoption or marriage.[49] Six unrelated persons occupying a one-family dwelling challenged the restriction on grounds that it interfered with their constitutional rights, among others, to travel, to migrate, and to privacy.[50] The opinion of the Court rejected all attacks, treating the village ordinance as raising an equal protection rather than due process question, and concluded that the subject was economic and social legislation.[51] The Court held the ordinance to be a proper exercise of the police power, "ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."[52]

That quotation, supporting the sovereign's use of the police power in aid of the general welfare, appeared in *Moore v. East Cleveland*,[53] but in a dissenting opinion.[54] The case concerned an ordinance containing a complicated definition of "family."[55] For present purposes, it is sufficient to state that the definition required that all residents of the household be related, but the kinds of relations and numbers of individuals were limited. Mrs. Moore lived in her home with her son, his son, and another of her grandsons, a cousin of the latter, and was convicted of a violation of the ordinance because the cousin was an "illegal occupant." The plurality opinion by Justice Powell, joined by three other members of the Court, took the position that the ordinance offended the due process clause of the Fourteenth Amendment, rather than the equal protection clause. Citing *Meyer, Pierce, Griswold,* and *Roe,* among others, the opinion asserted that what they were protecting were family values. "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."[56]

The addition of the element of "tradition" suggests a less

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49. *Id.* at 2.

50. *Id.* at 7.

51. *Id.* at 8.

52. *Id.* at 9. Justice Marshall's dissent, *id.* at 12, argued that the ordinance constituted an unconstitutional burden on the right to privacy of the six persons. His opinion relied on, among others, cases discussed heretofore, *Meyers, Griswold,* and *Roe.*

53. 431 U.S. 494 (1977).

54. *Id.* at 531, 539.

55. *Id.* at 496 n.2.

56. *Id.* at 503. Justice Stevens concurred in the judgment on a different substantive due process ground. He argued that the ordinance unconstitutionally limited "a fundamental right normally associated with the ownership of property—that of an owner to decide who may reside on his or her property. . . ." *Id.* at 520.

"noninterpretivist" approach than that which marked the prevailing opinion in *Roe v. Wade*. The plurality opinion differentiated the *Belle Terre* case on the ground, among others, that that ordinance affected individuals who were not related, and emphasized that the East Cleveland ordinance sliced "deeply into the family itself."[57] If one views the modern "substantive due process" cases as limiting an expansive reading of "privacy" to that concerned with "family" matters and, in turn, defining such matters by adverting to "tradition," the result may be said to accord with Justice Powell's speech.[58]

The presence of "family" interests figures in another branch of due process analysis, that concerning so-called irrebuttable presumptions, to which attention now turns.

IRREBUTTABLE PRESUMPTIONS

In December, 1976, Jacqueline Jarrett was granted a divorce from Walter Jarrett, and custody of their three daughters, aged 12, 10, and 7 years. He was granted reasonable visitation rights. In April, 1977, five months later, she told Walter that her boyfriend was going to move in with her and their daughters. Walter objected to no avail. He then petitioned the trial court to modify the divorce decree and grant him custody of his daughters on the ground that he did not want them raised in an immoral atmosphere. At the hearing, Jacqueline admitted that she and her boyfriend had no plans to marry; Walter testified that, in his opinion, the arrangement was not a proper moral atmosphere in which to raise three girls. The trial court modified the original decree to award custody to Walter, finding that it was "necessary for the moral and spiritual well-being and development"[59] of the daughters. The Illinois Appellate Court reversed on the basis that the trial court had not found Jacqueline unfit and that the trial record did not show any negative effects on the daughters.[60]

The Supreme Court of Illinois granted leave to appeal and, by a divided vote, reversed the appellate court, affirming the trial court judgment. The majority relied on Illinois's fornication stat-

57. *Id.* at 498. Justice Stewart's dissent rejected the distinction based on family. *Id.* at 535. Justice White's dissent did not so view the plurality analysis. He argued that applying the test of "traditions" to find an interest to be protected by substantive due process "would broaden enormously the horizons of the Clause. . . ." *Id.* at 549-50.

58. *Justices, supra* note 6.

59. Jarrett v. Jarrett, 78 Ill.2d 337, 342, 400 N.E.2d 421, 422 (1979).

60. *Id.* The appellate court opinion appears at 64 Ill. App. 3d 932, 937, 382 N.E.2d 12, 16 (1978).

ute[61] as setting the moral standard of the state and concluded that "her conduct offends prevailing public policy."[62] That, said the court, amounted to instructing her daughters by example, a finding supporting the trial court's conclusion. Only in passing did the majority refer to "irrebuttable presumptions." With reference to *Stanley v. Illinois*,[63] it differentiated this case on the ground that the trial court did not indulge a presumption but made a finding on the evidence before it.[64] One dissenting opinion asserted that the majority had applied a "*conclusive presumption*"[65] by relying on the fornication statute without any showing of Jacqueline's unfitness. Furthermore, asserted that opinion, the only difference between this case and *Stanley* was that between a statutory presumption and one judicially created.[66]

On October 20, 1980, the Supreme Court of the United States denied a petition for a writ of certiorari in *Jarrett v. Jarrett*.[67] And there the story might have ended but for the dissenting opinion of Justices Brennan and Marshall.[68] The decision of the Illinois Supreme Court, in their view, appeared "to contravene the teaching of *Stanley v. Illinois*"[69] because "there is no rational basis for the conclusive presumption actually utilized, whether Jacqueline is viewed as having violated the fornication statute only or as being a lawbreaker generally."[70] The opinion pointed out that there was no evidence of harm to the children. So, they wrote, "this case squarely presents the question whether the Due Process Clause entitled Jacqueline to a meaningful hearing at which the trial judge determines, without use of a conclusive presumption, whether violation of the fornication statute adversely affects the well-being of the children."[71]

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61. ILL. REV. STAT. ch. 38, § 11-8 (1977).

62. Jarrett, 78 Ill. 2d at 346, 400 N.E.2d at 424.

63. 405 U.S. 645 (1972).

64. Jarrett, 78 Ill. 2d at 350, 400 N.E.2d at 426.

65. *Id.* at 352, 400 N.E.2d at 427.

66. *Id.* at 353, 400 N.E.2d at 427. In an article appearing in the January 1981 issue of Trial magazine counsel for Jacqueline argued that the Illinois Supreme Court did not follow the *Stanley* decision. He asserted that the Illinois court "changed the focus in the child custody proceeding from the traditional concern for the welfare and best interests of the child to a focus on the conduct of a custodial parent." TRIAL, Jan. 1981, at 58. He expressed concern for the potential consequences of that decision on the lives of "one million children per year involved in the dissolution of their families." *Id.*

67. _ U.S. _, 101 S.Ct. 329 (1980).

68. *Id.*

69. *Id.* at 330.

70. *Id.* at 330-31.

71. *Id.* at 331. The dissenters pointed out in a footnote that the state had not enforced the fornication statute against the mother.

Stanley v. Illinois,[72] relied on by the dissents in both supreme courts, was decided in 1972. Mr. Stanley was the unwed father of three children who lived with them and their mother for 18 years. When the mother died, the children were declared wards of the state because, under Illinois law,[73] an unwed father was not a "parent." For that reason, his children could be taken from him without a showing of unfitness otherwise required.[74] Mr. Stanley appealed, contending that he had been denied the equal protection of the laws, but the Supreme Court of Illinois held that proof of his not having been married to the mother was sufficient basis to take his children from him.[75]

The Supreme Court of the United States granted certiorari on the basis of the equal protection claim, but posed the question presented in due process terms: "Is a presumption that distinguishes and burdens all unwed fathers constitutionally repugnant?"[76] The Court answered in the affirmative: "[A]s a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him . . . ."[77] That denial, continued the Court, while a hearing was granted to all other "parents," denied him the equal protection of the laws. The Court based its decision on the due process clause,[78] yet that issue was not raised or decided in the state courts. In a curious footnote[79] the majority stated that such a procedure was not contradictory to its usual practice because, in this case, the Court "reached the result by a method of analysis readily available to the state court."[80]

What is this thing called "irrebuttable presumption?" The most careful, modern definition appears in *Vlandis v. Kline*,[81] but the idea goes farther back than that. In the *Vlandis* case, the Court contended that "permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth

72. 348 U.S. 483 (1955).

73. ILL. REV. STAT. ch. 37, § 701-14 (1977).

74. 405 U.S. at 650.

75. *Id.* at 646-47. The Illinois Supreme Court's decision appears at 45 Ill. 2d 132, 256 N.E.2d 814 (1970).

76. *Id.* at 649.

77. *Id.*

78. Justice Douglas did not join in the equal protection part of the opinion. *Id.* at 659.

79. *Id.* at 658 n.10.

80. A vigorous dissent took exception to the analytical mode suggested by the footnote, and urged that the due process issue should not have been considered by the Court because "no due process issue was decided by any state court." *Id.* at 659.

81. 412 U.S. 441 (1973).

and Fourteenth Amendment."[82] *Vlandis* concerned a Connecticut statute which provided that the resident status of an applicant for admission to the state university system was to be determined by his or her legal address at the time of application, and that that status should remain during the entire period of attendance. In an action by two students whose legal addresses were outside of the state when they applied, the Court held the Connecticut effort invalid as a denial of due process. The majority opinion contained this definition: "when the presumption is not necessarily true in fact . . . [the due process clause of the Fourteenth Amendment requires] that the State allow . . . an individual to present evidence . . . ."[83]

The *Vlandis* rule was followed and applied in *U.S. Dept. of Agriculture v. Murry*,[84] concerning distribution of food stamps, and in *Cleveland Board of Education v. LaFleur*,[85] holding unconstitutional mandatory maternity leave regulations for pregnant public school teachers. The *LaFleur* case was marked by the presence of a *substantive* due process issue, marriage and family life, and the decision whether to bear a child. Therefore, said the Court, the maternity leave rules "must not needlessly, arbitrarily, or capriciously impinge upon this vital area of a teacher's constitutional liberty."[86] The Court held that requiring a pregnant teacher to take leave at a certain date in her pregnancy bore "no rational relationship to the valid state interest of preserving continuity of instruction."[87]

If the "irrebuttable presumption" doctrine is a part of procedural due process, the only question should be whether the sovereign's action fails to provide a fair hearing before depriving any person of life, liberty, or property.[88] It should make no difference, in application of the doctrine, whether the alleged deprivation has to do with food stamps or a decision whether to have a baby. But, in the view of a majority of the Court, apparently it does. *Wein-*

82. *Id.* at 446 (citing several cases dating back to 1926).
83. *Id.* at 452.
84. 413 U.S. 508 (1973).
85. 414 U.S. 632 (1974).
86. *Id.* at 640.
87. *Id.* at 643.
88. If, on the other hand, the doctrine is really an equal protection question in masquerade, it asks the wrong question. From *Vlandis v. Kline* onward, there appeared a dissenting thread which urged that these cases offered only questions of classifications by the sovereign, and that, therefore, the Equal Protection Clause was the measure. In addition, as the dissent of Chief Justice Burger pointed out in the *Vlandis* case, the majority opinion moved the "strict scrutiny" of equal protection cases into the area of procedural due process. Vlandis, 412 U.S. at 460.

berger v. Salfi[89] concerned a statute which denied Social Security survivors' benefits to widows and stepchildren whose relationship to the deceased had begun less than nine months before his death.[90] The United States District Court had held the statute unconstitutional as constituting an irrebuttable presumption.[91] The Supreme Court reversed, characterizing the statute as "social welfare legislation,"[92] and differentiating the earlier decisions as involving interests having a "constitutionally protected status."[93] The Court analogized this situation to that in *Williamson v. Lee Optical Co.*,[94] asserting that the legislature ought to have as much leeway in making judgments about the public treasury as about "the private sector of the economy."[95]

The "irrebuttable presumption" doctrine was not put to rest there, as might have been supposed, but surfaced again in *Elkins v. Moreno*.[96] The question posed was whether a state had power to refuse to grant "in-state" tuition fee status to nonimmigrant alien residents. The United States District Court held against the state on the basis of *Vlandis v. Kline*; the Court of Appeals affirmed.[97] The Supreme Court did not resolve the dispute, however, because of the majority's conclusion that the question whether certain aliens could become residents of the state was "purely a matter of state law,"[98] which must be decided on certification to the state court. The Court thereby avoided the question of whether to overrule or limit the "irrebuttable presumption" rule of the *Vlandis* case, relying on its "longstanding policy."[99]

There the doctrine rested, uneasily, until *Jarrett v. Jarrett*.[100] What may be said about it now? Counsel for the wife argued that the result in the state court (which stands as the law of the case) would affect the lives of many children yet to be marked by their parents' divorce.[101] The majority of the state high court concerned itself with what it saw as setting an example not good for the chil-

89. 422 U.S. 749 (1975).
90. *Id.* at 754 n.2.
91. *Id.* at 768.
92. *Id.* at 770.
93. *Id.* at 772.
94. 348 U.S. 483 (1955).
95. 422 U.S. at 774. Justice Brennan's dissent argued that the merits of the case could be disposed of "very briefly." In his view, the case was controlled by *Vlandis*. *Id.* at 802.
96. 435 U.S. 647 (1978).
97. *Id.* at 650.
98. *Id.* at 668.
99. *Id.* at 661.
100. _ U.S. _, 101 S. Ct. 329 (1980).
101. *See* note 66 *supra*.

drens' welfare.[102] The opinion dissenting from the denial of the petition for a writ of certiorari to the Supreme Court saw no evidence of harm to the children.[103] While there is no knowing the basis for that denial, the record of precedent to date suggests this: Legislative judgments will withstand "irrebuttable presumption" attack if the legislation may be characterized as "social welfare." Such judgments, even in the area of "privacy" or family matters, may withstand attack if they do not affect tradition. Furthermore, the record of precedent shows that what began as a broad prohibition of legislative action which contained a "presumption . . . not necessarily true in fact" has been narrowed. Finally, if the two Illinois cases (*Stanley* and *Jarrett*) are compared, it may be argued that, if the sovereign provides a hearing, the *application* therein of such a presumption does not deny due process.

CONCLUSION

The constitutional elements suggested in Justice Powell's remarks were the separation of powers ("legislative judgments") and federalism. Implicit was a suggestion that the Supreme Court, as presently constituted, would practice "interpretivism." As that mode is practiced in those parts of due process considered here, the result is deference to the capacity of states to act for the general welfare, at once, as Justice Powell intimated, restricting the role of the judiciary and giving more weight to federalism. Five members of the Court, as presently constituted, are over 70 years of age.[104] That fact, combined with the developments traced in this article, will make Court-watching during the next four years more than an academic exercise.

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102. *See* text at note 62 *supra*.

103. *See* text at notes 70, 71 *supra*.

104. *The Reagan Presidency, How Will Lawyers Fare?*, 67 A.B.A.J. 21, 23 (1981). The article asks, "What will Ronald Reagan's impact be on the composition of the Supreme Court?"