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IRREBUTTABLE PRESUMPTIONS, THE FEDERAL GOVERNMENT, AND THE RIGHTS OF ALIENS

INTRODUCTION

Aliens have long been a disadvantaged class of persons in the United States. They have been denied the right to own land, to seek public and professional employment, and even to participate in the political process.¹ In recent years, many restrictions have been invalidated. Today, under constitutional doctrine, aliens are a suspect classification in regard to state laws and regulations, and the strict scrutiny standard is applied in the protection of their fundamental rights.² Very few state classifications based on alienage survive such constitutional scrutiny. Because the Supreme Court has been hesitant to interfere with the plenary power of Congress over immigration and naturalization,³ aliens are not a suspect classification under federal laws and regulations. Only the less rigorous rational relationship standard protects the rights of aliens in regard to federal enactments. Concerned about the inherent inequities of such an approach, commentators have suggested that a multi-variable sliding scale approach would enable the courts to balance fairly alien rights against federal immigration and naturalization policy interests.

The irrebuttable presumption doctrine offers a technique to accomplish largely the same results without some of the drawbacks of the constitutional standards under equal protection analysis. The thrust of the doctrine is to identify presumptions that legislatures and the Congress make in the creation of laws and, where they are not universally true but nevertheless conclusive, require that they be made rebuttable. The irrebuttable presumption doctrine would not only allow an examination of the presumptions of the lawmakers, but would also

². See note 4 and accompanying text infra. Under the strict scrutiny standard, if there is a suspect classification or a fundamental interest at issue, the government is required to demonstrate that a “compelling governmental interest” makes the classification necessary. See, e.g., Korematsu v. United States, 323 U.S. 214 (1944).
³. See notes 20, 21 and accompanying text infra. Unlike the strict scrutiny standard, the traditional equal protection or “rationality” standard creates a strong presumption of constitutionality. This standard requires a challenger to “show that the statutory classification has no reasonable basis and enjoins the Court to assume any reasonably conceivable state of facts that could justify the classification.” Note, The Conclusive Presumption Doctrine: Equal Process or Due Protection?, 72 Mich. L. Rev. 800, 813 (1974).
permit speculation about the presumptions underlying classifications of persons. Unlike traditional equal protection analysis, ad hoc application of the irrebuttable presumption doctrine to federal alienage classifications would preserve congressional flexibility while enabling courts to tailor justice to individualized circumstances. This comment will attempt to highlight the advantages of applying the irrebuttable presumption doctrine to the federal regulation of aliens.

ALIENS AND THE EQUAL PROTECTION DOCTRINE

State Regulation of Aliens

For many years, courts did not recognize the legal rights of aliens.\(^4\) Then in \textit{Yick Wo v. Hopkins},\(^5\) the United States Supreme Court ruled that aliens are “persons” within the protection of the fourteenth amendment. This was the first step toward providing aliens with a legal defense against discrimination and prejudice. In subsequent cases, the Supreme Court’s recognition of aliens’ rights slowly grew. For example, in \textit{Truax v. Raich},\(^6\) an alien employee was permitted to enjoin the enforcement of a statute limiting the percentage of aliens on the employer’s work force. Nevertheless, the legal protection accorded to aliens under the rationality standard of the equal protection clause remained woefully inadequate. Finally, in the landmark case of \textit{Graham v. Richardson},\(^7\) the Supreme Court declared that aliens, like racial minorities, represent a “‘discrete and insular’ minority for whom . . . heightened judicial solicitude is appropriate.” The Court in \textit{Graham} observed that “the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits.” Recent Supreme Court decisions confirm that state statutes which restrict the rights of aliens will be subjected to the strict scrutiny analysis.\(^8\)

\(^4\) While virtually all the protections written into the Constitution are stated in terms of “persons” or “people” rather than citizens, these terms were not defined. Hence, it was unclear whether aliens could be “persons” within the protections accorded by the Constitution. See K. Claghorn, \textit{supra} note 1, at 297-98; see generally D. Carliner, \textit{The Rights of Aliens} 11 (1977).
\(^5\) 118 U.S. 356 (1886).
\(^6\) 239 U.S. 33 (1915).
\(^7\) 403 U.S. 365 (1971).
\(^8\) Id. at 372.
\(^9\) Id.; Takahashi v. Fish & Game Comm’n, 334 U.S. 410, 420 (1948).
\(^10\) In \textit{In re Griffiths}, 413 U.S. 717 (1973), a divided Court applied the strict scrutiny test to invalidate Connecticut’s exclusion of resident aliens from the practice of law.
Federal Regulation of Aliens

The federal government's ability to regulate the activities of aliens stems largely from its plenary power over immigration and naturalization. The Supreme Court first enunciated the congressional prerogative regarding aliens in United States v. Macintosh, stating: "Naturalization is a privilege, to be given, qualified, or withheld as Congress may determine, and which the alien may claim as of right only upon compliance with the terms which Congress imposes."

The Court continues to observe the international law concept of unfettered sovereign power of federal authority over aliens for three reasons. First, Article I, section 8 of the Constitution vests in Congress the exclusive power to regulate immigration and naturalization throughout the United States. Secondly, alienage has never been deemed suspect under the equal protection clause under classifications incorporated in federal legislation. Thirdly, the Court has recognized

In Sugarman v. Dougall, 413 U.S. 634 (1973), the Supreme Court ruled that, pursuant to the strict scrutiny standard, a New York law providing that only American citizens may hold permanent positions in the competitive class of the state civil service was violative of the fourteenth amendment's equal protection clause. Citing to Graham v. Richardson and Takahashi v. Fish & Game Comm'n, the Court reiterated its view that alienage is an inherently suspect classification which requires the Court to apply a higher standard of review. Id. at 642.

In Nyquist v. Mauclet, 432 U.S. 1 (1977), a five to four decision held unconstitutional a New York statute requiring resident aliens to either apply for citizenship or, if not qualified for it, to file a statement of intent to apply as soon as they were eligible for citizenship in order to qualify for state financial assistance for higher education. In following the Graham v. Richardson line of cases, Justice Blackmun's majority opinion observed:

The Court has ruled that classifications by a State that are based on alienage are "inherently suspect and subject to close judicial scrutiny." In undertaking this scrutiny, "the governmental interest claimed to justify the discrimination is to be carefully examined in order to determine whether that interest is legitimate and substantial, and inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn." Alienage classifications by a State that do not withstand this stringent examination cannot stand.

432 U.S. at 7 (citations omitted).

11. For a discussion examining the federal government's plenary power over immigration and naturalization, see Note, Constitutional Limitations on the Naturalization Power, 80 YALE L.J. 769 (1971) [hereinafter cited as Constitutional Limitations on the Naturalization Power].


13. Id. at 615.


15. U.S. CONST. art. I, § 8, cl. 4, provides: "The Congress shall have Power . . . . To establish an uniform Rule of Naturalization . . . ."

16. While the equal protection clause of the fourteenth amendment has been
the importance of allowing the executive and legislative branches substantial freedom in establishing regulations over aliens.  

A double standard seems to exist, resulting in a more lenient judicial scrutiny over federal alienage classifications than that imposed on the states. This double standard is demonstrated by comparing Graham, where a state statute was challenged, to Mathews v. Diaz, which involved a similar federal law. In Graham, state statutes denying welfare benefits to aliens failing to meet durational residence requirements were invalidated. By contrast, in Mathews, a statute prohibiting federal medical insurance benefits to aliens who had not resided in the United States for at least five years was upheld. As Justice Stevens observed: “It is unquestionably reasonable for Congress to make an alien’s eligibility depend on both the character and the duration of his residence.” While not stated, it is clear the Court acted out of deference to the broad power of Congress over naturalization and immigration.

The Case for Intensified Protection of Aliens in Regard to Federal Law

A strict scrutiny standard of review should be applied to

incorporated into the fifth amendment, the strict scrutiny standard has only been applied to classifications which are suspect for federal purposes. Those classifications are race and national origin. Bolling v. Sharpe, 347 U.S. 497 (1954); Korematsu v. United States, 323 U.S. 214 (1944); see Richardson v. Belcher, 404 U.S. 78, 84 (1971) (Douglas, J., dissenting); Schneider v. Rusk, 377 U.S. 163, 168-69 (1964).

17. As the Supreme Court observed in Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976): “[T]here may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State.” The importance of the federal government’s control over immigration and naturalization to the national interest was spelled out by Russell W. Davenport, former editor of Fortune magazine, who testified before the President’s Commission on Immigration and Naturalization:

Nothing perhaps has affected the world standing of the United States so deeply, in so many ways, over so long a period as its immigration policy. . . . Moreover, as we look toward the future, our immigration policy appears to become more important, rather than less. We are a symbol of freedom and the world looks to us to define in concrete ways how freedom can be achieved. Our immigration policy is vital to that definition.

PRESIDENT’S COMM’N ON IMMIGRATION AND NATURALIZATION, WHOM WE SHALL WELCOME 48 (1953).

21. Id. at 83.
22. Id. at 79-80.
federal as well as state laws and regulations limiting the rights of aliens. The rationale behind the application of the strict scrutiny standard to aliens was recognized by the California Supreme Court even prior to Graham. In Purdy & Fitzpatrick v. State, the California Supreme Court took judicial notice of the fact that aliens are the victims of prejudice. The court there observed that because aliens are denied the right to vote, they lack the most rudimentary means of dealing with the political process. In addition to their political powerlessness, aliens are largely a friendless and politically unpopular group.

Similarly, in Furuki v. Rogers, a federal court observed that the strict scrutiny test is "the means by which the judiciary ensures that . . . laws represent more than an official expression of naked prejudice." In Furuki, the court struck down a federal statute imposing a ten-year residency requirement on naturalized citizens who sought appointments as foreign service officers. The court observed that such classifications, like those based on race or nationality, stem from prejudice against, and subjugation of, ill-represented minority groups.

Arguably, deportation and naturalization involve such fundamental interests that this factor alone should trigger the use of strict scrutiny in testing the constitutional validity of alienage classifications. Nevertheless, it is essential to recall the result of applying the strict scrutiny standard to federal alienage laws: the government would be saddled with the difficult task of proposing plausible compelling interests that would be furthered by such discrimination. Since discrimination would additionally have to be necessary to that interest, a showing would have to be made that the statute was precisely

24. Id. at 580, 456 P.2d at 654, 79 Cal. Rptr. at 86. A commentator has observed: The lack of the franchise distinguishes aliens from other "suspect" classes. Without the vote, the alien cannot effect political change, he cannot bring his case before legislative assemblies, and he is deprived of the "remedial channels of the democratic process." Because he lacks any voice in the political arena, it is especially important that the alien be heard in the courtroom.

26. Id. at 728.
27. Id. at 729.
drawn to serve the government's legitimate objectives. These requirements would be virtually impossible for the federal government to satisfy. Hence, the strict scrutiny standard would undoubtedly strike down nearly all federal alienage laws. This result is unmanageable. It has been argued that "the federal government is invested with a special responsibility for the regulation of aliens in our society and this responsibility can hardly be dismissed ... by focusing concern on the alien's rights as opposed to the government's interests." It has been suggested that "the substantial means test" might accommodate the competing governmental and individual interests concerned when federal legislation affecting aliens is at issue.

While the four-sided balancing test might be well-suited to gauging the proper degree of scrutiny an alien's care deserves according to the degree that a federal law concerns immigration and naturalization policy, the infrequently invoked irrebuttable presumption analysis may afford Congress greater freedom in establishing classifications by alienage while insuring the alien a heightened protection of his rights.

The Irrebuttable Presumption Doctrine and Federal Regulation of Aliens

The Nature of the Irrebuttable Presumption Analysis

The exact nature of the irrebuttable presumption analysis as a standard of judicial review is unclear. Some commentators regard it as a disguised form of an equal protection analysis applying an extraordinarily strict standard of review. Others

29. Dunn v. Blumstein, 405 U.S. 330, 343 (1972) (striking down Tennessee's residency requirements of 1 year in the state and 3 months in the county for voter registration).

30. The government has rarely been able to meet its strict scrutiny burden, and then it has only been under very exceptional circumstances. In Korematsu v. United States, 323 U.S. 214 (1944), the Supreme Court upheld restrictions on persons of Japanese ancestry during World War II because of "circumstances [of the direst emergency and peril]." Id. at 220.

31. While strict scrutiny requires that a classification must be necessary to a compelling governmental objective, Justice Marshall has observed that alienage is "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 105 (1973) (dissenting opinion).


33. Id. at 24-25.

34. G. GUNThER, CONSTITUTIONAL LAW 892 (9th ed. 1975); Note, Irrebuttable Presumptions: An Illusory Analysis, 27 STAN. L. REV. 449, 473 (1975); see generally Note,
believe the irrebuttable presumption doctrine is merely a façade for substantive due process analysis.\(^{35}\) A non-comparative description by one commentator stated:

> When a statutory provision imposes a burden upon a class of individuals for a particular purpose and certain individuals within the burdened class are so situated that burdening them does not further that purpose, then the rigid statutory classification must be replaced, to the extent administratively feasible, by an individual factual determination that more accurately selects the individuals who are to bear the statutory burden. The legislature in such cases is said to have "conclusively presumed" that all members of the burdened class possess those characteristics that caused the burden to be imposed, and due process is found to require an individual opportunity to rebut this presumption.\(^{36}\)

A vital distinction between the irrebuttable presumption doctrine and both equal protection and substantive due process analysis is that the latter two approaches strike down congressional classifications while the irrebuttable presumption doctrine does not.

Irrebuttable presumption analysis allows a party to demonstrate on which side of a classification (s)he should fall. In short, evidence is allowed in to rebut the presumption.\(^{37}\)

Cases show that where the irrebuttable presumption approach is successfully applied, the classification is initially struck down completely.\(^{38}\)

Thus, a logical interpretation of the doctrine is that it strikes down the presumption if found unconstitutional or only indirectly strikes down the classification because of its deriva-

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The Irrebuttable Presumption Doctrine in the Supreme Court, 87 Harv. L. Rev. 1534, 1535-36 (1974) [hereinafter cited as Presumption Doctrine]. Gunther sees the irrebuttable presumption doctrine as an extraordinarily strict variety of "means" scrutiny because of the Vlandis complaint that the "presumption" there was "not necessarily or universally true in fact." G. Gunther, supra, at 892.

35. Sewell, Conclusive Presumptions and/or Substantial Due Process of Law, 27 Okla. L. Rev. 151, 159 (1974). Sewell has observed that the language of the Court in irrebuttable presumption cases like Vlandis v. Kline, 412 U.S. 441 (1973), bears a strong resemblance to substantive due process argumentation. Id.


37. See, e.g., Vlandis v. Kline, 412 U.S. 441 (1973) (irrebuttable presumption of non-residency for tuition purposes); United States Dep't of Agriculture v. Murray, 413 U.S. 508 (1973) (conclusive presumption that a household is not needy when tax deduction taken for benefit of a parent in a prior year for purposes of Food Stamp Act).
tion from the invalid presumption. Hence, it appears that once a classification is struck down by the irrebuttable presumption technique, Congress is not precluded from reviving that same classification provided the presumption intimately tied to the classification is made rebuttable. One commentator has described this approach as follows:

The government would not have to prove that it was employing the least restrictive alternative, nor would the government have to show that the classification served a compelling interest. Instead, the focus would be on the means utilized by the government in furtherance of its legitimate governmental interest. The government's quantum of proof in sustaining its means would be based on the balancing of four factors: the character of the classification; the individual interests affected; the government interests asserted in support of the classification; and the proximity of these governmental interests to the constitutional mandate of the Congress to control immigration and naturalization policies.

In balancing these factors, the initial emphasis would be placed on the proximity of the classification to immigration and naturalization policies. The closer the classification is to immigration and naturalization, the more deference the court will give to the government's rationale. And conversely, the further the classification is from immigration and naturalization, the higher the burden will be on the government to come forth with factually demonstrable reasons which substantially support the means in terms of the ends. It is the balancing of the proximity of the classification to immigration and naturalization policies which provides the necessary flexibility to the government while affording sufficient protection to the constitutional rights of aliens.39

Another commentator views the irrebuttable presumption doctrine as a product of the interplay between the substantive and procedural aspects of due process, stating: “[T]he doctrine rejects the conclusiveness of the presumption embodied in the statute if the presumed fact is not universally true. . . . The basis of the defect is substantive; the relief is procedural.”40 This characterization seems accurate.

40. Comment, supra note 37, at 384.
The Development of the Irrebuttable Presumption Analysis

The use of the irrebuttable presumption analysis as a technique of judicial review began in the 1920's. While the technique flourished for a while, it had its share of influential detractors and soon outlived its popularity. Until the 1970's, the doctrine lay dormant as a largely discredited approach. Then, in a series of cases challenging state statutes, *Bell v. Burson*, *Stanley v. Illinois*, and *Vlandis v. Kline*, the irrebuttable presumption doctrine was revived.

The United States Supreme Court first employed the irrebuttable presumption doctrine as a means of reviewing federal legislation in *United States Department of Agriculture v. Murry*. At issue was the constitutionality of a 1971 amendment to the federal Food Stamp Act of 1964 providing that:

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42. The principal opponents of the irrebuttable presumptions approach during the 1920's and 1930's were Brandeis, Holmes and Stone. G. *Gunther*, *supra* note 34, at 888-89.
44. 402 U.S. 535 (1971). In *Bell*, the State of Georgia mandated that an uninsured motorist involved in an accident have his license suspended unless a bond was posted to cover the damages of the aggrieved parties. While not making explicit reference to the irrebuttable presumption doctrine, the Court held on procedural due process grounds "that under Georgia's present statutory scheme, before the State may deprive petitioner of his driver's license and vehicle registration it must provide a forum for the determination of the question whether there is a reasonable possibility of a judgment being rendered against him as a result of the accident." *Id.* at 542.
45. 405 U.S. 645 (1972). In *Stanley*, an Illinois statute provided that the children of unmarried fathers, upon the death of the mother, were to be declared state wards and placed in guardianship, without any hearing on parental fitness and without proof of neglect. Applying equal protection reasoning, which alluded to procedural rights, the Court held that "all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody." *Id.* at 658.
46. 412 U.S. 441 (1973). In *Vlandis*, Connecticut had enacted a statute requiring nonresidents enrolled in the state university system to pay a higher rate of tuition and fees than state residents. The statute raised an irrebuttable presumption that students were nonresidents for tuition purposes as long as they attended the state university if the legal address of a married student was outside the State at the time of application for admission or, if a single student was outside the State at some point during the preceding year. *Id.* at 442-43. While the Court acknowledged that a state has a legitimate interest in protecting and preserving its university system and the right of bona fide residents to attend their state university on a preferential tuition basis it struck down the durational residence requirement. The Court held "that a permanent irrebuttable presumption of nonresidence—the means adopted by Connecticut to preserve that legitimate interest—is violative of the Due Process Clause, because it provides no opportunity for students who applied from out of State to demonstrate that they have become bona fide Connecticut residents." *Id.* at 453.
47. 413 U.S. 508 (1973).
48. Pub. L. No. 88-525, 78 Stat. 703, 7 U.S.C. §§ 2011-2026 (1976). The challenged amendment was merely one of several which were prompted by the concern
Any household which includes a member who has reached his eighteenth birthday and who is claimed as a dependent child for Federal income tax purposes by a taxpayer who is not a member of an eligible household, shall be ineligible to participate in any food stamp program . . . during the tax period such dependency is claimed and for a period of one year after the expiration of such tax period. 49

The Court acknowledged that congressional intent was to prevent non-needy households from participating in the food stamp program which Congress viewed as being abused by "college students" and the "children of wealthy parents." 50 The Court, however, found the presumption under these circumstances highly questionable:

We have difficulty in concluding that it is rational to assume that a child is not indigent this year because the parent declared the child as a dependent in his tax return for the prior year. . . . We conclude that the deduction taken for the benefit of the parent in the prior year is not a rational measure of the need of a different household with which the child of the tax-deducting parent lives and rests on an irrebuttable presumption often contrary to fact. 51

Hence, the Court found the statute unconstitutional as a violation of due process. 52

_Cleveland Board of Education v. LaFleur_ 53 was the greatest step toward establishing the legitimacy of the irrebuttable presumption doctrine as a constitutional approach. There the Court dealt with state administrative regulations requiring that pregnant teachers take a mandatory maternity leave without compensation several months prior to the child's anticipated date of birth. The Court observed that the regulations spawned irrebuttable presumptions of disability which were not necessarily true. 54 The Supreme Court held that the mandatory termination provisions of the Cleve-
land 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.  

Although concurring in the result, Justice Powell expressed reservations about the ramifications of the revived irrebuttable presumption doctrine. He warned that the approach, if adopted consistently, would hamper all congressional power to legislate through classifications.  

Justice Powell's apprehensions seem to have foreshadowed Weinberger v. Salfi, where the Court sought to limit the scope of the irrebuttable presumption doctrine so as to make it more acceptable as a serious approach to the review of federal regulations. In Salfi, the district court had invalidated duration-of-relationship Social Security eligibility requirements for the wives and stepchildren of deceased wage earners. However, the Supreme Court reversed, observing that:

There is . . . no basis for our requiring individualized determinations when Congress can rationally conclude not only that generalized rules are appropriate to its purposes and concerns, but also that the difficulties of individual determinations outweigh the marginal increments in the precise effectuation of congressional concern which they might be expected to produce.

The Supreme Court's balancing test for the application of irrebuttable presumption analysis to federal laws was further refined in Knebel, Secretary of Agriculture v. Hein. Pursuant to the Food Stamp Act of 1964, low income households, as defined by federal and state regulations, could buy food stamps at a discount. The appellee brought suit because transportation allowances were treated as income. The district court invalidated that regulation since it reasoned transportation grants do not increase food purchasing power. However, the Supreme Court reversed, observing that to allow "a deduction

55. Id. at 651.
56. Id. at 652.
58. Id. at 785.
61. No specific deduction was allowed for transportation allowances. Instead, there was a standardized deduction of 10% of the wages or training allowance which was intended to cover all incidental expenses. 429 U.S. at 293-94.
for all transportation expenses would create significant administrative costs as well as risks of disparate treatment." The Court, considering these factors in its balancing test, declined to find any conclusive presumptions embodied in the regulation.

In a more recent case, *Elkins v. Moreno*, the Supreme Court had an opportunity to apply the irrebuttable presumption doctrine to a case directly involving alien rights. Non-immigrant alien students claimed that the University of Maryland had raised an irrebuttable presumption of non-domicile against them. The district court granted relief, holding that such an irrebuttable presumption violated the due process clause. The court maintained that there were reasonable alternative procedures available to make the domicile determination, citing *Vlandis v. Kline*. The court of appeals affirmed.

In response to the petitioner’s claim that *Salfit* and its progeny overruled *Vlandis*, the Supreme Court made a quick sidestep past the issue of *Vlandis’* continuing vitality. It found no necessity to make a constitutional decision and disposed of the issue on federal statutory and state common law grounds. The Court noted: “If G-4 aliens cannot become domiciliaries, then respondents have no due process claim under either *Vlandis* or *Salfit* for any ‘irrebuttable’ presumption would be universally true. [i.e., G-4 aliens cannot become domiciliaries].“ Hence, the Supreme Court declined to employ the irrebuttable presumption analysis in the defense of alien rights for the present.

The foregoing synopsis suggests that irrebuttable presumption analysis could emerge as a viable judicial mechanism for addressing a challenge of federal laws or regulations on due process grounds. However, the Court is reluctant to employ the doctrine unless it perceives a serious threat to individual rights

62. *Id.* at 295.
63. *Id.* at 297. Clearly, the Court was concerned about the irrebuttable presumption doctrine interfering excessively with administrative discretion. The Court, in citing to *Mourning v. Family Publications Serv.*, Inc., 411 U.S. 356 (1973), in a footnote, observed:

That some other remedial provision might be preferable is irrelevant. We have consistently held that where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority.

65. *Id.* at 661 (explanatory parenthetical added).
Exploring the Asserted Weaknesses of the Irrebuttable Presumption Approach

The irrebuttable presumption doctrine has been criticized on four grounds. First, detractors of the doctrine argue that all issues involving potential unfair classifications could trigger irrebuttable presumption analysis. Basically, this danger is no more serious than the threat that the Court could apply strict scrutiny analysis to all issues involving a potential deprivation of important rights under the fundamental rights strand of equal protection analysis. In both instances, judicial restraint is a key factor in preventing abuse of the doctrine in question. Recent cases, for example, demonstrate that the Court is using the utmost judicial restraint regarding the irrebuttable presumption approach.

Secondly, it is argued that the use of irrebuttable presumption analysis clashes with the premise that we are governed by laws, not judicial action. Professor Sewell warns that:

Carried to its logical extreme, it would dictate that governmental policy be applied individually and in a judicial fashion to each person. Of course, legislation and rule-making cannot accommodate such a premise, as their value lies in their ability to regulate conduct on a general rather than an ad hoc basis.

However, as mentioned above, the courts have not abused the doctrine, but have been applying it only in the most flagrant circumstances. Moreover, classifications that are struck down on irrebuttable presumption grounds may easily be resurrected by making the presumption stemming from the classification rebuttable. Thus, by no means are general regulations going to be eliminated by the use of the doctrine.

A third criticism of the irrebuttable presumption doctrine is that when legislative intent behind an enactment is unavailable to the courts, "[t]he existence of a plausible purpose

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66. See Presumption Doctrine, supra note 34, at 1549; Sewell, supra note 35, at 179.
67. But see Sewell, supra note 35, at 180-82.
70. Id.
imperfectly represented by the challenged summary classification may thus enable the Court, via the conclusive presumption analysis, to substitute in toto another criterion for the original rulemaking body."71 In that case, judicial use of the irrebuttable presumption doctrine would threaten to usurp lawmaking authority. To this argument Professor Sewell has responded that

legislators are elected on the basis of popular appeal and political views rather than any particular sensitivity toward issues of fairness and justice. . . . This is not to say that legislatures and administrative bodies exhibit no regard for basic justice in the course of their actions and deliberations, but their focus is in different directions and it cannot be merely assumed that their exercise of discretion will be above reproach. If anyone is to provide assurance in this regard, the courts are the proper organs.72

In other words, the threat of judicial interference into legislative prerogatives may not only be excusable but necessary, provided that it is held within reasonable bounds.

Fourth, commentators attack the individualized justice of the irrebuttable presumption approach as being unprincipled and failing to establish clear guidelines for judicial action.73 However, there are situations in which individualized judgments, free from restrictive rules, should be viewed as permissible bases for decision.74 In fact, the very informality of individualized judgments may often promote the ends of justice and fair treatment. Obsession with the formal aspects of the law may subvert the spirit of fairness that the law must seek to serve. As Professor Tribe observes: "It is possible to argue that individualized and informal judgments are in some circumstances not only more 'enlightened' but indeed constitutionally propelled—no less so than judgments by determinate rules are in other circumstances."75

In summary, the alleged weaknesses of the irrebuttable presumption doctrine are not substantial enough to outweigh the fundamental fairness of the approach.

71. Note, supra note 34, at 459.
73. See generally Note, supra note 34, at 459.
74. See generally Tribe, Structural Due Process, 10 Harv. C.R.-C.L. L. Rev. 269, 284 (1975).
75. Id. at 285.
The Justification for Requiring Rebuttable Presumptions in the Federal Regulation of Aliens

Aliens are victims of prejudice. They are politically powerless and often regarded as social inferiors. They are frequently the objects of distrust and suspicion. Often with strange sounding names, faces, and customs, they have had to deal with the full measure of society's contempt of persons who are different. Because of this legacy of unequal treatment, heightened protection of aliens is justified.

Although the strict scrutiny test applied to state laws containing alienage classifications seems to have adequately safeguarded aliens' rights, the rationality standard applied to federal laws does not provide the same measure of protection. While the sliding scale test might strengthen alien rights in regard to federal enactments, that approach does not seem to have generated uniform approval. Thus, selective application of the irrebuttable presumption approach may be the most effective way to reconcile competing governmental and individual interests by bringing into sharper focus previously unexamined motives and attitudes underlying federal laws regarding aliens.

Although there is a strong need to allow the executive and legislative branches substantial freedom in regulating aliens, see note 24 and accompanying text supra. See also Rosberg, Aliens and Equal Protection: Why Not the Right to Vote?, 75 Mich. L. Rev. 1092, 1105 (1977).

76. M. Birnbach, supra note 76, at 74.
77. Note, supra note 3, at 816.
78. M. Birnbach, supra note 76, at 74.
79. Note, supra note 3, at 816.
80. Note, Alien's Right to Work: State and Federal Discrimination, 45 Fordham
it is also imperative that the federal government treat aliens fairly.\textsuperscript{81} The requirements of a flexible national policy demanding freedom from restrictive doctrines must be accommodated with an appreciative regard for the rights of the individual. The adoption of the irrebuttable presumption doctrine may provide an effective resolution to this problem because it manages to accommodate both interests.

The irrebuttable presumption doctrine will leave our national policymakers free from equal protection doctrines restricting the use of alienage classifications. Instead, it will preserve the discretion of Congress to establish classifications based on alienage. Upon a judicial finding that a federal law makes unfair presumptions about aliens, the law will be invalidated. However, since it is the conclusive nature of the presumption made that is objectionable and not the use of the classification itself, the law may be resurrected by making the formerly irrebuttable presumption rebuttable.

Most important, the irrebuttable presumption analysis facilitates the attainment of justice and fair treatment. It offers the individual alien the opportunity to demonstrate how a law may be unfair as applied to him or her. While resorting to equal protection grounds to strike down a classification would free many aliens from the task of proving individual unfairness of a statute which has been made rebuttable, the sweeping scope of this approach prevents it from being a popular technique of remedying the injustice of federal legislation in light of its costs to effective national policy. In contrast, the ad hoc nature of the irrebuttable presumption doctrine makes it very suitable in immigration and naturalization matters.

Another advantage of the irrebuttable presumption technique is that it is a transitional solution well suited to dealing with disputes that arise in settings of widely fluctuating be-

\textsuperscript{81} Note, supra note 14, at 774.
Where policymakers may be likely to change their minds, such as in federal immigration and naturalization matters, the individual treatment involved in the doctrine has special utility. A just result under the circumstances can be arrived at, not only in terms of an individual case, but also in terms of that time in history, since political events naturally work into the doctrine's balancing of factors.

Finally, the irrebuttable presumption approach forces a focus on many of the unexamined beliefs and attitudes underlying immigration and naturalization legislation. It will require legislators to reexamine their presumptions about the existence of alienage-linked traits, such as disloyalty, and other beliefs about specific nationalities of aliens. It will allow the courts to ferret out prejudice and antiquated notions about a class of persons about whom inferior status and unequal treatment have long gone unquestioned.


83. For instance, during World War II it was generally presumed that a noncitizen necessarily owed an affirmative duty to a foreign nation. However, as Justice Black stated in his concurring opinion in Oyama v. California, 332 U.S. 633, 666 (1948), several years after the war:

Loyalty and the desire to work for the welfare of the [government], in short, are individual rather than group characteristics. An . . . alien may or may not wish to work for the success and welfare of the state or nation. But the same can be said of a natural born citizen.

Hence, in regard to immigration and naturalization law, where political sentiments are likely to shift very quickly due to changes on the political scene, it would be wise to heed Professor Tribe's warning that "perhaps only personalized justice can be acceptable in settling disputes about broadly agreed-upon rights . . . in settings of widely perceived moral flux." Tribe, supra note 82, at 555.


85. Joseph Tussman and Jacobus tenBroek have made the following observation: "That citizenship is a test of loyalty and alienage of disaffection, even when alienage is coupled with ineligibility for citizenship, is a claim, as Mr. Justice Murphy observes, 'outlawed by reality.' Such 'matters of the heart are not necessarily settled by political status.'" Id.

86. Several other beliefs that have undoubtedly colored our immigration and naturalization laws are suggested by the historians Morison, Commager, and Leuchtenburg in their attempt to dispose of some misconceptions about immigration. They observe:

Nor was there ever any ground for fearing that the 'native stock' would succumb to the alien invasion, or that the foreign infiltration would upset the equilibrium of the American Population. . . . Recent immigrant stock has not shown itself less intelligent politically than the earlier stock or less faithful to democracy. . . . That the foreign-born figures more largely than the native-born in the statistics of crime and charity was an index of opportunity rather than character.

CONCLUSION

For a claim to be sustained under the irrebuttable presumption doctrine, there must be a palpable unfairness in the government's presumption, and the hardship imposed on the individual must outweigh the governmental interest promoted by the presumption. It appears unlikely that the Supreme Court will invoke the irrebuttable presumption analysis unless the balance weighs in favor of the individual and the Court finds some difficulty in applying an equal protection analysis.

In the area of federal regulation of aliens, judicial use of the irrebuttable presumption doctrine may best promote the political and social interests at stake. Since the doctrine strikes down presumptions and only indirectly strikes down classifications, Congress is not precluded from utilizing a given classification provided the presumption underlying it is made rebuttable. Consequently, the doctrine is far less disruptive of congressional policymaking over immigration and naturalization than traditional equal protection analysis. Since the approach avoids the creation of rigid doctrines, it allows the judiciary to further the interests of individualized justice though not committing itself to broad principles that may be at odds with the interests of our foreign policy.

Byron Toma

87. The public relations interests at stake in immigration and naturalization matters have been set forth by the President's Commission on Immigration and Naturalization:

The immigration law is a yardstick of our approval of fair play. It is a challenge to the tradition that American law and its administration must be reasonable, fair, and humane. It betokens the current status of the doctrine of equal justice for all, immigrant or native.

The immigration law is an image in which other nations see us. It tells them how we really feel about them and their problems, and not how we say we do. It is also an expression of the sincerity of our confidence in ourselves and our institutions. An immigration law which reflects fear and insecurity makes a hollow mockery of confident world leadership. . . . [The Commission] is convinced that a full regard for protecting our national security . . . can be achieved only with a positive immigration policy based not on fears but on faith in the future of a democratic and free United States.

President's Comm'n on Immigration and Naturalization, supra note 80, at xiii-xiv.