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MANDATORY RETIREMENT AND THE CONSTITUTION: CHALLENGING THE FACTUAL BASIS UNDERLYING LEGISLATIVE CLASSIFICATIONS

Vernon Townes Grizzard*

I. INTRODUCTION

A. Anticipated Developments in the Law

This article anticipates certain developments in the law affecting decisions to retire from work and suggests that the currently prevalent institution of mandatory retirement will evolve into a practice of determining different points of actual disability for various individuals and occupations. Such employment disability determinations will increasingly result from two modes of decision. Regulatory agencies and courts will produce a patchwork of rules establishing ages of retirement for different employment classifications. The promulgation of these rules will follow extensive proceedings conducted by appropriate rulemaking bodies. Alternatively, case-by-case factfinding procedures will be utilized to determine when a person should retire. The second approach, emphasizing the differences among people in the context of their employment situations,

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1. See Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 239-48 (5th Cir. 1976) (Brown, C.J., concurring) (court should invoke doctrine of “primary jurisdiction” and suspend judicial process pending referral to Department of Transportation for rulemaking hearings on maximum employment age, since DOT has responsibility for driver-related safety in the operation of interstate buses); Air Line Pilots Ass'n v. Quesada, 276 F.2d 892 (2d Cir. 1960) (Federal Aviation Administration regulation which set retirement age at 60 for commercial pilots upheld; regulation was adopted pursuant to administrative rulemaking procedures, following study by FAA medical staff), cert. denied, 366 U.S. 962 (1961). Such rules and regulations, when "clearly imposed for the safety and convenience of the public,” are sanctioned by 29 C.F.R. § 860.102(d) (1979).
will allow for substantial variation in outcome.²

Congress has taken major steps in these directions. In 1967 it passed the Age Discrimination in Employment Act (ADEA),³ which outlawed mandatory retirement, with some exceptions, before age sixty-five. In 1974 Congress extended coverage to employees of state and local governments.⁴ In 1978 the ADEA was again amended to abolish mandatory retirement for most federal employees and to protect most other employees from forced retirement until age seventy.⁵

The United States Supreme Court has followed Congress into this arena. After several denials of certiorari and summary deci-

2. See Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 28 U.S.C.A. §§ 331, 332, 372, 604 (Supp. 1981) (upon complaint and investigation, judicial councils in federal judicial circuits may certify mental or physical disability of lower federal court judge and request that judge retire voluntarily); see also Houghton v. McDonnell Douglas Corp., 553 F.2d 561 (8th Cir.) (test pilot over age 50 improperly terminated; age not a bona fide occupational qualification because evidence demonstrated that aging process occurs more slowly and to a lesser degree among professional pilots than in general population, and because medical technology can predict disabling physical condition in a test pilot with virtually foolproof accuracy), cert. denied, 434 U.S. 966 (1977).


5. ADEA Amendments of 1978, 29 U.S.C. §§ 623, 631, 633a (Supp. II 1978). Exempted from this extension of coverage were high-paid policymaking executives aged 65 and over, certain tenured faculty at the college level aged 65 and over (exemption expires July 1, 1982), and employees covered by certain collective bargaining agreements (exemption expired upon termination of agreement or on January 1, 1980, whichever occurred first). These amendments did not bring the military retirement system under the ADEA. Separate statutes regulate the retirement age in some other federal job classifications. See, e.g., 5 U.S.C. § 8335(a) (Supp. II 1978) (air traffic controllers retire at age 56); 5 U.S.C. § 8335(b) (Supp. II 1978) (federal law enforcement officers and firefighters retire at age 55).
mandations, the Court issued its first opinion on mandatory retirement in Massachusetts Board of Retirement v. Murgia. There the Court held:

The testimony clearly established that the risk of physical failure, particularly in the cardiovascular system, increases with age, and that the number of individuals in a given age group incapable of performing stress functions increases with the age of the group.

Since physical ability generally declines with age, mandatory retirement at 50 serves to remove from police service those whose fitness for uniformed work presumptively has diminished with age. This clearly is rationally related to the State's objective [of protecting the public].

[R]ationality is the proper standard by which to test whether compulsory retirement at age 50 violates equal protection. We disagree, however, with the District Court's determination that the age 50 classification is not rationally related to furthering a legitimate state interest.

The case of Vance v. Bradley occasioned the Supreme Court's second full treatment of the mandatory retirement issue. The Court upheld a congressional enactment requiring retirement from the Foreign Service at age sixty:


7. 427 U.S. 307 (1976). This case presented a constitutional issue but not a statutory question because the plaintiff, a state employee, was retired before the 1974 amendments to the ADEA gave state employees a statutory cause of action. For an example of critical comment provoked by this decision, see Abramson, Compulsory Retirement, the Constitution and the Murgia Case, 42 Mo. L. Rev. 25 (1977).

8. See infra notes 33-40 and accompanying text.


Congress has legislated separately for the Foreign Service and has gone to great lengths to assure that those conducting our foreign relations will be sufficiently competent and reliable in all respects. If Congress attached special importance to high performance in these positions, which it seems to us that it did, it was quite rational to avoid the risks connected with having older employees in the Foreign Service but to tolerate those risks in the Civil Service.

... If increasing age brings with it increasing susceptibility to physical difficulties, as the District Court was apparently willing to assume, the fact that individual Foreign Service employees may be able to perform past age 60 does not invalidate § 632 any more than did the similar truth undercut compulsory retirement at age 50 for uniformed state police in Murgia.

... And we have noted the commonsense proposition that aging—almost by definition—inevitably wears us all down.11

Following its decision in Vance the Supreme Court denied certiorari12 in two cases reflecting contrasting conclusions from different United States Circuit Courts of Appeals. In Palmer v. Ticcione,13 the plaintiff, a public school kindergarten teacher forced to retire at age seventy pursuant to New York state law, commenced an action under 42 U.S.C. § 1983 alleging age discrimination in violation of the equal protection and due process guarantees of the fourteenth amendment. The trial court dismissed the complaint for want of a substantial federal question. The Second Circuit Court of Appeals affirmed, reasoning that the case was indistinguishable from prior cases upholding compulsory retirement in occupations involving primarily mental skills.14 The appellate court

11. Id. at 106, 108, 112 (footnote omitted). Again, Justice Marshall dissented. This case was not argued primarily as a claim that the retirement provision discriminated irrationally between Foreign Service personnel over age 60 and those younger. Rather, the challenge emphasized that the statute unfairly discriminated between Foreign Service personnel (retired at age 60) and Civil Service personnel (retired at age 70). Id. at 96 and n.10; id. at 109-10 and n.27. But see id. at 115-16 (Marshall, J., dissenting) (claim that statute discriminates against persons aged 60 and over “is properly before us”).


reasoned further that compulsory retirement might be "[u]nrelated to any notion of physical or mental fitness," yet be rationally related to the fulfillment of any or all of these possible state objectives:

[A] state might prescribe mandatory retirement for teachers in order to open up employment opportunities for young teachers—particularly in the last decade when supply has outpaced demand, or to open up more places for minorities, or to bring young people with fresh ideas and techniques in contact with school children, or to assure predictability and ease in establishing and administering pension plans.\(^{15}\)

In Garrison v. Gault,\(^{16}\) decided the same day as Palmer, the plaintiff, a public high school biology teacher, was forced to retire at age sixty-five pursuant to Illinois state law. The trial court dismissed the complaint which, like the Palmer complaint, was premised upon 42 U.S.C. § 1983. Unlike the court in Palmer, however, the Seventh Circuit Court of Appeals reversed because the record did not reveal an identifiable governmental purpose for the retirement provision at issue, and because without evidence of record the court was incapable of answering the following question:

[Is there] any [rational] relationship between the attainment of the age of 65 and a schoolteacher's fitness to teach[?] . . . We cannot assume that a teacher's mental faculties diminish at age 65. On the contrary, as suggested by plaintiff's offer of proof, much in the way of knowledge and experience, so helpful to the educational profession, is often gained through years of experience.\(^{17}\)

The tension produced by the differing decisions of the Second and Seventh Circuit Courts of Appeals in the Palmer and Gault cases, a tension left unresolved by the Supreme Court's denial of review,\(^{18}\) locates the focus of this article. This article will present

\(^{15}\) The Court has continued to treat summarily cases challenging the constitutionality of mandatory retirement. Trafelet v. Thompson, 594 F.2d 623 (7th Cir.), cert. denied, 444 U.S. 906 (1979); Black v. Payne, 591 F.2d 83 (9th Cir.), cert. denied, 444 U.S. 867 (1979);
and juxtapose elements of often unrelated constitutional analysis available to courts adjudicating challenges to mandatory retirement. Weaving together these separate strands of established constitutional doctrine produces an analysis requiring a measured sensitivity to factual distinctions among the different employment situations of individuals facing mandatory retirement.

B. Background of Mandatory Retirement

With the enactment of the ADEA, there emerged a body of literature in the legal periodicals which ably presented the case against mandatory retirement as a matter of social policy. This article will not repeat the arguments which others have stated so thoroughly. Nevertheless, a brief guide to these works and the primary research materials underlying them may aid the reader who seeks detailed information regarding historical, demographic, economic, psychological, medical, or sociological perspectives on aging and retirement.

Demographic statistics reveal that the United States is progressively becoming a nation of more elderly people Labor force par-


For two extensive current bibliographies, see INTERIM REPORT, U.S. DEPT' OF LABOR STUDIES ON THE EFFECTS OF RAISING THE AGE LIMIT IN THE AGE DISCRIMINATION IN EMPLOYMENT ACT 149-61, 360-67 (1981) [hereinafter cited as INTERIM REPORT].

20. According to demographic projections, the population aged 65 and over will increase from 25 million in 1980 (11% of the total population) to 32 million in the year 2000 (13% of the total population). INTERIM REPORT, supra note 19, at 9. See also Drucker & Moore, Mandatory Retirement: Past, Present and Future of an Anachronism, 5 W. ST. U.L. REV. 1, 1-2 and n.3 (1977); Note, Age Discrimination in Employment, supra note 19, at 1312.
Participation by elderly workers has decreased steadily and markedly since 1950.\textsuperscript{21} Perhaps half of the labor force is subject to compulsory retirement programs.\textsuperscript{22} The choice of age sixty-five as a common age of retirement originated with German Chancellor Otto Von Bismarck’s public retirement program instituted in 1887, and was first manifested in the United States with the enactment of the Social Security Act of 1935.\textsuperscript{28}

Nearly half of those over age sixty-five who are unemployed live in poverty, even if they receive social security or pension benefits, and this percentage is increasing.\textsuperscript{24} The continued viability of the social security system is threatened by the demographic trends outlined above.\textsuperscript{25} Private pension plans have been expanding since World War II as an alternative source of income in post-retirement years.\textsuperscript{26}

Because it is often difficult to find an adequate substitute for the productive social role which employment represents in Western industrialized society, retirement has a negative psychological impact on the individual.\textsuperscript{27} Retirement has also been identified as a causal factor in declining physical health.\textsuperscript{28} The significance of these findings varies with respect to the individual’s occupation, and becomes greater when the decision to retire is not the individual’s own.\textsuperscript{29}

Chronological age is not a reliable indicator of how the aging process has affected an individual’s physical and mental condition.

\textsuperscript{21} The labor force participation rate of all men aged 65 and over has fallen from 27\% in 1970 to 19.3\% in 1980. INTERIM REPORT, supra note 19, at 10. See also Botelho, Cain \& Friedman, supra note 19, at 400-01; Note, Age Discrimination in Employment, supra note 19, at 1313.

\textsuperscript{22} Botelho, Cain \& Friedman, supra note 19, at 399 and n.4; INTERIM REPORT, supra note 19, at 21.

\textsuperscript{23} Drucker \& Moore, supra note 20, at 3; Comment, Age Discrimination and the Over-Sixty-Five Worker, 3 CUM.-SAM. L. REV. 333, 334-35 (1972).

\textsuperscript{24} Comment, The Constitutionality of the Mandatory Retirement Age, 5 U. SAN FERN. V.L. REV. 303, 311-12 (1976); Note, Age Discrimination in Employment, supra note 19, at 1318-20; Note, Too Old to Work, supra note 19, at 152-55; Comment, Mandatory Retirement, supra note 19, at 120-21; Comment, supra note 23, at 333-34.

\textsuperscript{25} Note, Age Discrimination in Employment, supra note 19, at 1348; INTERIM REPORT, supra note 19, at 12.


\textsuperscript{27} Note, Age Discrimination in Employment, supra note 19, at 1320-23; Note, Too Old to Work, supra note 19, at 155-58; Botelho, Cain \& Friedman, supra note 19, at 403-04.

\textsuperscript{28} Note, Age Discrimination in Employment, supra note 19, at 1322-24; Comment, Mandatory Retirement, supra note 19, at 121-22.

\textsuperscript{29} Note, Age Discrimination in Employment, supra note 19, at 1324.
tion. Research in industrial gerontology has consistently demonstrated that there is more variation in the ability of workers in the same age group than exists between different age groups of workers. In relation to output, absenteeism, accident rates, and ability to be trained for new skills, age is widely recognized as an unsatisfactory predictor of job performance.

In Part II, elements of constitutional doctrine presented to the Supreme Court in the Murgia and Vance cases will be considered. Particular attention will be paid to the course of litigation in Murgia in order to indicate how that decision took shape, what questions are closed, and what avenues the Court may have left open for future litigation.

II. MANDATORY RETIREMENT: THE LIMITS OF "RATIONALITY"

To date, the Supreme Court has discussed and disposed of cases involving the constitutionality of mandatory retirement solely in terms of equal protection analysis. Because aged persons have not been judicially recognized as constituting a "suspect class,"

30. Drucker & Moore, supra note 20, at 5-6; Kovarsky & Kovarsky, supra note 19, at 880; McDougal, Lasswell & Chen, supra note 19, at 643.
31. Note, Age Discrimination in Employment, supra note 19, at 1316; Note, Too Old to Work, supra note 19, at 159 and n.49.

[E]qual protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. Mandatory retirement at age 50 under the Massachusetts statute involves neither situation.

427 U.S. at 312-13 (footnotes omitted). When "strict scrutiny" is inappropriate, the Court employs the "rational basis" standard, inquiring only whether there is a "rational relationship" between the classification adopted and the furthering of a "legitimate state interest." The relatively relaxed standard is often referred to simply as "rationality." See id. at 312-16.
34. 427 U.S. at 313. The Court catalogued "suspect classifications" as follows: alienage, race, and ancestry. Id. at 312 n.4. Subsequently, the Court formulated an exception to this rule for classifications based on alienage. Thus, aliens may be excluded from performing governmental functions which fulfill a fundamental obligation of government to its constituency upon a showing that the citizenship requirement "bear[s] a rational relationship to a legitimate state interest." Ambach v. Norwick, 441 U.S. 68, 80 (1979) (citizenship requirement for New York public school teachers constitutional). See also Foley v. Connellie, 435
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and because employment is not a "fundamental right,"
the Court has refused to require that classifications establishing an age for mandatory retirement be justified by a compelling state interest. The Court has chosen instead to examine mandatory retirement provisions for "rationality" only, thus subjecting such provisions to the lowest equal protection standard of review.

Implicit in the Court's treatment of mandatory retirement cases is a refusal to create an exception for these cases somewhere on a continuum between the extremes of the strict scrutiny and rationality standards of equal protection review. Under this middle tier of equal protection analysis, classifications which discriminate on the basis of gender or illegitimacy are subjected to heightened, though not strictest, scrutiny. The burden is on those defending such classifications to show that the discrimination serves an important or significant governmental objective, and that the classification is "substantially related" to the achievement of that objective.

In the Murgia and Vance cases, the Court determined that the classifications at issue were rationally related to the achievement of identified and legitimate governmental purposes. Although several lower federal courts have specifically treated similar cases as raising a question of whether provisions for mandatory retirement constitute an unwarranted "conclusive presumption" of incapacity


35. 427 U.S. at 313. The Court listed "fundamental rights" as including rights of a uniquely private nature, the right to vote, the right of interstate travel, rights guaranteed by the first amendment, and the right to procreate. Id. at 312 n.3. Later the right to marry was similarly designated "fundamental" in Zablocki v. Redhail, 434 U.S. 374 (1978).


38. E.g., Lalli v. Lalli, 439 U.S. 259, 265 (1978) (plurality opinion); id. at 279 (Brennan, J., dissenting, joined by White, Marshall, and Stevens, JJ.).

39. In apparent response to Professor Gunther's suggestion that the middle tier standard of equal protection review be termed "rationality with bite," the Court has described such review as not "toothless." Trimble v. Gordon, 430 U.S. 762, 767 (1977) (quoting Mathews v. Lucas, 427 U.S. 495, 510 (1976)). Eventually, however, "substantially related" emerged as the preferred phraseology for the intermediate equal protection standard.

40. 427 U.S. at 314; 440 U.S. at 97-98.
for employment, the Supreme Court has to date neither mentioned nor foreclosed the use of conclusive presumption analysis in its decisions on review of those judgments.

A. Equal Protection Alone

The district court treated the plaintiff's allegations in Murgia v. Massachusetts Board of Retirement as fairly presenting issues of both due process and equal protection. The plaintiff's amended complaint reveals that he placed primary reliance upon the theory that the Massachusetts mandatory retirement statute violated due process by creating an unwarranted conclusive presumption that the plaintiff was unfit for employment solely because of his age.

The lower court relied extensively on Cleveland Board of Education v. LaFleur, with a footnote reference to Justice Rehnquist's dissent in that case, in which he forecast the applicability of conclusive presumption analysis to mandatory retirement rules. Brief study of the record in the Murgia case before the Supreme Court reveals that the plaintiff initially urged the Court to affirm on the basis of conclusive presumption reasoning:

The issue was whether the state could enforce the provisions of a mandatory retirement statute which incorporated a conclusive irrefutable presumption that a fifty year old member was incapable of continuing in his job when the state's own medical testing proved the invalidity of the irrefutable presumption. The district court correctly held that the state could not disregard its own determinations as to fitness and struck down the statute.


45. See infra note 53 and accompanying text.

46. Motion of Appellee to Affirm at 19, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976). In their papers filed in the Supreme Court, the appellants agreed that the conclusive presumption issue was fairly presented by the district court's holding. Appellants argued that the LaFleur case was not controlling and could be distinguished on its facts and that the conclusive presumption doctrine had no place in the case at bar. Brief for Appellants at 34-35, 38-39, 42-43; Appellants' Jurisdictional Statement at 9.
Yet the Supreme Court, with no reference to LaFleur, treated the case as raising solely an equal protection issue.\textsuperscript{47} The Court determined that rationality was the proper equal protection standard by which to test the mandatory retirement provision and concluded that the provision (mandatory retirement at age fifty) was rationally related to the identified legislative objective of protecting the public by ensuring the physical preparedness of state police.

Whether the Court determined that conclusive presumption analysis is inappropriate in the context of mandatory retirement is not answered by Murgia. The chronology of the case is relevant to why this question was not addressed in the Court's opinion. Attorneys for Murgia initially filed a motion asking for affirmance of the district court decision, relying heavily on LaFleur and conclusive presumption analysis. Briefs remained to be filed. The case of Weinberger \textit{v.} Salfi\textsuperscript{48} was decided several weeks prior to the filing of briefs on the merits in the \textit{Murgia} case. Attorneys for Murgia, who had initially argued that the district court correctly interpreted the case as raising the conclusive presumption issue, now urged a different view in their brief to the Court:

Whether the irrebuttable presumption doctrine is appropriate for the decision of this case is not in issue because the district court did not employ that doctrine in its analysis.

Together with the equal protection claim, the appellee raised the issue of denial of due process of law in the lower court and, relying upon this Court's decision in \textit{Cleveland Board of Education \textit{v.} LaFleur, supra}, asserted that the mandatory retirement statute created an irrebuttable presumption which should be invalidated.

The district court rejected these contentions and never reached the due process issue. It relied exclusively upon the Equal Protection Clause. . . .

Nowhere in its opinion does the lower court engage in any analysis of the irrebuttable presumption doctrine or application of that doctrine to the facts of the case. There is not any mention of the term irrebuttable presumption anywhere in the opinion. The court's refusal to apply the irrebuttable presumption doctrine appears to have been correct in light of \textit{Weinberger \textit{v.} Salfi}, 43 U.S.L.W. 4785, 4992 (U.S. June 26, 1975).\textsuperscript{49}

\textsuperscript{47} 427 U.S. at 308, 317.
\textsuperscript{48} 422 U.S. 749 (1975).
\textsuperscript{49} Brief for Appellee at 43-44, Massachusetts Bd. of Retirement \textit{v.} Murgia, 427 U.S. 307
Attorneys for Murgia argued that the lower court's *LaFleur* citation was a reference only to the analogous facts of that case and not to the appropriate mode of challenge or review. Consideration in Part IIB of the doctrinal interplay between the *LaFleur* and *Salfi* cases may partially explain why counsel for Murgia decided to forego reliance upon the conclusive presumption rationale, as well as why the Court decided *Murgia* without reference to *LaFleur*.

### B. Unwarranted Conclusive Presumptions: An Opportunity Missed?

In *LaFleur*, the Court held that "the mandatory termination provisions of the Cleveland and Chesterfield County maternity regulations violate the Due Process Clause of the Fourteenth Amendment, because of their use of unwarranted conclusive presumptions that seriously burden the exercise of protected constitutional liberty."\(^5\) The conclusive presumption was that pregnant school teachers are medically unfit to teach for several months before and after childbirth. The protected constitutional liberty was the right to decide freely whether to bear or beget a child.\(^61\) The underlying fact crucial to the holding was that "the ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter."\(^62\) In dissent, Justice Rehnquist, joined by Chief Justice Burger, paraded the horrors of extending this reasoning to the context of mandatory retirement:

> It was pointed out by my Brother STEWART only last year in his concurring opinion in *Roe v. Wade* . . . that "the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights. . . . Cf. . . . *Truax v. Raich*, 239 U.S. 33, 41." In *Truax v. Raich*, the Court said:

> "It requires no argument to show that the right to work for a living in the common occupations of the community is

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50. 414 U.S. at 651. In *LaFleur* and prior cases the Court used "conclusive presumption" and "irrebuttable presumption" as interchangeable labels. The term "conclusive presumption" has been used consistently throughout this article. Professor Laurence H. Tribe, whose work is discussed at length in Part IIB, *infra*, has adopted the "irrebuttable presumption" terminology. L. Tribe, American Constitutional Law 1092-97 (1978). The different labels do not indicate a difference of substance.

51. 414 U.S. at 640.

52. *Id.* at 645.
of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure.” 239 U.S. 33, 41 (1915).

Since this right to pursue an occupation is presumably on the same lofty footing as the right of choice in matters of family life, the Court will have to strain valiantly in order to avoid having today’s opinion lead to the invalidation of mandatory retirement statutes for governmental employees. In that event federal, state, and local governmental bodies will be remitted to the task, thankless both for them and for the employees involved, of individual determinations of physical impairment and senility.55

Justice Rehnquist’s opinion the following Term in Salfi cast some doubt on the likelihood that this prophesy would be realized.

In Salfi the Court upheld the constitutionality of provisions of the Social Security Act which prohibit a wage-earner’s widow from receiving benefits unless the duration of the marriage relationship before the wage-earner’s death was nine months or more. The duration-of-relationship requirement was characterized as a “prophylactic rule”54 designed to prevent payment of benefits when a marriage was entered into for the purpose of receiving benefits. The district court relied on LaFleur, Vlandis v. Kline,58 and Stanley v. Illinois56 in striking down the duration-of-relationship requirement as an impermissible conclusive presumption that marriages not satisfying the requirement were sham. The Supreme Court distinguished these conclusive presumption cases:

We hold that these cases are not controlling on the issue before us now. Unlike the claims involved in Stanley and LaFleur, a noncontractual claim to receive funds from the public treasury

53. Id. at 659 (Rehnquist, J., dissenting, joined by Burger, C.J.).
55. 412 U.S. 441 (1973) (“permanent irrebuttable presumption” of nonresidency for state university students who applied for admission while not residing in Connecticut, with consequent higher tuition rate, violates due process). Reconsideration of Vlandis was broached but deferred in Elkins v. Moreno, 435 U.S. 647 (1978).
56. 405 U.S. 645 (1972) (unwed father is entitled to a hearing on his fitness as a parent as a precondition to being separated from his children in a state-initiated dependency proceeding).
enjoys no constitutionally protected status.

We think that the District Court’s extension of the holdings of Stanley, Vlandis, and LaFleur to the eligibility requirement in issue here would turn the doctrine of those cases into a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution.

The language is strong, and many took it as a dead-end sign for the conclusive presumption line of cases. A representative comment was that “in Weinberger v. Salfi . . . the Court sounded the death knell for the much criticized irrebuttable presumption doctrine.”

The use of the conclusive presumption doctrine in cases such as LaFleur and Stanley has indeed been much criticized. While the Court has employed the analysis periodically for more than half a century, its reemergence in the 1970’s met with commentary which on occasion has approached virulent condemnation. It has been remarked that the Supreme Court “seems to misunderstand the nature of an irrebuttable presumption,” and that there appears to be “no justification for the irrebuttable presumption doctrine.” Analysis of a claim in conclusive presumption terms has been labelled “fundamentally misconceived” because such analysis is “logically equivalent to an equal protection argument.”

57. 422 U.S. at 771-72. This attempt to distinguish earlier conclusive presumption cases has been criticized as patently inadequate. See 422 U.S. at 802-05 (Brennan, J., dissenting, joined by Marshall, J.); The Supreme Court, 1974 Term, 89 Harv. L. Rev. 47, 80-81 (1975); Note, Equal Protection-Due Process—The Irrebuttable Presumption Doctrine, 1976 B.Y.U.L. Rev. 565, 579 n.86 [hereinafter cited as Note, Equal Protection-Due Process]; Note, Constitutional Law—The Conclusive Presumption Doctrine, 54 N.C.L. Rev. 460, 463, 467 (1976) [hereinafter cited as Note, Constitutional Law].


60. For discussion of the history of the conclusive presumption doctrine, see Note, supra note 54, at 449-50 and nn.3-5; Note, Equal Protection-Due Process, supra note 57, at 567-68. Professor Tribe locates the historical roots of the current doctrine in “the early 1940s.” L. Tribe, American Constitutional Law 1093 (1978).


62. Id. at 1556.

63. Note, supra note 54, at 473. See Bezanson, Some Thoughts on the Emerging Ir-
this reasoning by the Court has been assailed as violative of “neutral principles of constitutional adjudication.” Decisions reached in reliance upon conclusive presumption principles are almost certain to be marked by vigorous dissenting opinions.

In *Salfi* such critical assessments of the conclusive presumption rationale moved out of dissent and into the majority opinion. It was but a short step to the conclusion that the Court now looked with disfavor upon any developments along this line; commentators applauded this censure of the doctrine.

Yet the Court in *Salfi* expressly distinguished *LaFleur*. Some courts have stated that after *Salfi*, both *Stanley* and *LaFleur* are best characterized as “fundamental rights” cases appropriate for strict scrutiny under prevailing equal protection doctrine. Neither the Court nor commentators have so categorized these cases, and the reference in *Salfi* to *Stanley* as a case involving “important liberties cognizable under the Constitution” does not support the “fundamental rights” interpretation.

Lower courts have continued to wrestle with the relative prece-
dential value to be accorded *LaFleur* and *Salfi* in factual situations where neither case is controlling. It is possible that in *Murgia* the Supreme Court implicitly decided that conclusive presumption analysis is inappropriate in the context of mandatory retirement. However, given the chronology of litigation in *Murgia* and the strategy pursued by the litigants, a shorter explanation may suffice.

Justice Frankfurter has offered such an explanation for one of the most crucial decisions in American constitutional history. In a rare glimpse of the inner workings of the Court from one of the principals, Justice Frankfurter wrote to shed light on Justice Roberts' vote in *West Coast Hotel Co. v. Parrish*, which is often said to have ended an era of substantive due process. Justice Frankfurter describes the historical context for making public, on the occasion of Justice Roberts' death, the memorandum left him years before:

One is more saddened than shocked that a high-minded and thoughtful United States Senator should assume it to be an established fact that it was by reason of "the famous switch of Mr. Justice Roberts" that legislation was constitutionally sustained after President Roosevelt's proposal for reconstructing the Court and because of it. The charge specifically relates to the fact that while Roberts was of the majority in *Morehead v. New York* ex

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69. In *Gurmankin v. Costanzo*, 411 F. Supp. 982 (E.D. Pa. 1976), the court held that the refusal to consider a blind woman for employment as a teacher of sighted persons created an impermissible conclusive presumption, even though blind persons do not constitute a suspect classification:

Confronted with these two seemingly inconsistent opinions, I believe that *LaFleur* is the more appropriate precedent. Ms. Gurmankin's interest in public employment, though it may not be a "fundamental right," is certainly more important than the "right" to receive social security benefits in *Salfi*. In addition, Ms. Gurmkinkin'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. . . . [T]he blind, like pregnant school teachers, are an objectively defined group that should not be subjected to inaccurate and irrebuttable presumptions of incompetence.

*Id.* at 990-91 (footnote omitted). The Third Circuit Court of Appeals affirmed, noting that "the district court was correct to regard [the case] as controlled by *LaFleur.*" *Gurmankin v. Costanzo*, 556 F.2d 184, 187 n.5 (3d Cir. 1977). See Note, *Applying the Constitutional Doctrine of Irrebuttable Presumption to the Handicapped—Gurmankin v. Costanzo*, 27 DePaul L. Rev. 1199 (1978). See also *Talbot v. Fyke*, 533 F.2d 331, 332 (6th Cir. 1976) (*LaFleur* and *Stanley* "have no application in the present case for the reasons stated by the Supreme Court" in *Salfi*).

70. *See supra* note 48 and accompanying text.

71. *See supra* note 49 and accompanying text.

72. 300 U.S. 379 (1937).
In the memorandum, Justice Roberts recounted how the strategy adopted by appellate counsel in two similar cases influenced him first to reaffirm and subsequently to reconsider the same precedential case.\textsuperscript{74}

Applying a similar rationale to \textit{Murgia}, one could conclude that the Court took counsel for \textit{Murgia} at their word that the case at hand did not require the Court to reach the conclusive presumption question.\textsuperscript{75} Whether the Court would reject the applicability of \textit{LaFleur} if counsel confronted it directly with the issue awaits resolution.

Despite the limitations placed upon the conclusive presumption doctrine in \textit{Salfi}, during the following Term the Court summarily vacated and remanded a case solely on the authority of \textit{LaFleur}. The Court's opinion in the little-noted case of \textit{Turner v. Department of Employment Security}\textsuperscript{76} leaves no doubt that the \textit{LaFleur} formulation of the conclusive presumption rationale has not been

\textsuperscript{73} Justice Frankfurter, \textit{Mr. Justice Roberts}, 104 U. Pa. L. Rev. 311, 313 (1955).

\textsuperscript{74} The following excerpt from Justice Roberts' memorandum is quoted directly by Justice Frankfurter:

"Both in the petition for certiorari, in the brief on the merits, and in oral argument, counsel for the State of New York took the position that it was unnecessary to overrule the \textit{Adkins} case in order to sustain the position of the State of New York. It was urged that further data and experience and additional facts distinguished the case at bar from the \textit{Adkins} case. The argument seemed to me to be disingenuous and born of timidity. I could find nothing in the record to substantiate the alleged distinction. At conference I so stated, and stated further that I was for taking the State of New York at its word.

\ldots

"August 17, 1936, an appeal was filed in \textit{West Coast Hotels [sic] Company v. Parrish}, 300 U.S. 379. \ldots I stated that I would vote for the notation of probable jurisdiction. I am not sure that I gave my reason, but it was that in the appeal in the \textit{Parrish} case the authority of \textit{Adkins} was definitely assailed and the Court was asked to reconsider and overrule it.

\textit{Id.} at 314-15. \textit{See also} Hampton v. Mow Sun Wong, 426 U.S. 88, 104 n.24 (1976) (Court did not address argument which was not pressed by counsel for petitioners).

\textsuperscript{75} For a different view recognizing the role played by the \textit{Salfi} decision in the \textit{Murgia} litigation, but stressing that "one should not make too much of appeal strategy," see Gordon & Tenenbaum, \textit{Conclusive Presumption Analysis: The Principle of Individual Opportunity}, 71 Nw. U. L. Rev. 579, 581-82 (1976).

\textsuperscript{76} 423 U.S. 44 (1975).
eclipsed.\textsuperscript{77}

The fact that the Court has denied certiorari review in cases where the conclusive presumption rationale was treated by the lower court,\textsuperscript{78} or that the Court has summarily affirmed such a case,\textsuperscript{79} does not demonstrate that fuller consideration of the applicability of the conclusive presumption rationale is foreclosed. The Court has specifically indicated in this context that summary treatment and "cursory consideration" of prior cases does not bar subsequent opportunity for fuller exploration.\textsuperscript{80}

Will the Court be urged to reconsider whether classifications providing a maximum age\textsuperscript{81} should be determined "suspect," and

\textsuperscript{77} The presumption of incapacity and unavailability for employment created by the challenged provision is virtually identical to the presumption found unconstitutional in \textit{Cleveland Board of Education v. LaFleur}, \ldots Noting that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause," 414 U.S., at 639, the Court held that the Constitution required a more individualized approach to the question of the teacher's physical capacity to continue her employment during pregnancy and resume her duties after childbirth since "the ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter." \textit{Id.}, at 645.

\ldots The Fourteenth Amendment requires that unemployment compensation boards no less than school boards must achieve legitimate state ends through more individualized means when basic human liberties are at stake. We conclude that the Utah unemployment compensation statute's incorporation of a conclusive presumption of incapacity during so long a period before and after childbirth is constitutionally invalid under the principles of the \textit{LaFleur} case. \textit{Id.} at 46-47. Justice Powell joined the majority opinion. In \textit{LaFleur} he concurred separately on equal protection grounds, urging the Court to approach the conclusive presumption rationale "with extreme care." 414 U.S. at 652-56. His alignment with the majority in \textit{Turner} may indicate that he now takes a more favorable view toward such claims. Justice Rehnquist was the lone dissenter in \textit{Turner}. The Chief Justice and Justice Blackmun would have set the case for full briefing and oral argument.


\textsuperscript{80} \textit{Massachusetts Bd. of Retirement v. Murgia}, 427 U.S. 307, 308 n.1 (1976) (citing \textit{Edelman v. Jordan}, 415 U.S. 651 (1974)). In the \textit{Edelman} case, the Court explained that "[summary affirmances] are not of the same precedential value as would be an opinion of this Court treating the question on the merits." \textit{Id.} at 671. In \textit{Edelman} the Court expressly disapproved three prior summary affirmances on point.


\textsuperscript{81} This proposition is stated precisely in terms of "maximum age" because age-based classifications establishing a minimum age generally involve considerations which, though
whether there is a right to public or private employment opportunity which should be denominated "fundamental"? Justice Marshall, though dissenting from the Court's upholding of mandatory retirement provisions, did not so argue. The argument is alluded to by commentators critical of mandatory retirement, but it is not pressed. Although Congress has determined that age discrimination in employment is pervasive, commentators have generally conceded that the Court was correct in concluding that the aged, as a group, do not satisfy the Court's definition of a "discrete and insular" minority deserving strictest judicial protection. Such a doctrinal approach would have serious repercussions on innumerable legislative enactments outside the context of mandatory retirement. Faced with this prospect in other contexts, the Court has been extremely reluctant to expand the pantheon of "suspect classifications." It may be that the number or breadth of classifications so suspected is actually shrinking.

The conclusive presumption cases discussed herein present clear questions concerning the factual accuracy of legislative classifications, and so appear appropriate for discussion and decision under equal protection analysis. The middle tier of heightened scrutiny presents an option which might seem preferable to decisionmaking at either of the extremes of equal protection theory, strict scrutiny or rationality. Yet the Court chose to invalidate the conclusive presumptions at issue outside the confines of current equal protection

related to the subject of this article, are different enough to warrant separate treatment. For a related discussion in accord with this view, see L. Tribe, American Constitutional Law 1080-82 and n.14 (1978), and Tribe, Childhood, Suspect Classifications, and Conclusive Presumptions: Three Linked Riddles, 39 Law & Contemp. Probs. 8 (Summer, 1975). For a contrary view, see Malmed v. Thornburgh, 621 F.2d 565, 577 n.18 (3d Cir.) (discussing age-based classifications without distinguishing between minimum and maximum age barriers), cert. denied, 449 U.S. 955 (1980).

82. See, e.g., Comment, Constitutional Attacks, supra note 80, at 553-57.

83. See supra Part IA.


85. Compare Frontiero v. Richardson, 411 U.S. 677, 682 (1973) (plurality opinion) (characterizing Reed v. Reed, 404 U.S. 71 (1971), as providing "implicit support" for viewing sex-based classifications as inherently suspect and subject to "close judicial scrutiny") with 411 U.S. at 692 (concuring opinion) (Reed decision "did not add sex to the narrowly limited group of classifications which are inherently suspect").

86. In Foley v. Connellie, 435 U.S. 291 (1978), the Court upheld a New York law excluding aliens from employment as state troopers. Dissenting Justices argued that the majority broadened a previously narrow exception to the Court's "usual rule that discrimination against aliens is presumptively unconstitutional." Id. at 303 (Marshall, J., dissenting, joined by Brennan and Stevens, JJ.). See supra note 34.
alternatives. Part III of this article is an attempt to define a larger constitutional context within which questions raised by Stanley and LaFleur may be more satisfactorily considered.

III. THE FACTUAL BASIS UNDERLYING LEGISLATIVE CLASSIFICATIONS

The conclusive presumption cases are visible examples of the Supreme Court's reluctance to accept hypothetical justifications for a legislative classification when doubt has been cast on the accuracy of assumptions of fact upon which the classification is based. The Court may give close attention to the legislative process itself as a ready source of information concerning the factual basis for a legislative classification, an approach characterized by Justice Stevens as reviewing the "due process of lawmaking." Commentator and treatise author Professor Laurence H. Tribe has called the category of constitutional limitation represented by the above developments "structural due process." There is a common thread which runs through the analytical approaches adumbrated above. Each demonstrates that under certain circumstances not accounted for by the articulated strictures of equal protection analysis, the Court gives close scrutiny to the factual basis underlying legislative classifications. In Part III these analytical approaches are examined and compared, and it is demonstrated that they may be viewed as having a constitutional antecedent in the bill of attainder clause, which declares that no legislative act which imposes punishment in the absence of a judicial trial shall be enacted by the legislature.

A. Assumptions of Fact and "Due Process of Lawmaking"

In Cleveland Board of Education v. LaFleur and Stanley v.

87. See infra text accompanying note 104.
89. Professor Tribe has most recently used the term "structural justice," thus indicating that his concerns should not be viewed as limited to notions of due process alone. See id. at 1137-46 (chapter entitled "Model VII—Toward A Model of Structural Justice?").
90. This a paraphrase of Note, Age Discrimination in Employment, supra note 19, at 1338 n.207. The author describes this approach as manifesting a "focus upon fact" or a "concern for fact" in different doctrinal guises, while disclaiming any intention to trace the doctrinal origins of the tendency he identified. This article begins where his inquiry ended.
91. U.S. CONST. art. I, § 9, cl. 3 (Congress), and U.S. CONST. art. I, § 10, cl. 1 (state legislatures). See infra note 137.
MANDATORY RETIREMENT

Illinois,93 two oft-cited conclusive presumption cases, the Court examined the accuracy of assumptions of fact underlying the legislative classifications at issue. In LaFleur, the Court formulated the issue as a question of the accuracy of factual assumptions embodied in school board maternity leave rules: Do pregnant teachers become physically incapacitated for work at least four months before childbirth and remain so for three months thereafter?94 A comparison of the majority and dissenting opinions in Stanley reveals a sharp disagreement over the validity of a well-defined assumption of fact: Are unmarried fathers unsuitable and neglectful parents?95 Fact assumptions regarding these issues had been fashioned into rules of decision which functioned as conclusive presumptions of unfitness.

93. 405 U.S. 645 (1972).
94. The Court rejected such a general assumption about pregnancy:
   While the medical experts in these cases differed on many points, they unanimously agreed on one—the ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter. 414 U.S. at 645 (footnote omitted). The Court further rejected any general assumption concerning post-childbirth reemployment:
   It is clear that the factual hypothesis of such a presumption—that no mother is physically fit to return to work until her child reaches the age of three months—is neither necessarily nor universally true. . . .
   Of course, it may be that the Cleveland rule is based upon another theory—that new mothers are too busy with their children within the first three months to allow a return to work. Viewed in that light, the rule remains a conclusive presumption, whose underlying factual assumptions can hardly be said to be universally valid.
   Id. at 649 n.15.
95. The majority in Stanley explicitly rejected this categorical generalization regarding unmarried fathers as parents:
   It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children.
   405 U.S. at 654 (footnote omitted). The minority differed:
   Furthermore, I believe that a State is fully justified in concluding, on the basis of common human experience, that the biological role of the mother in carrying and nursing an infant creates stronger bonds between her and the child than the bonds resulting from the male's often casual encounter. . . . Centuries of human experience buttress this view of the realities of human conditions and suggest that unwed mothers of illegitimate children are generally more dependable protectors of their children than are unwed fathers. While these, like most generalizations, are not without exceptions, they nevertheless provide a sufficient basis to sustain a statutory classification. . . .
   Id. at 665-66 (Burger, C.J., dissenting, joined by Blackmun, J.). While reflecting agreement on the legislative generalization at issue, the two opinions discuss the assumption from slightly different angles. The majority compared married and unmarried fathers, while the dissent emphasized the comparison between unwed fathers and unwed mothers.
It seems plausible to regard *LaFleur* and *Stanley* as decisions reflecting the Court's awareness of changing moral values. Analysis of the opinions, however, leads to the conclusion that the Court found it more appropriate to discuss the issues and decide the cases in terms of whether the factual assumptions underlying legislative generalizations were sufficiently accurate. The legislative classifications were found too lacking in factual foundation to be sustained as conclusive presumptions in light of the important interests adversely affected by the rules. On the other hand, the classifications were not found so utterly lacking in factual foundation as to be impermissible elements in the decisionmaking process. The rules might survive as rebuttable presumptions, allowing individualized determinations to fulfill the need for establishing a factual basis for application of the legislative generalization.

The Supreme Court has reaffirmed the rationale of these two cases as follows:

In light of the weak congruence between gender and the characteristic or trait that gender purported to represent, it was necessary that the legislatures choose either to realign their substantive laws in a gender-neutral fashion, or to adopt procedures for identifying those instances where the sex-centered generalization actually comported with fact. See, *e.g.*, *Stanley v. Illinois* . . . cf. *Cleveland Board of Education v. LaFleur* . . . .

It is possible, therefore, to look in two directions for factual accuracy. The context of the classification will probably determine whether a new substantive rule or a particularized procedure is the more appropriate alternative. For example, in *LaFleur* the Court reserved opinion on whether "widespread medical consensus" might identify a date late in pregnancy when female teachers could

96. See infra notes 120-24 and accompanying text.

97. In *LaFleur* the Court intimated at one point that it might discuss the case in terms of changing values and "outmoded taboos." 414 U.S. at 641 n.9. Several pages later, however, the Court renounced any intention to couch its holding in terms of a rejection of the values which may have initially led to adoption of the school board rules: "While the regulations no doubt represent a good-faith attempt to achieve a laudable goal, they cannot pass muster . . . ." *Id.* at 648. Accord, *Dixon*, supra note 36, at 518-19 and nn.131-32 (apparently preferring to view *LaFleur* as resting on "lack of a factual nexus rather than on a value judgment").

98. For an argument that "mandatory retirement schemes involve the same types of 'fact' determinations" as did *LaFleur* and *Stanley*, see Abramson, *supra* note 7, at 31.

be described with sufficient accuracy as "disabled." If such identification could be made, the Court indicated that a new substantive rule specifying that date would probably be upheld on the basis of the medical consensus.

In *Stanley*, on the other hand, it seems more likely that individual child custody proceedings would continue to be necessary. The Court gives no indication that it might look favorably on a new substantive rule limiting the custody rights of all unwed fathers. This is because the "determinative issues of competence and care" are susceptible of such great variation with each parent and child that the risks of an inaccurate general rule are intolerable.

In addition to the context of the classification, the legislative process provides an obvious source of information regarding the factual basis for legislative classifications. In *Stanley* and *LaFleur* the Court did not dwell on the "legislative history" of the provisions there at issue, probably due to the circumstance that state legislatures and agencies often do not maintain the records neces-

100. 414 U.S. at 647 n.13.

101. See also *Roe v. Wade*, 410 U.S. 113 (1973). This abortion case unquestionably involved profound questions of moral and religious values. Justice Blackmun, in an opinion joined by a majority of the Court, resolved these questions by placing critical reliance on the biological fact of fetal viability:

> With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications.

*Id.* at 163. See also *id.* at 148-50. A change in the medical consensus regarding the point at which a fetus reaches viability would result in a new substantive rule, since viability "is an ultimately changeable boundary." *Tribe, Structural Due Process*, 10 Harv. C.R.-C.L.L. Rev. 269, 297-98 (1975).

Chief Justice Burger's concurring opinion highlights this aspect of Justice Blackmun's methodology:

> I am somewhat troubled that the Court has taken notice of various scientific and medical data in reaching its conclusion; however, I do not believe that the Court has exceeded the scope of judicial notice accepted in other contexts.


102. 405 U.S. at 657. The Court limited the reach of *Stanley*, but did not appear to question its continuing vitality, in *Quilloin v. Walcott*, 434 U.S. 246 (1978) (unwed father had no right to veto adoption by child's stepfather, even in absence of "unfitness" determination, where natural father never sought nor had custody of child and where state found "best interests of the child" were furthered by adoption into long-existing de facto family unit). The soundness of the *Quilloin* decision has been questioned in *L. Tribe, American Constitutional Law* 85-86 (Supp. 1979).
sary to construct such a history.\textsuperscript{103} In contrast, congressional statutory history materials are readily available, providing the Supreme Court with the opportunity to examine closely the federal legislative process.

Justice Stevens characterized such review as constitutionally required by the fifth amendment guarantee of "due process of law-making" in \textit{Delaware Tribal Business Committee v. Weeks}.\textsuperscript{104} The approach advocated by Justice Stevens alone in \textit{Weeks} was followed by a majority of the Court in \textit{Hampton v. Mow Sun Wong}.\textsuperscript{106} That case raised the unmistakable equal protection issue of whether a Civil Service Commission rule barring resident aliens from employment was constitutional. Yet the majority opinion by Justice Stevens resolved the case on due process grounds alone.\textsuperscript{106}

The Commission argued several facets of the national interest in justification of a citizens-only hiring policy. The Court found that neither the President nor Congress had "expressly mandated" that the Commission concern itself with protecting the national interest.\textsuperscript{107} Rather, the proper concern of the Commission was limited to ensuring "an efficient federal service."\textsuperscript{108} The Court found no evidence that the Commission had adopted the regulation out of a proper concern for efficiency, and such a justification was not accepted on hypothetical grounds alone.\textsuperscript{109} The Commission regula-

\textsuperscript{103} See, e.g., Craig v. Boren, 429 U.S. 190, 199-200 n.7 (1976) ("[T]he Oklahoma Legislature does not preserve statutory history materials capable of clarifying the objectives served by its legislative enactments.").

\textsuperscript{104} 430 U.S. 73, 98 (1977) (Stevens, J., dissenting). Hans A. Linde was apparently the first to use this phrase. Justice Stevens remarked: "Although I am indebted to Professor Linde for the phrase, I cannot fairly claim that my conclusion is compelled by the analysis in his illuminating article, \textit{Due Process of Lawmaking}, 55 Neb. L. Rev. 197 (1976)." \textit{Id.} at 98 n.11.

\textsuperscript{105} 426 U.S. 88 (1976). This was the first majority opinion authored by Justice Stevens. \textit{L. Tribe, American Constitutional Law} 951 (1978).

\textsuperscript{106} Justices Brennan and Marshall joined the opinion "with the understanding that there are reserved the equal protection questions." \textit{Hampton v. Mow Sun Wong}, 426 U.S. at 117.

\textsuperscript{107} The Court assumed, without deciding, that "the Congress and the President have the constitutional power to impose the requirement that the Commission had adopted." \textit{Id.} at 114.

\textsuperscript{108} \textit{Id.}

\textsuperscript{109} There is nothing in the record before us, or in matter of which we may properly take judicial notice, to indicate that the Commission actually made any considered evaluation of the relative desirability of a simple exclusionary rule on the one hand, or the value to the service of enlarging the pool of eligible employees on the other. Nor can we reasonably infer that the administrative burden of establishing the job classifications for which citizenship is an appropriate requirement would be a particularly onerous task for an expert in personnel matters; indeed,
tion was held to be a deprivation of liberty without due process of law.

The due process rationale of *Hampton v. Mow Sun Wong* was amplified by Justice Stevens’ concurring opinion in *Califano v. Goldfarb*. Both Justice Stevens and the four-member plurality posed the issue as whether Congress intended gender-based distinctions in the social security benefit system to provide compensatory treatment for females. In Justice Stevens’ view, any presumption that the disparate treatment accorded widows and widowers was justified by a legislative intent to redress the “legacy of economic discrimination” against females was “unte" "niable” because inquiry into the actual legislative history revealed “evidence to the contrary.”

Justice Stevens identified this preference for the real over the presumed legislative intent as “[r]espect for the legislative process.” The legislative history of the social security provision favoring widows over widowers led Justice Stevens to conclude that the presumption had resulted from the “habit” and “automatic reflex” of assuming that widows were dependent “in some general sense”:

I am therefore persuaded that this discrimination against a group of males is merely the accidental byproduct of a traditional way of thinking about females. I am also persuaded that a rule which effects an unequal distribution of economic benefits solely on the basis of sex is sufficiently questionable that “due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve [the] interest” put forward by the Government as its justification. See *Hampton v. Mow Sun Wong*, 426 U.S., at 103.

The opinions authored by Justice Stevens in *Hampton v. Mow Sun Wong* and *Califano v. Goldfarb* were based upon a thorough analysis of the Postal Service apparently encountered no particular difficulty in making such a classification. Of greater significance, however, is the quality of the interest at stake. Any fair balancing of the public interest in avoiding the wholesale deprivations of employment opportunities caused by the Commission’s indiscriminate policy, as opposed to what may be nothing more than a hypothetical justification, requires rejection of the argument of administrative convenience in this case.

*Id.* at 115-16 (footnote omitted).

110. *Id.* at 199 (1977). Justice Stevens’ concurrence was based on due process analysis, while the plurality employed an equal protection rationale.

111. *Id.* at 221, 223 n.9 (Stevens, J., concurring). *See id.* at 214-17 (plurality opinion).

112. *Id.* at 221 (Stevens, J., concurring).

113. *Id.* at 223 (Stevens, J., concurring). *See id.* at 217 n.18 (plurality opinion).

114. *Califano v. Webster*, 430 U.S. 313 (1977), is relevant to this development because
ough canvassing of legislative history. This approach parallels the close scrutiny given to assumptions of fact underlying legislative classifications in the conclusive presumption cases.

B. Professor Tribe's Formulation: "Structural Due Process"

In the case of *Crawford v. Cushman*, the Second Circuit Court of Appeals struck down a Marine Corps regulation mandating discharge of any woman, regardless of marital status, who became pregnant while in the Corps. In its opinion the court acknowledged use of an analysis suggested by Professor Laurence Tribe:

The case is one of those which, as Justice Marshall pointed out in his concurring opinion in *United States Department of Agriculture v. Murry*, 413 U.S. 508, 519 . . . (1973), "combines elements traditionally invoked in what are usually treated as distinct classes of cases, involving due process and equal protection." . . . Professor Lawrence [sic] H. Tribe has elaborated on this theme, calling the category of constitutional limitation that of "structural due process."  

Professor Tribe suggests that analysis of the due process guarantee as applied by the Supreme Court reveals concerns which are not readily separable into the categories of substantive or procedural due process. He identifies the Court's concerns as an implicit "third category of constitutional limitation—a category that focuses neither on the substantive content of policies already chosen nor on the procedural devices selected for enforcing those policies but rather on the structures through which policies are both formed and applied. . . ." The conclusive presumption cases figure prominently as examples of a developing concept of "structural due process." Tribe argues that the *Stanley* and *LaFleur* the majority opinion there relied heavily upon Justice Stevens' *Goldfarb* concurrence. *Id.* at 317, 320.

115. The Court consistently focuses on the actual legislative process in the context of sex discrimination cases like *Goldfarb*. See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975) (unanimous decision) ("[M]ere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme.") (footnote omitted).

116. 531 F.2d 1114 (2d Cir. 1976).

117. *Id.* at 1125. The court's holding was premised alternatively upon equal protection analysis, the conclusive presumption analysis of *LaFleur*, and "the structural due process analysis of Mr. Justice Marshall and Professor Tribe." *Id.* at 1126.

cases arose in contexts "where governmental policy-formation and/or application are constitutionally required to take a certain form, to follow a process with certain features, or to display a particular sort of structure."\textsuperscript{119}

The crucial characteristic shared by Stanley and LaFleur, according to Tribe, is the fact that both cases arose in a context of shifting moral values. In LaFleur the Court noted that the mandatory maternity leave rule most likely originated in Victorian taboos against pregnant women being seen in public.\textsuperscript{120} Likewise, the Stanley case involved attitudes toward unwed parenthood and appropriate sex roles in the upbringing of children, attitudes subject to widespread uncertainty in recent years. Extrapolation from these cases leads Tribe to suggest the following formulation of structural due process:

Thus we have argued that [both Stanley and LaFleur arose in] an area in which the need to reflect rapidly changing norms affecting important interests in liberty compels an individualized determination, one not bound by any preexisting rule of thumb within the zone of moral change. Rule-of-thumb decisionmaking in such circumstances is intrinsically unjust in that it denies the individual a responsive explanation of the exercise of state authority . . . .\textsuperscript{121}

Tribe emphasizes that the application of this concept can be defended "only in the presence of rapidly changing norms" since it would be difficult, if not impossible, to defend the principle that individualization of governmental processes is required whenever basic liberties are at stake.\textsuperscript{122}

Tribe's emphasis on "rapidly changing norms" as providing the necessary context for application of the structural due process rationale is further reflected in his suggestion that individualized processes may be justified only for a time, not necessarily as a permanent structure for decisionmaking. Should a new moral consensus emerge in the disputed context, a general rule may again be-

\textsuperscript{119} Tribe, Childhood, Suspect Classifications, and Conclusive Presumptions: Three Linked Riddles, 39 LAW & CONTEMP. PROB. 8, 19 (Summer, 1975) (emphasis in original) (footnote omitted).

\textsuperscript{120} 414 U.S. at 641 n.9. The Court clearly did not base its decision on this perception alone, however, because the state refused to rely on this as a possible justification. The Court based its holding only on evaluation of the reasons articulated by the state in justification of the maternity leave rule. \textit{Id.} at 648. See supra note 97 and accompanying text.

\textsuperscript{121} Tribe, \textit{supra} note 118, at 307 (emphasis in original) (footnote omitted).

\textsuperscript{122} \textit{Id.} at 307 n.115; Tribe, \textit{supra} note 119, at 25 n.60.
come appropriate. Until such a development, however, moral uncertainty justifies less rulebound, more ad hoc decisionmaking. The discretion permitted by such ad hoc decisionmaking will permit variations in substantive outcome. These variations are viewed by Tribe as an experiment, a possible step toward the development of new standards in a particular problem area:

If the decisionmaker may not rely on per se rules, he nonetheless knows that the general formal commitment to rules has been relaxed only in special circumstances. Moreover, a long enough series of individualized determinations supported by articulated reasons may offer a basis for reestablishing a rule or rules around a new consensus, much as common law adjudication is thought to catalyze the development of legal doctrine.  

While recognizing that decisionmaking under indeterminate standards entails the "risk" of arbitrary inequities, Tribe justifies this risk by the hope that "face-to-face confrontation" will result in outcomes reflecting greater moral sensitivity to evolving norms than could decisionmaking by codification.  

Tribe does not claim success at defining how courts could effectively apply a doctrine of structural due process. The difficulty he encounters is the same difficulty he identifies in criticism of a concept advanced by Professor Harry Wellington. Wellington has argued that due process incorporates "conventional morality." Commenting on Wellington's idea, Tribe points out that Wellington does not adequately take into account the "dubious legitimacy of any judicial determination about which specific values the society in fact 'shares' at any given time." This observation necessarily applies as well to any judicial identification of those societal values which are undergoing rapid change at any given time. Tribe recognizes that this is a shortcoming of his analysis when he asks the question: "How can courts reliably identify areas of moral flux and normative transition?" 

123. Tribe, supra note 118, at 314.  
124. Id. at 309-10; Tribe, supra note 119, at 26-27. Professor Tribe most recently identified this concept as a concern that "mandatory, per se rules" may be too rigid in a context of "moral flux" to be reliable as "a fair expression of the continuing consent of the governed." L. Tribe, AMERICAN CONSTITUTIONAL LAW 1080, 1091-92, 1097 n.30, 1145 (1978).  
126. Tribe, supra note 118, at 294 n.77.  
127. Id. at 319; see Tribe, supra note 119, at 36. This question is posed in the concluding paragraphs of Professor Tribe's explication; no answer is attempted.
At one point Tribe opens an inquiry which leads to an alternative formulation of structural due process analysis:

Put more simply, the commitment to real dialogue which this Article locates at the heart of an adequate notion of legitimacy represents in part "an agreement to limit liberty only by reference to a common knowledge and understanding of the world," an agreement that avoids creating "a privileged place for the view of some over others."\(^{128}\)

Throughout his analysis, Tribe treats this conception of a "common knowledge and understanding" of the world as a question of values. Common knowledge and understanding, however, is often susceptible to being posed as an issue of fact. This characterization is not necessarily in conflict with Tribe's analysis. He himself comes close to recognizing this view as quite justifiable, merely "another way of visualizing the problem."\(^{129}\) But by placing primary emphasis on whether a given issue arises in a context of shifting moral values, Tribe foregoes addressing that issue on factual grounds more accessible and amenable to the judiciary.\(^{130}\)

The Supreme Court preferred to address the issues in *Stanley* and *LaFleur* in terms of whether assumptions of fact underlying legislative classifications were sufficiently accurate, rather than whether changing values rendered a previous moral consensus uncertain.\(^{131}\) The Court's focus upon fact in these cases has been identified as a hallmark of the judicial process.\(^{132}\) In light of this consideration, Professor Tribe's analysis may be more persuasive when reformulated as follows:

When a legislative classification affecting important interests in liberty is found to have an insufficient factual basis in light of underlying legislative facts and fact assumptions, individualized procedures may be required to identify those instances where the

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131. *See supra* notes 97-98 and accompanying text.

generalization fits the particular facts.\textsuperscript{133}

When restated in these terms, Professor Tribe's general analysis intersects with the Supreme Court's reference in \textit{Craig v. Boren} to \textit{Stanley} and \textit{LaFleur} as cases exhibiting a "weak congruence" as a matter of fact between a legislative classification and the characteristic or trait purportedly represented by the classification.\textsuperscript{134} The links of logic which were so attenuated in Tribe's original formulation are now demonstrable in the experience of the particular case.

\textbf{C. The Bill of Attainder Clause and Legislative Classifications}

Whether the conclusive presumption cases should be discussed as due process or equal protection cases has been hotly debated.\textsuperscript{135} The question is best resolved by refusing to choose between the alternatives. The conclusive presumption cases have resisted efforts at categorization because they reflect judicial attempts to articulate in a single analytical construct aspects of both constitutional guarantees.\textsuperscript{136} That such an integrated approach makes sense is best indicated by comparing the conclusive presumption

\textsuperscript{133} Cf. \textit{supra} note 121 and accompanying text (Professor Tribe's original formulation of structural due process).

\textsuperscript{134} 429 U.S. 190, 199 (1976). \textit{See supra} note 99 and accompanying text (quotation from \textit{Craig v. Boren}). Whether this alternative formulation will be welcomed as a "friendly amendment" to Professor Tribe's analysis is subject to doubt when one considers the following passage:

> In an era when the power but not the wisdom of science is increasingly taken for granted, there has been a rapidly growing interest in the conjunction of mathematics and the trial process. The literature of legal praise for the progeny of such a wedding has been little short of lyrical. Surely the time has come for someone to suggest that the union would be more dangerous than fruitful.


Suggestion of this alternative formulation does not imply that a focus upon "facts" rather than "values" simply resolves the epistemological conflict between the objective and the subjective. \textit{Compare} Ingber, \textit{A Dialectic: The Fulfillment and Decrease of Passion in Criminal Law}, 28 Rutgers L. Rev. 861, 932 (1975) ("As all trial attorneys recognize, the facts developed at trial are not objective, but rather are the result of subjective analysis of viewpoints, biases, hopes, and ambitions.") \textit{with} Martin, \textit{The Proposed "Science Court."}, 75 Mich. L. Rev. 1058, 1064, 1069 (1977) (advocating experiment with science court to resolve scientific questions involved in policy disputes). For discussion of the fact/value distinction in relation to the dilemma of objective and subjective meaning, see R. Unger, \textit{Law in Modern Society} 4, 15-19, 43, 257-59 (1976).

\textsuperscript{135} \textit{See}, e.g., Ginsburg, Book Review, 92 \textit{Harv. L. Rev.} 340, 346 (1978) (noting the controversy and approving Professor Tribe's location of conclusive presumption cases "dominantly within equal protection").

\textsuperscript{136} \textit{See infra} notes 154-61 and accompanying text.
cases with the Supreme Court's interpretation and application of
the bill of attainder clause.137 The complementary aspects of con-
clusive presumption analysis (equal protection and due process)
mirror the dual elements which constitute a prohibited bill of at-
tainder (specification of the individual and punishment without
trial).

Long before Stanley and LaFleur were decided, Professor Paul
Freund foreshadowed the development of this line of cases:

A conventional formulation is that legislative facts—those facts
which are relevant to the legislative judgment—will not be can-
vassed save to determine whether there is a rational basis for be-
lieving that they exist, while adjudicative facts—those which tie
the legislative enactment to the litigant—are to be demonstrated
and found according to the ordinary standards prevailing for judi-
cial trials. . . . This formulation, like most categorizations, will
have to give a little at the seams. It puts exclusive emphasis on
the formal aspects of law-making. It is valid insofar as the legisla-
ture does indeed indulge in a generalization when it acts; but to
the extent that the legislature particularizes it approaches the ju-
dicial arena. The due process clause and the guarantee against
bills of attainder may help to keep the legislature within bounds;
but there are cases where the legislative act may not be invalid
and yet may resemble the judicial function in its application of
standards to particular persons or groups, and should be so judg-
ed on review.138

Stanley and LaFleur fit the general description given by Professor
Freund. Another commentator has succinctly explained why the
conclusive presumption cases can be discussed in direct relation-
ship with the bill of attainder clause: "An irrebuttable presump-
tion in a criminal statute might be a bill of attainder."139

Analysis of the guarantee against bills of attainder reveals that

137. There are actually two bill of attainder clauses. The guarantee against bills of at-
tainder, like the due process guarantee, applies to federal and state legislatures. U.S. Const.
art. I, § 9, cl. 3: "No Bill of Attainder or ex post facto Law shall be passed [by the Con-
gress]." U.S. Const. art. I, § 10, cl. 1: "No State shall . . . pass any Bill of Attainder, ex post facto Law . . . ." For a thorough canvassing of the historical origins of the bill of attainder clauses, see United States v. Brown, 381 U.S. 437, 441-46 (1965), and Comment, The
Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause,

138. P. Freund, Review of Facts in Constitutional Cases, in Supreme Court and Su-
preme Law 47, 47-48 (Cahn ed. 1954).

139. Comment, Irrebuttable Presumptions as an Alternative to Strict Scrutiny: From
the conclusive presumption cases, Justice Stevens’ concept of due process of lawmaking, and Professor Tribe’s structural due process analysis all have a common point of origin in the principle of separation of powers. In *Nixon v. Administrator of General Services,* the Court’s most recent major decision applying the bill of attainder clause to congressional legislation, six Justices joined in construing this provision as an “important ingredient of the doctrine of ‘separation of powers,’ one of the organizing principles of our system of government.” The Court found that the bill of attainder clause was intended to restrict the legislative branch just as the article III “case or controversy” requirement limits the power of the judiciary. The majority cited *United States v. Lovett* and earlier cases for the general rule condemning legislative acts which specify named or easily identifiable individuals and punish them “without provision of the protections of a judicial trial.” The statute in question was examined for the dual elements of specificity and punishment without trial.

The “specificity” element requires a determination of the legitimacy of a legislative classification. The element of “punishment” raises the question of whether there has been a deprivation of life, liberty, or property. The guarantee against bills of attainder

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141. *Id.* at 469 (quoting *United States v. Brown*, 381 U.S. 437, 442-43 (1965)).
143. 328 U.S. 303 (1946).
144. 433 U.S. at 468 (majority opinion); *id.* at 485 (Stevens, J., concurring). See *United States v. Lovett*, 328 U.S. 303, 315-16 (1946):

[L]egislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution.

145. In the *Nixon* case, Title I of the Presidential Recordings and Materials Preservation Act, codified at 44 U.S.C. § 2107 (1976), was held not to constitute a bill of attainder despite the fact that it specifically named former President Richard M. Nixon.
146. 433 U.S. at 471-72. The element of “specificity” recalls Justice Holmes’ opinion in *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915). Justice Holmes explained that “general statutes” need not give affected individuals a chance to be heard, but cited Londoner v. Denver, 210 U.S. 373, 385 (1908), for the proposition that where a “relatively small number of persons was concerned,” a hearing may be required. 239 U.S. at 445-46.
147. 433 U.S. at 472-75.
therefore necessitates inquiry into the subject matter of due process and equal protection. The bill of attainder clause, as consistently applied by the Court, demonstrates the interrelated character of these twin guarantees, as asserted by the Court in *Bolling v. Sharpe*.\(^{148}\)

In *Bolling*, the Court explained that, although the fifth amendment does not contain an equal protection clause as does the fourteenth amendment, "the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law', . . ."\(^{149}\) Thus did the Court draw the equal protection guarantee by inference from the fifth amendment due process guarantee.

The connection here suggested between the conclusive presumption cases and the bill of attainder decisions provided a means of concurrence in the case of *Wieman v. Updegraff*.\(^{150}\) While there were three separate opinions in *Wieman*, with one Justice refusing to join any of the opinions, in the final analysis the Court was unanimous in its decision to strike down a statute requiring a loyalty oath from employees of the state of Oklahoma.\(^{151}\) Justice Black briefly and eloquently reasoned that the statute was a bill of attainder in violation of due process.\(^{152}\) Justice Frankfurter, equally eloquent in praise of the teaching profession, found a violation of the Bill of Rights freedoms of speech, inquiry, and association which are incorporated in the fourteenth amendment due pro-

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149. *Id.* at 499.

Seventy years before *Bolling*, Justice Matthews, writing for a unanimous Court, provided an eloquent explanation of the interrelated nature of these constitutional protections:

> Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, "the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial," so "that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society," and thus excluding, as not due process of law, acts of attainder . . .

*Hurtado v. California*, 110 U.S. 516, 535-36 (1884). Justice Black has also found it necessary to refer to both due process and equal protection in order to give meaning to the concept of "the law of the land." *H. Black, A CONSTITUTIONAL FAITH* 31-32 (1968).

150. 344 U.S. 183 (1952).

151. *Id.* at 192. Justice Burton, finding none of the three opinions compelling, nevertheless concurred in the result.

152. *Id.* at 192-94. Justice Douglas concurred.
cess guarantee.\textsuperscript{153} To Justice Clark fell the task of writing an opinion for the Court which would adequately handle relevant precedent, since Justices Black and Frankfurter, taken together, cited but a single case in support of their views.

Although Justice Clark disposed of the case on due process grounds, his due process analysis differed markedly from the other two opinions by condemning the statute for an inaccuracy of legislative classification:

[The question is] whether the Due Process Clause permits a state, in attempting to bar disloyal individuals from its employ, to exclude persons solely on the basis of organizational membership, regardless of their knowledge concerning the organizations to which they had belonged. For, under the statute before us, the fact of membership alone disqualifies. If the rule be expressed as a presumption of disloyalty, it is a conclusive one. . . . Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process.\textsuperscript{154}

The Court did not espouse a conclusive presumption "doctrine" in \textit{Wieman}, but commentators have noted that the rationale later made explicit in \textit{Stanley} and \textit{LaFleur} is implicit in this earlier case.\textsuperscript{155} Justice Clark's opinion in \textit{Wieman} has proven durable in various contexts in which the Court has sought to ensure that deprivations arising from generalized accusations do not occur in the absence of particularized factfinding procedures.\textsuperscript{156}

The importance of \textit{Wieman} does not lie in discovering which of the three opinions was correct, and which off the mark. Each approach has experienced increased vitality since the case was decided. The confluence of the opinions demonstrates more than their separateness. Justice Marshall could have been speaking as easily of Justice Clark's analysis as of Justice Black's when he concurred in \textit{United States Department of Agriculture v. Murry}: "This analysis, of course, combines elements traditionally invoked in what are usually treated as distinct classes of cases, involving due process and equal protection. But the elements of fairness

\begin{itemize}
  \item \textsuperscript{153} \textit{Id.} at 194-98. Justice Douglas concurred.
  \item \textsuperscript{154} \textit{Id.} at 190-91.
  \item \textsuperscript{155} \textit{Note, supra} note 54, at 449-50 n.4; \textit{Note, Equal Protection-Due Process, supra} note 57, at 568 n.16.
\end{itemize}
should not be so rigidly cabined.”

Justice Marshall advocated a functionally integrated view of the due process and equal protection clauses when approaching a class of cases represented by Murry. He explained that “fairness” might involve analysis of classifications (equal protection) and hearing requirements (due process) in the same case, and that “we 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.” Justice Marshall contended that a conclusive presumption might have to give way and function not as a rule of law, but as a burden-shifting device, or rebuttable presumption.

Such an integrated view of the due process and equal protection clauses is not new. Justice Douglas wrote for the majority in Skinner v. Oklahoma when the Court struck down an Oklahoma mandatory sterilization statute as a violation of equal protection, reasoning that the statute did not sufficiently distinguish between conviction of larceny and conviction of embezzlement as grounds for sterilization. Chief Justice Stone concurred on due process grounds, doubting the appropriateness of striking down the statute on an equal protection basis.

Justice Jackson joined both the due process and equal protection opinions, arguing that neither analysis precluded the other, and that both contributed to a definition of the limits beyond which the legislature may not venture.

157. 413 U.S. 508, 519 (1973) (Marshall, J., concurring). Professor Tribe noted in passing an intersection between the bill of attainder clause and Justice Marshall’s opinion, but did not pursue the connection. Tribe, supra note 118, at 291 n.63, 284 n.45; Tribe, supra note 119, at 19 n.37, 15 n.21.

158. 413 U.S. at 519. See Tushnet, “...And Only Wealth Will Buy You Justice”—Some Notes on the Supreme Court, 1972 Term, 1974 Wis. L. Rev. 177, 184: “Mr. Justice Marshall’s concurrence in Murry supplied what the majority opinion lacked. . . . With this addition, the ‘conclusive presumption’ theory makes some sense in Murry.”

159. 316 U.S. 535 (1942).
160. Id. at 543.
161. I join the Chief Justice in holding that the hearings provided are too limited in the context of the present Act to afford due process of law. I also agree with the opinion of Mr. Justice Douglas that the scheme of classification set forth in the Act denies equal protection of the law. I disagree with the opinion of each in so far as it rejects or minimizes the grounds taken by the other.

Perhaps to employ a broad and loose scheme of classification would be permissible if accompanied by the individual hearings indicated by the Chief Justice. On the other hand, narrow classification with reference to the end to be accomplished by the Act might justify limiting individual hearings to the issue whether the individual belonged to a class so defined. Since this Act does not present these questions, I reserve judgment on them.

Id. at 546 (Jackson, J., concurring).
The bill of attainder clause limits the power of the legislature and defines in part the structure of governmental decisionmaking embodied in the principle of separation of powers. The opinions in *Skinner, Wieman,* and *Murry* demonstrate that the analytical construct employed in the conclusive presumption cases arises by inference from the bill of attainder clause. 162 That constitutional passage and the conclusive presumption rationale function as analogous limits on legislative action.

IV. A Basis in Fact for Overcoming the Limits of "Rationality"

A. Logical Rationality and Rationality "in Fact"

The constitutional analyses discussed in Part III emerged in part because equal protection doctrine, despite its apparent logical symmetry, has not proven satisfactory for addressing the full range of cases in which the accuracy of legislative classifications is challenged. Comparison of the "rationality" standard of equal protection review with the concept of a presumption of constitutionality 163 sheds light on the difficulty presently encountered by the Court.

Justice Brandeis concisely explained how the presumption of constitutionality should be used by the Court in *O'Gorman &*
Young, Inc. v. Hartford Fire Insurance Co., in which a state statute was challenged as being violative of due process:

As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute. It does not appear upon the face of the statute, or from any facts of which the court must take judicial notice, that in New Jersey evils did not exist in the business of fire insurance for which this statutory provision was an appropriate remedy. The action of the legislature and of the highest court of the State indicates that such evils did exist. The record is barren of any allegation of fact tending to show unreasonableness.

Although the statute in question was upheld in O'Gorman, the presumption of constitutionality was not given conclusive effect. The Court looked in two directions for facts to weigh against the presumption. First, the presumption operated as an invitation to the parties to make a record of legislative facts which would support "overthrowing the statute." Second, in the absence of such a record, Justice Brandeis indicated the Court would take judicial notice of facts relevant to the general need for the statute. If the

164. 282 U.S. 251 (1931).
165. Id. at 257-58 (footnotes omitted). My attention was initially drawn to this case by Professor Willard Hurst's class materials for his course on legislation at the University of Wisconsin Law School. The responsibility for the interpretation here made is mine.
166. Justice Brandeis did not use the term "legislative facts." "The distinction between adjudicative facts and legislative facts was first advanced in a 1942 article by Professor Davis [citation omitted]." Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 244 n.52 (5th Cir. 1976) (Brown, C.J., concurring). Nevertheless, the phrase accurately characterizes Justice Brandeis' reference to "underlying questions of fact."
167. While the reference to judicial notice may have a rhetorical ring, the Supreme Court has used this device to identify the factual background for decisions declaring statutes unconstitutional. See, e.g., Reed v. Reed, 404 U.S. 71, 75 (1971) (Burger, C.J., opinion for unanimous Court) ("Moreover, we can judicially notice that in this country, presumably due to the greater longevity of women, a large proportion of estates, both intestate and under wills of decedents, are administered by surviving widows."); see supra note 101 (discussing Roe v. Wade, 410 U.S. 113 (1973), in which the Court took judicial notice of scientific and medical data regarding the biological fact of fetal viability).

When new Federal Rules of Evidence were promulgated effective July 1, 1975, it was decided that judicial access to legislative facts should not be restricted by the requirements in the provision for judicial notice. See Fed. R. Evid. 201(a): "Scope of rule.—This rule governs only judicial notice of adjudicative facts." For discussion of this omission, see Fed. R. Evid. 201(a) advisory committee note, as promulgated by the Supreme Court, 56 F.R.D. 201 (1972). For further comments, see Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 244 n.52 (5th Cir. 1976) (Brown, C.J., concurring).
The presumption of constitutionality was not rebutted by a foundation of record facts or of facts judicially noticed, the presumption alone would uphold the statute. 168

The "rationality" standard of equal protection review is the functional equivalent of the presumption of constitutionality as applied by Justice Brandeis. Conversely, the "strict scrutiny" tier of equal protection analysis, invoked when suspect classifications or fundamental rights are implicated, serves as the presumption of constitutionality inverted. 169 Justice Marshall, the lone dissenter in Murgia and Vance, argued that constitutional challenges to mandatory retirement should be reviewed under the "substantially related" intermediate equal protection standard. 170 Justice Marshall thus sought to avoid relegation of mandatory retirement cases to review for "rationality" only, the lowest equal protection standard.

Traditional standards for judicial evaluation of legislative facts underlying a classification were reaffirmed in Vance:

In ordinary civil litigation, the question frequently is which party has shown that a disputed historical fact is more likely than not to be true. In an equal protection case of this type, however, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the govern-

168. Professor Hurst has remarked in this regard:
I think the Court has bungled this matter of the presumption of constitutionality by its failure to use it as a technique for disciplining the bar. . . .
I think the Court too often covers up for the bar when it says the statute must be presumed valid. What they should say is that the lawyer attacking it has not shown enough evidence to destroy it, therefore we uphold it.

Discussion by Willard Hurst at New York University School of Law (1953), reprinted in Supreme Court and Supreme Law 51 (Cahn ed. 1954).


mental decisionmaker.  

This language from Vance would indicate that the requirements of the "rationality" tier of equal protection doctrine can be met by hypothetical justifications alone, even when supporting assertions of fact are placed in substantial doubt before the Court. This expression of doctrine appears to leave no room for the advocate who, as Justice Brandeis put it, would establish a factual foundation for overthrowing a statute. Yet the Court's consistent use of the device of judicial notice indicates that a law could be held invalid if shown to be based upon fact assumptions which offend common knowledge.

A federal district court applying Murgia and Vance has pointed out that when the conception of "rationality" as explicated in Vance is applied in the mandatory retirement context, it places "limits upon judicial intervention [which] may well be so radical" that "any maximum age will do, whether it be 25 years of age, 30, 35, 65 or 85." The district court there rejected such an "abstract and pure" conception of "rationality" and upheld the statute after examining the record for evidence concerning the range of ages at which employees might be shown to become physically, mentally, or emotionally incapacitated for work. In so doing, the district court acted in accordance with the suggestion in Murgia that facts of record could vitiate a hypothetically valid classification.

171. 440 U.S. at 110-11.  
172. See supra note 167 and accompanying text.  
174. The dilemma discussed by the district court in this case was considered in Tussman & tenBroek, supra note 169, at 367-68:  
[T]he assertion that any particular relation holds between the two classes is an empirical statement.  
...  
... It is difficult to see that there is any intermediate point between complete deference to legislative factfinding and independent judicial judgment about the facts. The view that the Court does not concern itself with the truth of a belief but only with its reasonableness [or its "rationality"] seems a plausible compromise only if we fail to see that the reasonableness of a belief depends upon the evidence for its truth.

For other analysis and criticism of the rationality requirement, see Note, Legislative Purpose, Rationality, and Equal Protection, 82 YALE L.J. 123 (1972) (discussion of a statute's rationality obscures consideration of the relative merits of competing public policies).  
175. "There is no indication that § 26(3)(a) has the effect of excluding from service so few officers who are in fact unqualified as to render age 50 a criterion wholly unrelated to the objective of the statute." Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 315-16 (1976) (footnote omitted).
Murgia indicates that the door is open to the litigant who would controvert and disprove "in fact" the validity of assumptions or data actually relied upon by the legislature in support of classifications made for purposes of mandatory retirement.176

There is a shared element of meaning in the conception of rationality "in fact" suggested in Murgia, the cases assigned to "substantially related" pigeonholes between the "rationality" and "strict scrutiny" presumptions, and the analytical approaches discussed in Part III of this article. The common element is the reluctance of the Supreme Court to accept the logical hypothesis alone as sufficient justification for legislative classifications when the hypothesis is capable of comparison with actual experience and a factual record.

B. Mandatory Retirement: The Developing Factual Record

Evaluation of the validity of legislation establishing mandatory retirement should proceed from examination of the assumptions and data actually relied upon by Congress when it enacted and amended the Age Discrimination in Employment Act (ADEA). Congress enacted the ADEA with the following limitation: "The prohibitions in this [Act] shall be limited to individuals who are at least forty years of age but less than sixty-five years of age."177 Congress thus created three classifications: the protected class, those aged forty through sixty-four, and two unprotected classes, those less than age forty and those sixty-five years of age and older. This protective legislation was a direct outgrowth of a provision of the Civil Rights Act of 1964 which required the Secretary of Labor to conduct a study and to report to Congress his findings and conclusions concerning the need for legislation to ban age discrimination in employment.178 The resulting study concluded that "the time is at hand to go ahead" with legislation:

The basic reply then to the Congress' inquiry about what is required to prevent age discrimination in employment is that there should be provided the opportunity for full participating mem-

176. A distinction between Murgia and Vance in this regard is noted in Martin v. Tamaki, 607 F.2d 307, 310 n.4 (9th Cir. 1979). The distinction between the "conceivable" and the "actual" purpose of a legislative enactment is highlighted in United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 180-81 (1980) (Stevens, J., concurring in the judgment), and id. at 186-88 (Brennan, J., dissenting, joined by Marshall, J.).


bership in society until death—and that continuing education is the necessary and only possible qualification for such participation.\textsuperscript{179}

The purpose of the ADEA is to promote employment of "older persons" on the basis of ability rather than age.\textsuperscript{180} The irony of exempting from ADEA coverage persons aged sixty-five and over while protecting persons under age sixty-five has been forcefully noted.\textsuperscript{181} This limitation may have had a temporary effect of reinforcing discrimination in employment directed at the sixty-five-and-over age classification.\textsuperscript{182}

The legislative history of the 1978 amendments to the ADEA offers a somewhat unusual "Monday morning quarterback" perspective from Congress itself on the original 1967 legislative decision to cut off coverage at age sixty-five.\textsuperscript{183} A House committee report states unequivocally:

[M]ore recently the upper age limit of 65 has been subject to additional question because it allows mandatory retirement based on age alone. The upper age cutoff of 65 was originally selected because it was a customary retirement age and the age at which many public and private pension benefits became payable—not for any scientific reason.\textsuperscript{184}

A Senate committee report states equally clearly: "The [1967] act's


\textsuperscript{181} "The way the current law reads, we have actually institutionalized discrimination against workers over the age of 65. An employer with two potential employees—one aged 66 and one aged 63—would actually be in violation of the law if he hired the older individual." 123 CONG. REC. 34321 (1977) (remarks of Sen. Domenici). See Comment, The Constitutionality of the Mandatory Retirement Age, 5 U. SAN FERN. V.L. REV. 303, 308-09 (1976).

\textsuperscript{182} "The fact that the law only covers persons below age 65 may reinforce the trend toward decreasing participation of men 65 and over in the labor force and increasing acceptance of 65 as the mandatory retirement age." SENATE SPECIAL COMM. ON AGING, IMPROVING THE AGE DISCRIMINATION LAW: A WORKING PAPER 15, 93d Cong., 1st Sess. (Comm. Print 1973). See, e.g., Gault v. Garrison, 569 F.2d 993, 998 (7th Cir. 1977) (Pell, J., dissenting): "It appears plain that the Congress by so stating the policy did not regard discontinuance of employment beyond the age of 65 to be age discrimination of an arbitrary nature."

\textsuperscript{183} For citation to 1978 amendments and description of current coverage and exemptions, see supra note 5 and accompanying text.

current age limitation unfairly assumes that age alone provides an accurate measure of an individual’s ability to perform work. In fact, the evidence clearly establishes the continued productivity of workers who are 65 years of age and older.” 185 Congressional debate on the 1978 amendments reflects similar individual expressions of opinion that the upper age limit of sixty-five was chosen because it coincided with the age at which social security pensions customarily become payable. 186 Enactment of the ADEA in its original form was not based upon a legislative determination that there was some correlation between age sixty-five and disability for employment. 187

Nor did the 1978 ADEA amendments, which changed the coverage limitation from age sixty-five to age seventy, result from a determination that age seventy is more highly correlated with the onset of incapacity for work than is age sixty-five. The relevant House committee report explained the significance of the new age seventy cap on coverage as follows:

The age 70 limit is a compromise between some who favor removing the age limit entirely, and others who are uncertain of the consequences of changing the present age 65 limit. Experience with the age 70 limit would give us more data and other facts to better evaluate the pro and con arguments on eliminating mandatory retirement completely. There is also a precedent for the age 70 limit. This has been the age of mandatory retirement for most civil service employees for many years, and the committee knows of no managerial or labor problems as a result of the Federal mandatory retirement age of 70. 188

The relevant Senate committee report cited lack of information or research data as the reason for not extending protection beyond

187. For a contrary view that the legislative choice of age 65 as a cutoff point supports the argument that “age is at some point inherently related to ability,” see Note, The Age Discrimination in Employment Act of 1967, 90 Harv. L. Rev. 380, 384 (1976) (emphasis in original).
An increase in the upper age limit from 65 to 70 is supported by the evidence presented at the Labor Subcommittee hearings. Research studies conducted in the last ten years concerning the job capacity and health of older workers have focused on those between ages 60 to 70. Equivalent research for workers older than 70 years of age has only recently been undertaken, and results are as yet unavailable. The Labor Department study required by this legislation will focus on the need for and likely effect of uncapping the act. The committee felt it should not address this question until this information has been developed.  

Debate in both legislative chambers was marked by comments emphasizing that the choice of age seventy was an "arbitrary" product of "compromise," a necessarily limited "first step" which might be followed by congressional action to abolish mandatory retirement altogether. Subsequent congressional action was viewed as dependent in part upon experience gained from eliminating mandatory retirement within the "laboratory" of the federal government service.

The Supreme Court has not yet faced a challenge to the ADEA on the basis that the congressional choice of a cutoff age denies the equal protection of the laws to those sixty-five and older or seventy and older. In the context of the fundamental right to vote, the Court has rejected an equal protection challenge to a classification which restricted the statutory protection against discrimination in voting, holding that a reform measure aimed at eliminating an existing barrier to the exercise of the franchise may advance one step at a time. A classification limiting the scope and extent of the

194. Katzenbach v. Morgan, 384 U.S. 641, 656-58 (1966) (non-English-speaking persons educated in American-flag schools were extended the right to vote; non-English-speaking persons educated in other than American-flag schools were not similarly enfranchised).
reform must meet only the minimum rationality standard of review.\textsuperscript{195}

In the \textit{Vance} case, the Court specifically addressed the question of how responsive the legislative process has been to the problem of age discrimination in employment, noting that "Congress' recent action with respect to mandatory retirement ages shows that the political system is working."\textsuperscript{196} Legislative history demonstrates that the choice of age sixty-five in the 1967 ADEA and age seventy in the 1978 amendments was, in both cases, an experiment calculated in part to prepare the way for later expansions of protection.\textsuperscript{197} The 1978 amendments will undoubtedly spur independent research concerning the employment capabilities of persons older than seventy, just as enactment of the ADEA in 1967 was a catalyst for examination of the efficacy of the previous age sixty-five limitation.

Congress sought to ensure the development of a factual record sufficient for reexamination of the ADEA upper age limit by directing in the 1967 and 1978 legislation that reports be issued on the possible effects of further broadening ADEA coverage.\textsuperscript{198} The report required by the 1967 ADEA was not completed.\textsuperscript{199} In December 1981, the interim report required by the 1978 amendments was issued.\textsuperscript{200} A portion of this report considers the feasibility of eliminating the upper age limitation from the ADEA, but makes no recommendations.\textsuperscript{201} Policy recommendations will be included


\textsuperscript{196} 440 U.S. at 97 n.12.

\textsuperscript{197} See supra notes 190-93 and accompanying text.

\textsuperscript{198} The 1978 amendments directed the Secretary of Labor to study the feasibility of further raising or eliminating the upper age limit. 29 U.S.C. § 624 (Supp. II 1978).


\textsuperscript{200} \textit{Interim Report, U.S. Dep't of Labor Studies on the Effects of Raising the Age Limit in the Age Discrimination in Employment Act} (1981) [hereinafter cited as \textit{Interim Report}].

\textsuperscript{201} \textit{Id.} at 4, 197-235. Of particular value are two extensive current bibliographies included in other portions of the report. \textit{Id.} at 149-61, 360-67. The report may be obtained from Ruth J. Milam, U.S. Dep't of Labor, 200 Constitution Avenue, Room C-3315, Washington, D.C. 20210.
in the final report now slated for issuance in mid-1982.\textsuperscript{202}

There is scant support in the legislative history of the 1978 ADEA amendments for the interpretation that Congress meant to end the experiment and halt the expansion of ADEA coverage at age seventy. Congress is on record as deferring any such relatively permanent choice of a cutoff age until the results of pending research can be evaluated in light of continuing experience.\textsuperscript{203} Previous research findings have demonstrated that chronological age is not a reliable indicator of how the aging process affects physical and mental condition.\textsuperscript{204} Independent research and studies directed by Congress may soon produce a factual record indicating that age seventy is no more significantly correlated with the hypothetical onset of employment disability than is age sixty-five. If this occurs, it will no longer be possible to speak of the age seventy limitation as justified by the inadequate state of research, information, and experience.\textsuperscript{205} A court might then discern a rational basis for the initial adoption of the limitation, yet conclude that this initial rationality dissipated over time.\textsuperscript{206} Speculation as to the likelihood of this development must await returns from the continuing experiment with the age seventy limitation.

Discussion of a possible constitutional challenge to the ADEA coverage cutoff at age seventy should not obscure the fact that the ADEA does not require retirement. Considerations relevant to the age seventy cutoff, however, do have a bearing on the validity of statutes requiring retirement at age seventy. Although the strictures of current equal protection doctrine require mere rationality of both such classifications, there is a distinction between the two. The ADEA cap at age seventy is arguably underinclusive, while a

\textsuperscript{202} Id. at 18; telephone interview with Malcolm H. Morrison, Ph.D., Acting Chief, Research Support Staff, Employment Standards Administration, U.S. Dep't of Labor, Washington, D.C. (Feb. 2, 1982).

\textsuperscript{203} INTERIM REPORT, supra note 200, at 5.

\textsuperscript{204} See supra notes 30-32 and accompanying text.

\textsuperscript{205} See supra notes 188-93 and accompanying text.


Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson [163 U.S. 537 (1896) (announcing in dicta the “separate but equal” doctrine as applied to public education)], this finding is amply supported by modern authority. Any language in Plessy v. Ferguson contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of “separate but equal” has no place. Separate educational facilities are inherently unequal.
statute mandating retirement at age seventy would be challenged as overinclusive. Although the ADEA fails to extend protection against age discrimination to all older persons, it does not have the effect of forcing older persons to retire. In contrast, a mandatory retirement statute, by sweeping broadly to include within its scope those able and those not able to continue working, directly burdens and penalizes persons who are not too old to work.

Another difference between challenges to mandatory retirement statutes and to the ADEA coverage limitation is the composition of the affected class. The class affected by the ADEA limitation may be comprised of most persons seventy years of age or older, whereas the class affected by mandatory retirement at age seventy has two components: those forced to retire at age seventy, and those who would not be initially hired after age seventy. The class of those forcibly retired will be comprised only of those trained and experienced in performing a given job. The class of those not hired will be broader than the first class, because it will include...

207. A model of "underinclusive" and "overinclusive" classifications has been developed which justifies judicial tolerance when unequal treatment represents no more than a cautious approach to a complex problem. Tussman & tenBroek, supra note 169, at 347-53.

The "piecemeal" approach to a general problem, permitted by under-inclusive classifications, appears justified when it is considered that legislative dealing with such problems is usually an experimental matter. It is impossible to tell how successful a particular approach may be, what dislocations might occur, what evasions might develop, what new evils might be generated in the attempt to treat the old. Administrative expedients must be forged and tested. Legislators, recognizing these factors, may wish to proceed cautiously, and courts must allow them to do so.

Id. at 349.

208. The prima facie case against such departures from the ideal standards of reasonable classification is stronger than the case against under-inclusiveness. For in the latter case, all who are included in the class are at least tainted by the mischief at which the law aims; while over-inclusive classifications reach out to the innocent bystander, the hapless victim of circumstance or association.

Id. at 351. See Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 315-16 (1976) (suggesting that statute which excluded "few officers who are in fact unqualified" would be invalid).


Here, however, the Company's evidence was of a general nature applicable only to the general population. In this regard, it shed little light on the relative capabilities of test pilots as a group to adequately perform their tasks beyond a certain age. Houghton's evidence, however, was of a specialized nature, showing age changes are much slower among test pilots as a group than among the general population.
all potential job applicants. Furthermore, some mandatory retirement provisions are limited to a specific employment position while others govern numerous different employment positions.

Whether the statute at issue be specific or general, and whether the affected class of workers be defined narrowly or broadly, the important question is whether the Supreme Court will continue to treat such cases within the limits of the "rationality" tier of equal protection analysis as set forth in *Vance*. Mandatory retirement statutes implicate the right to work, which, while not designated as a fundamental right, nevertheless has been characterized by the Court as "of the very essence of the personal freedom and opportunity" the fourteenth amendment was designed to protect. This article has presented the argument that where such important liberties are affected, individualized procedures may be required if there is an insufficient factual basis for a legislative classification. The congressional determination to cut off ADEA coverage at age seventy cannot be enlisted in support of challenged mandatory retirement provisions, because the age seventy limitation was not based upon any demonstrated or assumed factual correlation between age seventy and employment disability. Congress established a temporary stopping place only, not a fixed boundary.

Congress consequently mandated further development of the factual record concerning mandatory retirement restrictions on the right to work. The sufficiency of the assumptions and data underlying legislative classifications which establish mandatory retirement will be tested against this changing background. In the absence of more general consensus on the facts, the correlation between chronological age and employment disability must be

210. Challenges to the constitutionality of mandatory retirement have been initiated almost exclusively by and on behalf of those retired, rather than those not hired. *But cf.* New York City Transit Auth. v. Beazer, 440 U.S. 568, 592 n.38 (1979) (dictum) (Court dismissed argument not pressed by litigants regarding "unemployability" of job applicants who are methadone users).

211. For example, the statute at issue in the *Murgia* case governed only uniformed state police officers. Such a statute is different from a statute which applies to varied groups of employees. See, e.g., Slate v. Noll, 474 F. Supp. 882 (W.D. Wis. 1979) (three-judge court), aff'd, 444 U.S. 1007 (1980).

212. *See supra* note 35 and accompanying text.

213. Hampton v. Mow Sun Wong, 426 U.S. 88, 115-16, 102 n.23 (1976) (quoting with approval Truax v. Raich, 239 U.S. 33, 41 (1915)). For further discussion of the dimensions of the right to work, see Abramson, *supra* note 7, at 35-37, 49-50, and *supra* notes 81-82 and accompanying text.

214. *See supra* notes 67-68 and accompanying text.

215. *See supra* note 133 and accompanying text.
evaluated in the particular context presented by each constitutional challenge to mandatory retirement.