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NOTES

The Conclusive Presumption Doctrine: Equal Process or Due Protection?

In Vlandis v. Kline and United States Department of Agriculture v. Murry, decided during its past term, the Supreme Court invoked the conclusive presumption doctrine to invalidate statutory provisions that restricted access to certain state and federal government benefits. This term, in Cleveland Board of Education v. LaFleur, the Court used the same rationale to strike down school board rules requiring teachers to take maternity leaves without pay. The essence of the doctrine is as follows: When a statutory provision imposes a burden upon a class of individuals for a particular purpose and certain individuals within the burdened class are so situated that burdening them does not further that purpose, then the rigid statutory classification must be replaced, to the extent administratively feasible, by an individual factual determination that more accurately selects the individuals who are to bear the statutory burden. The legislature in such cases is said to have "conclusively presumed" that all members of the burdened class possess those characteristics that caused the burden to be imposed, and due process is found to require an individual opportunity to rebut this presumption. The relatively few cases in which the Court applied this doctrine before last term involved such burdens as deprivation of property through estate or income taxation, denial of the right to vote, and removal of children from their unmarried father's custody, and

3. In Vlandis, the benefit involved was a state subsidy of higher education for residents; in Murry, it was the provision of food stamps for needy households.
4. 42 U.S.L.W. 4186 (U.S., Jan. 21, 1974).
5. The Supreme Court may have another opportunity to expand or explain the conclusive presumption doctrine in Aiello v. Hansen, 359 F. Supp. 792 (N.D. Cal. 1973) (three-judge court), prob. juris. noted sub nom. Geduldig v. Aiello, 42 U.S.L.W. 3362 (U.S., Dec. 11, 1973) (No. 73-640), which involves a California statute that exempts pregnancy-related work loss from coverage under the state's disability insurance program until 28 days after termination of pregnancy. The three-judge district court used the so-called "means scrutiny" test, described in the text accompanying notes 97-99 infra, and concluded that the statute violated the equal protection clause. The issues involved in the case appear to be quite similar to those in LaFleur.
This Note examines equal protection alternatives to the conclusive presumption doctrine that were apparently rejected by the Court; analyzes the doctrine itself in terms of constitutional language, judicial precedents, theoretical soundness, and practical workability; and concludes with a suggested equal protection standard that would serve the purposes of the doctrine while avoiding many of its difficulties.

Vlandis involved a Connecticut statute that imposed a higher tuition rate on nonresidents attending state institutions of higher education than on residents. Single students were defined as nonresidents if their legal addresses were outside of Connecticut at any time during the one-year period immediately preceding application for admission, while married students were classified as nonresidents if their legal addresses were outside the state at the time of application. Once established, a student’s residency status could not be changed during the period of his attendance at the Connecticut institution.

Since even the higher nonresident tuition did not fully defray the cost of a higher education, all students received some degree of state subsidy, but residents were given a greater subsidy on the “assumption that the resident or his parents have supported the State in the past and will continue to do so in the future.” The legislative purpose behind the tuition differential was thus to favor those who were likely to have made or to make a contribution to the state fisc, while requiring students who were in Connecticut only for the benefit of a higher education to pay a greater portion of their own way.

The student’s address at the date of application was adopted as a convenient rule-of-thumb, permitting easy administration by avoiding a more detailed inquiry into the personal circumstances of each student. Since application for admission is typically made several months in advance of the school semester, and since nonresident students were required to pay only 175 dollars for tuition, while resident students were required to pay only 175 dollars for tuition in addition to a 200-dollar nonresident fee, nonresident students were required to pay only 175 dollars for tuition. 412 U.S. at 444.

15. Brief for Appellant at 11.
16. Id.
17. The difference in the definition as applied to single and married students will be ignored for the purposes of this Note since it was of no significance in the case.
students are unlikely to have established a Connecticut address at
that early date, the statutory definition appeared to be a reasonably
accurate means of separating nonresidents from residents. Residency
status was made unchangeable to avoid difficulties of proof, since
it seemed difficult to establish a genuine change in residency among
"college students who seldom have set plans for their future
homes." 18

The plaintiffs in Vlandis were students at the University of
Connecticut who had applied for admission from outside the state
but who had acquired such contacts with the state as a permanent
home (plaintiff Kline), a driver's license, car registration, and voter
registration. Claiming to be bona fide Connecticut residents, they
sued in federal district court for a declaration that the statutory
definition of nonresident was unconstitutional under the due pro­
cess and equal protection clauses of the fourteenth amendment.

The plaintiffs' equal protection argument urged alternatively that
there was an impingement on their right to travel 19 or, in any
case, that the classifications created by the statute were not rationally
related to its goals. 20 Their due process claim rested upon the con­
clusive presumption doctrine: The plaintiffs argued that their right
to procedural due process was violated since the statute permanently
and irreversibly classified them as nonresidents. 21

The three-judge district court did not consider the plaintiffs' due
process and equal protection claims separately, relying upon Bolling
v. Sharpe 22 for the proposition that the standard in the instant case
would be the same under either clause. 23 The court found the Con­
necticut statute "arbitrary and unreasonable" on its face and there­
fore did not reach the right-to-travel argument. 24

18. Brief for Appellant at 15. See also 412 U.S. at 451.
amples of recent applications of the rational relation standard with less judicial defer­
See generally Note, Boraas v. Village of Belle Terre: The New, New Equal Protection,
21. Both the district court and the Supreme Court state that the plaintiffs argued a
violation of the due process clause. See 412 U.S. at 444; 346 F. Supp. at 527. The plain­
tiffs' complaints actually do not mention the due process clause. See Appendix at 4a-5a,
13a-14a.
23. 346 F. Supp. at 528. The district court's reasoning in this regard seems open to
dispute, since Bolling merely established that the fifth amendment due process clause
and the fourteenth amendment equal protection clause are "not mutually exclusive," 347
U.S. at 499, and that equal protection requirements can thus be applied to the
federal government by way of the fifth amendment. This does not imply that the
fourteenth amendment equal protection and due process standards are identical. 347
U.S. at 499. The use of the fourteenth amendment due process clause to deal with
equal protection problems would make the equal protection clause superfluous.
24. 346 F. Supp. at 529 n.4.
the conclusive presumption argument, the court ruled that "the state may not classify as 'out of state students' those who do not belong in that class." Finding the plaintiffs to be bona fide Connecticut residents, the district court concluded that the statute violated the fourteenth amendment. The court entered a permanent injunction against further enforcement of the statute and ordered a partial tuition refund to plaintiffs for the spring semester of 1972.

On appeal, the Supreme Court affirmed. Justice Stewart's opinion wholly ignored plaintiffs' equal protection arguments, although equal protection was clearly the focus of both parties' briefs and oral arguments. Rather, the Court decided the case on the sole ground of the conclusive presumption doctrine, formulating the standard as follows:

In sum, since Connecticut purports to be concerned with residency in allocating the rates for tuition and fees at its university system, it is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination. Rather, standards of due process require that the State allow such an individual the opportunity to present evidence showing that he is a bona fide resident entitled to the in-state rates.

United States Department of Agriculture v. Murry, handed down two weeks after Vlandis, involved an amendment to the Food Stamp Act of 1964. The over-all legislative objective behind the food-stamp program was "to safeguard the health and well-being of the Nation's population and raise levels of nutrition among low-income households." By 1970, Congress had become concerned that

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26. Connecticut's brief dealt solely with equal protection arguments. Plaintiffs' brief devoted only 11 of 59 pages to due process; the remainder concentrated on equal protection.
28. 412 U.S. at 452.
32. 7 U.S.C. § 2011 (1970). The federal food-stamp program is administered by the states in connection with other federally aided public assistance programs, 7 U.S.C. § 2013 (1970). The Act requires the states to follow "uniform national standards of eligibility" established by the Secretary of Health, Education, and Welfare, 7 U.S.C. § 2014(b) (1970), that are designed to take account of income and other financial resources available to recipient households in order to limit the benefits of the program "to those households whose income and other financial resources are determined to
the food-stamp program was being abused by the nonneedy,\textsuperscript{34} in particular by "college students, children of wealthy parents."\textsuperscript{34} Complaints from constituents had led at least some Congressmen to speculate that, if such abuses were not checked, public pressure might ultimately lead to the destruction of the entire program.\textsuperscript{35} The congressional response to this pressure was the following amendment:

Any household which includes a member who has reached his eighteenth birthday and who is claimed as a dependent child for Federal income tax purposes by a taxpayer who is not a member of an eligible household, shall be ineligible to participate in any food stamp program established pursuant to this chapter during the tax period such dependency is claimed and for a period of one year after expiration of such tax period.\textsuperscript{36}

Since the tax exemption is generally available only if the taxpayer provides over half of the dependent child's support,\textsuperscript{37} the draftsmen apparently thought it likely that households that included such dependents would have an independent source of income and thus be unlikely to need food stamps. While that is probably true as a general rule, the plaintiffs in \textit{Murry} came from needy households that were precluded from food-stamp relief by the operation of the amendment. They were represented by welfare rights advocates of the New York-based Food Research and Action Center, who were aware that the plaintiffs presented the most sympathetic fact situations for a test case challenge of the amendment.\textsuperscript{38}
Of the eight plaintiffs chosen to represent the class of households adversely affected by the provision, Mrs. Murry may be regarded as typical. Her household included herself, her two sons, one of whom was nineteen, and her two grandchildren. The household's sole source of income consisted of court-ordered child support payments of $57.50 per month from her ex-husband. When he claimed the two sons and one grandson as dependents in his income-tax return, Mrs. Murry's household was denied food stamps.

A class action was brought in federal district court to enjoin enforcement of the provision as a violation of plaintiffs' fifth amendment rights to due process and equal protection.39 The three-judge panel granted the relief requested, stating that

the Amendment wholly missed its target. By creating an irrebuttable presumption contrary to fact, the Amendment classifies households arbitrarily along lines that have no rational relationship to the statutory scheme or the Amendment's apparent purpose. It creates a classification which denies similar treatment to all persons similarly situated and is, on its face and by its operation as established in this record, grossly unfair. Thus, there is both a denial of due process and of equal protection.40

In an opinion written by Justice Douglas, the Supreme Court affirmed. As in Vlandis, primary attention in the briefs was devoted to equal protection arguments,41 yet again the equal protection claim was ignored in the Court's opinion. The Court found that the provision created "a conclusive presumption that the 'tax dependent's' household is not needy and has access to nutritional adequacy."42 It concluded "that the deduction taken for the benefit of the parent in the prior year is not a rational measure of the need of a different household with which the child of the tax-deducting parent lives and rests on an irrebuttable presumption often contrary to fact. It therefore lacks critical ingredients of due process . . . ."43 Although Justice Douglas had joined in Justice Rehnquist's dissent in Vlandis,44 he cited that case as precedent for the doctrine applied in Murry.45

41. The government devoted a single footnote to the due process argument in its main brief, Brief for Appellants at 7 n.4, and less than 3 pages in its reply brief. Reply Brief for Appellants at 10-12. Appellees used only 15 out of 50 pages in the argument section of their brief for the due process claim. Brief for Appellees at 57-72.
42. 413 U.S. at 511.
43. 413 U.S. at 513.
44. 412 U.S. at 463.
45. 413 U.S. at 513. Although Justice Douglas did not look at the purpose of the
Cleveland Board of Education v. LaFleur\textsuperscript{46} involved a rule, adopted by the Cleveland Board of Education, that imposed mandatory, unpaid maternity leaves upon pregnant school teachers for a period beginning five months before the child's expected birth and extending until the next regular school semester after the child reached the age of three months. While testimony from the rule's original draftsmen suggested that its purpose was to prevent embarrassment to pregnant teachers and to avoid classroom disruption caused by giggling schoolchildren,\textsuperscript{47} the school board attempted to justify the rule as "an orderly and efficient procedure to maintain an adequate continuity of able-bodied classroom teachers."\textsuperscript{48} Since most pregnant teachers would have to leave school at some stage in their pregnancy, and since women in the late stages of pregnancy were believed unable adequately to perform teaching duties,\textsuperscript{49} the five-month cut-off date was argued to fulfill "the administrative need for a uniform rule" and to afford adequate notice to allow the school to obtain a substitute teacher.\textsuperscript{50}

The plaintiffs in LaFleur were not due to give birth until mid-summer and desired to continue teaching through the end of the school year. When they were, nonetheless, required to take unpaid maternity leave beginning in March, they challenged the rule in federal district court as a violation of equal protection. The Supreme Court found the school board rule unconstitutional. Although the case had been argued and decided purely on equal protection grounds in both lower courts\textsuperscript{51} and had been treated by all statute, Justice Stewart, in his concurrence, noted that "alleviating hunger and malnutrition among the needy" was one of the statute's purposes. 413 U.S. at 514. Justice Stewart then concluded that Vlandis applied and that the plaintiffs should have been given the opportunity to show that they were, in fact, needy. 413 U.S. at 516-17. He also noted that "alternative means" were available to Congress for achieving its desire to restrict abuse of the food stamp program. 413 U.S. at 517 n.2.

46. 42 U.S.L.W. 4186 (U.S., Jan. 21, 1974). LaFleur was a consolidation of two cases, the second involving a similar rule adopted by the school board of Chesterfield County, Virginia. Since the facts of the two cases were essentially similar, only LaFleur will be discussed in this Note.

47. Appendix at 173a (Deposition of Dr. Mark C. Schinnerer, April 13, 1971). See also 42 U.S.L.W. at 4189 n.9.

48. Brief for Petitioners at 19.
49. Id. at 7-11.
50. Id. at 12.
51. Finding that "there is a reasonable basis for the rule which distinguishes pregnant teachers from all other teachers," LaFleur v. Cleveland Bd. of Educ., 326 F. Supp. 1206, 1214 (N.D. Ohio 1971), the district court held that "the plaintiffs' burden of showing that the maternity leave of absence is arbitrary and unreasonable," 326 F. Supp. at 1214, had not been carried. The Sixth Circuit reversed, finding a violation of the plaintiffs' right to equal protection: "This record indicates clearly that pregnant women teachers have been singled out for unconstitutionally unequal restrictions upon their employment." LaFleur v. Cleveland Bd. of Educ., 465 F.2d 1184, 1188 (6th Cir. 1972).
parties as an equal protection case in briefs and oral argument at the Supreme Court level, Justice Stewart's majority opinion rested the decision squarely upon the due process conclusive presumption doctrine:

Even assuming arguendo that there are some women who would be physically unable to work past the particular cut-off dates embodied in the challenged rules, it is evident that there are large numbers of teachers who are fully capable of continuing work for longer than the . . . regulations will allow. Thus, the conclusive presumption embodied in these rules, like that in Vlandis, is neither "necessarily nor universally true," and is violative of the Due Process Clause.

Vlandis and Murry both involved statutes with the over-all purpose of distributing government largesse among a class of beneficiaries possessing certain characteristics. Both cases also involved statutory provisions designed to restrict the receipt of benefits to the intended class. The draftsmen sought to do this by defining, in a manner that could be easily administered, a class of individuals who were thought unlikely to possess the characteristics of the intended recipients. Thus, in Vlandis, those who applied for admission from outside the state were considered unlikely to be residents and unlikely to become residents during their attendance at the university. In Murry, tax-dependent households were believed unlikely to lack financial resources sufficient to purchase an adequate diet.


53. See Transcript of Oral Argument, Oct. 15, 1973 [on file at the Michigan Law Review]. The sole reference to due process in the case appears to have been the following exchange between Mrs. Picker, counsel for respondents, and Justice Stewart:

Q. Mrs. Picker, you have referred to the 14th Amendment. Do you view this case as exclusively involving the Equal Protection Clause?

MRS. PICKER: Yes, we do, Your Honor.

Q. You do not view it as involving the Due Process Clause at all?

MRS. PICKER: Well, Your Honor, we did not think to plead that originally, and I am not sure that that is particularly detrimental to our case. We have learned a lot since the pleadings were originally filed in this case. It was prior to Stanley of course, and indeed prior to Reed v. Reed. It seems to me as though we indeed had a violation here of Due Process as well as Equal Protection, but we did not plead it. And therefore we have not argued it.

Id. at 38.

54. As noted above, the Court also decided the Vlandis and Murry cases on grounds that were only scantily argued and briefed by the parties. See text accompanying notes 26-27 & 41 supra. The practice of the Court in these cases is certainly open to criticism. It is unfair to the parties in that they are not allowed to present arguments to the Court on the issue that the Court decides is controlling, and it is unfair to the Court itself because the Court loses the benefit of an issue's being briefed and argued before it. For one reaction to this type of judicial action, see Stanley v. Illinois, 405 U.S. 645, 659-62 (1972) (Burger, C.J., dissenting). In cases such as LaFleur a jurisdictional problem may be presented because review of federal courts of appeals' decisions "shall be restricted to the Federal questions presented . . . ." 28 U.S.C. § 1253(2) (1970).

55. 42 U.S.L.W. at 4190.
The regulation involved in *LaFleur*, on the other hand, did not restrict the receipt of government benefits but imposed a burden (involuntary and unpaid maternity leave) upon the class of teachers more than four months pregnant. This classification rested initially upon a moral judgment—pregnant teachers should not be seen by schoolchildren after they begin to “show”—but was later justified by an empirical assessment—most women who are four-months pregnant are unable adequately to carry out teaching duties.

In each case, the draftsmen might have sought to achieve the legislative purpose in limiting the class by writing that purpose directly into the provision. This method would seem sufficiently flexible to be immune from attack under the conclusive presumption doctrine, but it would give rise to at least two problems not present in the statutes as they were actually written. First, such provisions would give considerable discretion to those charged with administering the respective programs. With each administrator applying the broad language in light of his individual biases, the results would be uneven, thus denying equal treatment to those affected, and unpredictable, thus failing to provide adequate notice to those coming under the law. Second, they would be much more difficult and expensive to administer. It is, therefore, not surprising that the draftsmen chose instead, for reasons of consistency, predictability, convenience, and economy, to draw “bright lines.”

Yet, as the instant cases illustrate, and as the draftsmen of the provisions were no doubt aware, the use of such rules of thumb has

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56. Thus, for example, the Connecticut statute might have read: Students who intend to reside indefinitely in the state after graduation, or who have made significant past contributions to the state, shall be classified as residents for tuition purposes.


59. As the government argued in *Murry*:

[Appellees'] argument with respect to procedural due process is based on the erroneous premises that the basic eligibility criterion is “need” and that applicants should be entitled to demonstrate need notwithstanding their failure to satisfy other statutory requirements. But since “need” is not a concept which either by its nature or as a result of a long history of judicial consideration has a clearly ascertainable content, Congress wisely chose not to make “need” the statutory standard for food stamp eligibility. This decision reflected in part an awareness that the determination of “need” on a case-by-case basis would be administratively unworkable.

Reply Brief for Appellants at 11.

60. It was argued in debate on the House floor that the tax dependency provision was overinclusive: “In some ways the most surprising deficiency in the committee bill is its total failure to deal effectively with those who do not deserve food stamps benefits. It attempts to do this by denying stamps to many students and by imposing a work provision. Both of these, however, will hurt many innocent and deserving members of such households.” 115 Cong. Rec. 42026 (1970) (remarks of Representative Conte).
the vice of inaccuracy. Faced with the conflict between accurately selecting those who are intended to be burdened or benefited and drafting statutes that can be effectively administered, most legislatures are likely to strike a compromise. Instead of trying to reach all those who might conceivably come within the legislative intent, they are satisfied to reach most of those, if that can be done with a statute that will be reasonably consistent, predictable, convenient, and economical in administration.

The decision of precisely how much inaccuracy to tolerate in the name of effective administration involves the weighing of a number of factors. In addition to the administrative considerations, these factors include the seriousness of the problem that the limiting provision is intended to remedy and the degree of hardship suffered by those who are burdened or fail to receive a benefit. Thus, if the abuse of food stamps by nonneedy college students were great, a somewhat overbroad prophylactic countermeasure such as the tax dependency amendment might be easier to tolerate than it would be if the abuse were minimal. Similarly, if the degree of hardship on college students classed as nonresidents were small, it might be easier to tolerate an overinclusive nonresident category than it would be if the hardship were great. And, if most women teachers were indeed seriously incapacitated in the later stages of pregnancy, an overbroad leave requirement would be more palatable.

This balancing of interests might well be viewed as a decision within the legislative, rather than the judicial, competence. In any case, Vlandis, Murry, and LaFleur raise the basic constitutional issues of the degree of permitted legislative discretion in balancing the need for accuracy in apportioning governmental burdens and benefits against the need for line-drawing and sound administration, and of the proper role of the Court in supervising the exercise of this discretion.

I. Equal Protection: The Rejected Approach

As indicated above, the Vlandis and Murry cases were argued primarily on equal protection grounds and can easily be analyzed in equal protection terms. Both cases involved statutory provisions that established two classes of persons with respect to government benefits: nonrecipients (outstate applicants and tax dependent households) and recipients (instate applicants and non-tax dependent households that met other criteria). LaFleur, argued solely on equal protection grounds, is also susceptible of equal protection analysis. The school board regulation established two classes: the burdened (teachers more than four-months pregnant) and the nonburdened (all other teachers). While the intensity of judicial review may vary
depending on the nature of the case, the basic equal protection issue is whether these distinctions between classes are justified.

In construing the equal protection clause, the Supreme Court has developed a doctrinal pattern under which the intensity of judicial review alternates between two poles depending on the nature of the case. At the activist pole, statutes involving "fundamental interests" or "suspect classifications" are strictly scrutinized, while at the deferential pole, statutes involving social or economic matters are allowed to stand if they exhibit minimal rationality.

At least since Skinner v. Oklahoma,61 the Court has applied strict scrutiny to legislative classifications which impinge upon fundamental interests. Interests heretofore recognized as fundamental have been the right to procreate,62 the right to vote,63 the right to travel,64 and possibly some aspects of personal privacy.65 Strict scrutiny also applies when the legislation under review creates certain suspect classifications. Classifications are suspect when based on race,66 nationality,67 and alienage;68 probably suspect when based on illegitimacy69 and poverty (when poverty results in an absolute deprivation),70 and possibly suspect when based on sex.71

Strict scrutiny means that the ordinary presumption in favor of a statute's constitutionality72 is not entertained. Instead, the government is given the burden of demonstrating that a "compelling governmental interest" makes the particular classification necessary. Even if such a compelling interest is shown, the classification is not deemed necessary if the same interest could be furthered by less drastic means.73 Once the strict scrutiny test is invoked, the govern-

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71. Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality opinion).
ment is rarely able to carry its heavy burden. Thus, the choice of the mode of adjudication is often determinative of the outcome of the case.

In *Vlandis*, the appellees argued that the strict scrutiny standard was applicable due to an impingement on their right to travel. Relying heavily on *Shapiro v. Thompson* and *Dunn v. Blumstein*, cases that involved durational residency requirements for welfare benefits and voter registration, respectively, the plaintiffs urged that Connecticut's permanent, irrebuttable residency classification penalized bona fide residents who had recently moved into the state. While this argument is not without some merit, the Court apparently viewed the burden on interstate travel created by higher nonresident tuition rates as distinguishable from the burdens involved in *Shapiro* and *Dunn*, which were the total deprivation of welfare benefits and the right to vote, the latter itself a fundamental interest. In any event, the right to travel argument was not dealt with by the Court.

With the exception of Justice Marshall's concurrence in *Vlandis*, none of the opinions in *Vlandis* or *Murry* suggests that strict...
scrutiny was applicable. However, Justice Stewart’s opinion in *Vlandis* refers several times to the availability of “reasonable alternative means”\(^\text{82}\) with which to classify students as resident and non-resident, an approach highly reminiscent of the “less drastic means” aspect of strict scrutiny review, although raised in the context of due process rather than equal protection. This prompted Chief Justice Burger to note in dissent: “There will be, I fear, some ground for belief that the Court now engrafts the ‘close judicial scrutiny’ test onto the Due Process Clause whenever we deal with something like ‘permanent irrebuttable presumptions.’”\(^\text{83}\)

In *LaFleur*, the respondents argued both branches of the strict scrutiny doctrine. They urged that the right to bear and raise children was fundamental\(^\text{84}\) and that the rule in question established a classification based on sex, a suspect classification.\(^\text{85}\)

As to the plaintiffs’ fundamental right argument, the school board replied that the only right affected by the maternity-leave rule was “an asserted ‘right’ temporarily to be employed as a Cleveland school teacher while in an advanced stage of pregnancy.”\(^\text{86}\) The Court, however, appeared to recognize a possible impingement upon the rights “of personal choice in matters of marriage and family life”\(^\text{87}\) and stated that “[b]y acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of these protected freedoms.”\(^\text{88}\) Nevertheless, the Court did not use this impingement

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\(^{82}\) 412 U.S. at 451-52.

\(^{83}\) 412 U.S. at 462. A similar use of equal protection language in a due process case was made in *Roe v. Wade*, 410 U.S. 113 (1973), a landmark decision subsuming the right of a woman to have an abortion during the first trimester of pregnancy under the right of privacy. There the Court said that “[w]here certain ‘fundamental rights’ are involved, the Court has held that regulation limiting these rights may be justified only by a ‘compelling state interest.’” 410 U.S. at 155. Justice Rehnquist dissented:

“The Court eschews the history of the Fourteenth Amendment in its reliance on the ‘compelling state interest’ test . . . . But the Court adds a new wrinkle to this test by transplanting it from the legal considerations associated with the Equal Protection Clause of the Fourteenth Amendment to this case arising under the Due Process Clause of the Fourteenth Amendment. Unless I misapprehend the consequences of this transplanting of the ‘compelling state interest test,’ the Court’s opinion will accomplish the seemingly impossible feat of leaving this area of the law more confused than it found it.” 410 U.S. at 173.


\(^{85}\) Brief for Respondents at 28-41.

\(^{86}\) Brief for Petitioners at 16.

\(^{87}\) 42 U.S.L.W. at 4189.

\(^{88}\) 42 U.S.L.W. at 4189.
as a ground for invoking strict scrutiny but only to indicate a deprivation of liberty rendering the due process clause applicable. 89

The only reference by any member of the Court to the plaintiffs' sex classification argument is in a footnote to Justice Powell's concurrence, where he merely states that he does not reach the question. 90

Unlike the strict scrutiny standard, the traditional equal protection standard creates a strong presumption of constitutionality for legislation dealing with economic or social matters. 91 This standard puts the burden on the challenger to show that the statutory classification has no reasonable basis and enjoins the Court to assume any reasonably conceivable state of facts that could justify the classification. 92 Legislation of even the most tenuous rationality has been upheld under this standard. 93 Since this more restrained equal protection test has recently been held applicable to cases involving education 94 and welfare, 95 it would appear apposite to the Vlandis, Murry,

89. It should be noted that, although the right to bear children is somewhat affected by the maternity leave requirement, the impingement is at most temporary and indirect. Thus, Skinner v. Oklahoma, 316 U.S. 535 (1942), involving total deprivation of the right to procreate, is distinguishable. Perhaps the Court requires a direct and heavy burden before the fundamental right-equal protection line of argument can succeed, while only an indirect impingement suffices as a deprivation of liberty for due process purposes. Cf. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 19-22 (1973) (suggesting total deprivation of a right is necessary to trigger strict scrutiny).

90. 42 U.S.L.W. at 4193 n.2. There is also a question of whether LaFleur involved a classification based on sex in the first instance. The school board argued that the record is clear that the sex characteristic has nothing whatsoever to do with the mandatory maternity leave . . . . It has nothing to do with sex as such, but only when the condition of sex voluntarily creates another condition—pregnancy. Even then pregnancy is not the determining classification, but it is only when the time comes, on the basis of reasonable medical evidence and administrative necessity, that her pregnancy makes the school teacher physically disabled within the environment of the school classroom that the classification applies.


95. See cases cited in note 81 supra.
and LaFleur cases. However, under this standard it appears that the provisions involved would easily have been upheld.

As can be seen from the above discussion, the two-tiered system of equal protection is inflexible. Choice of which tier is applicable in a given case tends to predetermine the result. In the vast majority of cases, if strict scrutiny is applied, the legislation is struck down; if the minimum rationality standard is invoked, the legislation is sustained. Yet there are cases, such as Vlandis, Murry, and LaFleur, in which the Court may desire to intervene despite the presence of a rational basis for the statutory classification and the absence of a fundamental interest or suspect classification. Two approaches have been suggested that would permit a more flexible equal protection analysis.96

Professor Gerald Gunther has observed a trend in certain of the Supreme Court's recent decisions97 toward an "intensified means scrutiny," which would "close the wide gap between the strict scrutiny of the new equal protection and the minimal scrutiny of the old not by abandoning the strict but by raising the level of the minimal from virtual abdication to genuine judicial inquiry."88 Gunther denominates this middle tier the "newer" equal protection, which, he says, would "have the Court take seriously a constitutional requirement that has never been formally abandoned: that legislative means must substantially further legislative ends."99

This approach demands two prerequisites. First, a legislative purpose must be imputed to the statute apart from its operative language and its total effect. Otherwise, there would be no distinction between the legislative means (specifically, language and effect) and the legislative end. Second, the Court must be willing and able to engage in empiric "legislative" fact-finding in order to assess whether the means "substantially further" the ends.

In Vlandis and Murry, the Court was willing to find a purpose behind the provisions involved,100 since this was necessary before the conclusive presumption analysis could be applied.101 However, it

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99. Id. at 20.
100. See note 45 supra and text accompanying notes 28 & 55 supra.
101. Although Justice Douglas did not discuss the purpose of the food-stamp program in Murry, Justice Stewart, the author of Vlandis and LaFleur, did so in his concurrence. See note 45 supra. It is necessary for a court applying the test to impute a purpose to the statute other than that indicated by the operative statutory language. It
does not appear that data were available from which the efficacy of the means in furthering the ends could be established. Thus, the "newer" equal protection approach could not be applied, at least not in Gunther's sense of a "genuine judicial inquiry." In LaFleur, on the other hand, the substantial medical testimony\footnote{102} and literature\footnote{103} before the Court would have provided a basis for assessing the degree of disability encountered in late pregnancy. Moreover, Justice Powell, concurring in the result, appeared to apply a form of means-focused analysis. While purporting to apply "rational basis standards of equal protection review,"\footnote{104} his standard was stricter than the minimum rationality test. Rather than assuming any conceivable state of facts that could justify the classification, Justice Powell would have required that the regulations "rationally serve some legitimate articulated or obvious state interest."\footnote{105} Further, instead of placing the burden on the challenger to show the lack of a rational basis, Powell would have placed the burden on the school board:

The boards emphasize teacher absenteeism, classroom discipline, the safety of school children, and the safety of the expectant mother and her unborn child. No doubt these are legitimate concerns. But the boards \textit{have failed to demonstrate} that these interests are in fact threatened by the continued employment of pregnant teachers.\footnote{106}

Thus, Justice Powell, at least, would have been willing to invoke the "newer" equal protection in the \textit{LaFleur} situation. His means-focus is apparent from his conclusion: "I believe the linkage between the boards' legitimate ends and their chosen means is too attenuated to support those portions of the regulations overturned by the Court."\footnote{107}

In his concurrence with the \textit{Murry} opinion, Justice Marshall suggested an equal protection approach in which the interests involved in each case would be balanced in accordance with the "rudiments of fairness."\footnote{108} In Justice Marshall's view, the Court "must assess the public and private interests affected by a statutory classification and then decide in each instance whether individualized determination is required or categorical treatment is permitted by the Constitution."\footnote{109} Under this approach the weights given the conflicting interests is then possible for the reviewing court to conclude that the operative language conclusively presumes that the plaintiffs were not members of the class intended to be benefited.

\begin{itemize}
\item \footnote{102} See Appendix at 89a-187a.
\item \footnote{103} Brief for Petitioners at 41-66 (Exhibit A).
\item \footnote{104} 42 U.S.L.W. at 4193.
\item \footnote{105} 42 U.S.L.W. at 4193 n.2.
\item \footnote{106} 42 U.S.L.W. at 4193 (emphasis added).
\item \footnote{107} 42 U.S.L.W. at 4193.
\item \footnote{108} 413 U.S. at 519.
\item \footnote{109} 413 U.S. at 519. \textit{See also} San Antonio Independent School Dist. \textit{v. Rodríguez}, 411 U.S. 1, 97-110 (1973) (Marshall, J., dissenting).
\end{itemize}
ests must ultimately rest on the subjective assessments of the decision-maker; the approach may lack predictability and consistency, and may result in extensive policy-making by those least equipped to make such decisions. This approach may also allow vague, conclusory opinions, since no decision-making structure is imposed on courts; decisions may be obfuscated behind general "balancing" language. But balancing may have the advantage of requiring the Court to make explicit the policy choices it is now implicitly making under the "rationality" and "strict scrutiny" standards. While not without support, the balancing approach to equal protection does not appear to have the assent of a majority of the Court at present.

II. DUE PROCESS: THE CONCLUSIVE presumption APPROACH

Perhaps the Court rejected an equal protection analysis because of the difficulty of reconciling a holding of unconstitutionality in Vlandis, Murry, and LaFleur with traditional equal protection precedents. But the conclusive presumption doctrine, while serving as a safety valve to escape the rigidity of current equal protection doctrine, is not without substantial difficulties of its own.

Under equal protection two established and two developing approaches exist with which to analyze problems of inequality. Their formulations, to some extent even those of the newer ones, are fleshed out by a history of judicial decisions. The Supreme Court, instead of using the existing methods of analysis, adopted a highly questionable approach, with little help from counsel.

A. Deprivation of "Life, Liberty or Property": The Threshold Issue

The conclusive presumption doctrine has its source in the due process clauses of the fifth and fourteenth amendments. While this issue received little attention in Vlandis, and none at all in Murry, the language of the Constitution requires that due process be afforded only where there is a deprivation of "life, liberty or prop-


It is at least arguable that no such deprivation occurred in either *Vlandis* or *Murry*. (In *LaFleur* the Court found a deprivation of "liberty." 113)

It has recently been contended that "the clause applies whenever the state deals with an individual, so long as the interests threatened are not wholly frivolous." 114 Moreover, the Court has itself suggested that the test is "state action that adjudicates important interests." 115 However, in the recent case of *Board of Regents v. Roth*, 116 the Court gave substantive content to the concepts of "liberty" and "property" as used in the due process clauses. *Roth* involved the due process claim of a nontenured college teacher who had not been rehired at the conclusion of his one-year contract term. The college gave no reason for its failure to continue his employment, and the teacher, who believed that the reason was the exercise of his freedom of expression, demanded a due process hearing. The Court held the due process clause inapplicable since he had been deprived of neither liberty nor property. Conceding that the teacher's interest in continued employment may be an important one, the Court stated that "to determine whether the due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake." 117 The *Roth* Court's discussion of the "property" concept is of particular relevance to the *Vlandis* and *Murry* situations:

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus, the welfare recipients in *Goldberg v. Kelly* [397 U.S. 254 (1970)], had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so. 118

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113. See text accompanying note 88 supra.
117. 408 U.S. at 570-71 (emphasis original).
118. 408 U.S. at 577.
This reasoning would indicate that there was no deprivation of "property" in Vlandis or Murry. However, the appellees in Vlandis argued that they were deprived of property "through increased tuition charges,"119 and the Court apparently accepted this argument, stating that the "statute operated to deprive them of a significant amount of their money without due process of law."120

A more accurate description of the Vlandis situation would be that the state failed to accord the appellees the degree of educational subsidy that it granted to statutory residents. Viewed in this light, the issue is whether appellees had a property interest in this state subsidy. According to Roth, "[t]he Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits . . . . To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must, instead, have a legitimate claim of entitlement to it."121

Unlike the plaintiffs in Goldberg v. Kelly,122 who "had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them," the Vlandis plaintiffs made no claim to statutory entitlement. Rather, they freely admitted that, under the terms of the statute, they were classified as nonresidents. The statute itself, therefore, conferred no property right.

Looking to the "purpose" rather than the letter of the statute, it could be argued that there was an "understanding" that all persons with domiciliary intent should receive the resident-tuition subsidy. Plaintiffs might claim a property interest derived from this understanding. However, this interpretation of the legislative purpose would be closer to a "unilateral expectation" than to an "understanding." Because of the fluidity with which statutory purposes may be manipulated,123 they provide a rather unstable basis from which to derive a property interest. For example, it seems plain from the language and effect of the Connecticut statute that its purpose was not to provide a resident-tuition subsidy to all persons with domiciliary intent, but rather to provide the subsidy to most of those persons, to the extent that they could be ascertained with a minimum of administrative expense. If this was the purpose of the statute, then the legislative "understanding" included the possibility that some persons, including the appellees, would not receive the benefit despite their actual domiciliary intent.

119. Brief for Appellees at 53.
120. 412 U.S. at 452.
121. 408 U.S. at 576-77.
Turning to *Murry*, the Court's opinion nowhere mentions the property deprivation requirement, possibly because the issue was not raised by the government. In addition, the appellees did not attempt to show a deprivation of "property," but merely asserted that "(p)rocedural due process is applicable whenever governmental action denies or terminates an individual's rights or benefits." But, as in *Vlandis*, the plaintiffs admitted that they were ineligible for benefits under the statute. Indeed, such ineligibility was a necessary element of their constitutional challenge. If, as the government argued, they were actually eligible for food stamps, they would have had no standing to challenge the substance of the statute.

As in *Vlandis*, a basis for a claim of entitlement could be the purpose of the statute. One source for a purpose is the Food Stamp Act's "[c]ongressional declaration of policy," which states that the objective is to "raise levels of nutrition among low-income households." But this objective can be achieved without providing food stamps to all needy households. Another possible source of the statutory purpose is the provision for eligibility standards, which are designed to limit the program "to those households whose income and other financial resources are determined to be substantial limiting factors in permitting them to purchase a nutritionally adequate diet." But this provision is, at least on its face, an "understanding" only that households with sufficient resources should not get food stamps. Only by negative inference can it be said that households with insufficient income should get relief, and another large step is required to find a congressional intent that all such households should get relief. Again, Congress may well have been content to reach most such households.

If the appellees in *Vlandis* and *Murry* could take little comfort in either the express language of the statutes or in their legislative purposes, an additional source of an "understanding" on which to base a property right might be the equal protection clause. Thus, the appellees might argue that the equal protection clause guarantees that all persons similarly situated will receive similar benefits; therefore, if others sufficiently like them were given food stamps or a higher tuition subsidy, there was an understanding that the appellees would have received similar treatment.

124. Brief for Appellees at 62 n.*.
125. Brief for Appellants at 5-6 n.3. See also 413 U.S. at 521-22 (Blackmun, J., dissenting).
126. If they were eligible under the statute, plaintiffs could not claim they were personally "aggrieved in fact" by the substance of the statute. See Sierra Club v. Morton, 405 U.S. 727 (1972); Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970). Rather, their injury would stem from an improper administrative application.
lee should have these benefits as well. To the extent that the equal
protection clause and the concept of equality implicit in the fifth
amendment place a duty on the state and federal governments to
act equitably in their distributive roles,129 there is a correlative right
in the citizenry to these benefits.

There may be three problems with this argument. First, there is
the Roth Court's statement that "[p]roperty interests ... are not
created by the Constitution."130 This statement, however, refers to
the due process clause and appears to stand only for the proposition
that procedural due process, by itself, does not create rights but
merely protects already existing rights. The right to equal treatment
in disbursements of governmental benefits would be an already
existing right.

Second, the Court has often recognized that the equal protection
clause does not demand "mathematical nicety" in apportioning social
benefits.131 However, it would seem that any deviation from equality
would be a deprivation. The question of whether it was justified, due,
for example, to administrative convenience or the difficulty in struc-
turing precise classifications, would be resolved in determining
whether the denial of the property interest was justified.

The third criticism of this approach seems more serious than the
others. If these cases are to be analyzed in part under the equal pro-
tection clause, it is conceptually cleaner to approach them in terms
of the already established equal protection doctrine, which has grad-
ually developed to deal with problems of equal treatment, rather
than by a circuitous route through the due process clause.

An application of the concept of equality might also lend itself
to classifying the interest involved as "liberty." The due process
clause does protect liberties, and liberties are created by the consti-
tution. One of the great liberties in any just society is a right to
equal treatment in governmental disbursements of benefits and lia-
bilities.132 But, again, a procedural due process approach seems inap-
propriate, as there is a time-tested method for dealing with this
problem—the equal protection concept.

Another possible interpretation of Vlandis and Murry is that they
indeed stand for the proposition that due process is required when-
ever the state deals with an individual so long as the interests threa-
tened are not wholly frivolous. This would erode Roth and, like the
application of equality concepts, significantly expand the definition of
"life, liberty, or property" for due process purposes. Prior due process

130. 408 U.S. at 577.
cases have involved deprivations in the sense of taking a person’s life,\textsuperscript{133} taking away some form of liberty,\textsuperscript{134} taking away something the individual had privately acquired,\textsuperscript{135} withdrawal of governmental benefits from persons who claimed statutory entitlement,\textsuperscript{136} or suspension of a governmental privilege already acquired.\textsuperscript{137} \textit{LaFleur} is not greatly different from these cases, but \textit{Vlandis} and \textit{Murry} appear to be the first cases in which the Court has held the due process clause applicable to the failure to confer governmental benefits on individuals who admittedly had no entitlement under the terms of the statute.\textsuperscript{138} This significant expansion of due process protection, unfortunately, was made without the help of briefs on the issue and was never directly addressed in the opinions.

B. The Procedure-Substance Distinction

Due process cases are conventionally divided into “procedural” and “substantive” cases.\textsuperscript{139} The two approaches are distinguishable in three important respects.

First, there is a difference in function. Procedural due process typically deals with the enforcement of public policy as determined by the legislature and expressed by statute.\textsuperscript{140} It requires that persons who are deprived of life, liberty, or property by the law be given reasonable notice and a fair hearing.\textsuperscript{141} It is basically a guarantee against arbitrary exertions of executive and judicial power.\textsuperscript{142} Substantive due process, on the other hand, functions as a check on the legislative formulation of policy and calls into question the em-

\begin{itemize}
\item \textsuperscript{133} E.g., Griffin v. California, 380 U.S. 609 (1965) (death penalty).
\item \textsuperscript{134} E.g., Griswold v. Connecticut, 381 U.S. 479 (1965) (privacy); Gideon v. Wainwright, 372 U.S. 335 (1965) (incarceration).
\item \textsuperscript{135} E.g., Stanley v. Illinois, 405 U.S. 645 (1972) (custody of children); Heiner v. Donnan, 285 U.S. 312 (1932) (taxation).
\item \textsuperscript{137} E.g., Bell v. Burson, 402 U.S. 535 (1971) (driver’s license).
\item \textsuperscript{138} This statement may not be strictly accurate if Shapiro v. Thompson, 394 U.S. 618 (1969), is taken into account. While decided according to the equal protection strict scrutiny standard, \textit{Shapiro} involved due process to the extent that a District of Columbia provision was invalidated, since equal protection is applicable to the federal government only by way of the fifth amendment due process clause. Bolling v. Sharpe, 347 U.S. 447 (1954). But the Court clearly considered \textit{Shapiro} an equal protection rather than a due process case, and, in addition, the statute was held to impinge upon the right to travel, so that a deprivation of “liberty” was involved.
\item \textsuperscript{139} A. BICKEL, \textit{The Least Dangerous Branch} 233 (1962).
\end{itemize}
prirical basis for, or the propriety of adopting, certain measures. Thus, it guarantees against arbitrary exertions of legislative power.143

Second, there is a difference in compatibility with the judicial role. Since courts have daily experience with the conduct of trials and the administration of justice, the setting of procedural standards is within the judicial sphere of competence, and decisions in this area may more readily receive public acceptance.144 Judicial intrusions into the substantive policy-making area, on the other hand, are likely to be viewed as disregard for the separation of judicial and legislative functions.145 This separation of powers is fundamental to a majoritarian system of government, which assumes that it is preferable to have policy set by elected and responsible legislators rather than by appointed judges.146 In addition, policy-making in the legislative halls allows for a greater input by different societal factions than does decision-making in judicial chambers. There is also a practical advantage: Legislatures may have superior institutional provision for factual input on broad policy questions.147

Third, as a consequence of the above two differences, there has developed a difference in standard of review. In procedural due process cases the Court has openly espoused a balancing test. For example, the Court in Goldberg v. Kelly formulated the test as follows: "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' . . . and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication."148 While a balancing test was once in vogue in substantive due process cases as well,149 the Court more recently has left the balancing of policy considerations to the legislative branch, adopting a substantive due process stan-

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143. A. BICKEL, supra note 139, at 233.
144. Ratner, supra note 140, at 1064-65.
146. A. BICKEL, supra note 139, at 18-20. See also Commager, Judicial Review and Democracy, in JUDICIAL REVIEW AND THE SUPREME COURT 64, 72-73 (L. Levy ed. 1967).
cies.").
148. See Comment, supra note 110, at 807; "The pre-1937 Court's approach to interpreting the vague provisions of the due process clauses may best be characterized as a 'balancing' of the burden imposed on a person's life, liberty or property by governmental regulation against the governmental justifications for the burdens." See also Ratner, supra note 140, at 1071.
standard of extreme deference to the legislatures\textsuperscript{160} and actively reviewing only legislation dealing with the right of privacy.\textsuperscript{161} As with two-tiered equal protection, this approach is a recognition of the judiciary's limited competence in dealing with broad social and economic policy considerations.\textsuperscript{162}

The appellees in \textit{Vlandis} and \textit{Murry} clearly couched their due process arguments in procedural terms.\textsuperscript{163} In \textit{Murry}, the appellees argued that "a conclusive statutory presumption, that may be erroneous, and adversely affects the rights of persons, is violative of procedural due process."\textsuperscript{164} In \textit{Vlandis}, the appellees claimed that "[t]he deprivation of a state provided entitlement such as education must be accompanied by the procedural due process required by the Fourteenth Amendment."\textsuperscript{165}

The Court in each case simply referred to "due process," omitting a label of either substantive or procedural. In certain respects, however, the Court employed a procedural analysis. For example, the cases cited are primarily procedural.\textsuperscript{166} Furthermore, the very term "conclusive presumption" suggests that the cases turn on a matter of procedure, as does the following language from the \textit{Vlandis} opinion: "[S]tandards of due process require that the State allow such an individual the \textit{opportunity to present evidence} showing that he is a bona fide resident entitled to the in-state rates."\textsuperscript{167} And Justice Marshall, in his \textit{Vlandis} concurrence, stated that the case concerned "nothing more than the \textit{procedures} by which the State determines whether or not a person is a resident for tuition purposes."\textsuperscript{168}

Yet, despite this language of procedure, other language used by the Court is more reminiscent of the substantive rational relation

\begin{footnotes}
\item[152] See \textit{Ferguson v. Skrupa}, 372 U.S. 726 (1963); authorities cited in note 147 supra.
\item[153] No due process claim was made in \textit{LaFleur}. See note 53 supra. The \textit{LaFleur} respondents did use the phrase "irrebuttable presumption" in their brief, see Brief for Respondents at 51, but not in connection with a due process argument. On the government side in \textit{Vlandis} and \textit{Murry}, the due process issue was either wholly ignored or casually dealt with in a few paragraphs. See notes 26 & 41 supra. In \textit{Murry}, for example, the government dismissed the due process argument as "nothing more than a restated equal protection argument in disguise." Reply Brief for Appellants at 10.
\item[154] Brief for Appellees at 65.
\item[155] Brief for Appellees at 87.
\item[156] The Court relied both in \textit{Vlandis}, see 412 U.S. at 446, 451, and in \textit{Murry}, see 413 U.S. at 513-14, on such cases as \textit{Bell v. Burson}, 402 U.S. 535 (1971), and \textit{Stanley v. Illinois}, 405 U.S. 645 (1972), both of which have been referred to elsewhere by the Court as procedural due process cases. See, e.g., \textit{Board of Regents v. Roth}, 408 U.S. 564, 572 nn.10-11 (1972).
\item[157] 412 U.S. at 432 (emphasis added).
\item[158] 412 U.S. at 435 (emphasis added).
\end{footnotes}
test than of the procedural balancing standard. In Vlandis, the Court characterized the statute involved as “wholly unrelated”160 to the state’s objective and as “arbitrary.”160 In Murry, the statutory provision was said to have “no relation”161 to its purpose of determining need and not to be a “rational measure”162 of a household’s need. Thus, the opinions lack the internal consistency necessary to classify the Court’s approach as either procedural or substantive due process.

The Vlandis and Murry cases appear in fact to be purely substantive in nature. First, the appellees admitted that the relevant statutory provisions had been properly applied. Rather than challenging the procedures of application, they, in effect, challenged the legislative fact-finding and demanded that new issues be made relevant.163 In essence, the Court required that the states extend benefits to those in the appellees’ class; in procedural cases the Court does not expand the class of people entitled to receive the benefit but only deals with what procedures are necessary when affecting that interest.

Second, to the extent that it was the policy of the legislature to further administrative values by narrowly defining the relevant issues, the Vlandis and Murry decisions were substantive in their conclusion that a more closely tailored selection process outweighed the policies of consistency, predictability, economy, and convenience.

In sum, the Vlandis and Murry opinions generated a degree of analytic confusion by their failure to distinguish between procedural and substantive due process. While the opinions were framed in language suggesting procedure (for example, “conclusive presumption”), the basic issue was one of substantive policy. Further, the Court employed language suggesting a “rational relation” standard, which has been associated in recent cases with substantive, but not procedural, due process.

Dissenting in both Vlandis and Murry, Justice Rehnquist char-

159. 412 U.S. at 441, 449, 450.
160. 412 U.S. at 450.
161. 413 U.S. at 508, 514.
162. 413 U.S. at 508, 514.
163. 413 U.S. at 508, 514. In Murry, for example, appellees argued that “the tax dependency provision was enacted because Congress presumed that any household containing a member who had been claimed as a ‘tax dependent’ for the prior year—had sufficient current income and resources ‘to purchase a nutritionally adequate diet. . .’” Brief for Appellees at 58. They proceeded to argue that this presumption was “very frequently erroneous,” id. at 60, and demanded that they be permitted to demonstrate “that adequate food resources are not available to them,” id. at 71, charging, in effect, that Congress had made the wrong issue relevant to its objective of determining need.

Similarly, the appellees in Vlandis urged that the legislature had omitted a significant issue: “The statutory scheme in this case excludes the important factor of residency from the state’s determination to deprive or grant the state provided entitlement in issue [i.e., the instate tuition subsidy].” Brief for Appellees at 51.
acterized the cases as examples of substantive due process in the now-discredited sense of the term. The judicial role connoted by "substantive due process" is illustrated in such pre-1937 cases as *Lochner v. New York* and *Coppage v. Kansas*. In *Lochner*, the Court held a New York statute that limited employment in bakeries to a maximum of sixty hours per week and ten hours per day to be an unconstitutional denial of liberty of contract under the due process clause. In *Coppage*, the Court struck down on similar grounds a Kansas statute outlawing "yellow dog" contracts—labor contracts that made refraining from joining a union a condition of employment. These cases and others of their era involved a judicial assessment of the social or economic wisdom of particular governmental regulation of business within the context of a Constitution assumed to embody the principle of laissez-faire and to imply a very active policy-making function for the Court.

An analogous judicial role in *Vlandis* or *Murry* would seem to require greater intrusions into the policy sphere than in fact took place. In these cases, the Court did not intrude into the legislative decisions to grant a higher tuition subsidy to residents than to nonresidents, and to operate a food-stamp program for needy households. The extent of the Court's substantive intrusion was to dictate that the purpose be to reach all similarly situated beneficiaries, not just most, as the legislature probably intended, and to require that greater administrative expense be allowed if necessary to effectuate the goal more accurately. In fact, the Court held the basic goal so important that it required it to be even more accurately carried out than the legislature intended. As the Court was only finely tuning the distribution mechanism, not reassessing the total program, Justice Rehnquist's comparison of these cases with the "substantive due process" era may be somewhat exaggerated.

C. Means Orientation

Nevertheless, the Court's substantive role in *Vlandis, LaFleur,* and *Murry* is not without some difficulty. If the Court's "rational..."
relation” language was intended to imply that the modern, deferential, substantive due process standard as formulated in such cases as Ferguson v. Skrupa169 was being applied, then that standard has been given new teeth in the instant cases. The judicial deference that the Ferguson standard embodies is markedly lacking. As Justice Rehnquist stated with regard to the Murry decision: “To be sure, there may be no perfect correlation between the fact that the taxpayer is part of a household which has income exceeding food stamp eligibility standards and his provision of enough support to raise his dependent’s household above such standards. But there is some correlation, and the provision is, therefore, not irrational.”170

The Vlandis, LaFleur, and Murry decisions may represent a middle ground between the “old” substantive due process of the Lochner era and the “new” substantive due process of the Ferguson variety. While the wisdom of the basic legislative policy was not challenged, the accuracy of the means adopted to effectuate that policy was held inadequate. Thus, the instant cases may parallel, in the due process area, the “means-focused” standard that Professor Gunther has perceived in recent equal protection cases.171

Any means-focused approach has substantial problems, however. It presupposes that a reasonably clear ends/means distinction can be drawn, specifically, that it is possible to identify the legislative “purpose” and then independently judge the rationality of the means employed to put that purpose into effect. If the purpose of any statute is taken to be coextensive with its language or practical effect, then ends and means merge, and the legislation is by definition perfectly “rational.” Only if a purpose is imputed to the legislature beyond the face of its statute can the issue of the rationality of the means have any relevance. Yet, once this stage of imputing a purpose is reached, the Court can define it in such a way that practically any degree of “rationality” can be achieved. Was the purpose in Vlandis, for example, to grant a higher tuition subsidy to all students with domiciliary intent, as the Court apparently assumed, or was it to reach as many such students as possible, consistent with an easily administered standard, or was it to subsidize only the narrow class of students with substantial relationships with the state? All have some plausibility, yet the first “purpose” would obviously make the standard adopted appear less rational than the others.

A second problem with the means-focused approach, as noted earlier, is the necessity of empiric, “legislative” fact-finding by the Court. Thus, if the Court in Vlandis decided that the legislature’s purpose was to grant higher tuition subsidies to all students with

170. 413 U.S. at 525.
171. See Gunther, supra note 98, at 26-30.
domiciliary intent, it would still have to determine whether the statutory definition of nonresident as one whose address was outside the state at the time of application "substantially furthered" that purpose. Statistical data would be required to determine whether the vast majority of out-of-state applicants lacked domiciliary intent and continued to lack domiciliary intent throughout their attendance at the university. If so, then the statutory means would presumably be "rational."

Such data were, of course, not available to the Court in Vlandis. Perhaps for this reason the Court appeared to demand perfect congruence between the statutory classification and the legislative purpose it was designed to effectuate, holding the classification "irrational" since it was not "necessarily or universally true in fact." 172 A means-focused approach with such a strict standard of "rationality" raises problems of practical government. As Professor Brest has observed, "[T]o refuse to allow departures from congruence to be justified in terms of efficiency . . . would increase the costs of governmental regulation so as to price most regulation out of existence." 173

A final problem with the strict means-focused approach is that legislators draft bills within budgetary constraints. The operative, classificatory language is often an attempt to strike a balance between those whom the legislators feel the state can afford to benefit and all those who may possibly or marginally deserve some help. The use of broad classifications is a tool for accomplishing this goal. A reviewing court is, of course, under no such constraint and may fail to consider the state's budgetary problems.

D. Analytical Difficulties

Perhaps the most serious defect in the conclusive presumption doctrine is that it rests upon a disingenuous, misleading analysis. It has long been recognized that there cannot be a conclusive "presumption," at least if the term is used to refer to an evidentiary burden-shifting device. 174 When a statute provides that certain consequences shall flow from fact A and then provides that from proof of fact B the existence of fact A shall be conclusively presumed, the practical effect is to make fact A irrelevant. The same result would be achieved by making the statutory consequences turn directly on fact B. The only genuine constitutional question in this situation is whether it is permissible to derive the given consequences from

172. 412 U.S. at 452.
173. P. Brest, supra note 147, at 563.
fact B. A procedural due process claim based upon a supposed right to present evidence of fact A is no more warranted than a claim concerning any other irrelevant issue. While it might be esthetically more pleasing for the legislature to say what it means—formulating the provision directly in terms of fact B, instead of resorting to the fiction of a conclusive presumption—this stylistic flaw violates no one's procedural rights.

Two early cases in which the conclusive presumption doctrine was invoked involved at least this statutory cosmetic defect. Schlesinger v. Wisconsin\textsuperscript{175} and Heiner v. Donnan\textsuperscript{176} dealt with provisions for the taxation of gifts that conclusively presumed that gifts made within a certain fixed period\textsuperscript{177} prior to the donor's death were made "in contemplation of death." Fact A in these statutes was the intent of the donor to give in contemplation of death. Fact B was the completion of the gift within the statutory period before death. The practical effect was to impose tax at a certain rate upon all gifts made within the statutory period. The actual donative intent was made irrelevant.

The real constitutional issue in these cases was whether it was permissible to impose a tax upon all gifts made within a certain period regardless of the donor's intent, when the legislative purpose was to eliminate estate tax evasion in the form of de facto testamentary gifts disguised as inter vivos transfers. The statutes did, of course, create overinclusive burdening classifications to the extent that some gifts made within the statutory period were genuine inter vivos gifts, that would otherwise be taxed at a lower rate or not taxed at all. Thus, an equal protection argument could have been made, through with little chance of success under the then-prevailing standard.\textsuperscript{178}

The Heiner Court, however, saw the issue as that of a litigant's "right to prove the facts of his case."\textsuperscript{179} The Court failed to explain how facts irrelevant under the statute could be considered "the facts of his case" and asserted merely that "whether the [conclusive] presumption be treated as a rule of evidence or of substantive law, it constitutes an attempt, by legislative fiat, to enact into existence a fact which here does not, and cannot be made to, exist in actual-

\textsuperscript{175} 270 U.S. 230 (1926) (McReynolds, J).
\textsuperscript{176} 285 U.S. 312 (1932) (Sutherland, J).
\textsuperscript{177} In Schlesinger, the period was six years; in Heiner, two years.
\textsuperscript{178} The Court had held in 1911 that "[a] classification having some reasonable basis does not offend [the equal protection] clause merely because it is not made with mathematical nicety or because in practice it results in some inequality," and that "if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed." Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).
\textsuperscript{179} 285 U.S. at 329.
The reasoning of the Heiner case has been severely criticized by Professor Morgan, who remarked that "[i]t would require very efficient mental blinders . . . to conceal from the intellectual vision the very evident purpose of the enactment to impose a tax upon all gifts made within two years of the death of the donor." 181

If the conclusive presumption analysis was inappropriate in Schlesinger and Heiner, it was even less appropriate in Vlandis, Murry, and LaFleur. The tax statutes in the earlier cases at least appeared on a superficial reading to make one fact relevant and then foreclose the taking of evidence on that fact. In contrast, the provisions in the instant cases were written directly in terms of the operative fact B, to continue the abstract example. Fact A is only to be found in the hypothetical purpose of the statutes. It is difficult to find anything resembling a "conclusive presumption" in the language of either the Connecticut tuition statute, the tax dependency amendment to the Food Stamp Act, or the maternity leave rule. Thus, in Vlandis the Court found the legislative purpose to be to charge higher tuition to nonresidents, and the Connecticut legislature was said to have conclusively presumed that all out-of-state applicants were and remained nonresidents. In Murry, the Court found the purpose to be to provide food stamps to all needy households, and Congress was said to have conclusively presumed that all tax-dependent households were not needy. In LaFleur, the Court found the purpose to be to grant leave to disabled teachers, and the school board was said to have conclusively presumed that all women more than four-months pregnant were incapable of teaching.

On this analysis, of course, every statute could be said to presume conclusively that its classification is accurate in light of its purpose in every case. Some examples of how widely this conclusive presumption analysis could be applied will be examined in the next section. But it might be wrong to suppose that the Court is misled by its own analysis. That the conclusive presumption doctrine fulfills a particular need can be seen by viewing the cases in which it has been applied.

The conclusive presumption doctrine has been applied exclusively in cases that involved overinclusive burdening classifications. 182 This means that all of the cases were amenable to an equal protection analysis. Yet, with two exceptions, 183 none was expressly decided on

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180. 285 U.S. at 329.
182. See cases in notes 1-2, 4, 6-10 supra.
equal protection grounds, perhaps because equal protection prece-
dent would have led to sustaining the legislation.

The Court was not disposed to sustain the legislation, as the
results in the conclusive presumption cases demonstrate. One pos-
sible explanation is that most of the cases have involved burdens
that worked a particular hardship on the individuals involved. Thus,
in *Stanley v. Illinois*, a father's children were taken away; in *Bell
v. Burson*, a traveling country parson's driver's license was sus-
pended; in *Murry*, impoverished households were denied food stamp
relief; and in *LaFleur*, teachers were required to take unpaid leave.
The hardship nature of these cases may have emphasized the need
for an escape from rigid equal protection doctrine. This way of
limiting the cases seems reasonable as statutes dealing with impor-
tant personal interests should be precisely drawn. It does not, how-
ever, explain *Vlandis*, which does not appear to deal with similar
hardship.

E. An Appraisal of the Technique

If the doctrine is to be manageable any future use must be
limited to its past role as a hardship exception to established equal
protection precedent. The *Vlandis* opinion, however, implies that
a "permanent and irrebuttable presumption," that is, a statutory
classification, might be unconstitutional whenever "that presump-
tion is not necessarily or universally true in fact, and when the State
has reasonable alternative means of making the crucial determina-
tion." If this language is taken at face value, the doctrine may be
widely applicable indeed, for the statutory presumption that is
"necessarily or universally true in fact" is extremely rare. And, if
the means available to the state for a case-by-case determination of
college students' domiciliary intent are "reasonable," then it would
seem that no issue of fact would pose too great an administrative
burden under the *Vlandis* standard. Chief Justice Burger marshalled
a parade of horribles:

[L]iterally thousands of state statutes create classifications permanent
in duration, which are less than perfect, as all legislative classifica-
tions are, and might be improved on by individualized determina-
tions so as to avoid the untoward results produced here due to the

the Court rejected a conclusive presumption challenge to a Federal Reserve Board regu-
lation that provided for disclosure of finance charges in any consumer sale payable in
more than four installments. The challenger, a large corporation, was threatened by
no hardship.
187. 412 U.S. at 452.
very unusual facts of this case. Both the anomaly present here and
the arguable alternatives to it do not differ from those present when,
for example, a State provides that a person may not be licensed to
practice medicine or law unless he or she is a graduate of an accred-
ited professional graduate school; a perfectly capable practitioner
may as a consequence be barred “permanently and irrefutably”
from pursuing his calling, without ever having an opportunity to
prove his personal skills.\

One example of a statute amenable to “conclusive presumption”
analysis would be the debt-adjusting law upheld in Ferguson v.
Skrupa. The Kansas legislature had precluded laymen from the
business of debt-adjusting, although lawyers were not so precluded,
on the presumption that “financially distressed debtors require ‘debt
adjustment’ services and advice which no layman, . . . however
honest, can possibly supply.” Despite this conclusive presumption
that no one who had not been admitted to the bar was competent
to engage in debt-adjusting, the Supreme Court sustained the statute
against both due process and equal protection challenges, stating
that it had “returned to the original constitutional proposition that
courts do not substitute their social and economic beliefs for the
judgment of legislative bodies, who are elected. . . .” Yet, under the
Vlandis standard, this statutory presumption seems far from “universally or necessarily true in fact,” since many experi-
enced debt adjustors surely have as much competence to engage in
that business as the average lawyer. Moreover, “reasonable alternative means” are available to the state in the form of licensing and
regulation of the debt-adjusting trade. Since competence to engage
in debt-adjusting could be measured by objective tests, it would
seem easier to determine than a college student’s domiciliary intent.
In terms of the individual impact, the individuals who were forced
to give up their livelihood by the Kansas statute surely suffered
greater hardship than the Vlandis appellees, who paid higher tuition
rates but were able to remain in school and did receive some state
subsidy. As Justice Rehnquist stated in his Vlandis dissent: “The
Court’s highly abstract and theoretical analysis of this practical
problem leads to a conclusion that is contrary to the teaching of
Ferguson . . . .”

The conclusive presumption analysis can also be applied to in-

188. 412 U.S. at 462.
191. Brief for Appellant Sanborn at 11.
192. 372 U.S. at 730.
193. 412 U.S. at 468.
come cut-offs for welfare eligibility. For example, at the time of
Murry a federal regulation precluded five-member households with
income over 440 dollars per month from receiving food stamps.194
It was thus conclusively presumed that such households had sufficient
income to purchase a nutritionally adequate diet. Yet, a five-member
household with income of 450 dollars per month could claim that,
due to special dietary requirements, this presumption was not “nec-
essarily true in fact.” Under Vlandis and Murry, the household
would appear to have a constitutional right to a due process hearing
on its actual need.195 There might seem to be little additional ad-
inistrative burden in making an exception to the strict income
cut-off for individual circumstances such as special dietary require-
ments. Yet, once exceptions to this “bright line” statute are per-
mitted, it would be difficult to limit their scope. Eventually, it
would be necessary to consider the entire range of special individual
circumstances, until the actual food needs of each household were
determined. One obvious example would be the age, size, sex, and
other factors influencing the caloric intake of each child in the
household. There is certainly a difference between a “five-member
household” with one adult and four pre-school children and a
household with two adults and three teen-age boys. Yet, under the
food stamp program, both households are conclusively presumed to
have the same level of need if they have the same income.

Another example of the kind of statute susceptible of conclusive
presumption analysis is the traffic speed limit. The purpose behind
a speed limit is usually to help ensure safe driving; if a speed limit
is set at 25 miles per hour on a certain street, it is thus conclusively
presumed that driving above that speed is unsafe.196 The ticketed
driver will assuredly not be heard to argue that, while he was driv-
ing at 35 miles per hour, he was driving safely under the prevailing


195. Indeed, a very similar example was used by the government in Murry in op- position to appellees’ motion for a temporary restraining order in federal district court:
“There are a lot of people in the country, I think, who may or may not be needy, to
whom food stamp relief is not available . . . . Who is to say $400 is enough, as opposed
to $399 a month? That one dollar does not make the difference between being needy
or not. Congress has to make limits.” Oral argument before Gesell, J., Hearing on
Motion for Temporary Restraining Order, July 19, 1972, quoted in Brief for Appellees
at B-10.

196. That this example is not as far-fetched as it first appears is shown by the case
of O’Donnell v. Wells, 323 Mo. 1170, 21 S.W.2d 762 (1929), in which an ordinance de-
clared that a rate of speed in excess of 25 miles per hour for a distance of one city
block should be considered proof of driving at a rate of speed that was not careful or
prudent. The Missouri supreme court struck down that ordinance under the conclusive
presumption doctrine and held that, while the legislature may provide that proof of a
certain character shall be prima facie evidence of a fact sought to be established, it can-
not prescribe what shall be conclusive evidence of that fact. While the court asserted
that the ordinance “does not fix a speed limit,” 323 Mo. at 1179, 21 S.W.2d at 765, it is
difficult to perceive more than a semantic distinction.
conditions. But this argument seems perfectly consistent with the rationale of *Vlandis* and *Murry*, and, if that rationale were widely applied, every speed limit in the United States would be unconstitutional. A "reasonable alternative" to speed limits is available—leaving the assessment of whether certain driving is unsafe to the discretion of the traffic policeman. Another possibility is to make speeding only prima facie evidence of unsafe driving and, therefore, permit the driver to introduce evidence that he was driving safely. Moreover, since a certain number of speeding convictions can result in the suspension of one's driver's license, the individual impact is similar to that involved in the *Bell* case.

A final example from among the "literally thousands" of statutes creating conclusive presumptions is section 16(b) of the Securities Exchange Act of 1934.\(^{197}\) This section conclusively presumes that, when a corporate director, officer or shareholder of over ten per cent of the stock buys and sells securities of his corporation within a six-month period, he is trading on inside information. Thus, even if a corporate "insider," as statutorily defined, can prove that he had absolutely no access to inside information, he is still given no opportunity to rebut this presumption.\(^{198}\) Moreover, the impact of a violation on the individual can be very significant; as stated by Chief Judge Learned Hand in *Gratz v. Claughton*,\(^{199}\) "[t]he crushing liabilities which Sec. 16(b) may impose are apparent from this action in which the judgment was for over $300,000; it should certainly serve as a warning, and may prove a deterrent."\(^{200}\) Reasonable alternative means are available to the government; the defendant could simply be allowed at his trial to show his lack of access to inside information.\(^{201}\) The burden of proving a negative may be heavy, but it is not as heavy as completely foreclosing the opportunity to present evidence.\(^{202}\) If it is too heavy, the burden could be placed


\(^{198}\) See Munter, *Section 16(b) of the Securities Exchange Act of 1934: An Alternative to " Burning Down the Barn in Order to Kill the Rats, "* 52 Cornell L.Q. 69, 90 (1966). But see Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582 (1973), and *Gold v. Sloan*, 486 F.2d 340 (1973) (defendant not liable under section 16(b) where he did not have access to inside information; restricted to noncash, "unorthodox" transactions, such as mergers), both discussed in Note, *Insider Liability for Short-Swing Profits: The Substance and Function of the Pragmatic Approach*, 72 Mich. L. Rev. 592 (1974).


\(^{200}\) 187 F.2d at 52.

\(^{201}\) For a proposed change in section 16(b) to allow the defendant to present rebuttal evidence on the issue of possession of inside information, see Munter, *supra* note 198, at 101.

\(^{202}\) Munter, *supra* note 198, at 94.
on the government to prove access to inside information; the government must already prove actual access in actions for insider trading under rule 10b-5. While it may be argued that section 16(b) gives adequate warning to corporate insiders, who can avoid liability under the section by waiting six months between trades, a similar opportunity to comply with the statute was available to the plaintiffs in Vlandis; They would have been classed as residents if they had moved to Connecticut before applying for admission, While a move that far in advance of the school semester may have been financially burdensome, it may be more costly for a corporate insider to hold securities for six months in a falling market.

The four examples cited above illustrate the fact that "conclusive presumptions" pervade the legal system, running the gamut from occupational licensing and welfare eligibility to traffic laws and securities regulation. None is likely to be "necessarily or universally true in fact," and "reasonable alternative means" in the Vlandis sense of an individual determination will almost always be available to the state. Given the minimal degree of individual impact of the rigid classification and the large additional administrative burden involved in a case-by-case determination in the Vlandis situation, it is difficult to see how the conclusive presumption doctrine in its most recently enunciated form can be limited.

The doctrine has substantial difficulties that render it unsuitable as a mode of constitutional adjudication. Since most statutes are "conclusive presumptions" and none is "universally true," the Supreme Court's test provides no guidance as to when the doctrine is to result in invalidation. The approach, in essence, merely consists in the Court's conclusory declaration that the statute in question is an unacceptable conclusive presumption.

If the doctrine is followed consistently, it would severely restrict the ability of legislatures to draft statutes that could be effectively administered. If the doctrine is not to be allowed to run roughshod over all existing legislation, it should be limited to statutory schemes dealing with important entitlements—Vlandis should be disregarded. It would be preferable, however, for the Court to abandon its "war on irrebuttable presumptions" as theoretically unsound and practically unworkable.


204. For additional examples, see LaFleur, 42 U.S.L.W. at 4194-95 (Rehnquist, J., dissenting).

205. See LaFleur, 42 U.S.L.W. at 4194 (Rehnquist, J., dissenting).

206. LaFleur, 42 U.S.L.W. at 4194 (Rehnquist, J., dissenting).
III. AN EQUAL PROTECTION ALTERNATIVE

By using the equal protection clause to resolve the problem of the overinclusive burdening classification, many of the difficulties relating to the conclusive presumption doctrine can be avoided. First, with regard to cases involving governmental benefits, the equal protection clause is preferable, since there is no need to contend with the threshold due process requirement of a deprivation of life, liberty, or property. Second, since all equal protection analysis is "substantive" in nature, the equal protection approach avoids the doctrinal confusion among the different functions, standards, and judicial roles associated with substantive and procedural due process. Third, a developed body of law is available to deal with cases involving discriminatory classifications. Finally, equal protection affords a more direct analysis of discriminatory legislative classifications, thus avoiding the problem of obfuscation that the conclusive presumption doctrine entails.

The equal protection approach does, however, share two difficulties with the conclusive presumption doctrine. Both solutions involve substantive judicial intrusions into the public policy sphere, and both must allow some overinclusiveness or inequality in the name of efficient administration. To minimize these difficulties, courts should exercise restraint in reviewing legislative classifications in the social and economic areas and, unless they are patent, arbitrary, invalidate them only when necessary to avoid needless hardship. The following is a suggested standard for reviewing social and economic classifications under the equal protection clause, reflecting three fundamental values—preservation of the legislature's role in formulating public policy, avoidance of needless individual hardship, and conservation of administrative resources: An overinclusive burdening classification violates equal protection when a more accurate individual determination would (1) avoid individual hardship and (2) be possible with little or no additional administrative expense, even though there is a rational relationship between

207. This is true only with respect to state legislation, since equal protection as applied to the federal government is a component of due process and should therefore entail all of the requirements of the due process clause. This may mean that the states are subject to different standards of equal protection than is the federal government. "[S]ince Congress is not expressly limited by any equal protection clause, it is not subject to the same limitation directed against discrimination as is imposed on the states." F. Kaufer, supra note 142, at 690. See also Robison v. Johnson, 352 F. Supp. 848, 855 (D. Mass.), revd., 42 U.S.L.W. 4313 (U.S., March 4, 1974): "[T]he appropriateness of subjecting federal legislation to equal protection analysis can only be determined on a case-by-case basis." This results in the application of a double standard to state and federal legislation faced with an equal protection challenge.

the classification and the purpose of the legislation. This standard would serve the purpose presently served by the conclusive presumption doctrine, that is, it would act as a safety valve for avoiding hardship in cases where there is a rational basis for the classification but where no fundamental interest or suspect classification is involved. The suggested standard differs from the conclusive presumption approach in three important respects: (1) It is based on the equal protection concept, rather than on due process; (2) it limits judicial review to cases of individual hardship; and (3) it requires a showing that the additional administrative burden would be small.

If this standard were applied to *Murry*, the statutory provision would be struck down. While it did have a rational basis, the tax-dependency provision worked needless hardship on a number of impoverished households.209 And it could be eliminated with little or no additional administrative burden.210 Likewise, in *LaFleur* the deprivation of the teachers' source of livelihood was hardship, and there does not appear to be any substantial administrative problems with permitting each pregnant teacher to determine, with her physician's assistance, her own date to begin maternity leave.

In *Vlandis*, however, the suggested standard would result in upholding Connecticut's statutory definition of residency, for there was no showing of real individual hardship,211 and the additional administrative burden required by an individual determination is likely to be significant.

Unlike the conclusive presumption doctrine, the suggested standard would not logically compel the invalidation of great numbers of federal and state legislative classifications. Yet, it would fulfill the need that led to the adoption of the conclusive presumption doctrine; it would reduce the rigidity of the present two-tiered standard of equal protection review.

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209. Incorrectly classifying appellees' impoverished households as nonneedy worked personal hardship in the form of hunger and even severe malnutrition. Brief for Appellees at 17.

210. The food stamp program had pre-existing procedures for determining the actual financial resources available to a household, so that any additional administrative burden imposed by the decision was de minimus. Id. at 71.

211. The personal hardship on appellees amounted to only a 450-dollars-per-semester tuition differential. As Chief Justice Burger pointed out in dissent, there was no allegation by either plaintiff "that the higher out-of-state tuition charge does, will, or even may deprive her of the opportunity to attend the University of Connecticut." 412 U.S. at 461 n.8.