Maryland Law Review

Volume 34 | Issue 2 Article 5

The Case of the Pregnant School Teachers: an Equal Protection Analysis

Note

THE CASE OF THE PREGNANT SCHOOL TEACHERS: AN EQUAL PROTECTION ANALYSIS

INTRODUCTION

In *Cleveland Board of Education v. LaFleur*,[1] the Supreme Court decided that mandatory maternity leave policies requiring a pregnant school teacher to terminate her employment after the fourth month of pregnancy were unconstitutional because they violated the due process clause of the fourteenth amendment. That the Court based its decision on due process rather than on equal protection grounds was somewhat surprising, especially since this case and similar maternity leave cases were decided on equal protection grounds in the lower federal courts[2] and equal protection was the school teachers' principal argument to the Court.[3] This Note will first discuss the Court's due process decision and formulate an equal protection analysis. This Note will

1. 414 U.S. 632 (1974).

2. Maternity leave cases which were decided under equal protection grounds in the lower federal courts include: Buckley v. Coyle Pub. School Sys., 476 F.2d 92 (10th Cir. 1973); Cohen v. Chesterfield County School Bd., 474 F.2d 395 (4th Cir. 1973), *rev'd on other grounds sub nom.* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Green v. Waterford Bd. of Educ., 473 F.2d 629 (2d Cir. 1973); LaFleur v. Cleveland Bd. of Educ., 465 F.2d 1184 (6th Cir. 1972), *aff'd on other grounds*, 414 U.S. 632 (1974); Heath v. Westerville Bd. of Educ., 345 F. Supp. 501 (S.D. Ohio 1972); Pocklington v. Duval County School Bd., 345 F. Supp. 163 (M.D. Fla. 1972); Bravo v. Board of Educ., 345 F. Supp. 155 (N.D. Ill. 1972); Williams v. San Francisco Unified School Dist., 340 F. Supp. 438 (N.D. Calif. 1972).

3. See Brief for LaFleur (No. 72-777) at 26, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974). Mrs. LaFleur's sole argument was based on the equal protection clause of the fourteenth amendment:

> Since in this case, as in others, no general rule of an inflexible nature has been adopted with respect to other types of medical conditions which employees suffer, Respondents contend that their treatment at the hands of the Cleveland Board of Education has been discriminatory in violation of the equal protection of the laws which the Fourteenth Amendment guarantees them.

Id. See also Brief for Cohen (No. 72-1129) at 4-5, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974). Mrs. Cohen raised a due process argument as well as an equal protection argument:

> Petitioner asserts that mandatory maternity leave policies discriminate on the basis of sex. In light of this Court's recent decisions . . . these regulations should be treated as invidious discriminations—based on suspect classifications—interfering with fundamental rights and must be measured by some compelling state interest rather than mere rational basis. Additionally petitioner contends that these regulations are so arbitrary in light of the due process clause as to not even survive a rational basis test.

Id.

then suggest that equal protection was a more proper basis for this decison and will analyze the legal difficulties the Court might have encountered in such an analysis.

Jo Carol LaFleur, a junior high school teacher employed by the Board of Education of Cleveland, Ohio, was required to leave her job in March 1971 because of mandatory maternity leave rules, even though she wanted to continue teaching until the end of the year. The maternity leave rules, adopted in 1952, required pregnant teachers to take maternity leave without pay and to begin this leave five months before the expected birth of the child. Application for maternity leave had to be made at least two weeks before the date of departure. A teacher was not allowed to return to work until the beginning of the next school semester, and then only if her child had reached three months of age. Mrs. LaFleur filed suit under 42 U.S.C. section 1983[4] challenging the constitutionality of the maternity leave rules as a deprivation of equal protection. The district court rejected plaintiff's claims.[5] The Court of Appeals for the Sixth Circuit reversed, holding that the maternity leave rules violated the equal protection clause of the fourteenth amendment.[6]

In a similar case, Susan Cohen, a teacher employed by the Chesterfield County School Board, was required to leave her job on December 18, 1970, even though she initially requested to be allowed to continue teaching until April 1, 1971, or alternatively until January 21, 1971, the end of the first school semester.[7] In this suit, also brought under 42 U.S.C. section 1983, the district court held the regulations to be a denial of equal protection,[8] and a divided panel of the Fourth Circuit affirmed. On a rehearing en

4. 42 U.S.C. § 1983 (1970) provides:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, priviliges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

5. 326 F. Supp. 1208 (N.D. Ohio 1971).

6. 465 F.2d 1184 (6th Cir. 1972).

7. 414 U.S. at 638. Chesterfield County School Board maternity leave regulations require a pregnant teacher to leave work at four months prior to the expected birth of the child. The teacher must give written notice at least six months before the expected birth date; she is re-eligible for employment after submitting written notice from her physician that she is physically fit for full-time employment and after giving full assurance that care for the child will cause minimal interference with job responsibilities. Re-employment is guaranteed no later than the first day of the school year following the date on which she was declared eligible for re-employment. *Id.* at 637 n.5.

8. 326 F. Supp. 1159 (E.D. Va. 1971).

banc, however, the Court of Appeals reversed and upheld the constitutionality of these regulations.[9]

Granting certiorari in order to resolve this conflict between the circuits, the Supreme Court in *Cleveland Board of Education v. LaFleur* found that these maternity leave rules penalized the school teacher for deciding to bear a child. Because these rules directly affected "one of the basic civil rights of man," the due process clause of the fourteenth amendment required that "such rules must not needlessly, arbitrarily, or capriciously impinge upon this vital area of a teacher's constitutional liberty."[10] The Court held that the interests advanced by the school boards in support of the rules did not justify the procedures which they had adopted. While it did not lay down any explicit guidelines for maternity leave regulations, the Court did indicate that school boards could justifiably require a teacher to give substantial advance notice of her expected termination date. The Court also indicated that the school boards might be able to set a firm date of termination during the last few weeks of pregnancy.[11]

The Court rejected the school boards' argument that firm cut-off dates were necessary to maintain continuity of classroom instruction. The Court found that, while the advance notice provisions were rational and they served the purpose of finding and

---

9. 474 F.2d 395 (4th Cir. 1973).

10. 414 U.S. at 640; four Justices joined with Justice Stewart in his majority opinion. Justice Douglas concurred in the result. Justice Powell also concurred in the result and wrote a separate opinion. Justice Rehnquist wrote a dissenting opinion joined by Chief Justice Burger.

11. 414 U.S. at 647 n.13. The Court noted that these teachers would now be covered under title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.* (1974). *Id.* at 638 n.8. Title VII prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. At the time these teachers were placed on maternity leave, title VII did not apply to state agencies and educational institutions. The Equal Employment Opportunity Act of 1972, however, extended title VII coverage to these employees.

The Equal Employment Opportunity Commission is the agency charged with administering this statute. The EEOC has published guidelines which provide that a mandatory maternity leave policy for women is a violation of title VII because it works a discrimination, based on sex, which is presumptively unjustified by the requirements of a job. 29 C.F.R. § 1604.10 (1973), "Employment policies relating to pregnancy and child birth" provides:

> (a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in prima facie violation of title VII.
>
> (b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any

hiring qualified substitutes, the requirements of termination specifically after the fourth and fifth months of pregnancy were not. Arbitrary termination dates such as these might in fact hinder such continuity. The Court pointed out that Mrs. LaFleur's fifth month of pregnancy occurred during March 1971. Thus, Mrs. LaFleur was required to leave work with only a few months left in the school year, even though she requested to finish the term. Therefore, the specific termination dates had no rational relationship to the valid state interest of preserving continuity of education. The Court found that advance notice provisions served the school boards' objectives just as well and imposed a "far lesser burden on the women's exercise of constitutionally protected freedom."[12]

The school boards also contended that these maternity leave rules protected the health of the teacher and her unborn child. These rules supposedly assured that the students have a physically capable instructor in the classroom, since it was argued that some teachers become physically incapable of performing various duties during the latter months of pregnancy. The Court accepted the proposition that some pregnant teachers would become incapacitated, but rejected the notion that this possibility should bar all such teachers from the classroom. The Court found that the mandatory cut-off rules contained an "irrebutable presumption" of physical incompetency.[13] There were obviously a substantial number of teachers who were capable of working longer than the Cleveland and Chesterfield County rules allowed. The Court recognized that these termination dates served the interest of administrative convenience since it obviated the necessity for a case by case determination of competency to continue teaching. However, the Court stated that administrative convenience alone was "insufficient to make valid what otherwise is a violation of due process of law. The Fourteenth Amendment requires the school boards to employ alternative administrative means, which do not so broadly infringe upon basic constitutional liberty, in support of their legitimate goals."[14]

---

health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

(c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity.

12. 414 U.S. at 643.

13. *Id.* at 644.

14. *Id.* at 647 (footnotes omitted).

Finally, the Court determined that the Cleveland rules concerning a teacher's eligibility to return to work were also unconstitutional. The Court found that to the extent the provision required a mother to wait until her child reached the age of three months and reflected the school board's thinking that no mother is physically fit to return until that time, "it suffers from the same constitutional deficiencies that plague the irrebuttable presumption in the termination rules."[15] The Court also thought the rule unnecessary since the requirement of a physician's certificate or a medical examination fully protected the school's interests.

THE COURT'S DUE PROCESS ARGUMENTS

Substantive Due Process

In the early history of judicial interpretation, the due process clause was thought to refer merely to procedural rights. The Court refused to apply the due process clause in any way to the question of the substantive reasonableness of state legislation.[16] Later, near the end of the nineteenth century, the Court did examine a statute to see if it had a real or substantial relation to the purposes for which it was enacted.[17] The Court soon went

15. *Id.* at 649 (footnotes omitted).

16. *See, e.g.*, Davidson v. New Orleans, 96 U.S. 97 (1877). In this case, the owner of certain real estate in New Orleans contended that an assessment against his land for draining swamps in New Orleans deprived him of his property without due process of law. The Court held that this statute did not deprive the appellant of due process because the tax burden was submitted to a court before it became effective and because notice was given to the appellant who had the right to appear and contest the assessment. The Court indicated that the due process clause was not a means to challenge the merits of legislation:

> There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be found.

Id. at 104. *See generally* Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643, 649 (1908).

17. *See* Mugler v. Kansas, 123 U.S. 623 (1887). In this case the Court held valid a state law prohibiting the manufacture and sale of alcoholic beverages except for medical, scientific, or mechanical purposes. The Court indicated that it would examine a statute to see if it had a real or substantial relation to the object at which it was directed. The Court stated:

> It belongs to that department [the legislative branch of the government] to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.
>
> It does not at all follow that every statute enacted obstensibly for the promo-

beyond this test and picked out certain areas in which the legislation, in order to be valid, had to be *more* than minimally rational.[18] A major criticism of this doctrine of substantive due process centered around the idea that the Court was picking out interests not expressly given protection by the Constitution and was subjecting legislation which impinged on these favored interests to a heavy burden of justification. This criticism eventually prevailed, and in later cases the Court rejected this substantive due process philosophy.[19]

Unfortunately, the decision and reasoning in *LaFleur* may signal a return to the picking and choosing of rights which may not be impinged by the state for reasons which are only minimally

---

tion of these ends, is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute . . . the courts must obey the Constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed . . . . The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has not real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

Id. at 661.

18. *See* Allgeyer v. Louisiana, 165 U.S. 578 (1897), and Lochner v. New York, 198 U.S. 45 (1905). These two cases dealt with the right to make a contract. The Court said that in this area the legislation, in order to be valid, had to be more than minimally rational. *Allgeyer* concerned the constitutionality of a Louisiana statute which prohibited any person from obtaining insurance on property in the state from an out of state marine insurance company not complying in all respects with state law. The Supreme Court reversed Allgeyer's conviction under this statute and held that the statute deprived the defendants "of their liberty without due process of law" and therefore violated the fourteenth amendment.

In *Lochner*, a New York statute required that no employee in a bakery work more than sixty hours in a week. The defendant was convicted under this statute for permitting an employee to work over sixty hours in one week. The Court reversed, holding that the statute interfered with the right to make a contract between employer and employee, a right protected by the due process clause.

19. *See* Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949). This case upheld a Nebraska constitutional amendment and a North Carolina statute which provided that no person should be denied the chance to retain or obtain employment because he is or is not a member of a labor union. In rejecting a contention that these provisions violated the due process clause of the fourteenth amendment because they deprived persons within the state of "liberty" either to refuse to hire someone because he is or is not a union member, or to make a contract to engage in such employment discrimination, the Court stated that "states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law." *Id.* at 536.

rational. The Court stated that the specific cut-off dates bore no rational relationship to a valid state interest,[20] but then admitted that "at least some teachers become physically disabled from effectively performing their duties during the latter stages of pregnancy."[21] If this latter statement is true, then certainly a rule which embodies it is at least minimally rational; it serves the end rationally. Thus, the Court, without inconsistency, should not have invalidated the regulations upon the ground that it failed to meet the requirements of *minimum* rationality. Rather than rest its decision solely upon an alleged lack of rationality, however, the Court buttressed its decison with a second line of argument: The Court questioned whether these regulations "[swept] too broadly,"[22] and found that they did. The Court then invalidated the rules since they contained an impermissible irrebuttable presumption.

In essence what the Court was doing was requiring that the school boards employ a "less restrictive alternative"[23] in determining whether a pregnant teacher was physically able to continue teaching. The "less restrictive alternative" in *LaFleur* was to give individual teachers a chance to establish as an individual matter an ability to continue teaching. This more active level of judicial review bears a striking resemblance to the reasoning employed in equal protection decisions where the Court finds that the questioned statute impinges a fundamental right. The Court has stated in that context that "only where state action impinges on the exercise of fundamental constitutional rights or liberties must it be found to have chosen the least restrictive alternative."[24] The *LaFleur* decision thus suggests that the Court has imported the equal protection standards of judicial review into the due process area and that it will require greater justification where legislation or regulation affects certain fundamental rights.

Assuming this importation of equal protection standards, it is next necessary to determine the nature of the fundamental

20. 414 U.S. at 643.

21. *Id.* at 644.

22. *Id.*

23. "Less restrictive alternative" means simply that the state must choose the device least burdensome to the individual's rights. The state's encroachment will not be allowed to stand if the Court is able to envision another means to the same end if the alternative means is less offensive to personal rights. In *LaFleur* the Court stated that "the choice of firm dates later in pregnancy would serve the boards' objectives just as well, while imposing a far lesser burden on the women's exercise of constitutionally protected freedom." 414 U.S. at 643.

24. San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 51 (1973), discussed *infra* at text accompanying notes 108 through 112.

right at stake in the *LaFleur* case. The Court's reasoning that maternity leave rules directly affected "one of the basic civil rights of man"[25]—*i.e.*, the right to procreate—seems unpersuasive in light of other Supreme Court decisions. While recognizing that the *LaFleur* rules added to the burden of childbearing, Justice Powell, in a concurring opinion, cited *Dandridge v. Williams*[26] and pointed out that other regulations have this effect and not every governmental policy that burdens childbearing violates the Constitution.[27]

In *Dandridge*, plaintiffs challenged the validity of the Aid to Families with Dependent Children (AFDC) program in Maryland. Maryland provided grants to most families in accordance with ascertained standards of need, but imposed an upper limit on the total amount of money any one family could receive. Larger families thus received less, per capita, than smaller families.[28] Plaintiffs contended that this unequal treatment violated the equal protection clause.

The Court, however, rejected this argument and upheld, under the minimum rationality standard of review, the validity of the program. The Court stated that "in the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect."[29] Thus, in *Dandridge* the Court rejected plaintiffs' argument that a fundamental right—the right to procreate—was affected and that the questioned regulations should therefore be subjected to an active standard of review.[30]

---

25. 414 U.S. at 640, quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); *Skinner* is discussed *infra* note 97.

26. 397 U.S. 471 (1970).

27. 414 U.S. at 651. Justice Powell further stated:

> Undoubtedly Congress could, as another example, constitutionally seek to discourage excessive population growth by limiting tax deductions for dependents. That would represent a governmental effort to "penalize" childbearing . . . . The regulations here do not have that purpose. Their deterrent impact is wholly incidental. If some intentional efforts to penalize childbearing are constitutional . . . then certainly these regulations are not invalid as an infringement of any right to procreate.

Id. at 651-52.

28. In *Dandridge*, the appellees were large family recipients of benefits under the AFDC program. The Maryland regulations provided a maximum grant of two hundred and fifty dollars per month per family, regardless of family size or actual need. Additional benefits were in effect denied to additional children born into a family already numbering six or more.

29. 397 U.S. at 485.

30. Justice Marshall stated in his dissenting opinion that the Court did not recognize any infringement on the appellee's right to procreate. He countered one of the appellee's arguments that the basic right to procreate was being affected:

If the effect on procreation was only insignificant in *Dandridge*, how could the Court find the "direct" effect on procreation in *LaFleur* to be substantial? The major penalty imposed on the teacher in *LaFleur* and on the mother in *Dandridge* was an economic penalty. It is true that the teacher was forced to give up her entire salary after the fourth month of pregnancy, while in *Dandridge* the welfare recipient was only giving up marginal income, since she would still receive the maximum two hundred and fifty dollar grant. However, in practical terms, the burden on the welfare recipient would most likely be greater. A pregnant teacher, usually married, would contemplate adequate support from her husband, and the loss of income would be temporary since the teacher has the opportunity to return to full employment.

In contrast, the welfare recipient in *Dandridge* was, by definition, receiving a stipend for the minimum ascertained need of her family. Under the AFDC program in Maryland, additional benefits were denied to additional children born into a family of six. Under this plan, a family of seven would no longer receive its *minimum* ascertained needs, and, further, this less-than-subsistence status would be permanent. Any argument that the burden on procreation in *LaFleur* was more "direct" or more substantial seems absurd, and the result suggests that the Supreme Court somehow thought that a teacher had more of a right to have children than did a welfare recipient.

Irrebuttable Presumptions

If, contrary to the Court's assertion, these maternity leave regulations do *not* affect the protected freedom of procreation, it would seem that these regulations should be constitutional, since they arguably meet the test of minimum rationality. However, a second possible rationale for the Court's decision is available. The mere fact that these regulations contain an "irrebuttable presumption" of physical incompetency might make these regulations unconstitutional under the Court's recent due process decisions. In *LaFleur* the Court relied on its decision in *Vlandis v.*

Appellees do argue that their "fundamental rights" are infringed by the maximum grant regulation. They cite, for example, *Skinner v. Oklahoma* . . . for the proposition that the "right of procreation" is fundamental. This statement is no doubt accurate as far as it goes, but the effect of the maximum grant regulation upon the right of procreation is marginal and indirect at best, totally unlike the compulsory sterilization law that was at issue in *Skinner*.

397 U.S. at 520-21 n.14.

Kline[31] to show that "permanent irrebuttable presumptions have long been disfavored"[32] under the due process clauses of the fifth and fourteenth amendments. In *Vlandis*, Connecticut imposed higher tuition rates upon nonresidents enrolled in the state university system. An unmarried student was classified as a nonresident if his legal address for any part of a one-year period preceding admission was outside of Connecticut.[33] The student could not change his status for his entire period of attendance at the state university. The statute therefore contained an irrebutable presumption of non-residency for the purpose of a student's attempt to qualify for the lower tuition rates for residents. One of the state's arguments was that the statute promoted administrative certainty and made it easier to separate, from bona fide Connecticut residents, students who came into Connecticut merely for its educational facilities. However, the Court held that, where there are reasonable alternative means for determining bona fide residence, the due process clause renders the conclusive presumption invalid.[34]

In *Vlandis* the Court never explicitly stated what interest was operating to counter the State's admittedly legitimate interest in administrative efficiency. The Court merely relied upon *Stanley v. Illinois*[35] for the proposition that "the Constitution

31. 412 U.S. 441 (1973).

32. 414 U.S. at 664, citing *Vlandis*, 412 U.S. at 446. This statement in *Vlandis* was based on the case of Heiner v. Donnan, 285 U.S. 312 (1932). In *Heiner*, the Court found unconstitutional a statute which conclusively presumed that all gifts made within two years of the donor's death were made in contemplation of death. The Court held that the statute was arbitrary and capricious and therefore deprived the taxpayer of his property in violation of the due process clause of the fifth amendment.

However, as Justice Rehnquist pointed out in a dissenting opinion in *Vlandis*: "The majority's reliance on cases such as *Heiner v. Donnan* . . . harks back to a day when the principles of substantive due process had reached their zenith in this Court. Later and sounder cases thoroughly repudiated these principles in large part." 412 U.S. at 467-68. The *Vlandis* Court also cites Schlesinger v. Wisconsin, 270 U.S. 230 (1926), and Hoeper v. Tax Comm'n, 284 U.S. 206 (1931), to show that irrebuttable presumptions have long been disfavored under the due process clause. These too were tax cases dealing with problems similar to those in *Heiner*.

Finally, the Court cited Tot v. United States, 319 U.S. 463, 468-69 (1943); Leary v. United States, 395 U.S. 6, 29-53 (1969); Turner v. United States, 396 U.S. 398, 418-19 (1970). These three cases dealt with presumptions in criminal statutes, which place these cases on a different footing. While it is true that there is a historical basis for saying irrebuttable presumptions have been disfavored under the due process clauses of the fifth and fourteenth amendments, the basis for applying this doctrine to cases such as *Vlandis* and *LaFleur* is questionable.

33. The statute also contained similar rules for married students.

34. 412 U.S. at 452.

35. 405 U.S. 645 (1972). In this case, Stanley's children were declared wards of the state after their mother's death because he was an unwed father. The Court held that under the due process clause the petitioner was entitled to a hearing on his fitness as a

recognizes higher values than speed and efficiency."[36] In *Stanley*, however, the Court had stated "that due process of law does not require a hearing 'in every conceivable case of government impairment of private interest' . . . [and that the] 'procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action'."[37] The Court thus recognized Stanley's substantial interest in the children he had fathered and raised, and that such an interest warranted protection absent a powerful countervailing interest.[38] The Court in *Vlandis*, however, did not specify the interest being protected. In a dissenting opinion in *Vlandis*, Chief Justice Burger recognized the Court's failure to identify an interest worthy of protection. He found the Court applying "strict scrutiny"[39] without explaining how the statute impaired a constitutional interest worthy of an active level of review. He further stated:

> The real issue here is not whether holes can be picked in the Connecticut scheme; of course that is readily done with this bad statute . . . . The Court's task is to explain why the "strict scrutiny" test, previously confined to other areas, should now in practical effect be read into the Due Process Clause . . . .
>
> There will be, I fear, some ground for a belief that the Court now engrafts the "close judicial scrutiny" test onto the Due Process Clause whenever we deal with something like "permanent irrebuttable presumptions." But literally thousands of state statutes create classifications permanent in duration, which are less than perfect, as all legislative classifications are, and might be improved upon by individualized determinations so as to avoid the untoward results produced here due to the very unusual facts of this case.[40]

---

parent before his children were taken from him. The state could not presume that unmarried fathers in general were unfit. By denying a hearing to unmarried fathers and by extending a hearing to all other parents whose custody of their children was challenged, the state denied Stanley equal protection under the fourteenth amendment.

36. 412 U.S. at 451, citing *Stanley*, 405 U.S. at 656.

37. 405 U.S. at 650-51, quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 894 (1961).

38. *Id.* at 651.

39. 412 U.S. at 460 (Burger, C.J., dissenting). "Strict scrutiny" refers to the standard of close judicial scrutiny applied to legislation or other governmental action which "operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution . . . ." San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973).

40. 412 U.S. at 462.

One possible conclusion from this line of cases is that the Court will employ a balancing test whenever a litigant contends that his due process rights are being infringed by a statute which contains an irrebuttable presumption. Presumably, the Court will weigh the severity of the deprivation to the individual against the costs to the state of providing a satisfactory way to rebut this presumption. In *LaFleur* the burden on procreation imposed by these maternity leave regulations seems to be much less substantial than in previous cases. Therefore, under *LaFleur* and also *Vlandis*, it seems that a person adversely affected by any statutes or regulations where such irrebuttable presumptions are employed will not have to make much of a showing that an important interest of his is being affected, since the state's main argument for irrebuttable presumptions will usually come down to no more than "administrative efficiency." Of course, the Court in *LaFleur* may have thought that the administrative difficulties were minimal, compared to the interests of the affected teacher. For one thing, a determination of the teacher's fitness would probably not be too difficult. She could obtain a certification of fitness from her own physician, or possibly the school board could require the teacher to submit to an examination by its own physicians. The Court might also have considered that the administrative burden would not be heavy, since out of 5,800 teachers in the Cleveland school system, only an average of two hundred and twenty-five teachers were out on maternity leave at a given time.[41]

Unfortunately, the Court never really explains what factors are operating in these irrebuttable presumption cases. As Chief Justice Burger pointed out in *Vlandis*, thousands of state statutes employing irrebuttable presumptions may now be open to attack; the State in *Vlandis* had presented a strong argument for employing irrebuttable presumptions in determining residency for tuition purposes and had lost. The principal deprivation to the individual was economic, the difference between paying in-state and out-of-state tuition rates. The determination of bona fide residence was difficult. A student could easily obtain a Connecticut driver's license and register to vote in Connecticut because of the mere fact that he would be present in Connecticut to attend the University. The question of whether a student was a resident, *i.e.* that he intended to remain in the State permanently, might present a difficult question which could require a complicated admin-

41. LaFleur, 326 F. Supp. 1208, 1210 (N.D. Ohio 1971).

istrative procedure. If the individual's interest outweighed the State's in *Vlandis*, there would seem to be few situations where a state could constitutionally employ an irrebuttable presumption.

The fact that the Court even chose to use a due process irrebuttable presumption analysis in *LaFleur* is also unusual. One commentator has suggested that "due process carrries a repulsive connotation of value-laden intervention for most of the Justices, of the Burger Court as well as the Warren Court."[42] Justice Rehnquist's dissent in *Vlandis*[43] charged that the Court's decision relied heavily on notions of substantive due process, a doctrine that had been repudiated by prior Court decisions. This contention seems to be accurate. The Court recognized the problems of determining the bona fide residence of students who come from out-of-state to attend the state university, since the students would be physically present within the state to attend the school. Therefore, as a matter of administrative convenience, it seems that the Connecticut statute was a rational way to deal with the problem. The Court found that this statute deprived the students of their due process rights under the fourteenth amendment; yet, the Court did not rely on any underlying constitutional right which would require that the statute meet more than a "mere rationality" scrutiny.

LaFleur can also be characterized as a substantive due process decision. In *LaFleur* the Court limited the substantive grounds by which the school boards could require the teacher to take maternity leave because these regulations impinged on the teacher's protected rights of procreation. However, as Justice Marshall has contended, there is no explicit "right to procreate" in the Constitution.[44] Thus, *LaFleur* can be characterized as a substantive due process decision in that the Court was picking out an interest not expressly given protection by the Constitution and was subjecting these maternity leave regulations to a burden of justification greater than "mere rationality." The Court seemed to indicate that the right of procreation was implictly a constitutional right, since the Court tied this right into "freedom of personal choice in matters of marriage and family life [which] is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."[45] Still, if one recognizes that the bur-

42. Gunther, *The Supreme Court, 1971, Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 42 (1972) [hereinafter cited as Gunther].

43. 412 U.S. at 463.

44. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 100-01 (1973).

45. 414 U.S. at 639-40.

den on procreation in this case was tenuous, it is hard to understand *LaFleur* as anything but a substantive due process decision, in which the Court is picking out and giving greater protection to interests not explicitly or implicitly safeguarded by the Constitution.

There was an alternative means of analysis available to the Court in *LaFleur*. In a concurring opinion Justice Powell argued that equal protection was the appropriate mode for decision in this case.[46] The analysis under due process is somewhat different from equal protection analysis; the former often involves a question of whether the ends of the statute are rational, while the latter deals with the question of whether the classification (*i.e.* to whom it applies) embodied in the statute is rational. This is why Justice Jackson argued in his concurring opinion in *Railway Express Agency, Inc., v. New York*[47] that the equal protection clause should be much favored over due process analysis when courts must deal with substantive law or ordinances. By holding that a regulation violates due process, the Court often finds that the ends of the regulation are not valid, which in many cases means the state will not be able to regulate in this area. However, by holding a regulation invalid under the equal protection clause, the Court merely tells a state that it must make the hard political decision to extend the coverage of the statute to all those persons to whom it should rationally apply.

Why did the Court not use an equal protection analysis? Every lower federal court dealing with these maternity leave provisions based its decision on equal protection.[48] This Note will

---

46. *Id.* at 651.

47. 336 U.S. 106, 112-13 (1949). In this case the Court upheld a New York City traffic regulation which prohibited vehicles from carrying advertising on the streets, unless the vehicles carried advertisements of the owner and the vehicles were not used primarily for advertising. In a concurring opinion Justice Jackson stated:

> The burden should rest heavily upon one who would persuade us to use the due process clause to strike down a substantive law or ordinance. Even its provident use against municipal regulations frequently disables all government—state, municipal and federal— from dealing with the conduct in question because the requirement of due process is also applicable to State and Federal Governments. Invalidation of a statute or an ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable.
>
> Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact.

48. There have been cases, dealing with automatic discharge provisions for pregnant women, decided under the due process clause of the fifth amendment. These cases involve the United States Military; since they did not involve state action, the fourteenth amendment, which embodies the equal protection clause, could not be applied. *See* Robinson v. Rand, 340 F. Supp. 37 (D. Colo. 1972). In this case the plaintiff, a woman member of the

suggest some of the advantages the Court could have obtained by using such an analysis and will alternatively deal with some of the problems confronting the Supreme Court in the equal protection area.

EQUAL PROTECTION ANALYSIS

Equal protection decisions[49] have recognized that it is permissible for the state to classify its citizens for various purposes and accordingly to treat them differently.[50] In fact, the state could hardly function if it were not allowed to do this. Traditionally a classification will be valid "if it includes 'all [and only those] persons who are similarly situated with respect to the purpose of the law.' "[51] However, modern Court decisions have altered this analysis somewhat. In *San Antonio School District v. Rodriguez*, the Court formulated a basic framework for analysis under equal protection. First, the Court must decide whether the statute or regulation "operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring [sic] strict scrutiny."[53] If not, the legislation "must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose . . . ."[54] This is referred to as a "two-tier" scrutiny.[55]

Air Force, was discharged when she became pregnant. The court found that Air Force Manual 39-10, Reg. 3-15, which provided for the immediate discharge of WAF's who become pregnant, violated the plaintiff's rights to due process under the fifth amendment. *See also* Struck v. Secretary of Defense, 460 F.2d 1372 (9th Cir. 1971) for another case dealing with these discharge provisions.

49. *See generally Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969) [hereinafter cited as *Developments*]. *See also* Gunther, *supra* note 42.

50. *Developments, supra* note 49, at 1076.

51. *Id.* at 1076.

52. 411 U.S. 1 (1973).

53. *Id.* at 17.

54. *Id.*

55. This idea of the "two-tier" scrutiny actually developed during Chief Justice Warren's term:

> At the beginning of the 1960's, judicial intervention under the banner of equal protection was virtually unknown outside racial discrimination cases. The emergence of the "new" equal protection during the Warren Court's last decade brought a dramatic change. Strict scrutiny of selected types of legislation proliferated. The familiar signal of "suspect classification" and "fundamental interest" came to trigger the occasions for the new interventionist stance. The Warren Court embraced a rigid two-tier attitude. Some situations evoked the aggressive "new" equal protection, with scrutiny that was "strict" in theory and fatal in fact; in other contexts, the deferential "old" equal protection reigned, with minimal scrutiny in theory and virtually none in fact.

Gunther, *supra* note 42, at 8.

Classification of the Maternity Leave Regulations

Determining the classification involved by the maternity leave regulations in *LaFleur* might have presented difficult problems for the Court. On its face the regulations seem to classify teachers into two groups: those four months or more pregnant and those less than four months pregnant. This would suggest that the classification is not based on sex, since both men and women may be less than four months pregnant.

This analysis, however, does not go far enough. The regulations here in question do burden only one sex. It is indisputable that this regulation will only affect those more than four months pregnant and that this class will be comprised entirely of women. In other cases where the classification was based on seemingly neutral factors, courts have been willing to look underneath the classifying factors and to recognize that the effect of the regulation was to discriminate against a particular group.

For example, in *Ho Ah Kow v. Nunan*,[56] the city of San Francisco passed an ordinance requiring every male imprisoned in the county jail to have his hair clipped to a length of one inch. One of the plaintiff's contentions was that this ordinance discriminated against Chinese[57] since it was the custom of Chinese men to wear hair in the queue style. The court stated, "The class character of this legislation is none the less manifest because of the general terms in which it is expressed."[58] The court found that the effects of the ordinance were especially severe upon Chinese prisoners and the ordinance inflicted upon them suffering disproportionate to what would be endured by other prisoners if the ordinance were enforced against them. Thus, even though this ordinance was neutral on its face and seemed to differentiate between prisoners with hair longer than one inch and those with hair less than one inch, the court was willing to recognize the underlying discrimination against one nationality.

The regulations in *LaFleur* have a similarly underlying dis-

56. 12 F. Cas. 252 (No. 6546) (C.C.D. Calif. 1879). The plaintiff, who was Chinese, bought a tort action against the sheriff of San Francisco for cutting off his queue. The sheriff demurred to this claim on the ground that he was authorized to do this by an ordinance of the city of San Francisco. The court overruled the sheriff's demurrer on two grounds. First, the court found that the board of supervisors exceeded its authority to enact this ordinance. Second, this ordinance imposed a cruel and unusual punishment against a class of persons, the Chinese, and therefore violated the equal protection clause of the fourteenth amendment.

57. The court noted that this ordinance was intended to be enforced only against the Chinese. *Id.* at 255.

58. *Id.*

criminatory effect, since only women can become more than four months pregnant. Further, the classification is inconsistent with one of the avowed purposes of these regulations, the continuity of classroom instruction. For a classification based on this purpose, pregnancy should not be the only factor to be considered. Other physical conditions fall within this classification because other physical conditions will result in absenteeism at a fixed date. For example, a cataract operation or a prostatectomy may be planned months ahead.[59] However, because pregnancy is being treated differently from other physical conditions falling within this avowed purpose, the school boards have undeniably picked out a condition which can affect only women. This action, thus, is a discrimination against one sex.

Lower federal courts have faced this classification problem and have come to varying conclusions. In *LaFleur*, the Sixth Circuit stated that this classification was one based on sex since "[m]ale teachers are not subject to pregnancy, but they are subject to many types of illnesses and disabilities."[60]

In contrast, the Fourth Circuit in *Cohen* concluded that maternity leave regulations are not classifications based upon sex because "[i]t does not apply to women in an area in which they may compete with men."[61] The court stated:

> How can the state deal with pregnancy and maternity in terms of equality with paternity? It cannot of course. The disabilities and preoccupations of maternity are visited but slightly upon the father. However sympathetic he may be, it is she who must shoulder the principal problems of pregnancy, the labors of childbirth and the care and feeding of the child in the early months of its life.[62]

This reasoning seems somewhat off the mark in talking about

59. Green v. Waterford Bd. of Educ., 473 F.2d 629, 634 (2d Cir. 1973). *See also* Cohen v. Chesterfield County School Bd., 474 F.2d 395, 401 (4th Cir. 1973), [*rev'd on other grounds sub nom.* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974)] (Winter, J., dissenting):

> [P]rostatitis is peculiarly a male disease and in this sense sex related. A prostatectomy, which may be required as a result of prostatitis or other chronic disease of the prostate, is rarely performed as an emergency surgical procedure. Rather, within a reasonable time range, the date for a prostatectomy is scheduled for a date suiting the availability of the hospital and the convenience of the surgeon and the patient.

60. 465 F.2d 1184, 1188 (6th Cir. 1972), *aff'd on other grounds*, 414 U.S. 632 (1974). In Green v. Waterford Bd. of Educ. 473 F.2d 624 (2d Cir. 1973), the Second Circuit reached a similar conclusion.

61. 474 F.2d 395, 397 (4th Cir. 1973).

62. *Id.* at 398.

"areas of competition." Granted that men are not in competition with some women when it comes to pregnancy, the area of competition here is properly seen to be in the teaching profession.

In addition to *Cohen*, the court in *Bravo v. Board of Education of the City of Chicago*[63] argued that there was no classification based upon sex. The court stated that the plaintiff was actually criticizing two distinctions made by the school board's maternity leave policy; first, the distinction, embodied in the mandatory leave policy, between teachers in their sixth and subsequent months of pregnancy and all other teachers and, second, the distinction between teachers on maternity leave and those absent from duty on other types of leave.[64]

The *Bravo* and *Cohen* courts basically contended that the classification involved in these maternity leave regulations cannot be based on sex since it classifies by the condition of pregnancy. However, this approach is simplistic in that it fails to recognize the underlying burden which in effect discriminates against one sex. Just as the court in *Ho Ah Kow* was willing to recognize that the practical effect of the classification was to discriminate against Chinese, so should the Supreme Court properly recognize that these maternity leave regulations burden only women and, therefore, contain a sexual classification.

Is "Sex" A Suspect Classification?

Several classifications have been denominated suspect by the Supreme Court. By determining that a particular classification is suspect the Court will subject the classification to a strict scrutiny and will demand a "very heavy burden of justification."[65] Up to the present time, the Court has recognized classifi-

63. 345 F. Supp. 155 (N.D. Ill. 1972). In this case, plaintiff was a teacher in the Chicago school system. Contending they violated the equal protection clause, she challenged the maternity leave rules of the Board of Education of the City of Chicago. These rules required the teacher to take maternity leave after the fifth month of pregnancy. The court refused to find that the regulations' classifications constituted sex discrimination. However, the court granted the plaintiff's motion for a preliminary injunction after finding that she had established a reasonable probability of ultimately showing that the regulations had no rational or substantial relationship to any valid purpose of the school board. The court also found, for purposes of the preliminary injunction, that the school board had offered no reason for treating maternity leave differently from other types of medical leave.

64. *Id.* at 157.

65. Loving v. Virginia, 388 U.S. 1, 9 (1967). In this case the appellants contended that a Virginia anti-miscegenation statute designed to prevent marriages between persons of different races violated the equal protection and due process clauses of the fourteenth amendment. The Court held that the statute violated the equal protection clause because there was no legitimate purpose behind prohibiting only interracial marriages. The statute

cations according to race,[66] national origin,[67] and alienage[68] as suspect.

Before a decision of whether sex should be included in the category of suspect classifications can be made, it is important to understand what factors cause a classification to be deemed suspect. While there are no explicit guidelines,[69] a number of

---

was also held to violate the due process clause, since marriage was a "fundamental" right and therefore could not be prohibited on the basis of racial classifications. The Court rejected the state's contention that this statute should be judged on the basis of mere rationality: "In the case at bar, however, we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race." *Id.* This "heavy burden of justification" applies to the other classifications which have been recognized as suspect.

66. McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964). In this case the appellants were charged with the violation of a Florida criminal statute which made it illegal for a black and a white person who are not married to occupy habitually a room at night. The appellants contended that the law violated the equal protection clause because it applied only to a white person and black person who committed the specified acts and to no others. The Court found that the classification was based "upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the fourteenth amendment was to eliminate racial discrimination emanating from offical sources in the states. This strong policy renders racial classifications 'constitutionally suspect'. . . ." *Id.* Since the Court found no overriding purpose for the statute it held that the statute contained an invidious discrimination in violation of the equal protection clause.

67. Korematsu v. United States, 323 U.S. 214 (1944). In this case, the petitioner, an American citizen of Japanese descent, was convicted of remaining in San Leandro Valley, California, in violation of an Exclusion Order of the U.S. Army, which directed that after May 9, 1942, all persons of Japanese ancestry should be excluded from the area. The Court recognized that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect." *Id.* at 216. However, the Court upheld petitioner's conviction after recognizing the compelling necessity for such a measure in times of warfare when the country was threatened by hostile forces.

68. Graham v. Richardson, 403 U.S. 365 (1971). In this case appellees challenged state laws which denied welfare benefits to resident aliens. These statutes were found to violate the equal protection clause and also to conflict with the exclusive federal power over aliens. Justice Blackmun stated that "the Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." *Id.* at 371-72.

69. *Developments*, *supra* note 49, at 1123-24. In pointing out that the basis for determining a suspect classification or fundamental right remains obscure, the article states:

> [T]he invidiousness of a particular classification and the importance of a particular interest are, of course, not always self-evident. Even when such judgments have been spelled out by the Supreme Court, the basis for the evaluation has remained obscure. In short, the decisions, as Professor Cox points out, have failed to elaborate "a rational standard, or even points of reference, by which to judge what differentiations are permitted and when equality is required." Why is a classification based on sex treated differently from one based on alienage? Why is voting treated differently from education, or education different from other public services? What other interests and classifications will be given special treatment in the future? The opinions contain only scattered hints of the answers to these

factors which point to a classification being suspect can be singled out.[70] The traits of the class will usually be congenital and unalterable, traits over which a person has no control and for which he should receive neither blame nor reward. These traits are also likely to stigmatize the class. Further, the class will probably be politically impotent or will wield less influence in the legislative process than their number in the general population would seem to indicate.

Historically, classifications based upon sex have not been deemed suspect.[71] For example, *Goesaert v. Cleary*[72] dealt with a Michigan statute which forbade any female to act as a bartender unless she was the wife or daughter of the male owner of a licensed liquor establishment. The Supreme Court found a rational reason for this legislative classification in that bartending by women might lead to moral and social problems. The legislature did not have to prohibit all women if it believed there were other factors which eliminated these problems in another group of females. In dicta, Justice Frankfurter stated:

> Michigan could, beyond question, forbid all women from working behind a bar. This is so despite the vast changes in the social and legal position of women. The fact that women now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced does not preclude the States from drawing a sharp line between the sexes, certainly in such matters as the regulation of the liquor traffic.[73]

The dissent found that the statute arbitrarily discriminated between male and female owners of liquor establishments.[74]

There has been a significant shift in the Court's attitude towards sex discrimination since *Goesaert*. In *Frontiero v. Richardson*,[75] four members of the Supreme Court[76] concluded

---

questions, and the Court has not made a sustained attempt to explain the basis for special treatment of suspect traits and fundamental interests. However, inferences from the pattern of decisions do yield some clues.

70. *Id.* at 1124-27.

71. *See* Comment, *Sex Discrimination and Equal Protection: Do We Need A Constitutional Amendment?*, 84 HARV. L. REV. 1499, 1502-06 (1971) [hereinafter cited as *Sex Discrimination and Equal Protection*].

72. 335 U.S. 464 (1948).

73. *Id.* at 465, 466.

74. *Id.* at 468 (Rutledge, J., dissenting).

75. 411 U.S. 677 (1973).

76. Justice Brennan wrote the opinion and was joined by Justices Douglas, White, and Marshall. In a concurring opinion, Justice Powell joined by two other justices agreed that the challenged statutes constituted an unconstitutional discrimination against serv-

that classifications based upon sex were inherently suspect and therefore should be subjected to close scrutiny.[77] In that case, appellant Sharron Frontiero, a lieutenant in the Air Force, sought increased housing and medical benefits for her husband on the ground that he was her dependent. Under the statutes in question, a serviceman could claim his wife as "dependent" whether she was in fact dependent on him for any part of her support. However, a servicewoman must prove that her husband is dependent upon her for over one-half of his support in order to claim him as a "dependent." Mrs. Frontiero was denied these benefits because she failed to demonstrate that her husband was dependent on her for over one-half of his support.

In his opinion, Justice Brennan attempted to show why classifications based upon sex were suspect. He pointed out that sex, like classifications considered suspect (such as race and national origin), was an immutable characteristic determined by the accident of birth.[78] And, unlike nonsuspect classifications which are also congenital, such as intelligence or physical disability, the sex characteristic, like race or national origin, frequently bears no relation to ability to perform or to contribute to society.[79] Justice Brennan also discussed the notion of stigmatization inherent in sexual classifications: "Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which in practical effect put women, not on a pedestal, but in a cage."[80]

---

icewomen in violation of the due process clause of the fifth amendment, but refused to call classifications based upon sex "suspect" because he believed that it was unnecessary for the Court to reach this decision since *Reed v. Reed*, 404 U.S. 71 (1971), abundantly supported the Court's decision. 411 U.S. at 691-92. Also, since the equal rights amendment, if ratified [at the time of the opinion, the equal rights amendment had been approved by Congress and submitted for ratification to the States.], would resolve the substance of the question, Justice Powell thought that it was premature to pre-empt by judicial action a major political decision already in the process of resolution. 411 U.S. at 692. Justice Stewart concurred in the judgment because he concluded that the statutes worked an "invidious discrimination in violation of the Constitution." 411 U.S. at 691.

77. 411 U.S. at 682. *Accord*, Sail'er Inn, Inc., v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).

78. 411 U.S. at 686.

79. *Id.* at 686-87.

80. *Id.* at 684. Justice Brennan also tried to expose how these paternalistic notions had become so embedded in the national consciousness that a member of the Supreme Court had proclaimed:

> "Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which

While admitting that the position of women in America had greatly improved, he said that women "still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena."[81] While it cannot be said that women are impotent politically, women are certainly, because of past discriminations, grossly under represented in our legislatures in relation to their numbers.[82] Justice Brennan also noted that "Congress has itself manifested an increasing sensitivity to sex-based classifications."[83]

Justice Brennan's reasoning that sex should be regarded as a suspect classification is persuasive. While, admittedly, the fourteenth amendment's primary purpose was to eliminate racial discrimination against blacks, the Court has extended its stricter review under the amendment to other classifications as well. There are striking similarities between race and sex discrimination.[84] For instance, the characteristics of each class are highly visible, which visibility enables legislators to draw stereotyped distinctions affecting these groups. Such stereotypical and irrational notions about women were probably operating in the maternity leave regulations in *LaFleur*. In a footnote, the Court suggested that "less weighty" considerations may have been the original reasons for these rules. Dr. Shinnerer, the superintendent of the schools in Cleveland at the time that these rules were adopted, suggested that the rules were designed to save pregnant school teachers from embarrassment because of giggling school children, since the termination date roughly corresponded to the time the pregnancy would first be noticeable. The Court noted this "only to illustrate the possible role of outmoded taboos in the

---

belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband . . . . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator."

Id. at 684-85, *quoting* Bradwell v. State, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring).

81. 411 U.S. at 686.

82. *Id.* at 686 n.17.

83. *Id.* at 687-88:

In Tit. VII of the Civil Rights Act of 1964, for example, Congress expressly declared that no employer, labor union, or other organization subject to the provisions of the Act shall discriminate against any individual on the basis of "race, color, religion, *sex*, or national origin." . . . Thus, Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a co-equal branch of Government is not without significance . . . .

84. *See generally Sex Discrimination and Equal Protection*, *supra* note 71, at 1501-08.

adoption of the rules."[85] Besides this paternalistic attitude towards women noted by the Court, there was also evidence to support the inference that the Cleveland maternity leave policy was based on Victorian notions about pregnancy.[86] Dr. Schinnerer testified that he was a strong believer that the mother should be at home with the child and this was one of the reasons for the return rule.[87]

Some of the arguments used to justify the different treatment—female inferiority, the need for male protection, and happiness in their assigned roles—are also similar to the arguments once used to justify treatment of the black race. Demographic statistics illustrate the effect of this treatment. For example, women and blacks hold the lowest paying jobs in industry.[88] In its amicus brief in *LaFleur*, the National Education Association presented statistics to illustrate that women are still discriminated against in the teaching profession.[89] From this evidence, the

85. 414 U.S. at 641 n.9.

86. Brief for the Nat'l Educ. Ass'n and the Women's Equity Action League Educ. and Legal Defense Fund as Amicus Curiae at 8, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

87. As to the reasons for adopting the rule which restricted the time of return, Dr. Shinnerer testified in the district court:

> Now, I had a twofold reason for that. One was so that it wouldn't be a second break. A second class wouldn't have the disruption of changing teachers in the middle of the semester. And the other was that I am a strong believer that young children ought to have the mother there. I think much of the difficulties we have in this country come from the fact that parents have neglected their children, and it is very important that they be there for the love and tender care of the babies . . . .

Appendix 72-777 at 183a-184a, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

88. *Sex Discrimination and Equal Protection, supra* note 71, at 1507-08.

89. For example, the NEA pointed out:

> Despite their large numbers and long-time participation in the profession, women are still discriminated against in the public schools. For example, as of the 1972-73 school year, women comprised 62.8 per cent of all full-time public school professional personnel; yet only 13.5 per cent of principals, 6.2 per cent of deputy and associate school superintendents, 5.3 per cent of assistant school superintendents, and 0.1 per cent of school superintendents were women. The small number of women in better-paid administrative positions is particularly striking in view of the fact that a higher percentage of women than men in the profession have twenty years or more of full-time teaching experience and fifteen years or more in their present school systems.
>
> Moreover, despite their greater seniority, the average annual salary of female classroom teachers in 1972-73 was almost 10 per cent less than for men in comparable positions. . . .
>
> The pattern of discriminatory treatment of women in regard to salary and promotion to administrative positions is a long-standing one, and appears to have originated with the desire, referred to above . . . "to de-feminize" the schools and encourage men to enter the profession. In 1930, 42 percent of junior high schools and 54.8 percent of senior high schools reported a policy of paying men teachers a

Court could have concluded that many irrational notions about women are the underlying reasons for many of these regulations affecting women. There seems to be a substantial basis for the argument that race and sex discrimination should receive essentially similar treatment under the equal protection clause.[90]

By declaring sex a suspect classification, some have argued that the Court would open up a whole area of new problems which would have to be determined on a case by case basis.[91] For example, women do differ from men in some physiological respects. Therefore, a state could argue that, since statistically women are physically weaker than men, a law would be valid which aims to protect women by prohibiting employment in certain jobs requiring the lifting of heavy weights. Of course, some individuals differ from the statistical norm. How much deviation should the Court allow between the class essential to the purpose of the statute and the class actually designated by the statute? Assessing such a deviation would involve evaluation of medical, sociological, and other relevant data. One way to eliminate many of these problems would be through the use of functional analysis, *i.e.*, a physical test of the weight lifting capacity of each individual. This approach would eliminate deviations from a perfect match. However, this might also involve much greater administrative costs in some areas, and the Court would have to determine in which areas the administrative costs would outweigh the personal interests involved.

Other problems might arise in areas of ingrained notions of personal bodily privacy. Examples of these are laws requiring separate bathrooms and dormitories. The Court could resurrect the notion of separate but equal in such cases and thus could protect the statute from the sweep of active review. This argument assumes that *Brown v. Board of Education* was premised on the idea that separate was inherently unequal because it implied that one race was socially inferior to another. However, these same notions do not operate in the context of male-female relationships because men have generally not indicated they do

---

higher salary than they paid women of equal training and experience . . . .
Brief for the Nat'l Educ. Ass'n and the Women's Equity Action League Educ. and Legal Defense Fund as Amicus Curiae at 14-16, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

90. *See Sex Discrimination and Equal Protection, supra* note 71, at 1507-08.

91. *See id.* at 1508-16 where the author reviews in depth the possible problems resulting from a judicial determination that sex is a suspect classification. *See also* Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 882 (1971), which sees little hope of obtaining equal rights for women under the fourteenth and fifth amendments.

not want to associate with women. Therefore, separate bathroom facilities would not have the implication of inferiority.[92] Another view is that the Supreme Court has recognized a constitutional right of privacy and one aspect of this right is to be free from official coercion in sexual relations.[93] The right of privacy would thus permit separate facilities, such as restrooms and sleeping quarters, where an individual's privacy rights in sexual relations are likely to be infringed.

While the courts would be confronted with hard problems if sex were declared a suspect classification, certainly none of these problems is insurmountable. As pointed out above, there are already doctrines available for the Court to apply in the area of personal bodily privacy. Similarly, if the Court required that states could only draw sexual classifications where there was a compelling state interest to do so it seems that sensible solutions are possible within established equal protection doctrines. By finding sex to be a suspect classification, the Court would effectively afford widespread protection against the often irrational notions which are the foundations upon which these rules, such as the maternity leave provisions, rest. At the same time, this approach would allow sufficient flexibility for the state to draw sexual classifications where there was a compelling interest to do so.

Do Maternity Leave Regulations Affect a Fundamental Right?

A determination that the maternity leave regulations affect a fundamental right is important, because such a determination would require the Court to subject the regulation to strict scrutiny. Again, there are few guidelines for such a determination, but some characteristics have emerged. For example, interests which have been deemed fundamental are considered "personal" as distinguished from the interests involved in cases of economic regulation.[94] One argument used to justify this differing treatment is that economic decisions may involve "local conditions" of which a legislature is better apprised and which is considered beyond the institutional competence of the Court.[95] The primary reason

92. *Sex Discrimination and Equal Protection*, *supra* note 71, at 1515-16.

93. Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971). While this article discusses the right of privacy in relation to problems which would arise in the area of personal bodily privacy under the proposed equal rights amendment, such analysis would clearly be applicable in an equal protection analysis under the fourteenth amendment.

94. *Developments*, *supra* note 49, at 1128.

95. *Id.*

for this differing treatment may simply be a belief that some interests are more important than others. Interests which the Court has found to be fundamental include voting,[96] procreation,[97] rights with respect to criminal procedure,[98] and most recently, interstate travel.[99]

96. Reynolds v. Sims, 377 U.S. 533 (1964). In this case the plaintiffs brought an action challenging the apportionment of the Alabama legislature. The plaintiffs contended that the Alabama apportionment plan denied them equal protection under the fourteenth amendment. The last apportionment was based on the 1900 federal census, and between 1900 and 1960 there had been uneven population growth, with the end result that Jefferson County with 600,000 people was given only one senator, as was Lowndes County with a population of only 15,417. The Supreme Court stated that the right to vote was a fundamental political right because it was preservative of all other rights. The Court found that the equal protection clause required substantially equal legislative representation for all citizens of a state regardless of where they live and held the Alabama apportionment plan invalid under the equal protection clause because it resulted in submergence of the principle of equal-population in at least one house of the state legislature.

97. Skinner v. Oklahoma, 316 U.S. 535 (1942). This case involved the constitutionality of an Oklahoma statute which provided for the sterilization of habitual criminals. A habitual criminal was defined as any person who had been convicted two or more times of felonies involving moral turpitude. The statute expressly excepted certain offenses, including embezzlement, from its terms. The petitioner had been convicted of stealing chickens in 1926 and of armed robbery in 1929 and 1934; the state undertook proceedings to have him sterilized. The Court found that since "one of the basic civil rights of man" was involved the statute was subject to strict scrutiny. The Court held the statute unconstitutional under the equal protection clause.

98. Griffin v. Illinois, 351 U.S. 12 (1956). Under Illinois law every person convicted at a criminal trial was given a right of review by writ of error. However, to obtain a full appellate review it was necessary to furnish the appellate court with a bill of exceptions or report of proceedings at the trial certified by the trial judge. It was sometimes impossible to prepare such bills of exception or reports without a stenographic transcript of the trial. While indigent defendants sentenced to death were provided with free stenographic transcripts, all other appellants had to buy their own. The petitioners claimed that they were indigent and that failure to provide them with a free transcript would violate the due process and equal protection clauses. The Supreme Court held that "[d]estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." *Id.* at 19. The statute was found to be unconstitutional, and the Court stated that Illinois must provide these petitioners with transcripts, although the state could later find other ways to afford adequate and effective appellate review to indigent defendants.

This right, like the right to vote, once granted, becomes fundamental. *See* Rinaldi v. Yeager, 384 U.S. 305 (1966): "This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Id.* at 310-11, citing *Griffin*.

99. Shapiro v. Thompson, 394 U.S. 618 (1969). This case involved several appellees who applied for Aid to Families with Dependent Children. They were denied this aid on the ground that they had not resided within the jurisdiction for at least a year before receiving welfare benefits. The State presented several justifications for this rule, including 1) that such rules protected the State's fisc since persons who require welfare assistance during their first year of residence are likely to be a continuing burden on the welfare program; 2) that this classification discouraged indigents from entering a State solely to obtain higher welfare benefits; and 3) that the rules facilitated planning of welfare budgets and provided an objective test of residency. The Court held that since the classification

In *LaFleur*, the school teachers argued that two fundamental interests were being impinged upon by these maternity leave regulations: a right of procreation and a right to employment. Procreation had already been recognized as a fundamental right.[100] However, the effect of these maternity leave provisions on procreation is certainly not as drastic as the sterilization penalty involved in *Skinner v. Oklahoma*.[101] As a practical matter, it seems doubtful that a woman would be seriously deterred from having a child because of these maternity leave regulations. Furthermore, even if these maternity leave regulations have some deterrent effect on the women's right to procreate, the effects are as marginal as the effects found in *Dandridge*.[102] Therefore, any impingement on this fundamental right should have been found insufficient to require a strict standard of review.

While the Supreme Court has never recognized employment as a fundamental interest for equal protection analysis, some lower courts have applied strict scrutiny to regulations which impinged on the complainants' "right to employment." In *Williams v. San Francisco Unified School District*,[103] the federal district court applied strict scrutiny to maternity leave regulations because the plaintiff was asserting "the basic right to employment."[104] The Supreme Court of California has declared, "The right to work and the concomitant opportunity to achieve economic security and stability are essential to the pursuit of life,

---

touched the fundamental right of interstate movement, the statute must be judged by the standard of a compelling state interest. Under this standard the Court found the statute to violate the equal protection clause.

100. Skinner v. Oklahoma, 316 U.S. 535 (1942) discussed at note 97, *supra*. The Court stated, "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." *Id.* at 541.

101. 316 U.S. 535 (1942), discussed at note 97 *supra*.

102. See text accompanying notes 28 through 30 *supra*.

103. 340 F. Supp. 438 (N.D. Calif. 1972). This case involved the mandatory maternity leave regulations of the San Francisco Unified School District terminating the employment of a pregnant woman two months prior to her estimated delivery date. Plaintiff was employed as a social worker in the district's special program for pregnant students. The court held, solely for purposes of the plaintiff's motion for preliminary injunction, that the school district's maternity leave policy violated the equal protection clause because it singled out pregnant employees for classification without any rational relationship to any legitimate objective of the school district and promoted no compelling interest of the district or the State of California.

104. *Id.* at 443, where the court stated:

> The plaintiff herein has asserted the basic right to employment free of invidious discrimination. Under this contention the court must ask not only whether the classification challenged here is rationally related to a legitimate objective of the defendants, but whether, in addition, it promotes any "compelling governmental interest" . . . .

liberty and happiness, [and therefore] [l]imitations on this right may be sustained only after the most careful scrutiny."[105] There is even language in a Supreme Court decision suggesting the importance of employment. In *Truax v. Raich*,[106] the Court stated:

> It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure . . . . If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words.[107]

Thus, if importance to the individual is the basis for determining what are fundamental rights, there would seem to be some basis for including employment in this category.

However, *San Antonio District v. Rodriguez*[108] seems to reject the idea of importance of the personal interest as a basis for determining what is a fundamental interest. In this case, appellees attacked the system of financing public education in Texas. The system was financed partly by local property taxes. This resulted in substantial differences between districts in per-pupil expenditures according to the district's taxable property wealth. The State contended that this system of financing encouraged local participation and control of education. Appellees argued that education was a fundamental personal right and that, since this classification affected education, it was subject to strict judicial scrutiny. Specifically, they contended that, because educa-

105. Sail'er Inn, Inc., v. Kirby, 5 Cal. 3d 1, 18, 485 P.2d 529, 539, 95 Cal. Rptr. 329, 339 (1971). This case concerned section 25656 of the Business and Professions Code of California which prohibited women from tending bar except when they were licensees, were wives of licensees, or were singly or with their husbands the sole shareholders of a corporation holding the license. The statute was held invalid under the California constitution, inconsistent with title VII of the Civil Rights Act of 1964, and unconstitutional under the equal protection clause.

106. 239 U.S. 33 (1915). This case dealt with an Arizona statute requiring an employer with five or more workers to employ not less than eighty percent qualified electors or native-born citizens of the United States or some subdivision thereof. Raich, an alien, was dismissed by his employer because his employer feared the penalties that would be incurred for violation of the statute. The Court held that the act was invalid under the fourteenth amendment. It should be noted that the Court deemed it important that the discrimination involved was imposed upon the conduct of ordinary private enterprise.

107. *Id.* at 41.

108. 411 U.S. 1 (1973). The opinion was written by Justice Powell, joined by Chief Justice Burger and Justices Blackmun and Rehnquist.

tion was essential to the effective exercise of first amendment freedoms and to the intelligent utilization of the right to vote, it was itself a fundamental personal right. The Court responded:

> [T]he importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause . . . .
>
> . . . .
>
> . . .[T]he key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.[109]

The Court found that education was not among the rights afforded explicit protection under the Constitution. The Court also implied that it was not implicitly protected. However, the Court continued: Even conceding "that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right [speech or voting]," no charge could be made that Texas' system did not provide the opportunity for each child to acquire basic minimal skills necessary for the enjoyment of these rights.[110] The Court found it particularly inappropriate to apply strict scrutiny in this case because this was not a case involving "legislation which 'deprived', 'infringed', or 'interfered' with the free exercise of some such fundamental personal right or liberty."[111] The Court said the system of financing was an attempt to extend and improve public education. Therefore, it appears that unless a right is given explicit protection in the language of the Constitution or there is ample precedent for calling an interest fundamental from previous Supreme Court decisions, the Burger Court will be unwilling to extend the notion of fundamental rights any further.[112]

---

109. *Id.* at 30, 33-34.

110. *Id.* at 36-37.

111. *Id.* at 38.

112. Justice Powell stated, "It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." *Id.* at 33. *See also* Gunther, *supra* note 42, at 12-13:

> The new Justices Blackmun, Burger, Powell, Rehnquist are disinclined to add to the list of fundamental interests unearthed by their predecessors. Three of last term's four rejections of equal protection claims illustrate that reluctance: *Lindsey* v. *Normet* [405 U.S. 56 (1972)] refused to find housing a fundamental interest;

The distaste for extending the range of fundamental rights seems to have the same basis as the Court's rejection of the old substantive due process decisions. In the substantive due process decisions, the Court was subjectively picking out favored interests not explicitly given constitutional protection and subjecting regulations which impinged on these favored interests to a heavy burden of justification. It is difficult to justify a position which would allow the Court to find fundamental rights or interests which are not given express protection in the Constitution when the Court is employing equal protection analysis and to reject the basis of the substantive due process decisions at the same time. It has been persuasively pointed out:

> When an equal protection decision rests on this basis, it may be little more than a substantive due process decision decked out in the trappings of equal protection.
>
> By setting up a hierarchy of protected interests, the Supreme Court leaves itself open to the charge that it is usurping the legislative function and preventing a proper majoritarian choice of values. The Court's decisions cannot escape an appearance of subjectivity when interests which are not expressly given protection in the Constitution are denominated "fundamental" and are protected under an approach which goes beyond the requirements of reasonable classification to allow for balancing.[113]

The right to employment is nowhere explicitly guaranteed by the Constitution. Therefore, it is unlikely that the right to employment would be found to be a fundamental right. However, the teachers could have drawn distinctions between the right to employment involved in *LaFleur* and the right to equal educational opportunities in *Rodriguez*. In *Rodriguez*, the Court made the point that the children in the property poor districts were being given the opportunity to acquire basic skills necessary for the enjoyment of protected constitutional rights, *e.g.* voting and speech. In *LaFleur*, by contrast, the school system was taking away all opportunity for the school teacher to practice her profession after the fifth month of pregnancy, although this deprivation would actually be short-term when compared to a deprivation of

---

Richardson v. *Blacher* [404 U.S. 78 (1971)] and *Jefferson* v. *Hackney* [406 U.S. 535 (1972)] reiterated that allocations of welfare benefits are not subject to strict scrutiny. Those failures to fulfill hopes kindled by the Warren Court's approach are not surprising. Judicial hesitancy in articulating values not clearly rooted in the Constitution is, after all, the clearest element of the elusive "strict construction" theme so prominent in the selection of the new appointees.

113. *Developments*, *supra* note 49, at 1132.

education which is likely to affect a person throughout his lifetime. Still, the teacher who is forced to go on such an early maternity leave will probably have difficulty obtaining any employment at all, since it is at this stage of the pregnancy that its physical manifestations will become noticeable. Most employers would be reluctant to hire a pregnant woman. The seriousness of this mandatory leave policy becomes apparent, since the woman will more than likely lose all employment income for a substantial period of time.

In *Rodriguez*, the Court also said that it was significant that Texas was attempting to reform the educational system and did not deprive, infringe, or interfere with the free exercise of some fundamental personal right or liberty. Again, in *LaFleur*, it is clear that the school board's maternity leave provisions are not reform measures but are simple interferences with the teacher's employment.

In a dissenting opinion in *Rodriguez*, Justice Marshall[114] found fault with the Court's notion that fundamental interests calling for strict scrutiny comprised only those rights which the Court was bound to recognize from the text of the Constitution itself.[115] While the right to travel interstate, although nowhere mentioned specifically in the Constitution, had long been recognized as implicit in the premises of the Constitution, Justice Marshall could not find this justification for other rights which had been denominated as fundamental. For example, *Skinner v. Oklahoma*[116] recognized as fundamental the right to procreate, and Justice Marshall could find no guarantee of this right in the Constitution. Similarly, *Reynolds v. Sims*[117] recognized voting in state elections as a fundamental right in equal protection analysis, and *Griffin v. Illinois*[118] recognized fundamental criminal process rights. As Justice Marshall made clear:

> These are instances in which, due to the importance of the interests at stake, the Court has displayed a strong concern with the existence of discriminatory state treatment. But the Court has never said or indicated that these are interests which independently enjoy full blown constitutional protection.[119]

114. Justice Douglas also joined in this opinion.
115. 411 U.S. at 99 (Marshall, J., dissenting).
116. 316 U.S. 535 (1942), discussed in note 97 *supra*.
117. 377 U.S. 533 (1964), discussed in note 96 *supra*.
118. 351 U.S. 12 (1956), discussed in note 98 *supra*.
118. 351 U.S. 12 (1956), discussed in note 98 *supra*.
119. 411 U.S. at 100 (Marshall, J., dissenting).

The test of determining what interests are fundamental depends on the "extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution."[120] Therefore, the closer the nexus between the nonconstitutional interest and a specific constitutional guarantee, the more fundamental becomes the nonconstitutional interest. Justice Marshall argued that this is why interests such as procreation, the right to vote in state elections, and equal access to the criminal appellate processes have been afforded special judicial consideration in the face of discrimination. It is not because they are fully guaranteed by the Constitution, but because they are to some extent interrelated with constitutional guarantees. Justice Marshall firmly rejected the notion that "the process need necessarily degenerate into an unprincipled, subjective 'picking-and-choosing' between various interests or that it must involve this Court in creating 'substantive constitutional rights in the name of guaranteeing equal protection of the laws.' "[121]

Justice Marshall argues that his nexus test for determining fundamental interests would not involve a subjective "picking-and-choosing" because there would have to be a clear connection between the interest that is sought to be protected and another interest clearly given protection by the Constitution. Thus, by depriving a person of an interest to which the Constitution does not give explicit protection, the state would also be harming an explicitly protected right. This follows from the connection between the protected right and the important interest of which the individual is being deprived. A good example is the right to vote in state elections. As Justice Marshall states, this right is nowhere given explicit protection in the Constitution. Yet, the Court has repeatedly recognized this as a fundamental right. The reason is that the Court has seen that voting is "a fundamental political right . . . preservative of all rights."[122]

Under Justice Marshall's analysis to determine fundamental interests, there does appear to be some nexus between the right to employment and specifically guaranteed constitutional rights. The right to employment will have a direct effect on the amount of income available to a person. It cannot be denied that the

120. *Id.* at 102.

121. *Id.*

122. Dunn v. Blumstein, 405 U.S. 330, 336 (1971). In this case the Court ruled unconstitutional a one-year durational residency requirement as a prerequisite for voting in Tennessee. The statute infringed the fundamental interests of voting and interstate travel and violated the equal protection clause.

larger amount of income available to any person will enable him to better exercise his first amendment rights, and even his right to interstate travel. For example, the larger a person's income, the more money he will be able to contribute to political candidates or other groups which espouse his point of view. Whether or not the nexus would be sufficient to constitute the right to employment as a fundamental interest is debatable.

Following *Dandridge* and *Lindsey v. Normet*,[123] it is hard to make the argument that employment would be found to be a fundamental interest, even if the severe limitations of *Rodriguez* are disregarded. In *Lindsey*, the Court rejected the argument that the "need for decent shelter" was a fundamental interest.[124] Similarly, in *Dandridge*, the Court recognized that the administration of public welfare involved the most basic economic needs of impoverished humans, yet the Court refused to apply a strict standard of scrutiny to the legislation.[125] Since the effects of a deprivation of employment would be largely economic, the chances that the Court would recognize employment as a fundamental right, even under this more liberal test, would be slim. Therefore, it seems that the school teacher's argument that these maternity leave regulations infringed on a fundamental "right to employment" would have been rejected under either the test of fundamental rights formulated in *Rodriguez* or Justice Marshall's more liberal test.

Still, the right to employment is an important personal interest and it is necessary to determine what effect, if any, this im-

123. 405 U.S. 56 (1972). In this case, appellants sought to have Oregon's Forcible Entry and Wrongful Detainer Statute declared unconstitutional. The Court rejected most of the appellant's contention that the State's judicial procedures for eviction of tenants after nonpayment of rent were in violation of the due process and equal protection clauses.

124. *Id.* at 72. The Court further stated:

> We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every racial and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement. Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial functions.

Id.

125. 397 U.S. at 485. The Court stated:

> To be sure, the cases cited, and many others enunciating this fundamental standard under the Equal Protection Clause, have in the main involved state regulation of business or industry. The administration of public welfare assistance, by contrast, involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different constitutional standard.

portance will have on the Court's determination of whether the classification in question is constitutional or not.

Two Tier—Sliding Scale Approach

If the classification in *LaFleur* is not found to be suspect or the interest fundamental, then, according to the two-tier test, the regulation must still be examined "to determine whether it rationally furthers some legitimate, *articulated* state purpose, and therefore, does not constitute an invidious discrimination . . . ."[126] The standard of review set out by *Rodriguez* to determine whether a statute is rational seems slightly more rigorous than that employed in older cases applying mere rationality review. The Court has indicated it will no longer supply reasons or ascribe purposes for the regulations being reviewed, but will require the state to bring forward and to articulate its reasons for the statutory classification in question.

However, it is questionable whether the Court has actually adhered to this framework in many recent equal protection decisions. The slight shift toward a requirement of articulating purposes does not adequately explain some of the Court's recent decisions.[127] In *Reed v. Reed*,[128] the divorced parents of the decedent both filed to administer his estate. Under the Idaho Probate Code, the parents of the decedent were in the same entitlement class for appointment as administrator. But another section of the Code gave preference to males over females where the persons were of equal entitlement. Thus, the Probate Court ordered, on the basis of the Code and without determining the relative capabilities of the competing applicants, that the letters of administration be issued to the father to administer the estate. The Idaho Supreme Court[129] rejected Mrs. Reed's claim that the Code vio-

126. 411 U.S. at 17 (emphasis added). *See also* McDonald v. Board of Election Comm'rs., 394 U.S. 802 (1968), where the Court stated: "Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be *conceived* to justify them." *Id.* at 809 (emphasis added).

127. See Gunther, *supra* note 42, at 20:

> The mood is far different in last term's interventionist invocations of old equal protection formulas. In terms of the long standing connotations of the old equal protection, the decisions are novel if not bizarre. Judicial deference to a broad range of conceivable legislative purposes and to imaginable facts that might justify classifications is strikingly diminished. Judicial tolerance of overinclusive and underinclusive classifications is notably reduced. Legislative leeway for unexplained pragmatic experimentations is substantially narrowed.

128. 404 U.S. 71 (1971).

129. 93 Idaho 511, 465 P.2d 635 (1970).

lated the equal protection clause by giving mandatory preference to males over females without regard to their qualifications as administrators.

On review, the Supreme Court did not apply strict scrutiny to the classification but purported to apply the test of *Royster Guano Company v. Virginia*.[130] The Court stated that "a classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[131] Purporting to apply a traditional minimum rationality test, the Court found that the objective of reducing the workload on probate courts by eliminating one class of contests had some legitimacy. However, to give a mandatory preference to members of either sex to accomplish the eliminations of hearings on the merits was to make the kind of arbitrary legislative choice forbidden by the equal protection clause. The Court also stated that "whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex."[132]

In his dissenting opinion in *Rodriguez*, Justice Marshall rejected the notion that the Court was applying a mere rationality test in *Reed*. The Idaho Supreme Court had believed that the classification was sustainable because the legislature could reasonably have concluded that, as a rule, men have more experience in business matters relevant to the administration of estates.[133] "This Court, in other words, was unwilling to consider a theoretical basis and unsubstantiated basis for distinction—however reasonable it might appear—sufficient to sustain a statute discriminating on the basis of sex."[134] Thus, Justice Marshall said that *Reed* could only be explained as an instance in which the particularly individious character of the classification caused the Court to scrutinize with more than traditional care the rationality of state discrimination.[135]

Justice Marshall cited *Eisenstadt v. Baird*[136] as another example of a case where the Court did not apply the mere rational-

130. 253 U.S. 412, 415 (1920).

131. 404 U.S. at 76.

132. *Id.* at 76-77.

133. 411 U.S. at 107 (Marshall, J., dissenting).

134. *Id.*

135. *Id.* In *Frontiero*, Justice Brennan also characterized *Reed* as a departure from the traditional rational basis analysis. 411 U.S. 677, 684 (1973).

136. 405 U.S. 438 (1972).

ity test as it purported to do. In this case, William Baird was convicted for giving a woman a package of vaginal foam at the end of his lecture on contraception at Boston University. The state law applied to "whoever . . . gives away . . . any drug, medicine, instrument or article whatever for the prevention of contraception," except as authorized in another section of the state statute, which provided that "[a] registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception."[137] There was also a similar exception for registered pharmacists. The legislative purposes of the scheme were not altogether clear. In *Commonwealth v. Baird*,[138] the Supreme Judicial Court noted only the State's interest in protecting the health of its citizens. In a later decision, however, the court found a more compelling ground to uphold the statute, namely, to protect morals through "regulating the private sexual lives of single persons."[139] The scheme distinguished among three distinct classes of distributees: first, married persons may obtain contraceptives to prevent pregnancy, but only from doctors or druggists on prescription; secondly, single persons may not obtain contraceptives from anyone to prevent pregnancy; and thirdly, married or single persons may obtain contraceptives from anyone to prevent not pregnancy but the spread of disease. The Court held that the deterrence of premarital sex could not reasonably be regarded as the purpose of the Massachusetts law, since it would be unreasonable to assume that the statute "prescribed pregnancy and the birth of an unwanted child as punishment for fornication"; that the statute cannot be reasonably regarded as a health measure because if there was need to have a physician prescribe (and a pharmacist dispense) contraceptives, that need would be as great for unmarried as well as married persons (Not all contraceptives are dangerous; therefore, if the statute were a health measure, it would not only invidiously discriminate against the unmarried, but also be overbroad with respect to the married.); and that the statute could not be sustained as a prohibition on contraception because the rights of access to contraceptives must be the same for the married and unmarried alike. Thus, Justice Marshall found:

> [A]lthough there were conceivable state interests in-

137. *Id.* at 440-41. Mr. Baird was neither a registered physician nor a registered pharmacist.

138. 355 Mass. 746, 247 N.E.2d 574 (1969).

139. Sturgis v. Attorney General, 358 Mass. 37, ____, 260 N.E. 2d 687, 690 (1970), citing Griswold v. Connecticut, 381 U.S. 479 (1965).

> tended to be advanced by the statute—e.g. deterrence of premarital sexual activity; regulation of the dissemination of potentially dangerous articles—the Court was not prepared to accept these interests on their face, but instead proceeded to test their substantiality by independent analysis . . . . Such close scrutiny of the State's interests was hardly characteristic of the deference shown state classifications in the context of economic interests . . . . Yet I think the Court's action was entirely appropriate, for access to and use of contraceptives bears a close relationship to the individual's right of privacy.[140]

Similarly, in *Frontiero*, Justice Powell relied on *Reed* to hold the challenged statute unconstitutional. However, can it really be said that there was no rational basis for the classification in *Frontiero*? The Government maintained that empirically, wives in our society are frequently dependent upon their husbands, while husbands are rarely dependent upon their wives. Therefore, Congress could conclude that it would be cheaper and more convenient to presume that wives are financially dependent upon their husbands, while burdening female members with the task of establishing dependancy.[141] It is difficult to see how Justice Powell could have reached the decision that this classification was unconstitutional if he were applying mere rationality standards, since the Government certainly seems to have articulated legitimate purposes to justify the classification as rational.

How, then, can these various decisions be explained? In *Rodriguez*, Justice Marshall contended that a principled reading of what the Court has done in the field of equal protection has been to apply a spectrum of standards in reviewing various discriminations.[142] Thus, he theorized that the degree of scrutiny will depend on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.[143] Justice Marshall found that the Court's recent decisions had, in effect, used this approach. The range of choice within which the Court

140. 411 U.S. at 104 (Marshall, J., dissenting).

141. Frontiero v. Richardson, 411 U.S. 677, 688-89 (1973).

142. 411 U.S. at 98-99. *See also* Vlandis v. Kline, 412 U.S. at 458-59, in which Justice White (concurring) stated:

> From these and other cases, such as . . . *Reed v. Reed* [and] *Frontiero v. Richardson* [citations omitted]; . . . it is clear that we may employ not just one or two, but as my Brother Marshall has so ably demonstrated, a "spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause."

143. 411 U.S. at 99. (Marshall, J., dissenting).

will allow the state to select "the means by which it will act and the care with which we scrutinize the effectiveness of the means which the State selects . . . ," will depend on the degree of scrutiny the Court will apply from the above test.[144]

Professor Gunther also agrees that recent decisions by the Court cannot be explained according to the older, rigid, two-tiered approach in cases dealing with equal protection. He contends that there may be a new model viewing "equal protection as a means-focused, relatively narrow, preferred ground of decision in a broad range of cases."[145] In other words, the Court would take seriously the constitutional requirement that "legislative means must substantially further legislative ends."[146] Even Gunther has admitted that something more than this new means-focused model must have been operating in *Reed*. Gunther argues that some sensitivity to sex as a classifying factor entered into the analysis.[147]

Applying Equal Protection Analysis to LaFleur

Justice Powell purported not to reach this whole range of questions in *LaFleur* since he found the classifications to be irrational. While the school board's arbitrary cut-off dates seem irrational as demonstrated by the Court, the necessity of keeping physically unfit teachers out of the classroom is a legitimate interest. The Court was willing to hypothesize in the face of conflicting medical testimony "that at least some teachers become physically disabled from effectively performing their duties dur-

144. *Id.* at 125.

145. Gunther, *supra* note 42, at 20.

146. *Id.* at 20. Gunther, at 21, further explains this new model:

> It would have the Court assess the means in terms of legislative purposes that have substantial basis in actuality, not merely in conjecture. Moreover, it would have the Justices gauge the reasonableness of questionable means on the basis of materials that are offered to the Court, rather than resorting to rationalizations created by perfunctory judicial hypothesizing.

147. *Id.* at 34. Gunther argues:

> . . . [T]he apparent conformity of the *Reed* opinion to the model is thrown into doubt by the holding that the sex criterion was "arbitrary." It is difficult to understand that result without an assumption that some special sensitivity to sex as a classifying factor entered into the analysis. Clear priority classifications are plainly relevant to the State's interest in reducing administrative disputes. Even if the requirement be that the means bear a "significant relationship" to the state's purpose, or contribute substantially to its achievement, the test would seem to have been met in *Reed*. Only by importing some special suspicion of sex-related means from the new equal protection area can the result be made entirely persuasive. Yet application of new equal protection criteria is precisely what *Reed v. Reed* purported to avoid.

Professor Gunther also admitted trouble in fitting *Eisenstadt* into his model. *Id.* at 34-36.

ing the latter stages of pregnancy."[148] However, Justice Powell thought that these regulations were bottomed on factually unsupported assumptions about the pregnant teacher's ability to perform her job.[149]

Justice Powell's conclusion that there is no factual basis to assume that pregnancy affects the teacher's ability to perform her job is important because, if this is true, then there is clearly no rational basis whatsoever for these maternity leave provisions. Under the majority's theory that some teachers do become disabled, there is some rationality for maternity leave provisions. The state has a legitimate interest in assuring that only capable teachers are in the classrooms at all times. The question under the majority theory then becomes (since some pregnant teachers will become unable to perform classroom duties adequately during the latter stages of pregnancy): Is it rational to require *all* pregnant teachers to take leave after the fourth month of pregnancy so that the school boards will not have to go to the expense of determining which teachers will not be capable of adequately performing their duties?

Under a traditional theory of minimum rationality, the school boards' maternity leave policy would arguably be constitutional. While the Court in *Reed* held that the statute involved was arbitrary and therefore irrational, this decision was criticized on the grounds that such a basis (administrative efficiency) should be sufficient to satisfy traditional rationality standards. In fact, three Justices later recognized that the Court must have been using something akin to a balancing test because of the invidious classification or important personal interests involved in these cases. Analyzing *LaFleur* under the "two-tier" scrutiny of *Rodriguez*, it is arguable that the only way the Court could have found these maternity leave regulations unconstitutional was by subjecting these rules to strict scrutiny because the classification was suspect or because the rules impinged on a fundamental interest. This may explain why the Court was reluctant to deal with *LaFleur* on an equal protection basis. Only four Justices were willing to accept sex as a suspect classification in *Frontiero*, and, in the area of fundamental rights or fundamental interests, there seems to be a deep division in the Court. Therefore, the Court may have been unable to reach any kind of concensus using the equal protection approach.

148. 414 U.S. at 644.
149. *Id.* at 654.

CONCLUSION

The importance of the decision in *LaFleur* can be assessed in terms of what it avoids as much as it can in terms of what it decides. It seems that many of the Justices may have become uncomfortable with the two-tier dichotomy that had prevailed in the equal protection area. After the Court's apparent rejection of a sliding scale approach in *Rodriguez*, the use of the irrebuttable presumption doctrine under the guise of due process accomplishes through a balancing test approximately what a sliding scale test would do in equal protection analysis. In *LaFleur*, the hardships to the school boards in establishing adequate procedures to administer their maternity leave policies would arguably be very minimal when compared to the hardship experienced by the women being required to terminate their employment at an early date.

The decision in *LaFleur* is troubling because the Court does not adequately articulate the reasoning behind this irrebuttable presumption doctrine. The Court may have been justified in identifying procreation as the interest affected in *LaFleur* because procreation had already been identified as a fundamental interest under equal protection analysis. However, the effect of these maternity leave regulations on procreation seems minimal. In his dissent in *Rodriguez*, Justice Marshall clearly identified the underpinnings of the sliding scale analysis and its manner of operation. There is a great need for the Court to explicate clearly its reasoning in these irrebuttable presumption cases. Until this is done, there is some validity to the notion that thousands of attempts at state legislation which involve such presumption will be open to attack.

While there were many inherent problems, it also seems that the maternity leave regulations involving classification should have been decided on equal protection grounds. The charge that a "sliding scale" approach is unprincipled (since it involves subjectively picking out interests which the Court feels are more important than others) seems to be no more unprincipled than the balancing which is evident in many of the recent cases decided under the guise of "mere rationality." Finally, by not dealing with the question of whether sex is a suspect classification, the Court will continue to be faced with regulations that involve classifications based on underlying irrational notions about women, for which the state will be able to offer some rationalization.