Applying the Constitutional Doctrine of Irrebuttable Presumption to the Handicapped - Gurmankin v. Costanzo

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NOTES

APPLYING THE CONSTITUTIONAL DOCTRINE
OF IRREBUTTABLE PRESUMPTION
TO THE HANDICAPPED—
GURMANKIN V. COSTANZO

Employment rights of the handicapped have received increasing attention in the courts over the past several years. New statutory bases for challenging handicap discrimination have been developed and tested, and attempts have been made to adapt long-standing legal theories to the handicap context. In the recent case of Gurmankin v. Costanzo, the constitutional doctrine of irrebuttable presumption, an old analysis recently resurrected, emerged as a theory under which a disabled plaintiff might successfully challenge discriminatory employment policies.

In Gurmankin, a United States district court held that a Philadelphia School District policy of not considering handicapped persons for teaching positions violated the Due Process Clause of the Fourteenth Amendment because it contained an irrebuttable presumption that

3. The first cases decided on irrebuttable presumption grounds were Schlesinger v. Wisconsin, 270 U.S. 230 (1926), and Heiner v. Donnan, 285 U.S. 312 (1932). In both, the statutes involved were found to contain impermissible presumptions that any gift made within a certain period before the donor's death was made in contemplation of death, rendering it susceptible to estate tax. After falling into disuse for approximately fifty years, the doctrine was revived in Vlandis v. Kline, 412 U.S. 441 (1973); United States Dept of Agriculture v. Murry, 413 U.S. 508 (1973); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); and Turner v. Department of Employment Security, 423 U.S. 44 (1975) (per curiam). In addition, commentators argue that the doctrine was invoked in Carrington v. Rash, 380 U.S. 89 (1965); Bell v. Burson, 402 U.S. 535 (1971); and Stanley v. Illinois, 405 U.S. 645 (1972). See authorities cited in note 56 infra.
4. A presumption in the law of evidence is an assumption of a fact (hereinafter called fact B) resulting from a rule of law which requires such a fact to be assumed from another fact or group of facts (hereinafter called fact(s) A) found or otherwise established in the action. If the party against whom the presumption operates may introduce proof in contradiction of it, the presumption is rebuttable. An irrebuttable, or conclusive, presumption is one in which, upon proof of fact A, fact B is always and necessarily accepted as proved. That is, upon proof of fact A, the party against whom the presumption works is precluded from asserting the non-truth of fact. B. C. Mccormick, McCormick on Evidence § 342, at 802-04 (2d ed. E. Cleary 1972). See also Note, The Irrebuttable Presumption Doctrine in the Supreme Court, 87 HARV. L. REV. 1534 (1974) [hereinafter cited as Harvard Note]. See generally Brosman, The Statutory Presumption, 5 TUL. L. REV. 17 (1930); Stumbo, Presumptions—a View at Chaos, 3 WASHBURN L.J. 182 (1964).
no handicapped person is competent to teach. Unfortunately, the precedential value of *Gurmankin* is somewhat limited by its faulty reasoning. This Note will criticize the *Gurmankin* court’s analysis, which wrongly applied the Supreme Court decision of *Cleveland Board of Education v. LaFleur*, and will indicate the shortcomings of the irrebuttable presumption doctrine that the court employed. Finally, the Note will suggest a more principled, alternative analysis that was available to the *Gurmankin* court.

**STATEMENT OF THE CASE**

Judith Gurmankin, a blind teacher certified in Pennsylvania, brought suit against the Philadelphia School District challenging the District’s policy of not hiring handicapped teachers. Her complaint alleged that the District had refused from 1969 through 1974 to allow her to take its required teacher’s examination, in furtherance of its policy of preventing persons having a “chronic or acute physical defect” from teaching. In the spring of 1974, the District finally permitted Ms. Gurmankin to take the exam. She passed the written portion but failed the oral section, which consisted of interviews with two District officials. Consequently, she also alleged that she had been the object of discrimination during the interviews.

Ms. Gurmankin sought and received a judgment for mandatory injunctive relief, in the form of a teaching position. In addition, she was awarded seniority rights as accrued from September, 1970, the time at which, the court ruled, it was reasonable to assume she would have been hired in the absence of discrimination. Ten months after the order, Ms. Gurmankin still had not been hired. The court amended its injunction to mandate her placement within thirty days in one of six schools of her choice.

8. The validity of her allegations was established by the testimony of the Director of Personnel for the District that, at the time of the trial (May 8, 1975), “current policy included ‘a restriction on the blind teaching the sighted.’” 411 F. Supp. at 986. The court also found that the grading of the oral examination had been based on “misconceptions and stereotypes about the blind and on assumptions that the blind simply cannot perform,” in contravention of facts, supplied by expert testimony, that indicated that blind teachers are competent, even to teach sighted students. *Id.* at 987-88.
9. *Id.* at 992-93.
10. See *Gurmankin v. Costanzo*, 556 F.2d 184, 186 (3d Cir. 1977).
Although the plaintiff presented three alternative claims, the Gurmankin court based its decision solely on the constitutional doctrine of irrebuttable presumption. The finding of an irrebuttable presumption in the District's policy would itself have been sufficient to decide the case, the court stated, had not conflicting interpretations as to the validity of the doctrine been presented by two recent Supreme Court decisions: Cleveland Board of Education v. LaFleur and Weinberger v. Salfiti.

LaFleur, advanced by the Gurmankin plaintiff, was decided squarely on irrebuttable presumption grounds. In LaFleur, the Supreme Court invalidated the Cleveland School Board's mandatory maternity leave policy for teachers. The Court found the policy to contain a presumption that every teacher four or more months pregnant was physically incapable of continuing her duties. Because the teachers were offered no opportunity to show that the presumption was incorrect as applied to them individually, the policy was adjudged conclusive and therefore unconstitutional as a violation of the Due Process Clause.

11. In addition to the plaintiff's allegations that the policy contained an irrebuttable presumption, she contended that she had been denied equal protection as guaranteed by the Fourteenth Amendment. Under that claim she asserted that preventing the handicapped from teaching lacked a rational relationship, or, in the alternative, a fair and substantial relationship, to the policy's purpose, and that the case presented a suspect classification. She also argued that the policy violated the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Supp. IV 1974). Plaintiff's Complaint at 1; Plaintiff's Memorandum of Law in Support of Motion for Preliminary Injunction at 14 [hereinafter cited as Plaintiff's Memo].

The court did not directly address the lack of a fair and substantial relationship argument. It found the Rehabilitation Act to be inapplicable because it became effective only after most of the discrimination alleged by the Gurmankin plaintiff had occurred.

Section 504 of the Rehabilitation Act of 1973 provides:

No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.


Both the district court, 411 F. Supp. at 989, and the circuit court of appeals, 556 F.2d at 188, implied that the Act conferred upon individuals affirmative rights enforceable in private lawsuits. Subsequent cases that have relied on Gurmankin have most often done so for this proposition. See, e.g., Lloyd v. Regional Transp. Auth., 548 F.2d 1277, 1281 (7th Cir. 1977); Drennon v. Philadelphia Gen. Hosp., 428 F. Supp. 809, 814, 816 (E.D. Pa. 1977).

12. The court found that "[t]he school board's policy of totally excluding blind persons as teachers of sighted students created an irrebuttable presumption that blind persons could not be competent teachers." 411 F. Supp. at 990.

15. 414 U.S. at 646.
LaFleur
drew support for its irrebuttable presumption basis from
principles established in a line of prior irrebuttable presumption
cases. It relied especially on one decision that struck down an Illinois
statute causing illegitimate children to become wards of the state
upon the mother's death without consideration of the natural father's
fitness as a parent.16 The statute was found to embody a presump-
tion that unwed fathers are not fit parents, and was held unconstitu-
tional as a violation of both due process and equal protection.17

LaFleur also relied on a later case that held unconstitutional Con-
nnecticut's requirement that non-resident students pay higher college
tuition than resident students.18 The Supreme Court in that case
forbade treating a student as a non-resident without providing him an
opportunity to show in-state residence, reasoning that such treatment
created an irrebuttable presumption.19

The defendant in Gurmankin asserted that a more recent case,
Weinberger v. Salfi,20 controlled. That case upheld, on equal protec-
tion grounds, social security regulations under which surviving wives
and stepchildren were denied benefits if their relationship with the
deceased had begun less than nine months before the deceased's
death. This holding was in line with other equal protection cases in
which the plaintiff's interest was deemed to be merely economic. In
one such case,21 a claim that welfare legislation violated equal protec-
tion was rejected with the following language:

In the area of economics and social welfare, a State does not violate
the Equal Protection Clause merely because the classifications
made by its laws are imperfect. If the classification has some
"reasonable basis," it does not offend the Constitution simply be-
cause the classification "is not made with mathematical nicety or
because in practice it results in some inequality."22

17. Id. at 658.
18. Vlandis v. Kline, 412 U.S. 441 (1973). Residency for an unmarried student was deter-
mined by where the student had lived within the year before he applied to the university. If he
had lived out-of-state at any time during that year, he was considered a non-resident, and was
treated as such for the duration of his university stay. Id. at 443.
19. Id. at 453.
22. Id. at 486, quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).
Equal protection cases consider interests by their degree of fundamentalness and classifications by their degree of suspectness. Education, public employment, and welfare and the “necessities of life” have specifically been held not to be fundamental interests. Since Salfi involved neither a fundamental interest nor a suspect classification, the only question to be considered by the Salfi Court was “whether Congress... could rationally have concluded... that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule.” The Court concluded that the “duration-of-relationship test meets this constitutional standard” and upheld the statute.

The Gurmankin defendant relied on Salfi not as an equal protection case, however, but as an irrebuttable presumption case that had held for the defendant. The facts of Salfi do present an apparent irrebuttable presumption, but the irrebuttable presumption cases advanced by the plaintiff in Salfi, which included LaFleur, were distinguished by the Salfi Court, on the basis of the interests of the plaintiffs. It is because the Supreme Court decided Salfi on equal protection grounds despite the apparent presence of an irrebuttable presumption that the Gurmankin court reasoned that Salfi had “limited” the validity of the irrebuttable presumption doctrine.

23. Fundamental interests have been held to include the right to association, Williams v. Rhodes, 393 U.S. 23 (1968); the right to privacy and autonomy, Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923); the right to free speech, Police Dep’t. v. Mosley, 408 U.S. 92 (1972); the right to vote, Reynolds v. Sims, 377 U.S. 533 (1964); and the right to interstate travel, Shapiro v. Thompson, 394 U.S. 618 (1969); United States v. Guest, 383 U.S. 745 (1966).


28. 422 U.S. at 777.

29. Id.

30. The presumption was that wives and stepchildren of less than nine months had entered into a relationship with the deceased merely for the purpose of securing social security benefits. Those affected by the presumption were not afforded an opportunity to disprove the attributed illicit purpose, rendering the presumption irrebuttable. In fact, the district court in Salfi held for the plaintiff on irrebuttable presumption grounds. Salfi v. Weinberger, 373 F. Supp. 961, 965-66 (N.D. Cal. 1974).

31. 422 U.S. at 771-72.

32. 411 F. Supp. at 990. The current state of the doctrine is uncertain. The consensus seems to be that Salfi did in fact restrict it. See, e.g., Monaghan, The Supreme Court 1974
In determining which Supreme Court decision controlled the facts before it, the *Gurmankin* court was also deciding which analysis it would use. If *LaFleur* were found to control, irrebuttable presumption would be the proper analysis. If *Salfi* emerged as controlling, equal protection analysis would govern.

To make its determination, the *Gurmankin* court first compared the plaintiffs' interests. It found that in *LaFleur*, the plaintiff's right "to conceive and to raise children" was constitutionally protected. On the other hand, it noted that the right to receive social security disability benefits, the interest asserted by the *Salfi* plaintiff, was not so protected.

Next the court examined classifications. It compared the classification in *Gurmankin*, blindness, to that in *LaFleur*, pregnancy, and found both to be, if not suspect, then at least ones that "should not be subjected to inaccurate and irrebuttable presumptions of incompetence." In contrast, it found that the *Salfi* classification was not suspect.

Finally, the *Gurmankin* court looked at the defendants' interests. It noted that *Salfi* was based to a great extent on the administrative

*Term, Foreward: Constitutional Common Law,* 89 Harv. L. Rev. 1, 81 (1975). Some commentators have gone farther. See, e.g., Ackerman, *The Conclusive Presumption Shuffle,* 125 U. Pa. L. Rev. 761, 771 (1977), where it was noted that "in... *Salfi*, Justice Rehnquist was able to speak for the Court in an opinion that repudiated conclusive presumption analysis." But five months after *Salfi* was decided, *Turner v. Department of Employment Security,* 423 U.S. 44 (1975) (per curiam), cited *LaFleur* as controlling and used the doctrine. *Turner* struck down a Utah statute making pregnant women ineligible for employment compensation for a period from twelve weeks before their due date to six weeks after childbirth. The statute was held unconstitutional as a violation of due process because it contained an irrebuttable presumption that women are unable to work during that eighteen-week period.


33. 411 F. Supp. at 990. Although *LaFleur* also involved employment, as does *Gurmankin*, neither the *LaFleur* nor the *Gurmankin* court addressed that fact.

34. Id. at 990, 991.

35. Id. at 991. Pregnancy, as a sex-related characteristic, might have been a sufficiently suspect classification in itself to have allowed the *LaFleur* plaintiff to prevail on equal protection grounds. See, e.g., Kahn v. Shevin, 416 U.S. 351 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971). See also notes 72 & 76 infra.

36. 411 F. Supp. at 991.
difficulty and expense that would have resulted from providing every social security claimant affected by the regulation with an individual hearing. No such problems, the court continued, would be encountered in granting hearings to people in the Gurmankin plaintiff’s position; few blind applicants wish to teach sighted students, and “hearings” in the form of the teaching examination were already given routinely to all applicants except the blind. Thus the strong defendant’s interest in Salfi was absent in Gurmankin. On the basis of these comparisons, LaFleur was found to be the more appropriate precedent, and Gurmankin was decided on irrebuttable presumption grounds.

CRITICISM OF GURMANKIN

The Gurmankin decision is vulnerable to criticism for two reasons. First, it distorts LaFleur to fit the facts before it. Second, it uses the doctrine of irrebuttable presumption, one of the most strongly criticized constitutional theories, while ignoring a more conventional alternative to the use of that doctrine.

Misapplication of LaFleur

When considering the Gurmankin court’s conclusion that LaFleur controlled, it should be noted that irrebuttable presumption is purportedly a Fourteenth Amendment due process doctrine. The protection offered by the Due Process Clause is limited to certain interests within the broad range of “life, liberty, and property.” The LaFleur decision centered upon the finding of a protected due process interest in the plaintiff’s right to bear a child. The Court made it clear that the mandatory maternity leave policy in question infringed upon that interest. The Salfi Court’s decision was also based on the

37. Id.
38. Id.
39. The defendant’s interest in LaFleur, preserving continuity of education and protecting the health of the teacher and her unborn child, was not addressed. 414 U.S. at 643.
40. See note 56 infra.
41. See e.g. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 646 (1974), where it was held that “the conclusive presumption embodied in these rules... is violative of the Due Process Clause.”
42. U.S. Const. amend. XIV, § 1 provides: “No State shall... deprive any person of life, liberty, or property, without due process of law...”
43. The policy in LaFleur was found to infringe upon “freedom of personal choice in matters of marriage and family life... [which is] one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.” 414 U.S. at 639-40. The LaFleur Court referred to that freedom as “one of the basic civil rights of man.” Id. at 640, quoting Skinner v. Oklahoma, 316
plaintiff's interest. There, however, social security benefits were found not to be a protected interest.

The Gurmankin court acknowledged that the nature of the plaintiff's interest is central to the irrebuttable presumption doctrine, noting at the outset of its analysis that Salfi had been distinguished from LaFleur and other irrebuttable presumption cases on the basis of the interests involved. It is thus astonishing that its discussion of the plaintiff's interest in public employment was so summary. The "analysis" consisted merely of an assertion that the plaintiff's interest was "certainly more important" than that in Salfi, and of an admission that it was not as important as that in LaFleur. The only case cited by the court to support its assertions, furthermore, emphasized the relative unimportance of public employment in the hierarchy of constitutionally protected rights and interests. It held that the "right to be fairly considered for public employment" is not a fundamental interest in the equal protection sense, and that "it is not likely that such could be shown."

Because the protected due process right crucial in LaFleur is absent in Gurmankin, the Gurmankin court's conclusion that LaFleur controlled is not persuasive. The court's cursory assessment of the plaintiff's interest, however, is at once an admission and an introduction to the court's forthcoming creative efforts. For it is followed by a lengthy and acute examination of the classification by which the District's policy operated, and it is actually upon that basis that the court found for the plaintiff.

The District's policy, as applied to Ms. Gurmankin, separated those it affected from those it did not by reference to one trait: blindness. This was, the Gurmankin court found, "a far different kind of classification than was involved in Salfi, and . . . one that demands a greater degree of constitutional protection." Salfi, it continued, involved an "artificial classification" that did not subject the Salfi plaintiffs to other disadvantages. By this the court meant that the Salfi classification was merely legislatively created; it held no implications for those it affected except with regard to one particular piece of legisla-

U.S. 535, 541 (1942). Why the case could not, then, have been decided on traditional non-economic substantive due process grounds in an open question. See note 63 and accompanying text infra.

44. 411 F. Supp. at 990.
45. Id. at 990-91.
47. Id. at 250.
49. Id.
tion. In contrast, the court saw "the blind, like pregnant school teachers," as an "objectively defined group." That is, a classification by blindness does have certain implications: "Ms. Gurmankin's blindness permanently sets her apart from other people in a way that may cause her to be treated differently from other people in every activity she attempts to engage in."

In this section of its analysis the court seemed to make a case for blindness as a suspect classification. But more important is that it even considered the classification in the District's policy, much less at such great length. This approach is so unexpected because neither *LaFleur* nor *Salfi* ever specifically mentioned classifications. Both cases focused only on the parties' interests. Certainly there was no implication whatever that the suspectness of the classifications figured in the decisions. The *Gurmankin* court's comparison of the classifications in those cases to the classification before it was an assertion of that factor's significance in those cases. That assertion was made to support an analogy between *Gurmankin* and *LaFleur* that would have collapsed had it been properly based only upon the plaintiffs' interests. *LaFleur* was found applicable only by this strained piece of reasoning.

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50. *Id.*

51. *Id.*

52. A classification may be suspect for several reasons. It may stigmatize and embody notions of superiority, affixing a badge of inferiority, or may be based on immutable conditions present since birth. See, e.g., *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879), in which the Court referred to a statute that excluded blacks from West Virginia grand juries as "practically a brand upon them, affixed by the law, an assertion of their inferiority. . . ." See also *Brown v. Board of Educ.*, 347 U.S. 483 (1954), wherein the Court wrote:

To separate [black students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

*Id.* at 494.

The classification may also be suspect because it affects a "discrete and insular minority," a group that is politically powerless at least in part because of formally sanctioned laws against them. United States v. *Caroline Products Co.*, 304 U.S. 144, 152-53 n.4 (1938) (Stone, J.). See *Graham v. Richardson*, 403 U.S. 365, 372 (1971), in which the Court held that "[a]liens as a class are a prime example of a 'discrete and insular' minority for whom. . . . heightened judicial solicitude is appropriate." The requirements for a suspect classification were recently reviewed in *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 2 (1973):

[T]he class [must be] saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

*Id.* at 28.

All of these considerations were mentioned by the *Gurmankin* plaintiff. Plaintiff's Memo at 9-13. The *Gurmankin* court denied in dictum that it had been influenced by the plaintiff's arguments:

I have no occasion to consider the equal protection arguments that have been stressed by the parties. I will note, however, that the plaintiff's claim that the blind
Use of the Irrebuttable Presumption Doctrine

The second fault with Gurmankin lies in its use of the irrebuttable presumption doctrine. The doctrine is so treacherous that the court should have avoided it altogether. The doctrine's most subtle and dangerous aspect is that it could apply in every case litigating an overinclusive statute or policy. This is so because a law, by its very nature, can only function by presuming, in the form of a classification. Classifications are the means used to separate those who are intended to be affected by a law from those who are not. Law-making bodies are nearly always content with reaching only most of the people sought to be affected by a law's purpose. That the statute also affects some people who are not within the scope of its purpose is accepted, for it is extremely rare to be able to achieve a "perfect fit" between the means and the end of a law.53 The use of a classification, al-

constitute a "suspect classification" is insupportable. Even admitting that the blind are a small, politically weak minority that has been subjected to varying forms of prejudice and discrimination, the limitations placed on a person's ability by a handicap such as blindness cannot be ignored. Unlike distinctions based on race or religion, classifications based on blindness often can be justified by the different abilities of the blind and the sighted.

411 F. Supp. at 992 n.8. But it is obvious that the court was significantly affected when it wrote that Ms. Gurmankin's blindness "permanently sets her apart from other people in a way that may cause her to be treated differently from other people in every activity she attempts to engage in," id. at 991, and observed that blind persons are subjected to disadvantages because of their classification.


53. The best evidence of the difficulty is that at the upper tier of equal protection, where to survive, a statute must be perfectly rational, statutes are almost never upheld. See note 59 infra. A few have been sustained. See, e.g., Korematsu v. United States, 323 U.S. 214 (1944) (exclusion of all Japanese citizens from certain West Coast areas upheld because of compelling state interest created by war emergency); Crane v. New York, 239 U.S. 195 (1915) (restriction on employment of aliens upheld as necessary for welfare of unemployed U.S. citizens). See generally Note, Constitutional Law—Lowering the Compelling State Interest Hurdle, 53 N.C.L. REV. 430 (1974). These cases, however, are in the distinct minority. The burden imposed by strict scrutiny has been called "fatal in fact." Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 8 (1972).
though a compromise, results in a law that is consistent, predictable, convenient, and economical to administer.\textsuperscript{54}

A classification is always a presumption that the law affects principally those whom it will serve the law’s purpose to affect. Furthermore, unless a law by its terms offers an individual the opportunity to controvert the presumption embodied in the classification, it may correctly be said to contain an irrebuttable presumption. Thus the Gurmanakin court is correct when it states that the District’s policy presents an irrebuttable presumption.\textsuperscript{55} But its “finding” an irrebuttable presumption is really nothing more than identifying an ever-present part of the whole, the classification.

Several members of the Supreme Court, as well as commentators, have been quick to point out this logical fallacy in the irrebuttable presumption doctrine.\textsuperscript{56} But only Justice Rehnquist has noted the danger the use of the doctrine presents: “The Court’s disenchantment with ‘irrebuttable presumptions,’ and its preference for ‘individualized determination,’ is in the last analysis nothing less than an attack upon the very notion of lawmaking itself.”\textsuperscript{57} And Justice Rehnquist does not go far enough.

To understand the danger of the irrebuttable presumption doctrine, it is important to realize that whenever it has been used, the statute or policy in question has been found unconstitutional.\textsuperscript{58} The “find-

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\item \textsuperscript{54} Note, The Conclusive Presumption Doctrine: Equal Process or Due Protection?, 72 Mich. L. Rev. 800, 809 (1974) [hereinafter cited as Michigan Note]. For an excellent general discussion of this area, see Tussman & tenBroek, The Equal Protection of the Law, 37 Calif. L. Rev. 341, 343-53 (1949) [hereinafter cited as Tussman & tenBroek].

\item \textsuperscript{55} The policy’s purpose was to ensure competence in the classroom. 411 F. Supp. at 990. In furtherance of this purpose, the handicapped were excluded from teaching and, more specifically, the blind were excluded from teaching the sighted. The policy thus presumed that all those who were handicapped were incompetent. Since, by operation of the policy, handicapped persons were not given an opportunity to show that the presumption was incorrect in their particular case, the presumption was irrebuttable.

\item \textsuperscript{56} Most notably, Justice Powell criticized the doctrine in LaFleur, stating: “As a matter of logic, it is difficult to see the terminus of the road upon which the Court has embarked under the banner of ‘irrebuttable presumptions.’” 414 U.S. at 652. See also Gordon & Tenenbaum, Conclusive Presumption Analysis: The Principle of Individual Opportunity, 71 NW. U.L. Rev. 579, 590-91 (1976); Simson, The Conclusive Presumption Cases: The Search for a Newer Equal Protection Continues, 24 Cath. U. L. Rev. 217, 225-26 (1975) [hereinafter cited as Simson]; Harvard Note, supra note 4, at 1545; Michigan Note, supra note 54, at 829; Note, Irrebuttable Presumptions: An Illusory Analysis, 27 Stan. L. Rev. 449, 456 (1975) [hereinafter cited as Stanford Note].


\item \textsuperscript{58} See, e.g., Turner v. Department of Employment Security, 423 U.S. 44, 46 (1975) (per curiam); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 646, 648 (1974); United States Dep’t
A doctrine that is invariably fatal, and that is characterized by something present in every statute but "found" only in certain ones, presents to a court an invincible weapon: the power to declare a statute unconstitutional at will. Alternatively, if the "triggering" device for the doctrine is not merely the judge's whim, it is the cumulative effect of nameless factors, never to be articulated and known only to the court.

The use of a doctrine of this nature obviously erodes the principle of stare decisis. Since the grounds for decision are disguised as the "finding" of an irrebuttable presumption, they need not be specified. Consequently, little precedent is set, and societal values are not recognized. Further, the randomness with which decisions may be made under the doctrine leads to the subversion of what should be the most basic element in legal decision-making: the rule of law.

59. In equal protection analysis, strict scrutiny requires a statute involving either a fundamental interest or a suspect classification to have a purpose that is "necessary to achieve a compelling state interest." "Necessary" means that the purpose cannot be accomplished in a less detrimental way. That is, it must not be possible to use a classification that is less overinclusive or less underinclusive. Theoretically, therefore, only a perfect relationship between the means and the end—"perfect rationality"—will enable a law examined under strict scrutiny analysis to sustain constitutional challenge. See Tussman & tenBroek, supra note 54, at 343-53.

50. See Vlandis v. Kline, 412 U.S. 441 (1973) (Burger, C.J., dissenting): "Distressingly, the Court applies 'strict scrutiny' and invalidates Connecticut's statutory scheme without explaining why the statute impairs a genuine constitutional interest truly worthy of the standard of close judicial scrutiny." Id. at 460.

51. Professor Levy has written eloquently decrying such result-oriented adjudication:

In constitutional cases . . . the judge who first chooses what the outcome should be and then reasons backwards to supply a rationalization, replete with rules and precedents, has betrayed his calling: Having decided on the basis of prejudice or pre-judgment, he has made constitutional law little more than the embodiment of his own policy preferences.

The confusion surrounding the doctrine of irrebuttable presumption is another reason for avoiding it. The *Gurmankin* court unavoidably introduced into its own opinion the confusion that has resulted from the use of the doctrine by the Supreme Court.

The most baffling aspect of this purported due process doctrine is that no case using it has ever specified whether the doctrine employs *procedural* or non-economic *substantive* due process. The doctrine's core is procedural; the plaintiff's lack of opportunity to controvert the presumption against him forms the very essence of the irrebuttable presumption cases. But the rights protected by the doctrine are sometimes non-economic substantive due process rights. The *LaFleur* Court's discussion of the plaintiff's interest in child-bearing, for example, is based solely on her right to privacy as guaranteed by the Constitution. No mention is made in either

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62. In order for a right to be protected by procedural due process, a plaintiff must show a "legitimate claim of entitlement . . . created . . . by existing rules or understandings that stem from an independent source such as state law. . . ." Board of Regents v. Roth, 408 U.S. 564, 577 (1972). To determine whether procedural due process requirements apply, a court "look[s] not to the 'weight' but to the nature of the interest at stake." Goss v. Lopez, 419 U.S. 565, 575 (1975) (emphasis in original). As the *Roth* Court was careful to point out, "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. . . . the range of interests protected by procedural due process is not infinite." 408 U.S. at 569-70.

63. As used in this Note, the term "non-economic substantive due process" refers to the application to the states of the rights protected by the first eight amendments to the Constitution. See *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968). These "fundamental rights" are subsumed within the word "liberty" in the due process clause. See, e.g., *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), which held these rights to be "implicit in the concept of ordered liberty." Others have called non-economic substantive due process "the incorporation doctrine." This is an improper term for two reasons. First, it was not the Bill of Rights itself that was incorporated into the due process clause but the rights *protected* by the Bill of Rights. As Justice Black has stated: "[O]ur Court has since the *Adamson* case held most of the specific Bill of Rights' protections applicable to the States to the same extent they are applicable to the Federal Government." *Duncan v. Louisiana*, 391 U.S. 145, 164 (1968) (Black, J., concurring) (emphasis added). Second, the Constitution makes no mention of the word "incorporation" but refers specifically to due process.

Those who call non-economic substantive due process "the incorporation doctrine" do so because they fear that the use of the former term will be confused with *economic* substantive due process, the thoroughly discredited analysis of the *Lochner* era. See note 90 infra. Consistently specifying which of the three forms of due process is being used—procedural, economic substantive, or non-economic substantive—avoids needless confusion and allows the use of proper nomenclature.

64. See, e.g., *Vlandis v. Kline*, 412 U.S. 441 (1973); "[S]tandards of due process require that the State allow . . . an individual the opportunity to present evidence that he is a bona fide resident entitled to the in-state rates." *Id.* at 452. See also *id.* at 455 (Marshall, J., concurring).


66. *Id.*
LaFleur or Gurmankin of a procedural due process interest. Other irrebuttable presumption cases, however, contain neither non-economic substantive due process rights nor procedural due process claims. The source of the rights recognized in those cases is not at all clear.

Another cause of confusion in Gurmankin and the Supreme Court's irrebuttable presumption cases is the appearance of language and concepts not associated with the doctrine's purported due process nature. Although the practical effects of due process and equal protection are not critically different, the occurrence of equal protection ideas in a due process doctrine leads to great uncertainty as to the actual nature of the doctrine. The Gurmankin court's attention to the plaintiff's interest, the defendant's interest, and the classification is indicative of this problem. The consideration of all three factors suggests equal protection, not due process, analysis. In due process analysis, classifications are not relevant.

67. Although no procedural due process claim was made in Gurniankin, the reviewing court affirmed on precisely that basis, compounding the confusion. The circuit court of appeals stressed not the LaFleur plaintiff's non-economic substantive due process interest in child-bearing but her procedural due process/property interest in continuing employment, which existed by virtue of her contract of employment. 556 F.2d 184, 187 (3d Cir. 1977). Having shifted from the focus of the district court, the appellate court then pointed out that the Gurmankin plaintiff too had had a procedural due process/property interest, because she possessed "an expectation, based on state law, of being admitted to the qualifying examination." Id. Because she had been certified as a teacher by the State of Pennsylvania, the appellate court went on, she was unqualifiedly eligible under Pennsylvania law to take the Philadelphia School District's examination. The court said, "The right to take the exam is a right arising under state law, and its deprivation in an arbitrary manner violated due process." Id. at 188.

The appellate court seemed to indicate that this had been the holding of the district court. It agreed with the lower court that LaFleur controlled and that the District's policy presented an irrebuttable presumption, and then went on to make the above modifications.


[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. [But] [t]he "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases.

Id. at 499. See also Karst, The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 HARV. L. REV. 1, 27 & n.146 (1977).

Some commentators, as well as members of the Supreme Court, have identified the irrebuttable presumption doctrine as an equal protection theory. It is, in fact, possible that *Gurmankin* was actually decided on sliding-scale equal protection grounds. The *Gurmankin* court stated:

Given Ms. Gurmankin's interest in obtaining employment and the insignificance of the burdens that would be placed on the school district if it allowed blind persons an opportunity to demonstrate their competence, I find that the . . . District's policy of refusing to consider blind persons to be teachers . . . created an irrebuttable presumption. . . .

The presence, absence, nature, or weight of the factors enumerated by the court have nothing whatsoever to do with the presence or absence of an irrebuttable presumption. If this reference to all three factors considered in equal protection analysis has any meaning at all, it is that sliding-scale equal protection analysis is being used.

Some language in the irrebuttable presumption cases implies that the same is true for that doctrine. See, e.g., *Vlandis v. Kline*, 412 U.S. 441 (1973) (White, J., concurring): "[I]t must now be obvious . . . that, as the Court's assessment of the weight and value of the individual interest escalates, the less likely it is that mere administrative convenience and avoidance of hearings . . . will be sufficient to justify . . . irrational discriminations." *Id.* at 459. See also *Turner v. Board of Employment Security*, 423 U.S. 44 (1975): "The Fourteenth Amendment requires that unemployment compensation boards . . . must achieve legitimate state ends through more individualized means when basic human liberties are at stake." *Id.* at 46.

71. See *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (Powell, J., concurring): "[W]hen the irrebuttable presumption doctrine is used,] the concept at root often will be something else masquerading as a due process doctrine. That something else, of course, is the Equal Protection Clause." *Id.* at 652. See also *Stanford Note*, supra note 56, at 468.

72. The theory of sliding-scale equal protection was propounded by Justice Marshall in *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting), and *Dandridge v. Williams*, 397 U.S. 471, 508 (1970) (Marshall, J., dissenting). Under this theory, which represents Justice Marshall's view of how the Court actually proceeds in equal protection analysis without so stating, a statute need not contain a fundamental interest or a suspect classification to warrant scrutiny. Instead, the degree of fundamentalness of an interest and the degree of suspectness of a classification are weighed against the state's interest. In other words, "[a]s the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly." *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 102-03 (1973) (Marshall, J., dissenting). A nexus between a classification and a well-established suspect classification is similarly treated.

For an exhaustive string citation of cases in which Justice Marshall considers the Court to have used a level of scrutiny more intense than that which seemed warranted and attributes it to their use of sliding-scale equal protection analysis, see *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 318 (1976) (Marshall, J., dissenting).

73. 411 F. Supp. at 991 (emphasis added).
There are numerous cases which seem to have used sliding-scale equal protection analysis. Neither a fundamental interest nor a suspect classification was present, yet the statute was closely scrutinized. In such cases, the official two-tier theory of equal protection dictates that the statute need only employ a classification that is "rationally related to a legitimate state objective." These cases, however, were by no means clearly decided under sliding-scale equal protection. Further, the Supreme Court has never explicitly recognized, much less formally adopted, that analysis. Finally, even to the extent it was used implicitly, commentators feel that sliding-scale equal protection has been rendered invalid by recent Supreme Court decisions.

The Gurmankin court declared its ground for decision to be irrebuttable presumption but recited a sliding-scale equal protection argument. If the irrebuttable presumption doctrine is sliding-scale analysis, it should be identified as such. Disguising the latter analysis as irrebuttable presumption to avoid reversal for having used a tenuous doctrine is disingenuous and confusing. If the doctrine is not sliding-scale analysis, then the bulk of the court's opinion is extraneous.

AN ALTERNATIVE THEORY

The Gurmankin court "found" an irrebuttable presumption in the District's policy because it wanted to hold for a sympathetic plaintiff where no legitimate, well-defined analysis would allow it to do so.

75. See note 80 infra.
76. One case, Reed v. Reed, 404 U.S. 71 (1971), has been interpreted in at least three ways. First, it has been termed a middle-tier equal protection case. This middle level of scrutiny, not yet "official" because the Supreme Court has never explicitly referred to it, pertains principally to cases involving sexual classifications. The statute in cases of this type is scrutinized more closely than it would be at the lower tier, even though there is no fundamental interest or suspect classification involved. The enunciated standard such statutes must meet to survive a constitutional challenge is that a "fair and substantial relationship" exist between the means and the end. Id. at 76.
    Second, it has been held to be a lower-tier equal protection case that contained "no rational relationship." Brown v. Merlo, 8 Cal.3d 855, 865 n.7, 506 P.2d 212, 219 n.7, 106 Cal. Rptr. 388, 395 n.7 (1973). See also text accompanying notes 85-88 infra.
    Finally, Reed has been labeled a sliding-scale equal protection case. Wash. U. Note, supra note 32, at 145 n.25.
77. Any references to it have been made only in dissent. See note 72 supra.
Public employment is not a fundamental interest and blindness is not a suspect classification; therefore strict-scrutiny, equal protection did not avail. Public employment is clearly not a non-economic substantive due process right, and no procedural due process argument was made, so neither conventional form of due process would serve. And sliding-scale equal protection analysis is unpredictable, unreliable and possibly discredited.

An alternative ground for decision—the presence of "no rational relationship" in the District's policy—offered the Gurmankin court an opportunity to decide the case in favor of the plaintiff without resorting to the doctrine of irrebuttable presumption. Although the court acknowledged that the District's policy bore "no rational basis," or relationship, to the ability of the blind to teach, it failed to address the significance of its finding.

The presence of a rational relationship between the end and the means of a statute is a minimum requirement for constitutionality under the Equal Protection Clause. Because the phrase is a term of art, endowed with great significance, it must be assumed that its use by a court is never casual. Thus, a finding of "no rational relationship" requires that the statute in question be found unconstitutional as a violation of equal protection.

A 1973 federal district court case remarkably similar to Gurmankin, Andrews v. Drew Municipal Separate School District, supports the feasibility of such a ground for decision. In Andrews, the two plaintiffs, both women fully qualified as teacher's aides, were denied employment because the school district's local policy forbade hiring unwed parents. The challenged policy was held to be a violation of equal protection. The Andrews court noted the presence of an irrebuttable presumption in the policy before it. Citing Stanley v. Illinois, the court wrote: "The fact that over 400 blind persons are teaching nationally . . . shows that there was no rational basis for the School District's practice of completely excluding blind teachers from teaching sighted students." 411 F. Supp. at 986 (emphasis added).

If a statute involves neither a fundamental interest nor a suspect classification, it falls into the lower level of the two-tier theory, known as "minimal scrutiny." At this level, a statute is, at least in effect, presumed constitutional until it is shown to be unconstitutional. In contrast, a statute is, again, at least in effect, presumed unconstitutional at the upper level. The classification need only bear a "rational relationship to a legitimate state [objective]." McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969). A "rational relationship" is one in which even over- and underinclusiveness are tolerated. See, e.g., Williamson v. Lee Optical Co., 348 U.S. 297 (1955). Only the lack of any relationship between the means and the end, to judge by the language of the standard, will render such a statute unconstitutional on equal protection grounds. Thus the application of the "rational relationship" standard is nearly synonymous with the upholding of the statute in question.

it stated: "The unconstitutional vice of the policy. . . is that it conclusively presumes the parents’ immorality or bad moral character from the single fact of a child born out of wedlock." Nevertheless, it ignored Stanley’s rationale, basing its decision squarely on a finding of "no rational relationship." Brown v. Merlo offers additional support for this approach. The California Supreme Court in Brown found that the California guest statute created three classifications; that none of the classifications included a fundamental interest or a suspect classification; and that minimum equal protection scrutiny was therefore appropriate.

It is interesting indeed that a finding so familiar and dispositive as "no rational relationship," though present in several United States Supreme Court irrebuttable presumption cases as well as in Gurmankin, was seized upon by neither the Supreme Court nor the Gurmankin district court as a ground for decision. One explanation may be that the courts feared accusations of having used the discredited doctrine of economic substantive due process. Because that

82. 405 U.S. 645 (1972).
83. 371 F. Supp. at 33 (emphasis added).
84. The Andrews court wrote:

[T]he policy or practice of barring an otherwise qualified person from being employed, or considered for employment, in the public schools merely because of one’s previously having had an illegitimate child has no rational relationship to the objectives ostensibly sought to be achieved by the school officials . . . thus it is constitutionally defective under the traditional, and most lenient, standard of equal protection. . . .

Id. at 31 (emphasis added).
86. The statute discriminated between automobile guests and other, social guests; between automobile passengers (paying riders) and automobile guests (non-paying riders) in the driver’s car; and between different sub-classifications of automobile guests, such as guests injured on the highway and those injured on a private road. Id. at 863, 506 P.2d at 217, 106 Cal. Rptr. at 393.
87. Id. at 861 & 862 n.2, 506 P.2d at 216 & n.2, 106 Cal. Rptr. at 392 & n.2.
90. See, e.g., Vlandis v. Kline, 412 U.S. 441, 463 (Rehnquist, J., dissenting). The use of economic substantive due process is universally disapproved, although neither its evil nor its definition is quite clear. It has been seen as an examination of the formulation of a policy’s or statute’s empirical bases—that is, its means, its ends, and the facts the legislature used to arrive at both. Michigan Note, supra note 54, at 821-22. See also Ratner, The Function of the Due Process Clause, 116 U. Pa. L. Rev. 1048, 1071 (1968). It has also been defined as "the judicial
doctrine is characterized by examining the means, ends, and legislative facts of a statute, and a finding of "no rational relationship" impugns a statute's means, such a finding does seem vulnerable to attack. Yet even the Supreme Court, which recoils from basing decisions on economic substantive due process, has used the "no rational relationship" rationale to strike down statutes.

It is tempting to draw two conclusions from the Court's use of that analysis: that its failure to employ the analysis in the irrebuttable presumption cases is not explained by its fear of engaging in economic substantive due process analysis, and that lower courts should therefore not hesitate to rely on "no rational relationship" to void a statute. But most likely the pitfalls of economic substantive due process are too well documented, and judicial aversion to it too strong, to give "no rational relationship" analysis a chance of widespread success. Except in the most grossly over- or underinclusive statutes or policies, like that in Gurmankin, the analysis will most likely not provide relief.

CONCLUSION

If the physically disabled are to prevail on a constitutional theory at all, their suspect-classification attributes present the most promise. Their very designation—"handicapped"—states their credentials as protected citizens. Racial minorities, an established suspect classification, were found only after litigation to have been so often denied opportunities to gain employment, equal transportation facilities, and quality schools that they could properly be said to be "handicapped." For those who start out physically disabled, the description is immediately apt.

If the handicapped are not eventually held to be a suspect class, they may have no constitutional remedy to employment discrimination except the doctrine of irrebuttable presumption. That doctrine was used by a federal district court in Gurmankin to produce good results. But the favorable outcome in that case cannot offset the danger presented by the continued use of the doctrine. The disabled


thus may have to rely on one of the numerous state and federal anti-discrimination statutes to enforce their rights to employment. Although the Constitution is a marvelously expansive document, it does not and cannot shield every interest and group that claims its protection. It is of utmost importance to respect its limitations.

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