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Constitutional Law - Equal Protection - Narcotic Addict Rehabilitation Act

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Though *Bankers Life* is doubtful support for expanding rule 10b-5 protection beyond the *Birnbaum* "purchaser-seller" limitation, there is no Supreme Court decision which can be construed as a mandate to keep it. The *Eason* court's new approach seems to be a positive step toward adopting a more workable test than the narrow "purchaser-seller" rule—a causal connection test, requiring that the investor be injured as a direct consequence of a fraudulent securities transaction. To assure that causation is direct rather than remote, the investor must have participated in the transaction that allegedly harmed him. Thus, by placing on the claimant the burden of proof of direct causation, a court can maintain some control over the amount of federal securities litigation, while allowing it to more fully embrace the broad purposes of section 10(b) and rule 10b-5.[28] While the Seventh Circuit has left unanswered the precise definition of "investors," it has made a constructive effort toward curing the defects that were inherent in the "purchaser-seller" limitation.

Dennis K. Larry

CONSTITUTIONAL LAW—EQUAL PROTECTION—NARCOTIC ADDICT REHABILITATION ACT—The United States Supreme Court has held that a provision of the Narcotic Addict Rehabilitation Act, which excludes narcotic addicts with two or more prior felony convictions from consideration for civil commitment in lieu of penal incarceration, does not violate the equal protection requirement of the due process clause of the fifth amendment.

Marshall v. United States, 414 U.S. 417 (1974).

Robert Edward Marshall was sentenced to ten years in prison

28. As noted earlier, the *Birnbaum* decision stands, aside from the "purchaser-seller" rule, for the proposition that section 10(b) was not directed at fraudulent mismanagement of corporate affairs, but at the type of fraud *usually associated* with the purchase or sale of securities. *Supra* note 4. The *Bankers Life* decision largely rejected the *Birnbaum* proposition. It stated that section 10(b) and rule 10b-5 are not limited to protecting the integrity of the securities markets, and that there is a federally enforceable claim by the purchaser or seller for fraudulent mismanagement in connection with a purchase or sale of securities. But *Birnbaum* still has vitality to the extent that transactions which constitute no more than fraudulent mismanagement, unconnected with a purchase or sale of securities, are still not actionable under section 10(b). In such cases the claimant must seek his remedy in state court.

after pleading guilty to a federal indictment charging him with entering a bank with intent to commit a felony.[1] He had petitioned the district court for treatment as a narcotic addict pursuant to Title II of the Narcotic Addict Rehabilitation Act of 1966.[2] In lieu of incarceration, Title II provides for civil commitment of eligible offenders for narcotic addiction treatment after examination and recommendation by both the Attorney General and trial judge.[3] It further provides for conditional release and supervision in the community after a minimum commitment of six months.[4] The district court judge recommended narcotic addiction treatment during incarceration but denied petitioner's request for commitment under Title II.[5] He found that petitioner's three prior felony convictions brought him within the Title II exclusionary provision which denies eligible offender status to an addict with two or more prior felony convictions.[6] Petitioner moved to vacate his sentence on the ground that the two-prior-felony exclusion violates the constitutional guarantees of equal protection required by the due process clause of the fifth amendment.[7] The district court denied the motion to vacate the sentence.[8] The court of appeals affirmed,[9] and the Supreme Court granted certiorari.[10] The Supreme Court affirmed, finding the two-prior-felony exclusionary provision constitutional.[11]

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1. 18 U.S.C. § 2113(a) (1970).
2. 18 U.S.C. §§ 4251-55 (1970) [hereinafter cited as Title II or the Act].
3. *Id.* §§ 4251-53.
4. *Id.* §§ 4254-55.
5. Marshall v. United States, No. C-71 1985 (N.D. Cal., filed Feb. 3, 1972).
6. 18 U.S.C. § 4251(f)(4) (1970) provides:

   (f) "Eligible offender" means any individual who is convicted of an offense against the United States, but does not include— . . . .

   (4) an offender who has been convicted of a felony on two or more prior occasions.

7. 414 U.S. at 420. Although the fifth amendment does not have an equal protection clause, the concept of equal protection is implied from the fifth amendment due process clause. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497 (1954).
8. Marshall v. United States, No. C-71 1985 (N.D. Cal., filed Feb. 3, 1972).
9. Marshall v. Parker, 470 F.2d 34 (9th Cir. 1972).
10. Marshall v. United States, 410 U.S. 954 (1973). The Court's reason for granting certiorari was two-fold: first, to consider petitioner's claim of unconstitutionality; second, to resolve a conflict among the circuit courts regarding the constitutionality of the exclusionary provision. Marshall v. United States, 414 U.S. 417, 418 (1974). For decisions upholding the constitutionality of the provision see Marshall v. Parker, 470 F.2d 34 (9th Cir. 1972); Macias v. United States, 464 F.2d 1292 (5th Cir. 1972). *But see* United States v. Bishop, 469 F.2d 1337 (1st Cir. 1972); United States v. Hamilton, 462 F.2d 1190 (D.C. Cir. 1972); Watson v. United States, 439 F.2d 442 (D.C. Cir. 1970).
11. Marshall v. United States, 414 U.S. 417, 430 (1974).

The Warren Court's extensive use of the equal protection doctrine produced the well-known two-tiered approach for the examination of legislative classifications attacked as denying equal protection. Under this doctrine, the Court applied strict scrutiny when the classifications involved were "suspect" or when they affected "fundamental interests."[12] The application of strict scrutiny reversed the ordinary presumption of validity and required the government to show that the legislation was a necessary means of achieving a legitimate governmental purpose.[13] When statutes did not affect "suspect classifications" or "fundamental interests" the Court applied the rational basis test.[14] This type of examination searched for any perceivable rationale behind the legislative enactment and upheld the legislation if any rational basis existed.[15] The dichotomy was a rigid one in which strict scrutiny almost assuredly meant intervention, while application of the rational basis test consistently led to deference in favor of the legislature.[16] The Burger Court, discontented with the rigid two-tiered approach, apparently developed a "middle-of-the-road" approach to equal protection problems.[17] This method of examination limited the list of "suspect classifications" and "fundamental interests" to those well-founded in precedent and concurrently expanded the rational basis test into a more stringent and meaningful standard requiring legislative means

12. *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1124-31 (1969) [hereinafter cited as *Developments*]. "Suspect classifications" include classifications based on race and classifications similarly dealt with, such as national ancestry and alienage. *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184 (1964) (race); Korematsu v. United States, 323 U.S. 214 (1944) (national ancestry). This concept was developed in the late nineteenth century and was based upon the reasoning that the central purpose of the fourteenth amendment was to eliminate invidious racial discrimination. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 10 (1967); Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873); *cf.* Yick Wo v. Hopkins, 118 U.S. 356 (1886). In contrast, the concept of "fundamental interests" was a recent development and was apparently first used in Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) (procreation). It is in this area that the Warren Court extensively expanded the use of strict scrutiny. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (interstate travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (voting); Griffin v. Illinois, 351 U.S. 12 (1956) (criminal procedure).

13. *Developments, supra* note 12, at 1101, *citing* Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).

14. *Developments, supra* note 12, at 1076-87.

15. *Id.* at 1074. *See, e.g.*, Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955).

16. Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) [hereinafter cited as Gunther].

17. *Id.* at 10-20.

to substantially further legislative ends.[18] In other words, the Court looked to the practical effects of the statute's application and compared these effects to the purposes sought to be achieved.[19] *Marshall v. United States*[20] is an indication of the present position of the Court in the equal protection area.

The majority decision in *Marshall* raises serious doubt as to the Court's willingness to consistently apply the "middle-of-the-road" equal protection standard to legislative classifications. The reasons for this doubt are twofold. First, the method of applying the equal protection standard in *Marshall* was substantially different from the method employed in the "middle-of-the-road" equal protection cases. Second, the Court ignored the irrebuttable presumption problem which the case presents. The majority in *Marshall* merely identified possible congressional purposes and failed to deal with the question of whether these purposes are actually furthered by the exclusionary provision and its practical effects. This deficiency in the majority opinion leads to the conclusion that the Court is reverting to the traditional "rational basis" test in its examination of legislative classifications.

Mr. Justice Burger, in delivering the majority opinion, stated that the concept of equal protection as embodied in the due process clause of the fifth amendment requires that there be some "rational basis" for the statutory distinction, or that it have some "relevance to the purpose" for which it was made.[21] After examining the Act

18. *Id.* at 17-36.

19. *See, e.g.*, United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973); James v. Strange, 407 U.S. 128 (1972); Humphrey v. Cady, 405 U.S. 504 (1972). The *Moreno* case is an excellent example of the "middle-of-the-road" equal protection approach. At issue was a provision of the Food Stamp Act of 1964 which excluded from the food stamp program any household containing an individual who was unrelated to any other household member. The Court, determining that the purpose of the Act was to safeguard the health and well-being of the nation's population and to raise levels of nutrition among low income households, found that the classification was "wholly without any rational basis." 413 U.S. at 533-38. To reach this conclusion, the Court rejected the government's argument that the classification should be upheld as rationally related to the clearly legitimate governmental interest in minimizing fraud in the program. The Court reasoned that the Act contained provisions aimed specifically at the problem of fraud, thus providing an alternative to the presumption. Further, the Court looked specifically to the effects of the classification and determined that "in practical effect" the classification does not operate to rationally further the prevention of fraud. *Id.* at 535-37.

20. 414 U.S. 417.

21. *Id.* at 422, *citing* McGinnis v. Royster, 410 U.S. 263 (1973); James v. Strange, 407 U.S. 128 (1972); Humphrey v. Cady, 405 U.S. 504 (1972); Rinaldi v. Yeager, 384 U.S. 305

and its legislative history to find the congressional purpose, he concluded: that the overall reason for the Narcotic Addict Rehabilitation Act was a congressional belief that some relationship existed between drug addiction and crime; that Congress had further determined that a rehabilitative approach, rather than the traditional penal approach, was necessary;[22] that this purpose, however, was not to make every addict eligible for civil commitment; and that the exclusionary provision was meant to exclude those narcotic addicts less likely to be rehabilitated and those whose records disclose a history of serious crimes.[23] The Court stated the issue as whether Congress could rationally assume that an addict with two or more felony convictions is less likely to be susceptible to rehabilitation by reason of his past record and thus pose a greater threat to society upon release. The Chief Justice identified three reasons[24] stemming from the experimental nature of the program[25] on which Congress could rationally have based the exclusionary provision:

1) congressional concern with the "susceptibility and suitability" of multiple offenders to rehabilitative treatment;
2) concern that persons with records of two prior felonies might

(1966); Baxstrom v. Herold, 383 U.S. 107 (1966); Bolling v. Sharpe, 347 U.S. 497 (1954). In *Bolling*, a District of Columbia school desegregation case, the Court held that, although the fifth amendment did not contain an equal protection clause, due process and equal protection stem from the American ideal of fairness, and the two are not mutually exclusive. Furthermore, it would be unthinkable that the Constitution would impose a lesser duty on the federal government than on the states.

22. 414 U.S. at 423, *citing* H.R. REP. No. 1486, 89th Cong., 2d Sess. 7 (1966); S. REP. No. 1667, 89th Cong., 2d Sess. 12 (1966).

23. 414 U.S. at 424-25, *citing* H.R. REP. No. 1486, 89th Cong., 2d Sess. 9-10 (1966); S. REP. No. 1667, 89th Cong., 2d Sess. 13 (1966).

24. 414 U.S. at 425-29.

25. Justice Marshall rebutted the majority's argument that Title II is an experimental program and that courts should be reluctant to interfere. He pointed out that the experimentation involves peoples' lives and health and maintained that the program, now in its seventh year, could no longer be considered experimental. *Id.* at 438. To read *Marshall* consistently with other Burger Court "middle-of-the-road" cases, the majority and dissenting opinions can be viewed as a factual disagreement over the experimental nature of the program. The majority, finding the program experimental, would grant more leeway to the legislature in dealing with sensitive problems. The dissent, viewing seven years as sufficient time in which to experiment, would require stricter judicial intervention. The problem with this "factual" analysis is that it would label as surplusage the major portion of the majority opinion, which attempts to emphasize that the congressional purpose is rationally furthered. It seems likely, therefore, that the majority did not rest its holding on this factual determination, but rather that its view of the facts supported its more basic argument that the provision rationally furthers the congressional purpose.

be a threat to the successful treatment of others in the program;[26]

3) the possible congressional concern that an addict with multiple convictions would pose a greater potential harm to society on early release than the addict who only had one or no prior felony convictions.

The opinion concluded that the above were rational bases for the classification without ever asking if multiple offenders are in fact less susceptible to treatment, would jeopardize the treatment of others, or would pose a threat to society upon early release.

Mr. Justice Marshall, writing for the dissent, concluded that even under the rational basis test, the exclusion is a totally irrational means toward the ends that Congress sought to achieve.[27] In contrast to the majority, he employed an intensified means-ends scrutiny—looking to the practical effects of the classification.

He identified three congressional purposes. The first was to give treatment to those addicts whose criminal activity was only a product of their addiction, while reserving strict criminal penalties for hardened criminals.[28] The statute, however, does not achieve that

26. The Court's first two reasons stem from the nature of the treatment process—"an arduous and delicate undertaking," requiring obedience and cooperation from the addict. S. REP. No. 1667, 89th Cong., 2d Sess. 15 (1966). The medical and scientific uncertainties Congress dealt with offer little basis for judicial response in absolute terms. Powell v. Texas, 392 U.S. 514 (1968) (Texas statute making intoxication in a public place a crime upheld as constitutional). Thus, the majority reasoned that legislative options must be broad, and courts must be careful not to modify legislation when Congress acts in these problem areas. That the statute does not work with mathematical nicety, and that Congress did not give the trial judge all of the discretion it could have given, does not render the provision unconstitutional. 414 U.S. at 425-28, *citing* Dandridge v. Williams, 397 U.S. 471 (1970); Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955).

27. Justice Marshall reiterated his disagreement with the Court's rigid two-tiered approach to equal protection issues. 414 U.S. at 431. *See, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98-110 (1973) (Marshall, J., dissenting); Richardson v. Belcher, 404 U.S. 78, 90-91 (1971) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 519-30 (1970) (Marshall, J., dissenting). He stated that, although the Court does not expressly endorse or reject this approach, except where the Court invokes strict scrutiny, the equal protection clause has been all but emasculated. Although the case did not meet the traditional suspect classification category, Justice Marshall did not agree with the majority's testing the statute by the same minimum standard of rationality as applied to the sale of eyeglasses or the ownership of pharmacies. 414 U.S. at 431-33. Here a man is deprived of treatment for his "disease" of narcotic addiction while others similarly situated are provided treatment and given suspension of prison sentences.

28. 414 U.S. at 434, *citing* 112 CONG. REC. 11,813 (1966).

end.[29] It allows an addict whose criminal activity was unrelated to narcotic addiction, but who later became addicted pending trial, to benefit from Title II if he has had only one prior conviction. It excludes an addict with two prior felony convictions, even when both of those felonies were related to his own drug use.

The second purpose Congress sought to achieve was the restriction of Title II treatment to those narcotics addicts who are likely to be rehabilitated.[30] The Act provides a method to determine this likelihood by limiting the participants to those whom the Attorney General determines are likely to be rehabilitated.[31] Inconsistent with the policy behind individualized determination is the irrebuttable presumption that a defendant with two prior felony convictions is unlikely to be rehabilitated. The use of irrebuttable presumptions, Justice Marshall pointed out, has been viewed unfavorably by the Court in the past.[32] Furthermore, the administrator of the California Narcotics Treatment Program, on which Title II was modeled, testified that persons with as many as four or five previous convictions respond better to the program than some of the younger persons treated earlier in their careers.[33]

Justice Marshall identified the third congressional purpose behind the exclusionary provision as a congressional desire to eliminate from the program violent antisocial persons who would interfere with the rehabilitation of others. But he again concluded the Congress has used "a numerical test to achieve a qualitative result for which it is manifestly unsuited."[34] The exclusionary provision creates the anomaly whereby an addict with an attempted murder conviction is qualified to participate, while one with two possession-of-narcotics convictions is not.

The majority's complete disregard of the irrebuttable presumption issue raised by the case further supports the conclusion that the Court is reverting to the traditional rational basis test.[35] The dissent

29. 414 U.S. at 435. Marshall states that it fails to achieve the end because "a numerical test was used to achieve a qualitative result for which it was totally unsuited."

30. *Id.* at 435.

31. 18 U.S.C. § 4252 (1970).

32. 414 U.S. at 435. *See* text accompanying notes 35-40 *infra* for an examination of irrebuttable presumptions.

33. 414 U.S. at 436.

34. *Id.* at 437.

35. The area of irrebuttable presumptions is confused by the Court's failure to clearly identify its justification for the concept. Although the Court bases the concept on a due

indicated that the exclusion is a conclusive and irrebuttable presumption that an addict with two or more prior felony convictions is not a likely candidate for rehabilitation. Citing *Vlandis v. Kline*,[36] Justice Marshall stated that "permanent irrebuttable presumptions have long been disfavored."[37] This applies particularly where the interest at stake is as important as personal liberty,[38] and where the question to be answered requires individualized determination.[39]

In *Vlandis*, students of the University of Connecticut challenged the constitutionality of a state statute which permanently and irrebuttably classified them as non-residents for the purpose of determining tuition and fees. The Court concluded that the statute violated the due process clause of the fourteenth amendment by creating a permanent and irrebuttable presumption, when the presumption was not necessarily or universally true, and when the state had "reasonable alternative means" of making the crucial determination.[40] Why should the same standard not be applied in *Marshall*? The exclusionary provision created a permanent irrebuttable presumption that narcotic addicts with two or more prior felony convictions are less likely to be rehabilitated. The remedy which the Court has used to cure an irrebuttable presumption is a hearing to determine the issue in dispute.[41] In *Marshall*, the Act in question provides

process theory, the doctrine is used in an area traditionally linked to equal protection. A possible explanation is that the Court has used the concept as a substitute for the "middle-of-the-road" equal protection test. Under the irrebuttable presumption approach, the remedy imposed is merely the addition of a hearing to the proceedure, while in the "middle-of-the-road" approach, the result is a completely unconstitutional classification. The difference in remedies allows the Court to apply a type of irrebuttable presumption/strict scrutiny with an effect even milder than the "middle-of-the-road" equal protection test. *But see* Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1535, 1556 (1974), for the proposition that the Court's use of the irrebuttable presumption concept is unfounded in legal theory.

36. 412 U.S. 441 (1973).

37. 414 U.S. at 435.

38. Although Mr. Justice Marshall feels that personal liberty is at stake, it should be noted that, but for the statute, the defendant, who has already been convicted, would be incarcerated.

39. 414 U.S. at 435. The determination of such issues in *Marshall* as the likelihood of rehabilitation requires weighing many factors and necessitates an individualized determination. The desired result can not be accomplished by the application of a numerical test.

40. 412 U.S. at 452.

41. Stanley v. Illinois, 405 U.S. 645, 658 (1972). The Court held unconstitutional a statute which permanently and irrebuttably presumed that all unmarried fathers were unqualified to raise their children and, therefore, required that the state take custody of illegitimate children upon the death of the mother. The Court required that a hearing be provided to determine the father's parental fitness.

for a determination by the Court of the defendant's potential for rehabilitation—the precise remedy required by the irrebuttable presumption cases. Yet the Court fails to give this provision its proper effect and instead upholds the presumption.

The majority opinion, by its failure to apply an intensified means-ends examination and by its failure to discuss irrebuttable presumptions, indicates the Court's inconsistency in applying the "middle-of-the-road" equal protection standard and its willingness to revert to the traditional "rational basis" test.

Henry Chajet

TRUSTS—CONSTRUCTIVE TRUST—IMPLIED CONTRACTS—TRUTH IN LENDING—The Supreme Court of Pennsylvania has held that mortgagors, alleging the misuse of escrow funds by mortgagees, stated a cause of action for breach of an express trust, for imposition of a constructive trust, and for breach of an implied contract, but that the allegations, if proven, would not violate the Truth in Lending Act.

Buchanan v. Brentwood Federal Savings & Loan Association, 320 A.2d 117 (Pa. 1974).

Plaintiffs, mortgagors, filed a class action suit in the Common Pleas court of Allegheny County[1] against the defendants, their mortgagees, and the Federal National Mortgage Association.[2] Plaintiffs sought to force defendants to discontinue the practice of commingling mortgage escrow funds[3] with defendants general funds and

1. Allegheny County is one of the four counties in the Pittsburgh, Pa. Standard Metropolitan Statistical Area.

2. At the time of the trial court's ruling, defendants consisted of fourteen federally-chartered and thirteen state-chartered savings and loan associations, four national banks, and one savings bank. Buchanan v. Brentwood Fed. Sav. & Loan Ass'n, 121 P.L.J. 247 (C.P. Allegh. Co. 1974).

3. Monthly tax and insurance payments are either held in escrow or capitalized. Under the former method, used by most mortgage lenders, mortgage payments are credited to three separately maintained accounts—principal, interest, and escrow. When taxes and insurance premiums are paid, the escrow account is debited and any remaining balance carried forward. Since taxes (in Allegheny County) and insurance premiums are paid annually, the lender has some portion of the funds available to him for all or part of the year. Escrow funds are "freely commingled with the mortgagee's general funds and used to earn income." 320 A.2d at 121-22 (footnote omitted).