COMMENTS

SOME THOUGHTS ON THE EMERGING IRREBUTTABLE PRESUMPTION DOCTRINE

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In a number of recent cases, the United States Supreme Court has applied a new or reinvigorated doctrine as a principal ground for decision.[1] In simplest form, the doctrine of irrebuttable pre-

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[1]Cleveland Bd. of Educ. v. LaFleur, 94 S. Ct. 791 (1974); United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973); Vlandis v. Kline, 412 U.S. 441 (1973); Stanley v. Illinois, 405 U.S. 645 (1972).

The irrebuttable presumption doctrine was employed in the taxation context in the 1920's and early 1930's, but it appears to have become dormant thereafter. *See, e.g.*, Heiner v. Donnan, 285 U.S. 312 (1932); Hoeper v. Tax Comm'n, 284 U.S. 206 (1931); Schlesinger v. Wisconsin, 270 U.S. 230 (1926). The doctrine has since been applied, but in the significantly different context of substantive criminal law. *E.g.*, Leary v. United States, 395 U.S. 6 (1969); Tot v. United States, 319 U.S. 463 (1943).

The case most often cited by the Supreme Court for recent applications of the doctrine is Bell v. Burson, 402 U.S. 535 (1971), in which the Court struck down a Georgia statute providing that an uninsured motorist involved in an accident who was unable to post bond for any resulting damages automatically had his driver's license suspended. Since no hearing on fault was required and fault could not be conclusively presumed in such circumstances, the conclusive presumption established by the statute was fatal to its constitutionality under the due process clause.

The *Bell* case presented the same issues as the later cases discussed in this Article. The Court read the Georgia statute as premised on a purpose to protect faultless victims from judgment proof defendants. With the statutory purpose so construed and limited, it was relatively easy for the Court, relying on procedural due process cases like Goldberg v. Kelly, 397 U.S. 254 (1970), to require a hearing on fault before suspension of a license. But the Court engaged in no analysis of the state's power to enact its suspension scheme irrespective of fault. Such a scheme would seem to be entirely rational, in light of the fact that states can enact compulsory insurance laws.

Thus, the Court avoided analysis of the underlying issues of state power and interest, just as it has done in *Vlandis*, *LaFleur*, and related cases. *See* text accompanying notes 23-26 *infra*. Since the Court avoided such analysis

sumption provides that if a legislative classification is imperfect in that it sweeps either too broadly or too narrowly,[2] the classification violates due process unless the presumption created by the classification is rebuttable.[3] The terminology employed in the application of the doctrine is virtually indistinguishable from that employed in the ordinary equal protection analysis, except that the end result is explained through the application of irrebuttable presumptions.[4] This Article will assess the value and impact of the doctrine in terms of its effectiveness as a principled rule of decision and its impact on the legislative use of classifications.

I.

The typical restrictions on legislative classification or line-drawing are minimal under the currently accepted equal protection model. In areas of economic regulation or situations in which

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and instead imputed a specific purpose to the statute, the application of *Goldberg* notions, which protect the fairness and accuracy of fact-finding under valid and unchallenged statutory standards, is clear. However, the two steps of imputing purpose and imposing due process standards cannot be separated, for they are integrated parts of a single decisional rule. When viewed in the aggregate, what results is a due process right to seek an exemption from a statutory classification, the rationality and constitutionality of which has never been challenged. *See* text accompanying notes 27-34 *infra;* Vlandis v. Kline, 412 U.S. 441, 465-69 (1973) (Rehnquist, J., dissenting).

[2]The more common terminology employed to describe this condition is overbreadth or under-inclusiveness. *See Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1077-87 (1969) [hereinafter cited as *Equal Protection*]; Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949). For a discussion of the doctrine's application to under-inclusive classifications, see note 35 *infra*.

[3]In Vlandis v. Kline, 412 U.S. 441 (1973), the Court stated:

> Our holding today should in no wise be taken to mean that Connecticut must classify the students in its university system as residents, for purposes of tuition and fees, just because they go to school there.
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> . . . .
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> We hold only that a permanent irrebuttable presumption of nonresidence—the means adopted by Connecticut to preserve that legitimate interest—is violative of the Due Process Clause, because it provides no opportunity for students who applied from out of state to demonstrate that they have become bona fide Connecticut residents.

Id. at 452-53. *See also* Cleveland Bd. of Educ. v. LaFleur, 94 S. Ct. 791, 799-801 (1974); United States Dep't of Agriculture v. Murry, 413 U.S. 508, 514 (1973); *id.* at 514-17 (Stewart, J., concurring); Stanley v. Illinois, 405 U.S. 645, 654 (1972).

[4]*See* cases cited note 3 *supra*.

fundamental rights are not impinged by a classification, the fourteenth amendment requires only that a state demonstrate that its classification is drawn in light of legitimate goals and that the classification is a rational means of accomplishing those goals in whole or in part.[5] The standard of rationality or reasonableness of relation between the means employed and the ends sought is not absolute, nor is it determined on the basis of the Court's judgment or value preferences. Rather, the relevant inquiry is whether a reasonable legislator could have concluded that the classification was a rational means of accomplishing or promoting any of the possible goals which might underlie a given statute.[6]

Within this doctrinal framework, the scope of permissible challenge to the relevant statutory classification is severely limited. The challenging party must establish that statutory inclusion of all like-situated persons in a given classification would be irrational under the standard set out above. The challenger is not entitled to argue that while he shares the characteristics of those persons placed within the classification and the classification is rational, particular circumstances germane to his situation alone render the specific application of the statute to him unconstitutional and require a personalized exemption.[7] For example, a state may have a statute which sets the age for legal consumption of alcoholic beverages at eighteen. The relevant questions under equal protection analysis are whether this age limitation is based upon a legitimate state goal, and whether a reasonable legislator, given a legitimate state goal, could believe that restricting drinking to those at or above eighteen years of age is a rational, albeit somewhat arbitrary and certainly imperfect, means of promoting that goal. A mature seventeen year-old would have standing to challenge the statute which disqualifies her from drinking, but only on the ground that the eighteen year age limitation, viewed as a whole with respect to all seventeen year-old persons, is irrational.

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[5]*See, e.g.*, North Dakota St. Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 94 S. Ct. 407 (1973); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Railway Express Agency v. New York, 336 U.S. 106 (1949).

[6]*See, e.g.*, Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961); McGowan v. Maryland, 366 U.S. 420 (1961); Goesart v. Cleary, 335 U.S. 464 (1948). *See also Equal Protection* 1077-84.

[7]This is implicit, of course, in the equal protection standards discussed above. For a fuller development of those doctrines in this context, see Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970). *See* note 1 *supra*. *Compare* Bell v. Burson, 402 U.S. 535 (1971), *with* Goldberg v. Kelly, 397 U.S. 254 (1970).

The seventeen year-old plaintiff would not be able to challenge the statutory discrimination on the ground that while the eighteen year limitation is generally rational, she is a particularly mature seventeen year-old who, but for her age, possesses characteristics more similar to persons eighteen or nineteen years of age, and thus she should be constitutionally exempted from the classification.

If drinking were a "fundamental" right, however, the relevant constitutional standard of rationality would be more strictly applied, and permissible overbreadth would be significantly limited. The state would not be free to establish a line at eighteen years of age if that line constituted no more than a blunt, albeit rational, instrument for accomplishing its purposes.[8] Rather, more narrowly tailored distinctions relating not to the imperfect indicator of age but rather to a distinction more closely related to the statutory purpose, such as maturity, would be required.[9] An individual challenge, therefore, would be permitted, but the result would be invalidation of the entire classificatory scheme for lack of narrow tailoring. A particularized exemption from the statute would not result.

When the relevant equal protection standard is rationality, the Court is, in effect, abdicating virtually all responsibility for assessing the wisdom or soundness of the social or economic policy underlying the statutory scheme; the choice of the means employed to promote the selected state policy is only lightly scrutinized. While this might result in some degree of arbitrariness on an individual basis, as in the case of the mature seventeen year-old, the individual rights at stake are not deemed significant enough to warrant judicial intrusion, and, in any event, clear statutory language notifying the individual of her obligations satisfies most of the fairness problems involved. If, for example, a state prohibits right turns at red stoplights, everyone is expected to comply or be subjected to the statutory sanction, despite the likelihood that an individual might endanger no one by accomplishing the prohibited right turn when no other cars or persons are near the intersection.

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[8]This would be true, as well, if age were a "suspect" classification. *See Equal Protection* 1122.

[9]A functionally accurate classification, as well, might be stricken if less onerous alternatives were available. *See, e.g.*, Sugarman v. Dougall, 413 U.S. 634 (1973); Roe v. Wade, 410 U.S. 113 (1973); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Carrington v. Rash, 380 U.S. 89 (1965).

If fundamental rights are affected by the statutory classification, or if the classification is drawn using suspect criteria, equal protection theory permits the Court to substitute its judgment not only with respect to the policy underlying the statute, but also with respect to the means employed to promote that policy. But substitution of judgment under the equal protection clause is limited to particular circumstances involving specific interests or rights given special constitutional protection,[10] and thus the Court is required to articulate its grounds for decision in broad and principled terms.

II.

The recently employed irrebuttable presumption doctrine must be viewed in the context of the equal protection model set forth above. In many respects, the doctrine represents a retreat from the requirement of articulated values under the equal protection clause. It is noteworthy, for example, that in four cases in which the doctrine of irrebuttable presumption was applied by the Supreme Court in the past three terms, very difficult policy judgments which would have been required under equal protection analysis were avoided. Yet each case was amenable to such analysis.

Cleveland Board of Education v. LaFleur[11] presented, under the equal protection mantle, the question which the Court avoided during the 1972 Term:[12] should sex be considered a suspect criterion for classification under the equal protection clause? Pursuant to a rule promulgated by the Board of Education of Cleveland, all pregnant school teachers were required to take a maternity leave without pay beginning five months prior to the ex-

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[10] *See* authorities cited note 9 *supra; Equal Protection* 1121-24.

[11] 94 S. Ct. 791 (1974). Mr. Justice Powell concurred in the result and stated in his separate opinion:

> I am also troubled by the Court's return to the "irrebuttable presumption" line of analysis of [*Stanley* and *Vlandis*]. Although I joined the opinion of the Court in *Vlandis* and continue fully to support the result reached there, the present cases have caused me to re-examine the "irrebuttable presumption" rationale. This has led me to the conclusion that the Court should approach that doctrine with extreme care.

Id. at 802.

[12] *See* Frontiero v. Richardson, 411 U.S. 677 (1973). The same issue was skirted during the 1971 Term in Reed v. Reed, 404 U.S. 71 (1971).

pected birth of the child. The teacher could not return from maternity leave until the beginning of the next regular school semester following the date when the child attained the age of three months. The Court first addressed the school board's argument that a mandatory leave policy was necessary to assure continuity of instruction and to permit the employment of replacements. Noting that advance notice of departure would serve these ends as effectively as a strict cut-off date, and that a five-month rule would often result in a teacher's departure shortly before the end of a semester, thereby subverting the goal of continuity, the Court concluded that the classification was arbitrary and not rationally related to these asserted interests of the school.[13] The board argued further, however, that the five-month rule was designed to keep physically unfit teachers out of the classroom. The Court did not hold that the rule was irrational in light of this purpose. Rather, the Court stated that even if one were to assume *arguendo* that some women would be physically unable to work past the cut-off date established in the challenged rules, certainly large numbers of teachers would be physically capable of continuing work for longer than the rules allow. Thus, the Court reasoned, "the conclusive presumption embodied in these rules . . . is neither 'necessarily nor universally true' and is violative of the Due Process Clause."[14] Through the application of the irrebuttable presumption doctrine to the classifications embodied in the maternity leave rules, the Court avoided the need to pass on whether such rules are sex-based and violative of the equal protection clause.[15] Absent the irrebuttable presumption approach, however, the Court would have had to pass on the sex discrimination holding, for the Court admitted that the classification in the rules was rational under lenient equal protection standards.

A similar result was reached by the Court during the 1972 Term in *Vlandis v. Kline*.[16] There the Court declared unconstitutional under the due process clause a Connectitcut statute mandating an irrebuttable presumption of nonresidency for purposes of qualifying for reduced tuition rates at a state university. Under equal protection analysis, the question presented was whether the right to travel or the right to education should be held applicable

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[13]94 S. Ct. at 798.

[14]*Id.* at 799.

[15]*See id.* at 802-04 (Powell, J., concurring); *id.* at 804-05 (Rehnquist, J., dissenting).

[16]412 U.S. 441 (1973).

to nonresident tuition standards imposed by state schools, and should thus trigger close scrutiny analysis under the equal protection clause and substantially limit the ability of educational institutions to impose out of state tuition.[17] In the alternative, the relatively lenient scrutiny characteristic of equal protection analysis in areas of economic regulation could have been applied. Since, under this analysis, the Court would have found it difficult to conclude that the Connecticut scheme was irrational,[18] the result would have been to defeat the claim raised by the plaintiff and to sustain the constitutionality of nonresident tuition rates in general. The Court, however, did not address either of these points, but skirted the issues by applying the irrebuttable presumption doctrine. The Court stated that the due process clause forbids denying an individual the resident rates on the basis of an 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."[19] The standard which the Court applied in assessing the validity of the irrebuttable presumption or classification scheme was whether the distinctions were "necessarily or universally true in fact". If this standard is not satisfied, conclusiveness will not be permitted under the due process clause.

Two other recent cases have applied the doctrine with similar effect. In *United States Department of Agriculture v. Murry*,[20]

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[17]*See id.* at 454-55 (Marshall, J., concurring). Justice Marshall joined the opinion of the Court, but not insofar as that opinion held permissible a one-year residency requirement as a prerequisite to qualifying for in-state tuition benefits. According to Justice Marshall,

> That question is not presented by this case since here we deal with a permanent, irrebuttable presumption of nonresidency based on the fact the student was a nonresident at the time he applied for admission. . . .
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> . . . .
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> In the absence of full consideration of those equal protection questions, I would leave the validity of a one-year residence requirement for a future case in which the issue is squarely presented.

Id. at 455.

[18]*See id.* at 463-69 (Rehnquist, J., dissenting).

[19]*Id.* at 452. The "reasonable alternative means" is the individualized hearing. *See* text accompanying notes 33-34 *infra*.

[20]413 U.S. 508 (1973). *Murry* was clearly a very difficult case, since there was no easily available "fundamental" right on which to base close scrutiny analysis. The majority opinion by Mr. Justice Douglas seems to

the Court was presented with a choice between striking portions of the federal Food Stamp Act by invoking strict scrutiny on the basis of a right to travel or to basic sustenance, and sustaining a "rational," albeit distasteful and occasionally inequitable, statutory scheme under lenient equal protection standards. Both issues were avoided through application of the irrebuttable presumption doctrine. In *Stanley v. Illinois*,[21] the Court was invited to invoke strict scrutiny in assessing a statute which prevented an unmarried father from obtaining custody of his children upon the death of the mother. The Court applied the irrebuttable presumption doctrine under the due process clause, and avoided the need to determine under equal protection analysis whether sex discrimination, discrimination against illegitimates, or fundamental rights of child rearing were involved. The Court reasoned that although it may be that most unmarried fathers are unsuitable parents, and it may be that Stanley is such a father, "all unmarried fathers are not in this category; some are wholly suited to have custody of their children."[22]

The application of the irrebuttable presumption doctrine in these cases has had the following effects. The Court has avoided equal protection analysis which would have presented difficult policy choices regarding the importance and ranking of rights and interests at stake. In each case, however, the Court seems to have been committed to reaching the result which application of the difficult equal protection principles would support, for the

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conclude that under equal protection standards the classification at issue was wholly irrational, but the opinion is, at the same time, firmly rooted in the irrebuttable presumption doctrine. Mr. Justice Stewart, concurring, relied exclusively on the irrebuttable presumption aspect of the case. Mr. Justice Marshall was more forthright and would have applied heightened scrutiny under the equal protection guarantee in the fifth amendment. The dissenters—the Chief Justice and Justices Blackmun, Powell, and Rehnquist—were also more forthright about the equal protection issues although they would have resolved them differently than did Mr. Justice Marshall.

[21] 405 U.S. 645 (1972). Mr. Justice White authored the Court's opinion, which was based on both due process and equal protection theory. The Court's opinion came close to noting an express limitation on the irrebuttable presumption doctrine to "cognizable and substantial" private interests, such as child rearing. *Id.* at 652. Reference to similar interests was made in *LaFleur*, 94 S. Ct. at 796. Little, if any, guidance, however, was provided concerning the principled footing or significance of these observations, and, in view of the absence of similar reference in *Murry* and *Vlandis*, the significance of such possible limiting constructions is problematical. *See* note 40 *infra*.

[22] 405 U.S. at 654.

plaintiffs were granted relief in each case. The fact that the Court may be now in the process of re-examining and redefining equal protection doctrine[23] provides no justification for the use of a basically unprincipled or unarticulated doctrine by which the Court avoids facing fundamental policy choices but achieves the desired results on a case-by-case basis. The Court, quite simply, is having its cake and eating it too.

III.

A closer look at the irrebuttable presumption doctrine as a device for resolving constitutional issues raises serious questions about its scope and application. The doctrine is based on the due process clause of the fourteenth amendment, and it partakes of both the substantive and procedural aspects of the due process guarantee. It thus merges the two aspects of due process analysis, yet avoids the most difficult analytical issues presented under each heading.

The irrebuttable presumption doctrine seems to have substantive underpinnings, since it seems to be selectively applied to certain types of cases involving important, yet nonfundamental, rights. *LaFleur* raised the difficult issue of whether sex-based discrimination is constitutionally suspect. *Vlandis* and *Murry* involved arguably new extensions of the right to travel, a matter which the Court may have preferred to leave untouched. *Stanley* was susceptible to analysis in terms of sex discrimination or the fundamental rights of procreation, privacy, or the like. But selective application of the doctrine to these "quasi-fundamental" rights or interests can only be gleaned from what the Court has decided in fact, since the Court has made little effort to distinguish or identify in principle the scope of the doctrine's application.[24] Indeed, the value of the doctrine seems to lie in the fact that it permits the Court to avoid the difficult policy issues raised in the cases.

The device employed to evade the difficult substantive policy judgments is the procedural aspect of the doctrine. Rather than assessing on substantive grounds those situations which would warrant application of a more stringent standard of under-inclus-

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[23]*See* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

[24]*See* notes 21 *supra*, 40 *infra*.

iveness or over-inclusiveness[25] in the legislative classification, the Court seemingly adopts the rigid rule that lines must be drawn finely and with precision in all contexts. When fundamental rights are involved, or when discrimination on the basis of suspect criteria exists, current equal protection doctrine would prohibit imprecision even if an opportunity to rebut the classificatory presumption were afforded, unless compelling state interests could be identified which would support imprecision.[26] But in all other areas, the irrebuttable presumption doctrine prohibits inaccuracy in legislative line-drawing. This result is antithetical to the heretofore broad powers given to legislatures to draw imperfect lines when only economic or nonfundamental interests were at stake.

IV.

Every statutory classification involves a presumption within the meaning of the irrebuttable presumption doctrine. Most statutes contain classifications which differentiate between those persons or things subject to the statutory disqualification and those not subject to it. A vast number of such statutes—perhaps most—involve conclusive or irrebuttable presumptions or distinctions.[27] For example, assume that a state has enacted a statute which requires all trucks weighing more than 8,000 pounds to use heavy duty tires. The purpose of the statute might be that any tire supporting more than 1,800 pounds should be heavy duty in order to assure highway safety at highway speeds. Should a trucker whose vehicle weighs 8,100 pounds, with 6,000 pounds of displacement on the rear tires, be constitutionally entitled to challenge the statute on the ground that it fails to permit him to rebut the admittedly rational legislative attempt to promote highway safety? Neither of the front tires on the trucker's vehicle support 1,800 pounds, and thus the conclusive presumption that four tires are needed to

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[25]*See* note 35 *infra* for a discussion of the doctrine's application to underinclusive classifications.

[26]*See* notes 8, 9 *supra* & accompanying text.

[27]Examples abound. For example, most regulatory statutes relating to the jurisdiction of regulatory agencies or to safety or health requirements contain irrebuttable presumptions. So also do most statutes relating to traffic safety and control, to age qualifications, whether for drinking, marriage, voting, or holding public office, *cf.* Oregon v. Mitchell, 400 U.S. 112 (1970), or to the availability of various forms of welfare. *See* Dandridge v. Williams, 397 U.S. 471 (1970). Indeed, in light of the irrebuttable presumption doctrine, and more particularly the *Murry* case, one might seriously question the current efficacy of the *Dandridge* holding.

insure safety in light of the state's purpose is neither "necessarily nor universally true." Should a person whose truck weighs 8,000 pounds but who drives it exclusively in the city at less than highway speeds also be entitled to challenge the statute?

The irrebuttable presumption doctrine, applied fully, could invalidate all such classifications and require that opportunity always be provided for individualized exemptions from the statute.[28] The challenge, moreover, would be in the form of individualized determinations of whether the legitimate purposes of the statute or rule would require its application to a given case.[29] The ramifications of the doctrine in this context are immense. The first ramification of the irrebuttable presumption doctrine raises fundamental issues regarding the function and form of law. As Justice Rehnquist recounts in his dissenting opinion in *LaFleur*, the evolution of Anglo-American law has basically been from law in the form of individualized determinations, with no codification of legal principle or notice to those affected, to "a relatively uniform body of rules enacted by a body exercising legislative authority . . . ."[30] The *sine qua non* of legislation or codification is the drawing of distinctions and lines, and the functional benefits of

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[28]A possible distinction could be drawn between the application of the irrebuttable presumption doctrine in *LaFleur* and its application to state traffic laws, for example. A state's prohibition on right turns at red stoplights would be subject to the irrebuttable doctrine if the underlying purpose were to promote safety. *See* text accompanying notes 9-10 *supra*. This is because the prohibition on right turns is neither "necessarily nor universally" consistent with traffic safety. However, if the state's purpose were to insure uniform adherence to certain minimal rules of the road, or if it were based on a compelling need for certainty as an end in itself, the irrebuttable presumption might be "necessarily or universally" true.

This exercise of broadening the state purpose in order to satisfy the irrebuttable presumption standard of absolute accuracy fits the traffic safety situation nicely. But it fits the pregnancy leave regulation situation as well, for similar purposes based on need for certainty as an end in itself can be constructed in that context as well. The distinction, if one exists, would be based instead on an evaluation of the importance of the right sought to be vindicated, the significance of the state's interests, and the need for narrow tailoring in light of these factors. The irrebuttable presumption doctrine, however, avoids the equal protection-type analysis implicit in this approach and specifically declines to require the narrow tailoring which results therefrom. *See* note 40 *infra*.

[29]*See* text accompanying notes 32, 33 *infra*.

[30]94 S. Ct. at 805; *id.* at 802 (Powell, J., concurring). *See* J. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY, 2-13, 19-21, 45-46, 57-58, 99-111, 290-302 (1971).

this form of law relate primarily to avoidance of individualized determinations. This approach is manifested in current equal protection doctrine, whether lenient or close scrutiny is applied. In neither instance are individualized determinations resulting in individual exemptions from the challenged classification permitted.[31] The irrebuttable presumption doctrine, in significant respects, constitutes a rejection of this approach to lawmaking, for it requires significant resort to individualized determinations without regard to the nature of a state's interest or the countervailing interests at stake.

The second ramification of the doctrine relates to the form and consequence of rebuttal which must be permitted. How would one argue that the presumption should be inapplicable in one's situation? The *LaFleur* opinion stated that the pregnant teachers must be able to offer evidence to demonstrate that they were able to continue teaching without harm to the fetus or to students and without unduly burdening the school's staffing needs.[32] This would require, initially, an identification of all the possible purposes of the relevant statute or rule. In the context of the *LaFleur* case, this could be a difficult and time-consuming task. Simply identifying the many possible purposes is often an arduous process, and evaluating their legitimacy and relevance to the particular situation could be even more troublesome. The next step in rebutting the presumption would be to argue that an individual's particular situation falls without the scope of legislative purposes and that disqualification under the statute or rule, therefore, would fail to serve the articulated policies. This task could easily

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[31]This is true, as well, of the void for vagueness doctrine. Individualized determinations are antithetical to the values embodied in this approach, which requires clear notice of proscribed conduct, and results, when such notice is lacking, in constitutionally mandated redrafting of the relevant law on clearer and narrower grounds. *See* Note, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960). This result tends inescapably toward law by rule rather than law by exception or ad hoc determination.

Even the procedural due process cases, such as Goldberg v. Kelly, 397 U.S. 254 (1970), stop short of a due process right to statutory exemptions. Rather, the due process theory underlying *Goldberg* is based on the need for accurate and fair application of the statutory terms. If the individual is found, after a hearing, to fall within the statutory language—absent a challenge to the statute on its face or as applied—the inquiry is complete; no exemption, despite the statute's clear language, will result. *See, e.g.*, Goldberg v. Kelly, *supra;* Greene v. McElroy, 360 U.S. 474 (1959).

[32]94 S. Ct. at 798, 799 & n.13, 801. *See* Stanley v. Illinois, 405 U.S. 645, 657 n.9 (1972).

become time consuming and would often involve the introduction of complex evidence, expert opinion, and the like.

The most serious consequences raised by the irrebuttable presumption doctrine, however, do not relate to its inefficiency as a lawmaking tool. Indeed, one might well conclude that the benefits of the doctrine are substantial enough to outweigh the costs of inefficiency, for the individualized scrutiny required by the doctrine constitutes a very effective means of tempering the consequences of lenient scrutiny under the equal protection clause when only economic or nonfundamental rights are at stake. Upon closer analysis, however, it becomes evident that the benefits of such a procedure to the individual are questionable.

Under the *LaFleur* opinion, the burden can be squarely placed on the individual.[33] While the Court in *LaFleur* declared the pregnancy leave regulations unconstitutional, it is by no means clear that even greater disqualifications from teaching because of pregnancy could not be imposed if the regulations were repromulgated with rebuttable rather than conclusive presumptions. For example, the *LaFleur* opinion did not hold that a pregnant teacher could not be forced to stop teaching five or even seven months before term, nor that such a rule, if it contained a rebuttable feature, would not be constitutional. Assume, for example, that a teacher who is three months pregnant is required by rule to stop teaching. That rule is not facially invalid or even suspect if she can challenge its application in her case. However, in order to successfully challenge the application of the rule to her, she must rebut the school's particularized need, which in her case might be an inability to find a replacement immediately rather than after eight months of pregnancy. Assume, in the alternative, that a teacher is pregnant at the end of a given semester and will give birth four or five months later, at or near the end of the coming semester. The *LaFleur* opinion suggests strongly that the school, in order to assure continuity of teaching in the classroom, could require removal at the end of the semester preceeding term,

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[33]94 S. Ct. at 799 & n.13, 801; *see* Stanley v. Illinois, 405 U.S. 645, 655-57, 657 n.9 (1972). This allocation of the burden of proof follows implicitly from the irrebuttable presumption doctrine, since under it, the rationality, and thus constitutionality, of the statute, absent the irrebuttable presumption, is assumed. Thus, the challenger would have the burden of demonstrating an unconstitutional application of a presumptively constitutional statute in the particular circumstances presented.

whether that point be two, five, or more months into pregnancy.[34] This result not only follows from the language of the opinion itself, but from the fact that the Court avoided identifying and resolving the underlying principles and policies in the context of conventional equal protection analysis.

Implicit in the conclusion that the benefits of the irrebuttable presumption doctrine will be illusory to the individual is the further conclusion that application of the doctrine will legitimize overbreadth in statutory classifications. The ultimate result of the irrebuttable presumption doctrine's application will be to permit overly broad[35] statutes to remain on the books, tempered in their

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[34]94 S. Ct. at 797-98, 799-800. Indeed, this conclusion flows directly from the scope of the Court's holding, which strikes the regulations because of the irrebuttable presumptions rather than because of their irrationality. As long as a regulation drawn along these lines contains a rebuttable feature, nothing in the opinion suggests that it would be constitutionally infirm. *See id.* at 803 (Powell, J., concurring). The majority opinion, moreover, explicitly recognized continuity of classroom teaching as a legitimate goal, *id.* at 798, as did Mr. Justice Powell's concurring opinion, *id.* at 803.

[35]None of the cases decided under the irrebuttable presumption doctrine has expressly dealt with the doctrine's application to under-inclusive classifications. Indeed, since application of the irrebuttable presumption doctrine results in an individualized exclusion from a statutory classification, one would expect that individualized challenges to exclusion from (as opposed to inclusion in) classifications would be rare. Exclusion from a classification ordinarily means avoidance of a disability imposed on those falling within the group defined by the classification. For example, the eighteen year-old age limitation for drinking may well be under-inclusive as well as over-inclusive if the purpose of the limitation is to restrict drinking to those persons mature enough to make rational judgments about alcohol. This classification would be over-inclusive because some sufficiently mature seventeen year-olds would be disabled from drinking. It would be under-inclusive because some immature nineteen year-olds, for example, would be permitted to drink. The immature nineteen year-old, however, is unlikely to challenge his or her inclusion in the classification which encompasses persons over seventeen years of age.

If, however, the statutory classification is under-inclusive, and those persons included within it are granted benefits rather than deprived of them, a request for individualized inclusion in (as opposed to exemption from) the classification under the irrebuttable presumption doctrine might arise. For example, if a statute designed to provide hospitalization benefits for those persons most in need were enacted, and under the statute an income level for qualification in the program were set at $3,500.00, a person having ten dependents and making $3,600.00 might well argue that the irrebuttable presumption that persons making less than $3,500.00 were in need would not be "necessarily or universally" true. Accordingly, the person making $3,600.00 and having ten dependents could seek an individualized inclusion within the under-inclusive statutory classification despite the clear language of the

impact only by an opportunity to rebut the presumptions or classifications contained within them. Under the decided cases, reenactment of the stricken rule is constitutional so long as the presumptions contained therein are rebuttable.

With the demise of *Lochner v. New York*,[36] it was generally felt that, in most areas of state legislation, overbreadth, even if accompanied by irrebuttable classifications or presumptions, was acceptable within generous bounds of rationality.[37] Only selected areas relating to fundamental rights under the Constitution, such as the right to free speech, needed the greater protection afforded by a requirement that statutory classifications be accurately drawn and narrowly tailored to further important state interests. With respect to legislation which, in purpose or effect, burdened those rights or classified on the basis of suspect criteria, precision in the relationship between the legislative classifications and the necessary and legitimate ends of the state was required.[38]

It is conceivable, however, that the irrebuttable presumption doctrine will be employed as an expeditious line of retreat from the substantial protections afforded such fundamental rights by the Court. Indeed, the four recently decided cases manifest such a view; in each the Court retreated from the fundamental rights analysis which has characterized equal protection law for the past twenty years, fell back upon the irrebuttable presumption doctrine to obtain the result which the Court felt necessary, and thus avoided consideration of the central issue. The consequence

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statute and despite the rationality and constitutionality of the classificatory scheme. In such an instance, the irrebuttable presumption doctrine would seem to require the claimant's inclusion in the under-inclusive classification. Of course, the same scheme can be viewed in reverse, with the statutory classification establishing an over-inclusive classification consisting of those *not* entitled to benefits. Thus, the same claimant could challenge his or her inclusion in a classification consisting of persons deprived of benefits on the ground that the classification is over-inclusive because, in light of the statutory purpose, the classification includes persons who should not be deprived of benefits. So viewed, an exemption from the classification would then be possible under the irrebuttable presumption doctrine as applied in the over-inclusive context. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970).

[36]198 U.S. 45 (1905).

[37]*See, e.g.*, Vlandis v. Kline, 412 U.S. 441, 465-69 (1973) (Rehnquist, J., dissenting); McGowan v. Maryland, 366 U.S. 420 (1961); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Railway Express Agency v. New York, 336 U.S. 106 (1949); *Equal Protection* 1077-84; Ely, *supra* note 7.

[38]*See* notes 8-9 *supra* & accompanying text.

of *LaFleur*, for example, will be to permit statutes or rules to remain on the books which arguably discriminate on the basis of sex—a result which would not be permitted under equal protection analysis if such discrimination were deemed suspect. Discriminatory statutes based on illegitimacy, as in *Stanley*, or those which affect fundamental rights of procreation and child-rearing, such as the pregnancy leave regulations in *LaFleur*,[39] will also remain on the books in arguably over-inclusive form, the only caveat being that specific applications of the statute will be subject to scrutiny. Thus, sex discrimination, for example, will be officially condoned. Only those wise enough or bold enough to challenge the statute's application will receive the full benefit of their constitutional rights. Notice to others will be illusory at best. If the Court is disatisfied with the harsh and often inequitable effect of "lenient" equal protection scrutiny, surely a better solution would be to require greater precision on the face of the statute or rule.[40]

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[39]94 S. Ct. at 796.

[40]*See* Gunther, *supra* note 23.

While the possible future evolution of the irrebuttable presumption doctrine is beyond the scope of this Article, at least two possible doctrinal developments exist. First, as Mr. Justice Powell surmised in his concurring opinion in *LaFleur*, 94 S. Ct. at 802, the selective application of the doctrine in the cases discussed in this Article may simply indicate that the Court is applying disguised equal protection analysis. Insofar as the result reached under the irrebuttable presumption doctrine—retention of the statute but the granting of an exemption—is different from that reached under equal protection analysis, however, this is not a fully satisfactory explanation. *See* text accompanying notes 27-32 *supra*.

Another possible evolution of the irrebuttable presumption doctrine might be a reformulation of Justice Harlan's due process analysis. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 680 (1966) (Harlan, J., dissenting); Goodpaster, *The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts*, 56 IOWA L. REV. 223 (1970); *cf.* United States v. Kras, 409 U.S. 434 (1973). Justice Harlan's due process approach embodied an evaluation of whether a "basic liberty" was involved, but the identification of such a right did not involve an assessment of the legitimacy of state goals to the degree required under the equal protection clause. And a basic liberty did not, as in equal protection, virtually end the constitutional inquiry. Rather, it was a first step in an analysis largely devoted to an evaluation of the means selected by the state to accomplish its purpose and a consideration of the possibility that less restrictive alternatives might exist. In some respects, this formulation approximates the irrebuttable presumption doctrine, with its emphasis on means and de-emphasis on legitimacy of ends and absolute ranking of rights. The difference remains, however, in that even under Justice Harlan's formulation individualized exemptions were not permitted; rather elimination or mitigation of statutory overbreadth was required.

In light of *Broadrick v. Oklahoma,*[41] a recent case in which the Court narrowed the circumstances in which facial challenges to statutes on first amendment grounds would be permitted, it may not be farfetched to speculate that overly broad statutes affecting first amendment rights will similarly be permitted to remain on the books, subject to a citizen's procedural right to a determination in advance whether prospective action would be constitutionally proscribed by the statute. Such a prediction is surely not inconsistent in principle with either *LaFleur* or *Broadrick,* and it is the practical result accomplished under the approach of both cases.

V.

The consequence of the irrebuttable presumption doctrine is twofold. First, while the doctrine seems to have accomplished the desired result in the decided cases, further analysis suggests strongly that the protections afforded the rights at stake in those cases were illusory. Although the challenged statutes or rules were stricken, the insertion of a procedural device for challenging the statute will permit the prior statutory distinctions to be re-enacted. Second, the doctrine can be viewed as manifesting the Court's conclusion that, for example, pregnancy leave regulations do not constitute sex-based discrimination, but rather discrimination based on functional factors unrelated to sex. Thus, striking the statute under equal protection analysis would not be warranted, since, absent invidious sex discrimination or a burden on fundamental rights, a rational basis under the equal protection clause would clearly exist. Through the doctrine of irrebuttable presumption, however, the Court avoids having to decide the sex discrimination issue, yet the Court can reach a conclusion seemingly consistent with the view that pregnancy leave policies are sex-based and violative of the equal protection guarantee. The doctrine permits the Court to avoid analysis of the important policy issue, but to decide the particular case in a manner satisfactory to it.

The more relevant line of cases in light of the exemption characterized by the irrebuttable presumption doctrine is the procedural due process cases dealing with hearing rights. *E.g.,* Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). But *LaFleur, Murry, Vlandis,* and *Stanley* do not deal extensively with this line of cases. This is appropriate for the procedural due process cases present significantly different issues, rest on significantly different theories, and reach significantly different results than Bell v. Burson, 402 U.S. 535 (1971), *Stanley, Vlandis, Murry* or *LaFleur. See* note 1 *supra.*

[41] 413 U.S. 601 (1973).

As a device of doctrinal restraint, the irrebuttable presumption doctrine is thus much more appealing than such devices as standing, mootness, ripeness, abstention, and the like, for those jurisdictional doctrines do not permit the Court to pass on the merits of the case. So viewed, the irrebuttable presumption doctrine is very dangerous. Not only are its limitations unclear, and its possible applications unsettling, but, more significantly, the doctrine serves as a device which permits the Court to make decisions on the basis of the "equities" without the restraint imposed by neutral principle.