Recovering the *LaFleur* Doctrine

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**ABSTRACT:** The landmark 1974 Supreme Court case of *Cleveland Board of Education v. LaFleur*, which held pregnancy dismissal policies unconstitutional, deserves a far more prominent place in our constitutional history and canon than the case now holds. This article uses novel historical research to recover the activism that gave rise to *LaFleur* and the multiple, significant meanings of the decision for workers, school boards, feminist lawyers, and the legal academy. In the early 1970s, women’s rights organizing within unions, grassroots feminist activism, and sex discrimination law all evolved in symbiotic relationship. Labor and legal feminists argued for sex equality and reproductive liberty as interdependent, necessary conditions for women to realize the status of rights-holding persons under the Fourteenth Amendment. Although decided upon the basis of an incoherent and quickly discredited theory of procedural due process, the *LaFleur* decision also grappled with the relationship between women’s rights to equal employment and their right to bear children. Today, rigid doctrinal categories sever the constitutional right to sex equality from the right to reproductive liberty. Recovering the *LaFleur* doctrine entails recovering an activist vision of equal employment and reproductive freedom as inextricably related as well as a moment at which the Court contemplated the significance of that relationship to women’s citizenship.

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INTRODUCTION

The landmark 1974 Supreme Court case of *Cleveland Board of Education v. LaFleur* merits a project of historical recovery. No scholar has yet...
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This article argues that recovering the history of the *LaFleur* case can help to illuminate the intertwined social and legal histories of the modern women's movement and U.S. constitutional law.

Constitutional scholars have long debated the relationship between women's equality rights protected by the Fourteenth Amendment's Equal Protection Clause and women's privacy-related liberties protected by the Due Process Clause. Today, women's rights to sex equality and to reproductive institutional and financial support for rights-based litigation; see also Tracy A. Thomas, *The Struggle for Gender Equality in the Northern District of Ohio*, in *The History of the Northern District of Ohio* (Roberta Alexander & Paul Finkelman eds., forthcoming 2011) (discussing the *LaFleur* and abortion cases).


liberty constitute distinct doctrinal categories. The jurisprudence recognizing a right to privacy in reproductive decision-making does not take into account the multiple sex equality interests at stake. Equal protection jurisprudence, likewise, does not address the implications of reproductive liberty for women’s equality. In 2003, the Supreme Court recognized for the first time that the regulation of pregnant women on the basis of sex-role stereotypes may violate the Equal Protection Clause. Constitutional doctrine, however, severs the constitutional right to sex equality from the substantive due process right to reproductive liberty. This article recovers the history of the labor and social movement activism yielding the litigation that culminated in *LaFleur*, which envisioned sex equality and reproductive liberty as inextricable rights of citizenship. The article also recovers how the *LaFleur* decision cautiously affirmed dimensions of the labor and legal feminist vision, while falling short of the boldest aspects of that vision.

In the early 1970s, labor and legal feminists argued that sex equality and reproductive liberty are interdependent conditions of women’s full legal personhood under the Fourteenth Amendment. Labor and legal feminists used evolving antidiscrimination law, in both collective bargaining and litigation campaigns, to argue for equal employment opportunity and substantive reproductive liberty. Public school teachers fought pregnancy dismissal policies that mandated the termination of pregnant school teachers and prohibited the return of new mothers to the workplace until several months after childbirth. Feminists argued that equal employment constituted a fallacy if premised on foregoing the right to bear children. And, if the law required women to give up their jobs when they became pregnant, childbearing would reinforce women’s subordination by imposing women’s dependence within the private family.

The majority opinion in *LaFleur*, although trepid and even evasive in its language and doctrinal basis, possessed far bolder implications for women’s citizenship status than either the constitutional canon or historical record credits it with possessing. In striking down pregnancy dismissal policies as unconstitutional, the decision established a due process right not to be stereotyped on the basis of pregnancy. Although ostensibly decided upon the

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5. I use the term “legal feminists” to describe activists and attorneys who used the law as a primary tool to improve women’s socioeconomic status.

6. I borrow the term “labor feminists” from historian Dorothy Sue Cobble to refer to activists who fought within their unions to achieve greater power for women within the labor movement, as well as social and economic rights. See Dorothy Sue Cobble, *The Other Women’s Movement: Workplace Justice and Social Rights in Modern America* 3 (2005).
basis of a procedural due process theory, the opinion sparked both criticism and praise for expanding conceptions of substantive due process. The footnotes and subtext of the opinion also recognized women's sex equality interests in the litigation. The history of the LaFleur case recovers a moment at which the Court contemplated a richer relationship between sex equality and reproductive liberty than is recognized under contemporary Fourteenth Amendment jurisprudence.

Part I discusses the labor and legal feminist campaigns against pregnancy dismissal policies. The history of labor and legal feminist campaigns reveals that both union organizing and feminist mobilization catalyzed the development of sex discrimination law that, in turn, strengthened these workplace and social movements. Activists within the American Federation of Teachers, as well as feminist plaintiffs and attorneys, challenged traditional gender ideals that underpinned the policies, including conservative sexual norms, stereotypes about pregnant women’s lack of capacity to work, and the family-wage system. That system comprised a cultural ideal, reinforced through social norms, employer policies, and law that the nuclear family consists of an independent male wage-earner and dependent female caregiver. Labor and legal feminists sought to replace traditional gender ideals with liberal ideals about sexuality, the treatment of pregnant women as individuals rather than as a class, and women’s right to act as workers as well as mothers. Feminists, however, argued not only for equal treatment and individual rights but for more ambitious objectives including paid pregnancy disability leave and parental leave for both women and men. Teacher activists met with the greatest resistance from public school administrations in response to these deeper, redistributive claims. And the same types of challenges ultimately led the Supreme Court not to decide LaFleur under the Equal Protection Clause and to cabin its radical implications in subsequent decisions.

Part II analyzes the pregnancy discrimination cases in the lower federal courts. Plaintiffs, lawyers, and the courts all wrestled with the doctrinal questions raised by the pregnancy dismissal policies: Were pregnancy-based classifications under the law synonymous with sex discrimination? What standard of scrutiny should the courts apply under the Equal Protection Clause to legal regulation on the basis of sex? Feminists argued that pregnancy dismissal policies amounted to unconstitutional sex discrimination and urged federal courts to interpret equal protection in light of developing sex equality law under Title VII of the Civil Rights Act of 1964. Feminist attorneys also experimented with the idea that the pregnancy dismissal policies burdened women’s fundamental right to bear children. In 1973, the Court’s decision in Roe v. Wade enacted a revolution in substantive due process, opening the door

7. On the family-wage system, see ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA 7 (2001).
to the argument that women should have a right to bear children parallel to the right to abortion. This incipient doctrinal trend established the foundation for a holding that pregnancy dismissal policies threatened women’s reproductive liberty as well as sex equality interests.

Part III considers how the Supreme Court, in deciding LaFleur, negotiated a complex, dynamic legal landscape ridden with doctrinal and political risks. Much to feminists’ disappointment, the majority opinion did not address the pregnancy dismissal policies within a sex-equality framework. The Court avoided two fundamental dilemmas: how to define the relationship between pregnancy and sex discrimination and whether to apply a strict scrutiny standard of review to sex under the Equal Protection Clause. Instead, the majority held that the pregnancy dismissal policies created a series of unconstitutional “irrebuttable presumptions” that violated women’s fundamental reproductive liberty under the Due Process Clause. While the irrebuttable presumptions doctrine justifiably drew considerable derision, LaFleur also held far more serious and potentially radical implications. Most significantly, the decision embraced a new view of women as independent citizens in the public sphere rather than as dependents within the private family.

I. THE LABOR AND LEGAL FEMINIST CAMPAIGNS AGAINST PREGNANCY DISMISSAL POLICIES

When Jo Carol LaFleur and attorney Jane Picker filed suit against the Cleveland Board of Education, they joined a larger movement for women’s rights. Part I locates the origins of the LaFleur case in the resurgence of a mass women’s movement and labor feminist activism. The social history of the case reveals a synergy among women workers combating exclusionary employment rules, growing if tentative union support for women’s rights, the rise of a coterie of feminist attorneys, and new sex discrimination laws.

The synergy between labor, feminism, and law belies the notion that the advent of antidiscrimination law in the sixties and seventies necessarily undermined collective action for structural reform. Individual litigation did not supplant union organizing. Rather labor feminists used law, including administrative guidelines and court decisions, as tools in organizing for sex equality in the workplace. The growth of feminism as an identity-based movement did not inhibit unions’ critique of political economy. Instead, labor

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8. For the argument that Title VII undermined both the labor movement and the intellectual critique of capitalism, see Nelson Lichtenstein, State of the Union: A Century of American Labor 1-19, 178-211 (2002). Legal and social historians of civil rights, however, have begun to challenge the narrative that by the 1960s, a preoccupation with formal, individual rights had replaced a democratic unionism concerned with economic justice. For a summary of the literature on the subject, see Kenneth W. Mack, Bringing the Law Back into the History of the Civil Rights Movement, 27 LAW & HIST. REV. 657, 660-61 (2009).
feminists used growing consciousness of women’s rights to critique the material and social subordination of women within the workplace. Finally, union activists did not rest content with equal treatment mandates realized under law but rather mobilized for broader redistributive objectives.

Litigation challenging pregnancy dismissal policies contested the legal regulation of pregnant workers on the basis of traditional gender ideals. Brave plaintiffs and their pioneering lawyers, including LaFleur, Picker, and others, identified employer regulations excluding childbearing women from the workplace as the foundation for gender hierarchy. Pregnancy dismissal policies implicated traditional social ideals rooted in conservative responses to female sexuality, the protection of white women, and the family-wage system. The policies relegated childbearing women to socioeconomic dependence within the private family, denying them the right to act as autonomous and equal individuals in the sphere of labor market competition. This Part examines labor and legal feminist efforts to challenge the social ideals that undergirded pregnancy dismissal policies and to replace them with new liberal principles underpinning antidiscrimination law. The Part conducts close historical case studies of labor feminist organizing within the American Federation of Teachers (AFT) and the district court hearing in LaFleur v. Cleveland Board of Education.

A. Courts, Teachers, and Unions

Pregnancy discrimination cases mushroomed in the federal district courts during the early 1970s. Before 1971, no cases in the federal district courts challenged pregnancy discrimination in employment, under either the U.S. Constitution or Title VII. That year, federal district courts decided seven pregnancy discrimination cases; in 1972, they decided nine more cases; in 1973, another three new cases; in 1974, an additional seven; and in 1975


two more. Plaintiffs brought claims under the Equal Protection Clause of the Fourteenth Amendment and Section 1983, as well as under Title VII. Teachers were especially active in challenging pregnancy discrimination, and statutory claims proliferated after Congress extended Title VII to educational institutions in 1972.

The ascendance of women’s rights organizing within teacher unions catalyzed the emergence of the pregnancy discrimination cases. Of the twenty-eight cases decided in the lower federal courts between 1971 and 1974, sixty percent had teacher plaintiffs. The history of labor feminist activism thus provides crucial context for understanding why cases challenging pregnancy discrimination arose in the early 1970s. This history also highlights the difficulty of translating the socioeconomic grievances, which lay behind court cases such as LaFleur, into legal claims. We learn what gets lost in that process of translation. Activists within teacher unions did not argue for only an end to pregnancy dismissal policies but also for broader objectives, including paid pregnancy disability and parental leave. These claims extended beyond evolving sex discrimination standards to pose deeper challenges to public school administration.

Labor feminist ideology and activism had flourished in the decades between the New Deal and the civil rights era. During this period, women workers struggled within their unions for “full industrial citizenship,” which entailed both “the right to market work for all women” and the “social rights . . . necessary for a life apart from wage work, including the right to care for one’s family.” Labor feminists campaigned for rights to equal pay, maternity leave, state and federal funding of childcare centers, and shorter and more flexible work hours, among other entitlements.

In the late sixties, a new vision for sex equality articulated by the mass feminist movement, which centered on individual self-determination and equal employment opportunity, sparked a crisis within labor feminism. The newly enacted Title VII and the proposed Equal Rights Amendment rendered suspect

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17. The state action doctrine cannot account fully for the predominance of teacher plaintiffs. The Constitution only constrains public actors, and far more women during the early seventies worked as teachers than in any other form of public employment. Plaintiffs also brought pregnancy discrimination cases, however, under Title VII, which reached private employers and, after March 1972, educational institutions and local, state, and federal governments.

18. COBBLE, supra note 6, at 4.

19. Id. at 5-6.
the continued legality of sex-specific labor standards. Some labor activists agreed with the consensus within the broader feminist movement that these "protective laws" discriminatorily excluded women from employment opportunities. Other labor activists argued that the laws offered genuine and essential protection to low-income women workers who not only comprised the least organized, lowest paid, and most vulnerable sectors of the workforce, but who also faced the double burden of work in the home at the end of their paid workday. By the early 1970s, however, lawsuits under Title VII as well as preemptive administrative and legislative action had eroded the protective laws. With the major ideological and political obstacle to labor support removed, the Equal Rights Amendment became a union demand.

The issues surrounding pregnancy in the workplace rested at the intersection of labor feminists' older commitment to social protection and their newer commitment to sex equality. Labor feminists in the early seventies mobilized for both antidiscrimination laws and affirmative entitlements related to pregnancy. They realized that the gendered rhetoric of social protection, which had long justified both restrictions and privileges unique to women workers, rang hollow when it came to the very reproductive functions that purportedly necessitated state intervention. Labor feminists desired both the opportunity to work and the benefits that would enable their ongoing economic independence when they decided to bear children. They fought for the right not to have to choose between paid employment and motherhood. They pursued both equal employment opportunity and reproductive liberty.

Under the leadership of the American Federation of Teachers Women's Rights Committee Chair Marjorie Stern, feminist activists within Federation locals targeted restrictive maternity leave clauses as priorities for change. Stern

20. See, e.g., Arlene Van Breems, Working Women Caught in State and Federal Law Bind, L.A. TIMES, Nov. 12, 1969, at H1 (statement of Aileen Hernandez, former West Coast Education Director for the International Ladies Garment Workers Union and one of the original five commissioners for the Equal Employment Opportunity Commission, critiquing California protective laws at public hearings in 1969: "I don't really need your gallantry or your protection.").

21. See, e.g., Harry Bernstein, Debate Grows over Job Discrimination Due to Sex, L.A. TIMES, Mar. 7, 1966, at A1 ("[W]oman's role and responsibilities in our culture are not the same as those of the male . . . . She may be gainfully employed but at the same time be a wife, mother, homemaker, nurse or any combination of these at different stages of her life." (quoting Ruth Miller of the Amalgamated Clothing Workers)); Nat'l Consumers League, Statement on State Protective Labor Legislation 1-2 (Jan. 1967) (Catherine East Papers, box 16, folder 18) (on file with the Schlesinger Library, Radcliffe Institute, Harvard University) (arguing that women comprise the most vulnerable sector of the workforce).


23. COBBLE, supra note 6, at 190-95.

24. See, e.g., Muller v. Oregon, 208 U.S. 412, 423 (1908) (upholding the constitutionality of a state maximum hours law for women).

25. Elizabeth Duncan Koontz, Childbirth and Childrearing Leave: Job Related Benefits, 17 N.Y. L. FORUM 480, 482 (1971) ("Contrary to popular belief, the state laws singling out maternity for special treatment in employment all are exclusionary or restrictive.").
and other teachers drew on a long tradition of activism. Women had formed the more radical wing of the AFT since the Progressive era, when they opposed the pro-war unionism and red-baiting tactics of conservative elements of the union. The problem of sex discrimination was nothing new, either. During the Depression, in the context of widespread unemployment among men viewed as legitimate breadwinners, hostility to married women's workforce participation had heightened. School boards across the nation had resorted to a practice of firing married female teachers and hiring single ones. The AFT responded by fighting within their unions and the courts to protect the tenure of married teachers, and the practice subsided when World War II caused labor shortages. The question of women's rights remained significant for women AFT activists, some of whom gained appointments to President Kennedy's Commission on the Status of Women in the early sixties.

The legacy of support for sex equality and extant resistance to change in gender roles shaped the relationship among female teachers, union organizing, and litigation. In part, activist sentiment within the teacher unions, including the AFT and the National Education Association, catalyzed rights consciousness among women teachers. Union activists in locals supportive to women's rights used law—including administrative regulations, litigation, and court decisions—to pursue reform of maternity provisions in teacher contracts via the collective bargaining process. Union intransigence also led women to the courts. Thus, law served as at once a backstop to union locals' failure to support women's rights, a byproduct of feminist activism within unions, and a tool enabling labor feminist organizing.

B. Reforming Maternity Leave: The American Federation Teachers and Labor Feminism

In the early 1970s, public school systems across the country excluded pregnant women and new mothers from the workplace. A National Education Association Survey in 1970 found that most school systems required teachers to take mandatory, unpaid maternity leaves at the beginning of the fourth or fifth month of pregnancy, often without any job guarantee. Some school systems required female teachers to remain on leave for a full year following childbirth. For women teachers, pregnancy dismissal policies meant the loss of wages and benefits just at the time when they were needed the most. For

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27. Id. at 177-79.
28. Id.
29. Koontz, supra note 25, at 492.
30. Id.
some, the dismissal policies mean the end of a teaching career. The policies conditioned employment on the disavowal of childbearing, forcing women to choose between work and motherhood.

The pregnancy dismissal policies embodied traditional ideals about sexuality, pregnancy, and gender roles. First, the dismissal policies suggested that pregnancy, as a visual representation of female sexuality, represented an inappropriate presence in the classroom. Second, the dismissal policies reflected an entrenched public opinion, which the medical profession had only just begun to challenge, that pregnant women could not continue to work past the mid-point of their pregnancies without jeopardizing the health of themselves or their fetuses. Third, in relegating both pregnant women and new mothers to the home, the dismissal policies imposed the family-wage system. Pregnancy dismissal policies denied childbearing women access to the financial and social benefits of paid employment, enforcing their socioeconomic dependence within the private family.

As Chair of the American Federation of Teachers Women's Rights Committee, Marjorie Stern made reforming maternity leave clauses her top priority. In August 1970, the AFT passed an historic resolution at its national convention stating that there should be "no loss of rights for teachers on maternity leave, that the length of leave be established between the teacher and her physician, that there be provision for continual educational training of women teachers on leave . . . ." Marjorie Stern argued that maternity leave should be fixed by a woman and her physician, allowing pregnant teachers and new mothers who were capable of working, needed their salaries, and wanted to work, to continue teaching. Stern argued further that pregnant teachers should be able to use accumulated sick and personal leave for pregnancy- and childbirth-related leave; that pregnancy should not be an occasion for loss of seniority credit or other employment and contract rights; and that school districts should pay for the medical expenses of childbirth.

The maternity issue held further potential as a concrete organizing tool. Liberalizing maternity clauses appealed to the large numbers of young women among the teaching workforce. Beginning in 1971, Stern initiated a steady stream of communication with the leaders of nascent local women's rights committees. Stern urged activists to focus on reforming school board maternity

provisions as a means of strengthening the women's rights voice within the AFT and building the union as a whole. Stern repeatedly argued that improving maternity policies constituted a tangible, popular goal "which your local can possibly accomplish in a relatively short time."34

1. The Liberalization of Maternity Provisions in Teacher Contracts

In the early 1970s, Marjorie Stern, the AFT Women's Rights Committee, and local activists endeavored to end pregnancy dismissal policies and to bargain for alternative contract provisions consistent with emergent antidiscrimination principles. Ideological and personal ties between teacher unionists and feminist organizations nurtured women's rights activism within the Federation. Stern described the "plantation psychology" dominant in schools, which rewarded teacher "passivity, self-sacrifice," and acceptance of "hierarchy." A school administrator "may be tyrannical, or benevolent, or blandly paternalistic, but it is through him that teachers seek their identity, just as women do through their fathers or husbands, and similar to what blacks were forced to do through the master-slave relationship." Stern concluded, "Here is where ideas of the women's and black liberation movements parallel the teacher rights movement." The parallels took concrete form via AFT members also active within feminist organizations. These women demanded that public schools "become more concerned with the feminist point of view." They used the Federation as a resource in support of local National Organization for Women chapter campaigns against school boards. An


36. Id.

37. Id.


outreach advertisement for a northern Minnesota local read like a radical feminist newsletter: "How many of you are working for power-mongering or at the least, antagonistic school boards . . . ? In your community are you considered a strange woman, a bitch, a man-hater, etc., because you believe in and work for human equality and totally reject the discriminating stereotypes under which both sexes suffer . . . ?"\(^{40}\)

AFT activists argued that the cultural representation of pregnancy as an embodiment of sexuality, verboten within the classroom, perpetuated archaic stereotypes. Eileen Rossi, a professor of Sociology at the City College of San Francisco advised the city's AFT local, which in 1967 became the first to attempt to reform contractual maternity provisions. According to Rossi, schools treated a pregnant teacher as "a thing to be put away and talked as little about for her nine months of 'deformity' [as possible]."\(^{41}\) Rossi drew on ideas about social progress to delegitimize pregnancy dismissal policies. She described the impulse to sequester pregnant women as "akin to the isolation of women in primitive tribes during certain times of the month."\(^{42}\) Cultural stereotypes marking pregnancy as simultaneously shameful, selfish, and incompatible with employment had no place in the modern, civilized school.

The connection between pregnancy dismissal policies and traditional sexual morality manifested, too, in the policies' treatment of single versus married women. The Cleveland policy that Jo Carol LaFleur would challenge exemplified many similar policies, which excluded unmarried pregnant women from even the meager job tenure protections offered to married women forced to take unpaid maternity leave. The marital issue arose in hearings before the Washington State Human Rights Commission to determine whether the state should require employers to cover pregnancy within their leave and benefit policies applicable to sickness and temporary disability. Opponents argued that even if employers had to extend such pregnancy-related benefits to married women, unmarried women should not be extended the same benefits.\(^{43}\) In

\(^{41}\) Letter from Alfred J. Tapson, President, S.F. Fed'n of Teachers, to Eileen Rossi, Professor of Sociology, City Coll. of S.F. (June 26, 1967) (Marjorie Stern Papers, Part II, box 1, folder 16) (on file with the Walter Reuther Library, Wayne State University Archive of Labor & Urban Affairs) (attaching Memorandum from Eileen Rossi, Professor of Sociology, City Coll. of S.F., Proposal for Changes in the Existing District Policies Regarding Maternity Leaves 1).  
\(^{42}\) Id.  
testimony before the Human Rights Commission and in a letter to the editor of the Seattle Times, Stern railed against school boards' "Victorian policies." 44

In addition to combating the conservative sexual mores undergirding pregnancy dismissal policies, AFT activists marshaled evolving medical standards to counter the stereotype that pregnant women lacked the capacity to work. The San Francisco Unified School District required married pregnant teachers to take a minimum of three months' leave before childbirth. 45 Eileen Rossi attributed the requirement to fear of liability for injury to a pregnant woman during the last three months of fetal development. The school district's position represented a common argument at a time when many doctors and the public generally believed that pregnancy made work hazardous for women. Rossi countered this concern by citing an obstetrics professor at Johns Hopkins University, Nicholson J. Eastman, who believed that pregnant women could continue to work in jobs that did not inordinately tax them physically, for as long as they desired. Rossi argued that with the exception of physical education teachers and women experiencing particularly dangerous pregnancies, maternity leave should be placed "at the discretion of the prospective mother and her doctor." 46

AFT activists also challenged the prohibition on teachers' return to work following childbirth. They argued that the regulation of women's return to the workplace derived from the cultural ideal that new mothers belonged in the home. This ideal conflated women's role as childbearers with their primary responsibility for childrearing. By contrast, feminist activists within the AFT embraced an emerging distinction between the biological and social dimensions of reproduction. That distinction played a critical role in feminist thought. For example, the radical feminist leader Ti-Grace Atkinson argued that women experienced subordination as a political class because society made childrearing and domestic work women's primary social function. 47

In arguing for liberalized regulations respecting pregnancy, the AFT took advantage of new Equal Employment Opportunity Commission (EEOC) guidelines on sex discrimination issued in April 1972. The guidelines interpreted Title VII to require employers to treat "[d]isabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom" as temporary disabilities for job-related purposes. 48 The EEOC guidelines represented the culmination of a near-decade of deliberation and evolution in EEOC policy on pregnancy-based sex discrimination. Initially,

44. Letter from Marjorie Stern to Editor, Seattle Times, supra note 32; Stern, supra note 32.
45. The policy also required women to refrain from returning to work within the six-month period following childbirth. Memorandum from Eileen Rossi, supra note 41, at 1.
46. Id. at 3.
following the passage of Title VII, the General Counsel’s Office within the EEOC issued decisions treating pregnancy as a unique condition not governed by the general legal principles regulating employer personnel policies. Some decisions concluded that employers’ exclusion of pregnancy-related disability from temporary disability benefits did not constitute unlawful sex discrimination. Other decisions concluded that Title VII required employers to provide maternity leave regardless of the leave extended for other temporarily disabling conditions.49

By 1970, women’s rights reformers outside the EEOC had developed a new principled approach to regulating pregnancy in the workplace. The Citizens’ Advisory Council on the Status of Women issued a critical statement that year: “Childbirth and complications of pregnancy are, for all job-related purposes, temporary disabilities and should be treated as such under any health insurance, temporary disability insurance, or sick leave plan of an employer, union, or fraternal society.”50 The sex/gender distinction important to feminist theory at the time played a crucial role in the development of the temporary disability paradigm. Jacqueline Gutwillig, the Chair of the Citizens’ Advisory Council on the Status of Women, considered the “semantic separation” between childbearing and childrearing “one of the most important contributions of our [the Council’s] consideration of this issue . . . .”51 In addition, the temporary disability paradigm affirmed the principle that pregnant women should be treated as individuals, not as a class, by requiring an individual evaluation of a pregnant woman’s capacity to work. Furthermore, the model had appeal because it would offer replacement income to pregnant women and women recovering from childbirth, who were physically unable to work, within a sex-neutral framework that dodged the pitfalls of protective legislation.52

The National Organization for Women (NOW), which had formed four years earlier to pressure the EEOC to enforce the sex provision of Title VII, also began to advocate for the temporary disability model. A couple of feminist attorneys on staff with the EEOC, Susan Deller Ross and Sonia Pressman


51. CITIZENS’ ADVISORY COUNCIL ON THE STATUS OF WOMEN, WOMEN IN 1971, at 54 (1972); see also Hearing on Maternity Leave Before the Wis. Dep’t of Indus., Labor, and Human Relations 2 (May 4, 1972) (Statement of Catherine East, Exec. Sec’y, Citizens’ Advisory Council on the Status of Women) (Catherine East Papers, box 5, folder 25) (on file with the Schlesinger Library, Radcliffe Institute, Harvard University) (portraying the distinction between childbirth and childrearing as the Citizens’ Advisory Council’s “chief contribution” to the subject of maternity and work).

Fuentes, urged the agency to modify its stance on pregnancy discrimination. As a result of both external and internal advocacy, the EEOC stance on pregnancy discrimination evolved and culminated in the 1972 guidelines.

While NOW saw the EEOC guidelines as the basis for equal employment litigation, the American Federation of Teachers viewed them as leverage for collective bargaining with school boards. Stern admonished that most districts' maternity leave policies "are not only antiquated . . . and paternalistically applied, but . . . [also] are fast becoming illegal." Stern, however, encouraged locals to bargain for pregnancy, childbearing, and childrearing policies that surpassed the EEOC guidelines. While the guidelines provided a floor, Stern argued that locals should ensure that revised contract provisions "substantially improve the conditions under which a woman takes leave." Stern and local activists viewed law as a tool with which to pursue collective bargaining, not as a limit on the labor feminist vision for sex equality.

2. The Limits of Reform

Liberalizing maternity provisions in teacher contracts to allow pregnant women and new mothers to work when capable would make significant advances toward, but would not realize, sex equality. Equal employment opportunity, feminists believed, would also require temporary disability benefits for pregnancy-related disability and paid parental leave available to both male and female workers. These objectives demonstrated that labor feminists pursued a far more ambitious agenda than merely assimilationist, formal equality. Instead, they pursued a more equitable distribution of childrearing between women and men within the home, as well as a shift of the costs of reproduction from the private family to the larger public. Labor feminists achieved the most success, however, when combating market-irrational employment discrimination. They faced considerably more difficulty transforming public school administration in a manner that would impose significant costs on school boards.

The allocation to the private family of the economic costs of pregnancy, childbirth, and childrearing buttressed the family-wage system. The exclusion of pregnancy from temporary disability coverage drew legitimacy from the

53. For further discussion of the tension between the solutions posed by Ross and Fuentes, as well as the resolution of that conflict within the EEOC, see id.
54. See Schwartz, supra note 49.
55. Stern, supra note 34, at 2.
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notion that women did not work to support their families. Women, employers alleged, did not deserve the same benefits that breadwinning men deserved, during periods of women's economic dependence. School boards denied pregnant women access to the social insurance protections and entitlements offered for other forms of human dependence and flourishing including paid sickness, disability, and vacation leave. Demographic change, however, had made the family-wage ideal ever more illusory for most American families. Single women, especially, could not rely on men's salaries but rather needed to earn income during pregnancy and to receive income replacement when pregnancy or childbirth yielded periods of physical incapacity.

The denial of paid parental leave reinforced a gender inequitable division of childrearing labor within the home. Employers routinely denied men childcare leave on the assumption that men did not need to serve as primary caregivers. Even when employers offered parental leave to both male and female employees, it was most often unpaid. That made it more difficult for feminists to achieve an equitable division of childrearing labor between the sexes. In the majority of married couples, men earned higher incomes than their wives. Therefore, economic incentives made it more rational for women than men to take parental leave to serve as primary caregivers. Making parental leave paid would encourage a more gender equitable division of childrearing responsibility within the family by offering incentives to male leave-taking.

By late spring of 1972, Stern had identified a shift in local contracts' language "from 'maternity leave' to 'disability leave' and 'child rearing' leave." The new language represented a discursive trend away from constructing childcare as a need of women toward the legal separation of biological from social reproduction. The Federation used the distinction between childbirth and childrearing to argue that childrearing and adoption leaves should be extended to men.

Fathers who fought school boards to gain access to childcare leave faced strong resistance, but also met with some success. Gary Ackerman, for example, encountered numerous obstacles to obtaining childcare leave from his job as a teacher with the New York City schools, until his local successfully

58. See Memorandum from Isabelle G. Rosenfels to Marjorie Stern, supra note 43 (stating that "maximum opposition to the maternity leave proposal" of the Washington State Human Rights Commission would likely concern "the use of accrued sick, disability, and vacation leave days toward maternity leave . . . ").
59. For further discussion, see Dinner, supra note 52.
60. On the limits of the family-wage ideal for single and low-income women, including most families of color, see NANCY MACLEAN, FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE 16-17 (2006).
62. Stern & Kaye, supra note 57.
Word of Ackerman’s struggle inspired Seattle teacher Vernon Olsen. Olsen “looked at the Equal Rights Amendment” and asked himself, “If a female could take a year off for child-rearing, why couldn’t a male?” When Olsen first applied for leave, the school board offered only maternity leave and stated he would need to resign if he wanted to take time off from work. The next year, teachers negotiated a new contract including childcare leave. The district still needed some convincing. But after a grievance hearing in which the Seattle Federation of Teachers sided with Olsen, the school district agreed to grant a one-year paternity leave. Olsen dropped the charges he had filed with the Washington State Human Rights Commission. His story featured as the lead article on the front page of the Seattle Times, the newspaper with the largest circulation in the state.

Feminist activists within the AFT ran into the greatest resistance from both the national Federation and union locals when they began to demand paid parental leaves and pregnancy disability benefits. At the 1972 AFT convention, Stern failed in her third consecutive attempt to achieve a national resolution in favor of paid maternity benefits. Her proposal for paid parental leave for fathers of newborns similarly met defeat. Stern noted that opposition usually came from “those locals which have successfully negotiated contracts, have state collective bargaining laws, and have had to make priority choices in actual bargaining situations.” Although their objections might have been “somewhat more realistic,” Stern nevertheless pledged to continue advocating for benefits “either at the bargaining table or the convention floor.” The locals’ reluctance suggests that many Federation members proved willing to support women’s rights so long as they did not have a cost. They were unwilling to negotiate for paid pregnancy and parental leave benefits if that might mean sacrificing another contract item.

A few locals with particularly active women’s rights contingents strove valiantly to win inclusion of pregnancy and childrearing leave within paid leave


64. Constantine Angelos, City Schools Grant First Paternity Leave, SEATTLE TIMES, Apr. 5, 1974, at 1 (quoting Vernon Olsen).

65. Id.


67. Letter from Marjorie Stern to Miles Myers, supra note 66.

68. Id.
systems. But school districts often stymied their efforts because of the benefits’ anticipated expense. For example, although San Francisco teachers had negotiated for a variety of insurance policies, Stern wrote in January 1973 that the union had not achieved paid maternity leaves. The union would first have to negotiate for paid disability insurance, which would in turn include maternity in its coverage. This type of insurance, however, proved a challenging item to bargain for, because it was both more expensive and less comprehensive than other types of policies such as life and long-term disability insurance. Some activists advanced ideas for alternative mechanisms to achieve paid leave for childbearing and childrearing, other than temporary disability benefits. One union local advocated grouping numerous types of leaves—sabbatical, personal necessity, medical, and maternity—under the general label of sick leave, made categorically available to teachers. Another local bargained for hospital, medical, and surgical insurance covering all gynecological and obstetrical services for female members of the bargaining unit. All these innovative proposals represented seeds of change that never came to fruition.

The labor feminist initiatives within the AFT that never fully flowered were those that posed the deepest redistributive challenge to public school administration. Allowing pregnant teachers to continue teaching so long as they remained healthy and to return to work sooner did not tax school district budgets. Allowing both male and female teachers to take unpaid childrearing leaves posed only a minimal economic burden. In short, labor feminists achieved reform of maternity leave policies to the extent that new, liberalized contract provisions better integrated female workers into a capitalist economy. Feminist attempts to transform that economy to provide greater financial support for childbearing and early months of childrearing met with profound resistance.

Momentum for change came to a halt with the premature end to Stern’s career as Chair of the Women’s Rights Committee. In Autumn 1974, the American Federation of Teachers held a bitterly contested election for the national presidency between the six-year incumbent David Selden and Albert

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Shanker, the president of New York City’s United Federation of Teachers. The Selden-Shanker feud concerned whether the AFT should either continue to pursue Selden’s vision of the union as a liberal political force working for social justice, or embrace the more conservative vision of bread-and-butter unionism heralded by Shanker. For Stern, Selden’s defeat meant the loss of a sympathetic national leader.\(^7\) Support for women’s rights had already waned within the union; Stern had to fight to get a workshop entitled Women’s Rights as a Bargaining Tool on the schedule for the 1974 convention.\(^7\) That September, the Federation’s Executive Committee declined Stern’s request for coverage of her expenses to attend the first meetings of the Coalition of Labor Union Women.\(^7\) At the start of Shanker’s term, Stern resigned. The new President and Executive Council did not reappoint any members to the Women’s Rights Committee.\(^7\)

\section*{C. LaFleur v. Cleveland Board of Education and Legal Feminism}

In the winter of 1971, Jo Carol LaFleur found herself waging a battle to continue teaching at a Cleveland public school. School district policy established that “a maternity leave of absence shall be effective no later than the end of the fourth month of pregnancy (five months before the expected date of the normal birth of the child).”\(^7\) The teacher handbook restricted maternity leave to married teachers, with the implication that unmarried teachers would be terminated with no right to return.\(^7\) Married and expecting a child, Jo Carol LaFleur had no intention of taking leave and filed a formal grievance with her principal “requesting that [she] be allowed to remain the entire school year.”\(^7\)

\begin{footnotesize}
\begin{enumerate}
\item \footnote{Murphy, supra note 26, at 258-61.}
\item Cleveland Bd. of Educ., Chapter Three: Leave of Absence Without Pay (Women’s Law Fund, box 24, folder 11) (on file with the Western Reserve Historical Society).
\item Jo Carol LaFleur, Initiation of Grievance Form for Personnel Represented by the Cleveland Teachers Union (filed Mar. 3, 1971) (Women’s Law Fund, box 24, folder 11) (on file with the Western Reserve Historical Society).
\end{enumerate}
\end{footnotesize}
Although the Board of Education took the maternity leave policy under advisement, it refused to make any changes before LaFleur's scheduled leave date of March 12, 1971.80

The roots of the LaFleur case show that pregnancy dismissal policies derived from social values respecting pregnancy, sexuality, mothering, and race. This social history also exemplifies the alliance that formed between employed women—activists in their workplaces—and feminist attorneys who themselves faced discrimination in the legal profession. Analyzing the LaFleur case, beginning with the complaint and district court hearing, provides insight into the content of the feminist vision for employment equality and reproductive liberty. Feminists sought to replace conservative gender ideals with principles based on liberal notions of individual self-determination, progressive social policy, evolving medical standards, and sex equality in the workplace.

1. From Civil Rights to Women's Rights: Jo Carol LaFleur's Journey

Jo Carol LaFleur grew up in a white, working-class neighborhood of Richmond, Virginia during the 1950s and 1960s, when the highly segregated city began to experience African-Americans' intensifying challenge to Jim Crow.81 She graduated from John Marshall High School in Richmond in 1964, as a member of the school's last all-white class.82 During her childhood, Jo Carol came to a slow, startling revelation of the depth of racial oppression surrounding her and its dehumanizing effects on her own relationships. The summer of 1967, after her junior year at the College of William and Mary, she served as a lifeguard at one of the new swimming pools that the City of Richmond opened in black neighborhoods. The pools represented Richmond's attempt to subvert legal challenges to segregation in public accommodations, but they had some unintended consequences. Jo Carol found acceptance and friendship at the pool that would put her on a new path. As she described several decades later, "There are some highways that once you cross them, you cannot retrace your steps."83

In the spring of 1968 LaFleur turned twenty-one; she graduated college in June and, in August, married and moved with her husband to Cleveland. These personal milestones in her life occurred against the backdrop of the assassinations of Martin Luther King, Jr. and Robert F. Kennedy and the

82. Id. at 6.
83. Id. at 8.
violence at the Democratic Convention in Chicago. LaFleur, like other feminists at the close of the sixties, took considerable inspiration from the civil rights movement. Many of her Northern contemporaries joined the Freedom Rides in the South as well as the student-led New Left movements. These young women's participation served as a political consciousness-raising and, when faced with the pervasive sexism among the male leaders of these movements, an awakening to gender hierarchy. The civil rights movement instructed a new generation of feminists, like LaFleur, in methods of protest and encouraged them to interrogate the structures of subordination and inequality in their own lives.  

Before moving, LaFleur took her own, local stance for civil rights in Richmond. She delivered a speech at her Baptist church attempting to persuade the members to allow black children to attend Vacation Bible School. While she did not succeed, the bitterness of the experience sparked LaFleur's commitment to devote her career to teaching African-American children. That inspiration brought LaFleur in the fall of 1970 to Patrick Henry Junior High School on East 123rd Street in Cleveland, where the administration assigned her to a transition class of girls at risk of dropping out of school.

Little more than a year after arriving at Patrick Henry, LaFleur found herself trying unsuccessfully to convince school authorities that she was wholly capable of continuing to work. LaFleur quickly discovered that not her condition itself but rather her pregnant appearance formed the basis for the school's opposition. The dignity and courage of the civil rights activists LaFleur had encountered in the South, as well as her own dedication to her students, inspired LaFleur to take action.

LaFleur thought the Cleveland school board's "forced maternity leave system" was not only "grossly unfair but also illegal." Following the leave's commencement, LaFleur showed up at school first thing in the morning for two weeks. The principal registered her presence and then turned her away. A personnel letter reminded her, "[Y]ou have no status as a member of the Patrick Henry Junior High School faculty."

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84. For a thorough discussion of the resurgence of a mass feminist movement in the late sixties, and of young women's participation in the civil rights and New Left movements, see SARA EVANS, PERSONAL POLITICS: THE ROOTS OF WOMEN'S LIBERATION IN THE CIVIL RIGHTS MOVEMENT AND THE NEW LEFT (1979).
86. Id. at 12.
87. Id. at 15.
88. Id. at 15-16.
90. Nesset-Sale, supra note 81, at 18.
LaFleur repeatedly sought out potential sources of aid, each of which then
denied her a remedy. She requested union counsel to represent her both in
school board hearings and federal court. But the union did not offer her
support. She contacted the local chapter of the American Civil Liberties
Union (ACLU), only to hear that her case was not winnable. LaFleur next
called the library for the Plain Dealer, Cleveland’s largest newspaper, and
asked for the names and telephone numbers of two or three women’s
organizations. After tracing a line of referrals, LaFleur reached Jane Picker,
then a volunteer advocate with the Women’s Equity Action League, who
proved eager to help.

2. Jane Picker and the Makings of a Landmark Case

Jane Picker was no stranger to sex discrimination. She graduated from Yale
Law School in 1960 as one of a handful of women in her class. After moving to
Cleveland when her husband, Sidney Picker, received a job teaching at Case
Western Reserve Law School, Jane Picker became involved with the Women’s
Equity Action League (WEAL). Elizabeth Boyer, a local women’s rights
leader, and other Ohio members of the National Organization for Women
(NOW) founded WEAL in Cleveland in 1968. Boyer wanted to form an
organization as an alternative to NOW that would pursue women’s economic
advancement, but not abortion rights, through educational, legislative, and
judicial legal channels, rather than via public protest. In 1972, following a
dispute with Boyer over WEAL’s litigation activities, Picker would form a
sister organization, the Women’s Law Fund, to carry out a court-oriented
agenda.

First though, Picker accepted a job in early 1970 with a leading Cleveland
firm: Squire, Sanders & Dempsey. Picker served as the first female lawyer to
work at the firm in the position of attorney. Picker recalls that the firm had
hired two female lawyers previously, one whom they employed as a librarian.
and another whom they relegated to work filling out tax forms. Squire, Sanders & Dempsey confined Picker to backroom research because she was a woman. "I wanted litigation experience and they were not about to let a woman work in litigation," she said. Picker saw that the firm had allowed its few black lawyers to do pro bono work, even though it barred them from face-to-face work with paying clients and from courtroom appearances; so, she asked to do the same. Though the decision proved controversial, the firm ultimately allowed her to take some pro bono clients. And then Picker received the call from LaFleur.

A large litigation campaign did not loom at the forefront of Picker's mind when LaFleur contacted her. The strategy would come later. Picker recalls today that for the moment, "We had a client; we had a problem." Yet, Picker also anticipated the landmark character of the nascent case facing her, predicting it would go all the way to the Supreme Court. Her gumption proved "fortuitous," as she based all her preparation on this correct assumption.

Soon, a second plaintiff emerged. Ann Elizabeth Nelson taught French to seventh, eighth, and ninth graders at Central Junior High School in Cleveland. She did not qualify for the Board’s maternity leave, however, because she had not yet served one continuous year. When the Cleveland Board of Education learned of Nelson’s pregnancy, it discharged her outright on March 26, 1971.

Picker faced the task of convincing a federal court that pregnant workers no longer warranted protective treatment and instead possessed a legal right to treatment as autonomous individuals. The 1908 Supreme Court case Muller v. Oregon, still good law in 1970, posed the largest doctrinal hurdle. Muller upheld a state law limiting the workday for female factory and laundry employees to ten hours. The Court reasoned that protecting a woman's physical health, and consequently her childbearing capacity and the health of her offspring, constituted a public concern. In 1971, a court might similarly reason that protecting pregnant female teachers from injury by requiring them to take leave amounted to a legitimate state interest. Under the rational basis test then applicable to sex classifications, the school’s policy would probably pass muster if a district court reached this conclusion. Picker remembers that she “wrote the brief in a way so as not to lead back to Muller.”

101. Id. at 20.
102. Id. at 1.
103. Id. at 2.
104. Id. at 4.
105. Id. at 3.
107. Id.
109. Interview with Jane M. Picker & Sidney Picker, supra note 96.
3. The District Court Hearing in LaFleur

The record produced by the district court hearings in *LaFleur* provides a window into competing legal and cultural constructions of pregnancy. The defendant school board used the rhetoric of gender protection to justify its pregnancy dismissal policy. The record, however, alluded to other motivations for the maternity leave policies: concerns about the visual representation of sexuality in the schools and traditional gender ideals regarding pregnancy and motherhood. The plaintiffs in *LaFleur* and their advocates sought to convince courts that the state’s construction of employment policies on the basis of sex-role stereotypes violated evolving constitutional and statutory standards of sex equality. The plaintiffs sought to redefine the pregnancy dismissal policy as an overbroad classification that violated the civil rights principle of individual treatment. To challenge the prohibition on female teachers working past the mid-point of their pregnancies, the plaintiffs portrayed pregnant women as presumptively healthy. To challenge the prohibition on new mothers’ return to work, the plaintiffs depicted the policy as serving anachronistic cultural ideals.

In defending against the legal challenge to its pregnancy dismissal policy, the Cleveland Board of Education marshaled a decades-old gendered rhetoric of protection. The defendants called a prominent Cleveland obstetrician-gynecologist, William Wier, to testify regarding the medical risks of pregnancy. Wier thoroughly rehearsed the myriad medical complications that accompany each stage of pregnancy: spontaneous abortion, nausea, vomiting, and headaches during the first trimester; spontaneous labor, premature delivery, and toxemia during the second; and even graver dangers of more serious toxemia and placenta previa during the third. Wier also identified psychological effects of pregnancy, explaining that women “are worried about the probability of a miscarriage . . . difficulties in labor and abnormalities in the children.” Wier suggested that working in the schools would exacerbate these physical and psychological vulnerabilities. For example, the shoving and pushing that presumably occurred regularly in school hallways could produce the potentially lethal “premature separation of the placenta.” Although Wier conceded that he had no medical evidence to back the claim, he suggested that the hormonal changes produced by the stress of teaching might induce premature labor.

Race featured explicitly in the school board’s rhetoric of gender protection. The lawyers for the school board portrayed Cleveland’s schools as dangerous places to work. The attorneys highlighted the racial and class composition of

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111. *Id.* at 110.
112. *Id.* at 112-13.
113. *Id.* at 111-12.
the student body to underscore Jo Carol LaFleur’s social status as a white female, asking her to characterize the approximately 2200 students then attending Patrick Henry Junior High School: "And they were all from the inner city?" "Yes," LaFleur replied. "About 100 percent black, are they not?" The interchange suggested that the increased racial tensions and violence in the inner cities during the late sixties had heightened the significance of pregnancy dismissal policies for their policies’ proponents.

The record made clear, however, that the original motivation for Cleveland’s pregnancy dismissal policy had little to do with the protection of the pregnant teacher. Instead, the policy reflected a fear of students’ reactions to the pregnant female body as an emblem of sexuality. Attempting to demonstrate the rationality behind the proposal’s enactment, the defense deposed Mark Schinnerer, then Superintendent of the Cleveland Public Schools, who had introduced the maternity leave provision in the early 1950s. Schinnerer explained that he had designed the policy to avoid situations in which pregnant women “were subjected to humiliations, indignities on the part of pupils, generally, who giggled about it.” Schinnerer suggested that the presence of pregnant teachers in the classroom would both embarrass these teachers and disrupt the educational process. The Board of Education chose four months as the cut-off date because “it was about a halfway point and it was at that point when the physical appearance begins to change.”

Although the Board of Education had never explicitly defended its pregnancy dismissal policy on the basis of fears about the visual representation of sexuality in the classroom, the plaintiffs attempted to expose the cultural anxieties that lay beneath the surface of the Board’s legal defense. The plaintiffs contested the notion that students reacted negatively to pregnant teachers in the classroom. Part of the irony of the case arose from the fact that LaFleur had taught a class in which several of the students had actually been pregnant. LaFleur testified that when she told her transition class about her pregnancy, “there was a big round of applause that went up from the girls . . . and various delightful comments.” The girls did not make any snide remarks but rather “were tickled pink and were very happy for me.” Students in the study hall section LaFleur taught planned to have a shower for her, and one

114. Id. at 65.
116. Id. at 11.
117. Id.
118. Id. at 16.
119. Transcript of Hearing, supra note 110, at 57.
120. Id. at 55.
121. Id.
young mother offered to give her maternity clothes to LaFleur. The plaintiffs endeavored to show that the pregnancy dismissal policy, rather than pregnancy, disrupted the educational process.

The notion that teaching would jeopardize the health of a pregnant woman and her fetus did form one of Cleveland's explicit defenses. The plaintiffs argued that this defense reflected a stereotype inconsistent with the current medical consensus. In contrast to the defendants' construction of pregnant women as vulnerable and in need of protection, the plaintiffs portrayed pregnant women as presumptively healthy and able to work. The portrayal of pregnancy as a normal, healthful condition rather than an illness constituted a pragmatic litigation strategy and also reflected Nelson and LaFleur's personal experiences. In a handwritten appeal to the Assistant Superintendent for Personnel contesting her leave status, LaFleur wrote about her pregnancy, "I feel extraordinarily well. My doctor says that I am in excellent physical condition; yet the Administration has the gall to tell me that I am unfit for a classroom." LaFleur argued that the pregnancy dismissal policy discriminated on the basis of overbroad stereotypes: "It seems unfair to punish all pregnant women for the difficulties encountered by a few of them." While advocates had analogized pregnancy to a disability for the purpose of obtaining disability benefits for pregnant women on leave, LaFleur used evidence of her own health and evolving obstetrical protocols to normalize the condition of pregnancy and to argue for the continued right to employment.

Just as Eileen Rossi had done in critiquing San Francisco's pregnancy dismissal policy, the plaintiffs in LaFleur also used evolving medical opinion to delegitimize Cleveland's policy. At trial, the plaintiffs called Ann Elizabeth Nelson's obstetrician, Verners Rutenbeigs, as a witness. He had told Nelson that "she could teach as long as she felt motivated to do so." Rutenbeigs believed women could work throughout pregnancy so long as they were in good health and not required to engage in strenuous physical activity with risk of injury. Ann Nelson's chances of having placenta previa and toxemia were the same as any other women's chances: about one in 200 to 250 and about one in ten respectively. The plaintiffs' attorneys made a case that all pregnant women lived with risks and that employment as a teacher did not significantly exacerbate them.

The plaintiffs attempted to reframe Cleveland's maternity leave provision as an example of the state protective labor standards that EEOC regulations and

122. Id. at 57.
123. Id. at 25-26.
124. LaFleur, supra note 89, at 1-2.
125. Id. at 2.
126. Transcript of Hearing, supra note 110, at 82.
127. Id. at 82-83.
128. Id. at 94-95.
a number of federal courts had invalidated. The strategy represented an attempt to shape constitutional litigation with reference to the evolving standards of sex discrimination under Title VII. Lawyer Carol Agin questioned the Board of Education's personnel supervisor about his testimony regarding the number of physical assaults on teachers. Agin asked whether the supervisor had ever considered excluding all women from teaching, or all women weighing under 150 pounds, "because of their inability to defend themselves." The judge, however, stymied this line of questioning: "Whether he has considered it or not wouldn't make any difference to me in deciding this lawsuit." Agin strategically analogized pregnancy to other disabilities: "Do men teachers with heart conditions get assaulted? . . . Isn't there a problem . . . that his assault might cause another heart attack?" The judge sustained an objection from the defendants' attorney.

Last, plaintiffs challenged the stereotype that new mothers belonged in the home. The policy that Cleveland Superintendent Schinnerer established had included a prohibition on women's return to work for six months following childbirth. The school board had since modified the policy to allow women to return at the three-month mark. Schinnerer testified in deposition, "I am a strong believer that young children ought to have the mother there. . . . [I]t is very important that they be there for the love and tender care of the babies." The defendant school board's trial memorandum had made no mention of the three-month ban on return to employment. A quotation placed at the end of the memorandum suggested that the Board, like Schinnerer, continued to believe that Cleveland's policy had more to do with mothers' childrearing duties than it did the question of new mothers' capacity to work. The Board's memorandum concluded with a biblical quote: "One is reminded of the words of the Prophet Isaiah: 'Can a woman forget her sucking child, that she should not have compassion on the son of her womb.'"

The district court denied LaFleur and Nelson's request for a temporary injunction. The presiding judge, James C. Connell, appointed to the bench by President Eisenhower in 1954, saw little merit in her claims. Connell began by discussing the protective motivation behind the school board's maternity leave policy, citing evidence presented by the defendant respecting pregnant women's physical and psychological vulnerability. Under a standard of rational

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129. Because Squire Sanders had the Cleveland Board of Education on retainer as a client, Jane Picker could not argue LaFleur in court. Instead, lawyer Carol Agin argued the case. Interview with Jane M. Picker & Sidney Picker, supra note 96, at 3.
130. Transcript of Hearing, supra note 110, at 227.
131. Id.
132. Id. at 228.
133. Id.
134. Transcript of Deposition of Dr. Mark C. Schinnerer, supra note 115, at 26-27.
basis review, Judge Connell found that state governments had broad discretion in exercising the police power for the common good and that the policy at issue reflected a reasonable use of this power. Finally, Picker’s fears about Muller v. Oregon came true. The district court opinion in LaFleur cited Muller for the proposition that limitations placed upon women’s employment did not violate the Equal Protection Clause, quoting the 1908 Supreme Court opinion regarding differences in women’s physical anatomy and social roles.  

Five days later, Judge Robert R. Merhige, presiding in the U.S. District Court for the Eastern District of Virginia, came to opposite conclusions in a nearly identical case: Cohen v. Chesterfield County School Board.  

Bob Merhige began his law career in the same segregated Richmond in which Jo Carol LaFleur grew up, and like LaFleur, had gradually come to recognize the depth of racial injustice around him. Although Merhige did not advocate on behalf of civil rights as a lawyer in the private sector, once appointed to the bench by President Johnson in 1967, he quickly became embroiled in the battle over civil rights. Merhige presided over more than forty school desegregation cases. He interpreted the Supreme Court’s decision in Green v. County School Board as a clear statement that Brown now stood for an affirmative integration mandate. Merhige also had demonstrated a commitment to sex equality prior to deciding Cohen. In 1969, Merhige had written an opinion for a three-judge district court, holding that the exclusion of women from the undergraduate college at the University of Virginia violated women’s rights to equal protection.  

In his Cohen opinion, Merhige stated that no medical evidence justified the school board’s regulation requiring female teachers to take maternity leave at the end of five months of pregnancy. The judge wrote that pregnant women should be treated as individuals: “[S]ince no two pregnancies are alike, decisions of when a pregnant teacher should discontinue working are matters best left up to the woman and her doctor.” Merhige held that the maternity

136. LaFleur, 326 F. Supp. 1208.
139. 391 U.S. 430 (1968) (striking down freedom-of-choice plans as an ineffective mechanism to achieve desegregation that unjustly placed the burden of integration on black children and parents).
policy discriminated against women because it treated pregnancy differently than other medical disabilities.\footnote{143 Id. at 1161.} Three years into the future, the Supreme Court would consolidate these two cases, \textit{Cohen} and \textit{LaFleur}, on petition for a writ of certiorari and would confront the competing legal positions they represented: one holding mandatory maternity leaves constitutional and the other finding them unconstitutional.

\section*{II. \textbf{PREGNANCY DISCRIMINATION CASES IN THE LOWER FEDERAL COURTS: FROM THE CIVIL RIGHTS MODEL TO \textit{SEX EQUALITY TO SUBSTANTIVE DUE PROCESS}}}

Over the course of litigation efforts during the early 1970s, legal feminists argued that pregnancy dismissal policies violated their rights to equality and to liberty under the Fourteenth Amendment. Legal feminists attempted to translate their vision of justice, which labor feminists had pursued in organizing campaigns, into doctrinal claims that the courts might recognize. Feminist attorneys argued that pregnancy dismissal policies violated both the Equal Protection and Due Process Clauses. The separation of equality and liberty as a matter of constitutional structure and judicial doctrine, however, made it difficult for legal feminists to articulate the relationship between these interests in legal claims. Part II discusses the doctrinal and institutional obstacles legal feminists faced as they undertook the vexing process of translating socioeconomic claims into legal ones. This Part analyzes legal feminists’ successes and disappointments in persuading courts that women possessed interrelated rights to equal employment opportunity and reproductive liberty.

This Part first examines legal feminists’ effort to convince the lower federal courts that pregnancy dismissal policies violated women’s rights under the Equal Protection Clause. In cases challenging these policies, plaintiffs and their attorneys made two broad argumentative moves: They argued, to begin, that discrimination on the basis of pregnancy constituted sex discrimination and, furthermore, that sex, like race, should trigger a strict scrutiny standard of review. In making these arguments, legal feminists faced two corresponding obstacles. Courts initially applied a formalist conception of sex equality that failed to recognize how the legal regulation of pregnancy on the basis of sex-role stereotypes contributed to women’s inequality. Even when courts began to recognize the relationship between pregnancy-based and sex discrimination, however, they resisted plaintiffs’ arguments for strict scrutiny on the ground that ‘real’ biological differences necessitated the ongoing salience of sex differentiation under the law.
Second, this Part examines legal feminists’ efforts to convince the lower federal courts that pregnancy dismissal policies violated women’s rights under the Due Process Clause. In addition to challenging these policies as a violation of sex equality, legal feminists challenged the policies as an infringement of women’s reproductive privacy rights. Most notably, Ruth Bader Ginsburg, then counsel for the ACLU Women’s Rights Project, began as early as 1971 to experiment with the argument that by forcing women to choose between motherhood and work, the dismissal policies infringed on women’s right to bear children. In 1973, the Supreme Court’s decision in *Roe v. Wade* opened the door wider to substantive due process arguments against pregnancy dismissal policies. Feminist attorneys began to argue that just as women had a right to abortion, so too did they have a fundamental right to bear children. Pregnancy discrimination, they argued, burdened this right.

The holding, which at least one federal court had reached by 1973, that pregnancy dismissal policies infringed women’s reproductive rights under the Due Process Clause, held implications for women’s right to sex equality as well as reproductive liberty. The family-wage system took as one premise that bread-winning men would pay for the costs associated with pregnancy and childbirth, including medical expenses and women’s lost income during periods of physical incapacity and early infant caregiving. The holding that the denial of equal employment opportunity to childbearing women infringed upon their reproductive liberty entailed a sea change in the view of the family. Such a holding suggested that women should be treated as independent individuals competing in the public sphere rather than socioeconomic dependents within the family.

### A. The Liberalization of Maternity Leave Policies Under the Equal Protection Clause

Legal feminists successfully leveraged evolving antidiscrimination principles to challenge pregnancy dismissal policies under the Equal Protection Clause. Yet, they also faced significant resistance to their doctrinal goals from judges who subscribed to a formalist conception of sex equality and who believed in the extant legal relevance of biological sex difference. When plaintiffs first began to bring lawsuits challenging the pregnancy dismissal policies in 1971, they drew on the civil rights model to convince courts that the policies constituted arbitrary classifications, unconstitutional under rational basis review. Courts, however, rejected plaintiffs’ argument that that the dismissal policies discriminated on the basis of sex. By 1972, courts began to internalize plaintiffs’ arguments that the dismissal policies reflected sex-role stereotypes inherent to gender inequality. Courts nonetheless refused to accept
plaintiffs’ arguments that they should make sex a suspect class under the Equal Protection Clause.

1. Rational Basis Scrutiny and Sex-Role Stereotypes

Evolving principles of antidiscrimination law led courts to hold pregnancy dismissal policies unconstitutional. These principles included the need to justify state action on the basis of rational and empirically based social policy as well as the eschewal of overbroad stereotypes. In response to the first wave of plaintiffs’ suits in 1971 and 1972, courts began to hold that the policies lacked justification in current medical standards and unfairly classified women as a group on the basis of anachronistic stereotypes concerning pregnancy and gender roles.\(^{144}\) Despite ruling in plaintiffs’ favor, these opinions employed a formalist interpretation of the classifications at issue to reject plaintiffs’ argument that the policies amounted to unconstitutional sex discrimination.

Judges’ insistence on evidence-backed and consistently applied social policy reflected the influence of a particular model of civil rights. This model construed discrimination as the legal imposition of overbroad social stereotypes that harmed individuals within the stereotyped group.\(^ {145}\) Judges paid homage to this principle when they concluded that mandatory leave policies lacked evidence supporting their rationality. For example, one district court judge found that the board’s policy of allowing pregnant students and substitute teachers contradicted its alleged rationales for the pregnancy dismissal policies.\(^ {146}\) School boards often justified the policies on the ground that they purportedly served continuity in children’s education. When courts interrogated this rationale, they found that the policies actually harmed children’s educational continuity.\(^ {147}\)

Plaintiffs used evidence of evolving medical standards to reveal the policies as rooted in outdated stereotypes. Courts found such evidence persuasive. For example, the Northern District of Illinois found that no valid medical opinion backed a school board’s claim that its dismissal policy

\(^{144}\) But see, e.g., Schattman v. Tex. Emp’t Comm’n, 459 F.2d 32, 39 (5th Cir. 1972) (holding that the state employer did not violate the Equal Protection Clause because the defendant “did not terminate her employment because she was a woman or because she became pregnant but only because her pregnancy was far advanced”); Struck v. Sec’y of Def., 460 F.2d 1372 (9th Cir. 1971) (upholding U.S. Air Force pregnancy discharge policy); Miller v. Indus. Comm’n, 480 P.2d 565, 568 (Colo. 1971) (upholding denial of full unemployment compensation award to women who took maternity leave on ground that “special consideration of pregnancy cannot be said to be unreasonable and therefore unconstitutional”).

\(^{145}\) The definition of civil rights did not represent a static or predetermined concept, but itself had a dynamic history rife with ideological and political contest. For a discussion of the conflict over the meaning of civil rights in the 1940s and 1950s, tracing a shift from claims rooted in economic exploitation to claims focused on formal equality and the psychological harm wrought by racial stereotypes, see Risa L. Goluboff, THE LOST PROMISE OF CIVIL RIGHTS (2007).


\(^{147}\) See, e.g., id.
protected pregnant teachers.\textsuperscript{148} The Northern District of Ohio noted that medical evidence presented at trial revealed the irrationality of a leave requirement at the end of the fourth month of pregnancy.\textsuperscript{149} In reality, the first and not the second trimester posed the most danger to the expectant mother.\textsuperscript{150} Likewise, a Northern District of California opinion quoted at length from written statements and affidavits by obstetricians attesting to the physical and psychological benefits of work to pregnant women as well as to individual variation in pregnant women’s capacity to work.\textsuperscript{151}

Courts also interpreted the Supreme Court’s 1971 decision in Reed v. Reed, the first to strike down a law as a violation of sex discrimination, as further heightening the prohibition of government regulation of persons on the basis of overbroad stereotypes, rather than the liberal principle of individual treatment. In Reed, the Court employed a rational basis standard of review to invalidate an Idaho law expressing a preference for male over female estate administrators as a violation of the Equal Protection Clause.\textsuperscript{152} Commentators at the time saw the decision as employing an intermediate standard of review, greater than rational basis scrutiny but less than strict scrutiny.\textsuperscript{153} The Southern District of Ohio applied Reed to a pregnancy dismissal case, interpreting the Supreme Court’s decision to prohibit the perpetuation of “old sexual stereotypes, in the guise of benign protective statutes.”\textsuperscript{154} Instead, the district court endorsed a new paradigm of individual treatment: “Any rule by an employer that seeks to deal with all pregnant employees in an identical fashion is dehumanizing to the individual women involved and is by its very nature arbitrary and discriminatory.”\textsuperscript{155}

Even when lower federal courts applied Reed as precedent, however, they proved reluctant to view the pregnancy dismissal policies within a sex equality framework. Indeed, despite the undercurrents of sex equality in their opinions, judges balked at plaintiffs’ proposition that the challenged pregnancy dismissal policies constituted sex discrimination. For example, one judge reasoned that a challenged policy drew distinctions “between teachers who are required to stop working during their sixth and subsequent months of pregnancy . . . and all other teachers[,] . . . and between teachers on maternity leave and those [teachers] . . . on other types of leaves. These obviously do not involve criteria that can be characterized as suspect.”\textsuperscript{156} Courts’ logic evinced a formalist

\textsuperscript{148} Id.
\textsuperscript{150} Id.
\textsuperscript{152} 404 U.S. 71 (1971).
\textsuperscript{154} Heath, 345 F. Supp. at 506.
\textsuperscript{155} Id. at 505.
\textsuperscript{156} Bravo v. Bd. of Educ., 345 F. Supp. 155, 157 (N.D. Ill. 1972); see also Heath, 345 F. Supp. at 507 (holding the pregnancy dismissal policy irrational but not finding sex discrimination).
interpretation of sex equality, which distinguished between classifications on the basis of pregnancy and classifications on the basis of sex. Formalist reasoning blinded judges from seeing that pregnancy dismissal policies relied upon stereotypes regarding female sexuality, pregnant women's capacity for work, and the family-wage system.

In addition to formalism, a persistent belief in the importance of biological difference to the law caused judges to reject the sex discrimination paradigm. A district court that found the challenged regulations unconstitutional nevertheless reasoned: "Despite the rising crescendo of controversy about Women's Liberation which has been raging in the popular press recently, this Court is willing to conclude that there are certain ineluctable differences between men and women."\textsuperscript{157} Pregnancy dismissal policies might be irrational, but their legal invalidation could not herald the erosion of sex differentiation under the law.

2. \textit{A Cautious Embrace of the Sex Discrimination Paradigm}

By the spring of 1972, the courts had moved beyond early determinations that pregnancy dismissal policies constituted irrational state action in violation of the Equal Protection Clause, to hold that these policies violated women's right to sex equality. Courts' new willingness to analyze the policies within a sex equality framework reflected the rising influence of the second-wave feminist movement and of nascent constitutional and statutory sex equality jurisprudence. These cases did more than prohibit overbroad, arbitrary classifications that denied individual treatment. The cases explicitly characterized legal regulation of pregnancy on the basis of sex-role stereotypes as sex discrimination.

The courts explicitly acknowledged the relationship between evolving social standards, feminist political activism, and their holdings in the pregnancy discrimination cases. In April 1972, Judge Constance Baker Motley in the Southern District of New York denied New York City's motion for summary judgment in a class action suit claiming that pregnancy dismissal policies violated equal protection.\textsuperscript{158} Motley—formerly a leading NAACP attorney and New York State Senator—wrote: "It is true, as plaintiffs claim, that equal rights for women is an idea whose time has come. As a result, the courts have begun to re-examine all sex based restrictions and to apply with increasing sensitivity the guarantee of equal protection of the laws to prohibit arbitrary sex discrimination.

\textsuperscript{157} Heath, 345 F. Supp. at 505.

discrimination.” The Second Circuit spoke with even greater candor: “One realizes with a shock what so many women now proclaim: Old accepted rules and customs often discriminate against women in ways that have long been taken for granted or have gone unnoticed.”

Judges, however, drew lines in the sand. Though willing to connect pregnancy discrimination to sex inequality, judges did not follow plaintiffs’ suggestion that they treat sex as a suspect class and apply heightened scrutiny under the Equal Protection Clause. From the perspective of legal formalism, making sex a suspect class in a case concerning pregnancy—the exemplar of sex difference—appeared paradoxical. From the plaintiffs’ perspective, however, the pregnancy dismissal cases illustrated precisely the need for strict scrutiny for sex-based classifications. The legal regulation of pregnancy on the basis of sex-role stereotypes formed the crux of gender hierarchy. Strict scrutiny for sex would shed a harsher light on the legal regulation of gender, including pregnancy-related regulation, which might otherwise appear to the courts as rational, familiar, and intuitively logical.

Part of the lower courts’ reluctance derived from the fact that the Supreme Court, at the time, did not provide clear guidance. In the case of Frontiero v. Richardson, decided in May 1973, Justice Brennan authored a plurality opinion arguing that sex was “inherently suspect” and, like race, merited strict scrutiny under the Equal Protection Clause. Brennan, however, proved unable to muster a majority in support of his position. Justice Stewart concurred in the plurality’s judgment. Justice Powell wrote a separate concurrence arguing that the pendency of the Equal Rights Amendment (ERA), which had passed Congress and now awaited ratification by the states, should prevent the Court from prematurely resolving the standards applicable to sex. In deciding the pregnancy discrimination cases, the lower courts interpreted Frontiero as a sign that the equal protection standards applicable to sex remained ambiguous; most avoided weighing in on the controversy and decided the cases under rational basis scrutiny.

159. Id.
163. Id. at 682.
164. For further discussion, see Serena Mayeri, “When the Trouble Started”: The Story of Frontiero v. Richardson, in WOMEN AND THE LAW STORIES (Elizabeth M. Schneider & Stephanie M. Wildman eds., 2010).
165. Id. at 692 (Powell, J., concurring).
In the spring of 1972, however, when LaFleur appealed her case to the Sixth Circuit, the Supreme Court had not yet handed down *Frontiero*. Both parties in *LaFleur* contested the level of scrutiny that the Sixth Circuit should apply to sex-based classifications. The teachers, as plaintiff-appellants, relied on a California Supreme Court case and a *Harvard Law Review* Note to make the argument that sex, like race, should be considered a “suspect classification” under the Equal Protection Clause. The defendant-appellees responded that the Supreme Court had never held sex to be a suspect classification. The school board argued that the Sixth Circuit should act with caution because the Equal Rights Amendment had passed Congress and was pending ratification by the states. Adoption of the strict scrutiny standard, the board warned, would “gratuitously expose[] the multitude of existing sex-related laws to judicial ‘amendment,’ without consideration of whether judicial, legislative, or constitutional reform, or a combination, is the best procedure for upgrading women’s rights.”

The board implied that the expansion of sex equality rights under the Equal Protection Clause would lack democratic legitimacy. In stark contrast to the Cleveland school board, which argued that evolving sex discrimination doctrine under Title VII should not inform the Sixth Circuit’s interpretation of the Equal Protection Clause, the plaintiffs drew on precedent under Title VII to make their constitutional argument. This strategy represented an effort to infuse constitutional argument with popular understandings of sex equality. Since the mid-1960s, feminists had used democratic channels to articulate their vision of sex equality. They had campaigned for the inclusion of a sex provision within Title VII, pressured the EEOC to enforce this sex provision, and advocated for the temporary disability paradigm. Now, feminist advocates sought to use their successes in the legislative and administrative spheres to shape the development of equal protection doctrine. In the early 1970s, courts had not yet sharply distinguished between constitutional and statutory standards. The plaintiff-appellants in *LaFleur* had ample doctrinal space in which to maneuver.

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169. This type of argument prefigured Justice Powell’s concurrence in *Frontiero v. Richardson*, 411 U.S. 677, 691 (1973).


171. In the mid-1970s, courts began to more rigidly delineate between constitutional and statutory standards of equality. See, e.g., *Washington v. Davis*, 426 U.S. 229, 242 (1976) (holding that the
The effort to tie constitutional standards of sex equality to statutory ones was at once strategic and political. When Jane Picker first began to prepare the *LaFleur* case for briefing and argument before the district court, the federal courts' nascent sex equality jurisprudence did little to support her challenge to the school district's mandatory maternity leave policy. Picker and Agin turned to another source of law that might potentially illuminate the meaning of constitutional sex equality: the nascent body of court opinions and administrative regulations under the sex equality provision of Title VII. They drew upon Title VII even though the statute at that time did not cover state governments and educational institutions. Picker and Agin had argued before the district court that a Title VII case striking down a mandatory maternity leave policy buttressed their constitutional challenge to the Cleveland Board of Education policy. The strategy did not prove successful at the district court level, however. In ruling for the defendants, the U.S. District Court for the Northern District of Ohio held that because Title VII did not form the basis of jurisdiction in *LaFleur*, the Title VII case did not offer the plaintiffs any support.

Just as Picker and Agin felt that Title VII and EEOC authority held relevance for their case, so too did EEOC staffers feel that they had a stake in the case's outcome. The fluidity between statutory and constitutional standards of sex equality reflected the personal and ideological connections between feminist attorneys pursuing litigation and the few feminist staffers at the EEOC. Susan Deller Ross, the EEOC staffer most instrumental in devising the 1972 EEOC guidelines on pregnancy discrimination, asked the Sixth Circuit's permission to participate in oral argument and to file a reply brief on disparate impact theory of discrimination, cognizable under Title VII, is not similarly available under the Equal Protection Clause).


173. *Id.* at 11-12 (citing *Schattman v. Tex. Emp't Comm'n*, 330 F. Supp. 328 (W.D. Tex. 1971) (holding that the termination of female employees at seven months of pregnancy was a violation of Title VII), *rev'd* 459 F.2d 32 (5th Cir. 1972)). The Fifth Circuit later reversed the district court opinion in the Title VII case cited by Picker and Agin. *Schattman v. Tex. Emp't Comm'n*, 459 F.2d 32 (5th Cir. 1972).


behalf of amicus curiae.176 The EEOC brief argued that under Reed, the school board must support its policy with evidence rather than stereotypes and that administrative convenience could not serve as a justification for sex discrimination.177 After oral argument, but before the Sixth Circuit had decided the case, Congress amended Title VII to reach educational institutions and governments.178 The next month, the EEOC issued its sex discrimination guidelines adopting the temporary disability paradigm.179 Ross wrote to the clerk for the Sixth Circuit calling attention to the new legislation and suggesting that the guidelines, though not directly applicable, nonetheless offered an “appropriate standard to use in deciding this case.”180 Ross felt that the EEOC, as the agency responsible for enforcing the sex equality mandate under Title VII, could influence the court’s understanding of constitutional sex equality. Ross must also have feared that the ratchet could go both ways. An adverse decision under the Equal Protection Clause might have negative consequences for the robust enforcement of the sex provision under Title VII.

The Sixth Circuit’s July 1972 decision in LaFleur held that Cleveland’s pregnancy dismissal policy violated the Equal Protection Clause.181 The decision reflected the influence of evolving sex equality standards under Title VII. The majority opinion took note of Congress’s amendments to Title VII and the EEOC guidelines regarding pregnancy discrimination.182 The court did not explain, however, exactly what significance statutory antidiscrimination law held for standards of constitutional interpretation. Clues throughout the opinion suggest that the court found Title VII standards relevant to constitutional sex equality. The court distinguished an unfavorable Fifth Circuit decision under Title VII not by differentiating between statutory and constitutional standards of sex equality, but rather by reasoning that the regulation at issue in the Fifth Circuit case had less drastic consequences for female workers.183 Furthermore, the temporary disability model enshrined in the EEOC guidelines shaped how


181. LaFleur, 465 F.2d at 1185, 1188-89.

182. Id. at 1186.

183. The regulation at issue in the Title VII case imposed mandatory maternity leave at the seventh month rather than the fourth or fifth month of pregnancy. Id. (citing Schattman v. Tex. Emp’l Comm’n, 459 F.2d 32 (5th Cir. 1972)).
the court understood the pregnancy dismissal policy. The court explained that
the differential treatment of pregnancy, though a condition unique to women,
constituted sex-based discrimination: "Male teachers are not subject to
pregnancy, but they are subject to many types of illnesses and disabilities." 184

While the Sixth Circuit concluded that sex-role stereotypes, rather than
inherent biological difference, lay at the heart of the pregnancy dismissal
policies, the Fourth Circuit came to the opposite conclusion in Cohen v.
Chesterfield County School Board. 185 The majority opinion for an en banc court
reversed Judge Merhige's opinion for the Eastern District of Virginia and ruled
for the defendant school board. 186 The opinion's language slipped between
formalist and normative conclusions. The court suggested that equal protection
only prohibited classification between males and females to the extent that the
sexes were similarly situated. Accordingly, the decision held that classifications
on the basis of pregnancy could not constitute sex discrimination because
pregnancy was a condition unique to females. 187 The court cited for support
other laws regulating single-sex characteristics: the criminalization of rape
by males, military regulations requiring men to shave their beards, and regulations
prohibiting women from revealing their breasts in public. 188

The Fourth Circuit, however, described reproductive sex difference in
romantic terms that alluded not only to pregnancy but also to gender roles. The
opinion further explained that the laws of society could not overcome those of
nature: "No man-made law or regulation excludes males from those
experiences, and no such laws or regulations can relieve females from all of the
burdens which naturally accompany the joys and blessings of motherhood." 189
Having rejected the link between pregnancy-based and sex-based
discrimination, and having found no other reason to apply a strict scrutiny
standard of review, the court applied rational basis review to uphold the
defendant's pregnancy dismissal policy. 190

Once again, Cohen and LaFleur formed a dyad, though in the circuit courts
of appeals the cases reversed positions: LaFleur came out in favor of the
teachers and Cohen for the school board. In less than two years, the Supreme
Court would resolve the conflict between the holdings. But in the meantime
plaintiffs continued to litigate.

184. Id. at 1188.
185. 474 F.2d 395 (4th Cir. 1973) (en banc).
186. Id. at 399.
187. Id. at 397 ("The fact that only women experience pregnancy and motherhood removes all
possibility of competition between the sexes in this area.").
188. Id.
189. Id.
190. Under the rational basis standard, the Fourth Circuit held that the defendant school board
needed only to show that the pregnancy dismissal policy reasonably related to the state's legitimate
interest in promoting educational continuity. Id. at 398-99.
B. Struck v. Secretary of Defense and Legal Feminist Experimentation with Fundamental Rights Arguments Against Pregnancy Dismissal Policies

In November 1971, the Ninth Circuit Court of Appeals upheld the constitutionality of an Air Force regulation that called for the automatic discharge of officers upon a determination that they were pregnant or had given birth to a live child.\(^{191}\) Susan Struck, an Air Force nurse dismissed from her post in Vietnam because she was pregnant, had challenged the regulation. The Ninth Circuit affirmed a district court ruling for the government,\(^{192}\) holding that the statute rationally took account of the physical difference between an expectant mother and father. Had there been an attack, the court reasoned, Struck might have had a miscarriage and become "a patient instead of a nurse."\(^{193}\)

When the Supreme Court granted Captain Struck's petition for a writ of certiorari in October 1972, Ruth Bader Ginsburg saw an opportunity to realize the larger aim of achieving strict scrutiny for sex-based classifications.\(^{194}\) Ginsburg did not oppose sex-based classifications as a matter of formal equality, but rather argued that the Air Force's pregnancy discharge policy violated women's constitutional right to sex equality by imposing sex-role stereotypes.\(^{195}\) Ginsburg's brief before the Supreme Court noted that although the Air Force took multiple affirmative steps to accommodate fathers in service, it presumed Susan Struck "unfit for service under a regulation that declares, without regard to fact, that she fits 'into the stereotyped vision . . . of the 'correct' female response to pregnancy.'"\(^{196}\) The regulation imposed traditional sex roles on pregnant women by "reinforce[ing] societal pressure to relinquish career aspirations for a hearth centered existence."\(^{197}\) The Air Force's pregnancy discharge policy excluded childbearing women from participation in the military, the quintessential locus of male citizenship. The policy made visible how the legal regulation of pregnancy shaped women's unequal citizenship status.

\(^{191}\) Struck v. Sec'y of Def., 460 F.2d 1372 (9th Cir. 1971), vacated, 409 U.S. 1071 (1972).
\(^{192}\) Id. at 1374, 1377.
\(^{193}\) Id. at 1375.
\(^{197}\) Id. at 60.
The Supreme Court, however, never decided Struck on the merits and thus avoided deciding how the legal regulation of pregnancy might affect women’s rights under the Equal Protection Clause. In December 1972, after having vigorously opposed Struck’s recourse to the courts, the Air Force decided to extend her the “charity of a military commander” and waive the discharge regulations in her case. Ginsburg contended that the case was not moot because Struck had not yet received all the relief entitled her and because the Air Force continued to enforce the discharge policy with respect to other service members pursuing cases in the federal courts. The Court nevertheless vacated the judgment of the Ninth Circuit and remanded the case for consideration of the mootness issue. Frustrated in her efforts with Struck, Ginsburg pinned her hopes for achieving strict scrutiny on another case: Frontiero v. Richardson.

In Struck, Ginsburg had not only pursued strict scrutiny but had experimented, too, with fundamental rights arguments challenging the Air Force regulations, which forced a pregnant officer either to abort or to accept discharge. Ginsburg argued, before the Ninth Circuit and the Supreme Court, that the regulation violated Susan Struck’s right to reproductive privacy as well as her First Amendment right to free religious expression. With hardly any discussion, the Ninth Circuit dismissed this line of argument, finding that the “necessity for, or at least the high degree of rationality of [the regulation] shows plainly through the fabric of this case.” Ginsburg’s arguments reveal that she viewed sex equality and reproductive liberty as intertwined rights. In subsequent cases, feminist attorneys would similarly argue that these policies infringed upon women’s reproductive liberty as well as their equal employment opportunity.

The fundamental rights argument held both strategic strengths and weaknesses. The argument had the potential to circumvent the major doctrinal obstacle to the equal protection argument: courts’ formalist interpretation that sex equality did not reach sex-unique characteristics. An evaluation of whether a maternity policy infringed upon a fundamental right did not involve a comparison between women and men. Defendants, however, could also invoke the rights/privilege distinction to defeat the kind of privacy argument Ginsburg

199. Id. at 2-4.
203. Id. at 52-58.
204. Struck, 460 F.2d at 1376.
205. Siegel & Siegel, supra note 195, at 791, 796.
set forth in *Struck*. Justice Oliver Wendell Holmes famously articulated the rights/privilege distinction in the 1892 case of *McAuliffe v. Mayor of New Bedford*, which upheld the firing of a policeman under a regulation that restricted his political activities. Defendants could apply the same logic to pregnancy dismissal policies. If one expanded upon the substantive due process line of cases relating to familiar privacy from *Meyer v. Nebraska* and *Pierce v. Society of Sisters* through *Griswold v. Connecticut*, women might have a fundamental right to bear children. But, a defendant could argue, women did not have the right to work while exercising the right to bear children. In a second case challenging the Air Force discharge policy, *Gutierrez v. Laird*, the U.S. District Court for the District of Columbia resorted to the rights/privilege distinction. The court held that the policy did not infringe upon women's right to bear children but merely denied them the privilege of serving in the Air Force while exercising that right.

### C. Roe v. Wade and the Opening of Substantive Due Process Claims

In 1973, the Supreme Court's decision in *Roe v. Wade* enacted a revolution in substantive due process. The Court found a right "broad enough to encompass a woman's decision whether or not to terminate her pregnancy" in the "zones of privacy" created by the "First Amendment . . . the Fourth and Fifth Amendments . . . the penumbras of the Bill of Rights . . . the Ninth Amendment . . . or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment." *Roe* engendered not only political controversy, but also criticism by legal elites for its expansion of substantive due process doctrine reminiscent of the vilified *Lochner* era. Most famously, then-Yale Law School professor John Hart Ely critiqued the decision as having no basis in the constitutional text. For legal feminists, *Roe* represented a victory for abortion

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206. 29 N.E. 517, 517 (1892).
207. *Id.*
208. 262 U.S. 390 (1923) (holding that a law prohibiting the teaching of modern foreign languages to grade students violated teachers' and parents' substantive liberties under the Fourteenth Amendment).
209. 268 U.S. 510 (1925) (finding a substantive due process right to educate one's children outside the public school system).
210. 381 U.S. 479 (1965) (holding that a law prohibiting the use of contraceptives violated married couples' privacy rights).
212. *Id.* at 290-91.
214. *Id.* at 152.
rights but also a disappointment in its failure to locate the right to abortion in women's constitutional right to sex equality under the Equal Protection Clause. Nevertheless, legal feminists attempted to use Roe as a doctrinal basis upon which to articulate a constitutional vision for women's interdependent rights to economic autonomy and to reproductive liberty.

At the time the Court decided Roe, tremendous uncertainty existed regarding the contours of the Court's fundamental rights jurisprudence under the Due Process Clause. Risa Goluboff has recently uncovered internal Supreme Court memoranda demonstrating that the Court contemplated expanding substantive due process to include liberties that extended beyond the right to abortion to other exercises of individual freedom. The 1972 case of Papachristou v. City of Jacksonville struck down a criminal vagrancy statute as void for vagueness, but also implied a broad scope for the liberties that substantive due process might protect. The decision talked about the importance of the activities the defendants had engaged in, including walking, loafing, and strolling, as part of people's enjoyment of the "amenities of life." The earliest draft of Justice Douglas's majority opinion in Papachristou had argued that the right to enjoy the "amenities of life" formed part of those rights retained by the people under the Ninth Amendment. Later drafts located the right to enjoy the "amenities of life" in the Fourteenth Amendment's Due Process Clause. Brennan, however, had warned Douglas that deciding Papachristou on the basis of an expanded fundamental rights doctrine might alienate members of the Court, especially in light of the Roe v. Wade decision with which Justice Blackmun was then wrestling. When the Court did expand the bounds of substantive due process in Roe, it remained unclear the extent to which that doctrine might expand.

Legal feminists exploited that ambiguity to argue for a right to bear children concomitant to the right to abortion. The Roe v. Wade decision endowed feminists' use of fundamental rights doctrine to challenge pregnancy dismissal policies, a strategy that Ginsburg had begun to innovate in Struck, with greater discursive power. In February 1973, the ACLU Women's Rights

216. For a discussion of the women's movement's sex equality arguments for the right to abortion, see Reva B. Siegel, Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression, 56 Emory L.J. 815, 823-37 (2007).
218. 405 U.S. 156 (1972).
220. Id. at 1365-67.
221. Brennan urged Douglas to instead write the Papachristou case on the basis of the vagueness doctrine. Douglas's concurrence in Roe, furthermore, adopted a framework for recognizing fundamental liberties under the Due Process Clause, which Brennan had outlined in another memorandum to Douglas. Id. at 1380-81. While Papachristou had nearly been decided on the basis of substantive due process, Blackmun's first drafts of Roe experimented with deciding the case on the basis of the void for vagueness doctrine. Id. at 1379.
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Project hired a researcher to help develop a paper for publication entitled “The Right to be Pregnant.” Ginsburg wrote to Mary Ellen Schattman, who had appealed the Fifth Circuit decision in her case to the Supreme Court as a pro se litigant: “The inspiration [for the paper] came from you in the telephone conversation in which you noted, even before the Court’s abortion decisions, the anomaly of providing free access to abortion while placing impediments in the way of the woman who wants to bear her child.” Ginsburg’s commitment to using fundamental rights doctrine was not merely strategic, but also reflected her beliefs about the social value of pregnancy: “It is a bit unsettling to have a constitutional right to abort, with no adverse career consequences, while the choice to bear a child is conditioned upon surrendering a service career!”

Ginsburg also offered her assistance to Vermont Legal Aid to help lawyers bring a third military discharge case, Crawford v. Cushman. She suggested that the plaintiff’s brief to the district court should draw on Roe’s precedent to supplement the arguments made in Struck about women’s fundamental rights to privacy in reproductive decision-making and freedom of religion. Nevertheless, Ginsburg remained most optimistic about the brief’s sex equality arguments, which noted that Stephanie Crawford’s general discharge rather than an honorable one from the U.S. Marine Corps punished her for sexual relations when no similar policy punished men. She warned her colleague at Legal Aid: “The theory that a fundamental right is at stake is not so firmly grounded. You should make the sex-as-suspect classification argument.” The district court opinion, ruling in favor of the Marine Corps, held that the pregnancy discharge regulation violated neither Crawford’s right to equal protection nor her right to privacy. Not until 1977 would the Department of Defense, against Army objections, rescind its policy of discharging pregnant women as a practice in conflict with equal treatment.

Soon after Ginsburg and Vermont Legal Aid submitted their briefs in Cushman, however, the Tenth Circuit issued a decision connecting the issues of pregnancy dismissal policies and abortion. The March 1973 opinion in Buckley v. Coyle noted: “If the right to maintain freedom from interference with terminating a pregnancy is a right of the magnitude described by the Supreme


223. Id.


227. Id.

228. Id.


The court struck down a school board’s pregnancy dismissal policy as unconstitutional because it both discriminated on the basis of sex and interfered with female teachers’ privacy rights by forcing them to choose between becoming pregnant and remaining employed. The infringement of the plaintiff’s fundamental rights, as well as the possibility that the school applied its maternity policy in a racially discriminatory manner, led the circuit court to hold that the trial court should evaluate the policy on remand under a strict scrutiny rather than a rational basis standard.

The Buckley decision represented an implicit affirmation of legal feminists’ critique of women’s dependence within the family. The recognition that pregnancy dismissal policies infringed on women’s right to bear children contained an implicit rejection of the family-wage ideal. One might argue that the policies did not infringe on the childbearing right because women could still bear children as economic dependents within the family, supported by breadwinning men. In contrast, the argument that the pregnancy dismissal policies infringed upon women’s reproductive rights suggested that women had a right to maintain socioeconomic independence while simultaneously becoming mothers. In using Roe to challenge pregnancy dismissal policies, legal feminists highlighted the interdependence of equality and liberty as necessary conditions for women to realize full personhood under the Fourteenth Amendment.

III. THE SUPREME COURT DECIDES CLEVELAND BOARD OF EDUCATION V. LAFLEUR

Although Cleveland Board of Education v. LaFleur now rests at the margins of the constitutional canon, in actuality it enacted a transformation in women’s legal status under the Fourteenth Amendment. The LaFleur case required the justices of the Supreme Court to consider what was then, and remains today, one of the most profound questions concerning women’s legal status: what is the relationship between women’s interests in sex equality and reproductive liberty? To legal feminists’ chagrin, the Court did not decide LaFleur under the Equal Protection Clause. Instead, the Court decided the case under the doctrine of “irrebuttable presumptions,” which allowed the Court to find the pregnancy dismissal policies unconstitutional while evading the difficult questions about equal protection doctrine that were raised by the case. Rehnquist’s dissent in LaFleur, which quoted Burger’s dissent in an earlier

231. Buckley v. Coyle, 476 F.2d 92, 96 n.3 (10th Cir. 1973).
232. Id. at 95-96.
233. Id. at 96-97.
234. See infra Subsection III.A.3.
irrebuttable presumptions case, aptly critiqued the doctrine: “literally thousands of state statutes create classifications permanent in duration, which are less than perfect, as all legislative classifications are, and might be improved on by individualized determinations.”235 A year after LaFleur, writing a majority opinion in Weinberger v. Salfi, Justice Rehnquist went out of his way to shut the lid on an irrebuttable presumptions analysis,236 which would emerge only once more in the Court’s jurisprudence.237

Still, the LaFleur opinion had implications much more profound and worthy of serious consideration than did its incoherent and quickly discredited doctrinal rationale. In striking down the pregnancy dismissal policies, the decision lent the imprimatur of legal authority to the labor and legal feminist vision for the interdependence of women’s rights both to equal employment opportunity and to reproductive liberty under the Fourteenth Amendment. The case also approached the precipice of substantive due process in holding that the challenged policies infringed upon women’s right to bear children. Ultimately, the LaFleur decision set constitutional limits on the law’s imposition of the family-wage system. The decision stood for the proposition that the Constitution does not allow the state to interpret motherhood as relegating women to dependence within the private family. Rather, women have the right to become mothers and simultaneously to maintain socioeconomic independence within the public sphere.

A. The Doctrinal Landscape

When the Supreme Court granted writs of certiorari in the cases of Cleveland Board of Education v. LaFleur and Cohen v. Chesterfield County


236. Salfi concerned a provision of the Social Security Act setting forth a duration-of-relationship requirement for a “widow” or “child” to qualify for benefits. 422 U.S. 749, 753 (1975). Rehnquist’s majority opinion reversed the district court decision that had held that the provision was an unconstitutional irrebuttable presumption, on the basis that the district court lacked jurisdiction. Id. at 756-67. Nevertheless, Rehnquist reached the merits to hold that the rational basis equal protection standard set forth in Williamson v. Lee Optical Co., 348 U.S. 483 (1955), and Dandridge v. Williams, 397 U.S. 471 (1970), rather than an irrebuttable presumptions analysis, governed the case. 422 U.S. at 767-73. Justice Douglas wrote a brief dissent stating that the legislative presumption at issue impeded the right to a jury trial. 422 U.S. 749, 785-86 (1975) (Douglas, J., dissenting). A bolder dissent written by Justice Brennan and joined by Justice Marshall stated that the majority holding was “flatly contrary to several recent decisions,” citing a series of irrebuttable presumptions cases. 422 U.S. at 802 (Brennan, J., dissenting).

237. In November 1975, in a per curiam opinion from which only Justice Rehnquist dissented, the Court held unconstitutional a Utah law making pregnant women ineligible for unemployment benefits from twelve weeks before the expected due date to six weeks after childbirth, stating that the law involved nearly the identical presumption of incapacity as LaFleur. Turner v. Dep’t of Emp’t Sec., 423 U.S. 44, 46 (1975).
School Board, the Court's Fourteenth Amendment jurisprudence was in considerable flux. Since 1970, the Burger Court had frozen the Warren Court's expansion of fundamental rights and equality jurisprudence via the application of a strict scrutiny standard of review in equal protection cases. At the same time, however, the Burger Court had gingerly begun to implement a more searching form of rational basis scrutiny. What legal scholars called the "Newer Equal Protection" complicated the classic two-tier system of adjudicating equal protection claims. Meanwhile, the Court had added to the Warren Court's revolution in criminal procedure, civil rights, and civil liberties by rejuvenating substantive due process in Roe.

In a complex and dynamic legal landscape, several doctrinal paths stood open to rule that the challenged pregnancy dismissal policies were unconstitutional. Each of these paths also posed peculiar risks and controversies. For the author of a potential opinion invalidating the policies, the trick would be how to select a path that both sustained a majority and posed the least risk of sending the Court in directions in which it did not want to proceed.

1. The Plaintiffs' Arguments for Strict Scrutiny

The plaintiffs in the consolidated cases of Cleveland Board of Education v. LaFleur and Cohen v. Chesterfield County School Board argued that the Court should apply a strict scrutiny standard of review to strike down the pregnancy dismissal policies under the Equal Protection Clause. The plaintiffs first argued that the pregnancy-based classification at issue discriminated on the basis of sex. Highlighting the evolution in doctrinal standards from Reed to the plurality opinion in Frontiero, the plaintiffs further argued that the Court should make sex a suspect class under the Constitution. The plaintiffs argued, in addition, that the Court should apply strict scrutiny under the Equal Protection Clause because the leave policies infringed upon the plaintiffs' fundamental rights. Cohen argued that "by requiring her to choose between..."
employment and pregnancy, the mandatory leave rule trespasses upon . . . the working women's right to privacy." 243

The parties in LaFleur and Cohen put Roe v. Wade to opposite uses. The defendant school boards used Roe to buttress their argument that the pregnancy dismissal policies took rational account of the difference between pregnancy and temporary disabilities. The school boards argued that pregnancy could not constitute a temporary disability because the Supreme Court cases legalizing birth control and abortion—Griswold, Eisenstadt v. Baird, 244 and Roe—had made pregnancy voluntary: "No female today, teacher or not, is required to become pregnant." 245 Picker, however, contended that this interpretation of the case law went beyond the reproductive rights recently conferred on women to impose a deeply troubling set of obligations. Just as the Tenth Circuit had stated in Buckley v. Coyle and as Ruth Bader Ginsburg had ruminated in relation to Crawford v. Cushman, Picker's brief to the Supreme Court queried: "Has woman today having gained the right not to be pregnant against her will lost her former right to bear a child?" 246 Thus, Roe potentially opened the door for a ruling that affirmed women's substantive liberty to bear children as a corresponding right to that of abortion. That doctrinal path, however, might lead the Court away from the dangerous realm of strict scrutiny under the Equal Protection Clause to the even more hazardous realm of substantive due process.

The Court might, as plaintiffs urged, designate sex a suspect class or interpret the policies as infringing on fundamental interests in childbearing and work, thereby triggering strict scrutiny under the Equal Protection Clause. But doing so would commit the Court to a rigid standard in a highly controversial area of law, where most Justices probably feared to tread.


A second option facing the Court in LaFleur was to turn toward what commentators had termed the "newer equal protection." If it chose this doctrinal path, the Court would conduct a searching means-ends inquiry into whether the pregnancy dismissal policies were substantially related to the asserted state objectives.

In the early 1970s, the Burger Court departed from the classic, two-tier equal protection scheme. That scheme, commentators noted, involved scrutiny that was minimal in theory and toothless in fact and "scrutiny that was 'strict' in theory and fatal in fact." 247 The Burger Court evinced a determination to end

243. Id. at 19.
244. 405 U.S. 438 (1972).
245. Brief for Petitioner at 26, LaFleur, 411 U.S. 947 (No. 72-777).
246. Brief for Respondents, supra note 240, at 53.
247. Gunther, supra note 153, at 8.
the Warren Court’s expansion of fundamental interest jurisprudence.\textsuperscript{248} At the same time, the court’s minimal, or rational basis scrutiny now appeared to have “bite.”\textsuperscript{249} Constitutional scholar Gerald Gunther observed in an influential review of the 1971 term that the Court had implemented, \textit{sub silentio}, a third, more flexible standard that disrupted the classic, two-tier equal protection scheme.\textsuperscript{250} In a number of cases, the Court had performed a more searching inquiry than that theretofore afforded under minimal scrutiny. The Court inquired whether a law’s means substantially furthered the law’s ends.\textsuperscript{251} That practice gave the Court a mechanism to stray from extreme legislative deference, ostensibly without inquiring into the legitimacy of legislative purpose.\textsuperscript{252} Gunther called the changed doctrinal landscape the “newer equal protection.”

The Court used the new, amorphous means-ends inquiry to avoid treading more definitively in especially controversial and uncertain areas of constitutional doctrine.\textsuperscript{253} Cases involving sex equality and reproductive privacy well illustrated this avoidance mechanism. In \textit{Reed}, ACLU attorneys Ruth Bader Ginsburg and Melvin Wulf made an analogy to race to argue that the Court should make sex a suspect classification subject to strict scrutiny.\textsuperscript{254} In a unanimous opinion, however, the Court invalidated the provision on the ground that the state’s means did not substantially relate to its objectives.\textsuperscript{255} In \textit{Eisenstadt v. Baird},\textsuperscript{256} the Court invalidated a state law prohibiting the distribution of contraceptives to unmarried individuals. The plaintiffs had argued for an extension of the privacy right established in the 1965 case of \textit{Griswold v. Connecticut},\textsuperscript{257} which had legalized the use of contraceptives by


\textsuperscript{249} Gunther, \textit{supra} note 153, at 12. Gunther surveyed fifteen equal protection cases that did not involve either race or voting—triggers for strict scrutiny—and found that in ten of these cases the Court affirmed the constitutional challenge, and in an eleventh the Court found the claim substantial enough to remand. \textit{Id.} at 11-12. Of these eleven cases, seven “acknowledge[d] substantial equal protection claims on minimum rationality grounds.” \textit{Id.} at 19.

\textsuperscript{250} \textit{Id.} at 19.

\textsuperscript{251} \textit{Id.} at 18-20.

\textsuperscript{252} \textit{Id.} at 21-23.


\textsuperscript{254} For a comprehensive discussion of the use of the race analogy in \textit{Reed}, see Serena Mayeri, \textit{Constitutional Choices: Legal Feminism and the Historical Dynamics of Change}, 92 \textit{CAL. L. REV.} 755, 814-17 (2004).

\textsuperscript{255} \textit{Reed v. Reed}, 404 U.S. 71, 76-77 (1971).

\textsuperscript{256} 405 U.S. 438 (1972).

\textsuperscript{257} 381 U.S. 479 (1965).
married couples. The majority opinion in *Baird* sidelined the thorny issue of reproductive privacy and instead employed a means-ends analysis.258

By 1973, however, the Court indicated that it may be retreating from a third equal protection standard and returning to the two-tier system of review. In March, the Court held in *San Antonio Independent School District v. Rodriguez* that education was not a fundamental interest recognized explicitly or implicitly by the Constitution.259 In what one commentator labeled a "cryptic" footnote,260 the majority opinion characterized *Baird* as a strict scrutiny case that had interpreted the challenged state law to infringe on fundamental rights.261 Then in April, Justice Brennan issued a plurality opinion in *Frontiero v. Richardson*, representing four members of the Court, which stated that sex should be treated as a suspect class.262 Thus, in *Rodriguez* a majority of the Court had resorted to traditional minimal scrutiny, while in *Frontiero* a plurality of the Court had desired to extend strict scrutiny to a new suspect class but had been unable to obtain a fifth vote. In neither of these opinions did the Court rely on the kind of means-ends analysis Gunther had identified. Thus, to decide *LaFleur* on the basis of rational basis scrutiny with "bite" would return the Court to the "newer equal protection," contrary to the most recent trend away from that doctrinal scheme.

3. Irrebuttable Presumptions Doctrine Under the Due Process Clause

If a majority of the Court desired to find the pregnancy dismissal policies unconstitutional, but wanted to apply neither strict scrutiny nor ratcheted up rational basis scrutiny, yet another option remained. The Court could choose a safe, if evasive, route by using the rubric of procedural due process to invalidate policies to which Justices might object on both equality and liberty grounds.

As the Court drew back from the "newer equal protection," it developed a doctrine under the Due Process Clause as an alternative mechanism for avoiding the most controversial equal protection issues of the day.263 In three


259. 411 U.S. 1, 36-37 (1973).


261. 411 U.S. at 34 n.73.


cases decided during the Court's 1972 and 1973 terms—Stanley v. Illinois,264
Vlandis v. Kline,265 and United States Department of Agriculture v. Murry,266—the
Court employed an "irrebuttable presumptions" analysis to invalidate state
legislation. These cases struck down statutory regulations that disadvantaged a
class of persons on the basis of a legislative presumption, without affording the
opportunity to disprove the applicability of the presumption in individual
circumstances. Legal observers explained that the irrebuttable presumptions
analysis afforded the Court greater flexibility than had the "newer equal
protection." Equal protection analysis required the Court to choose between
allowing and denying a legislature's use of a particular classification. By
contrast, the irrebuttable presumptions analysis under the Due Process Clause
allowed for a legislature to retain a classification, so long as it provided an
opportunity for disadvantaged individuals to challenge the individual
applicability of the classification.267

The irrebuttable presumptions analysis generated substantial criticism,
however, because of its logical incoherence. Nearly all legislation involved
overbroad and under-inclusive presumptions.268 The most heated criticism of
the irrebuttable presumptions doctrine suggested that it represented substantive
due process in a new, barely disguised procedural form. The Dean of the New
York University School of Law quipped only half-jokingly that the vilified
Lochner Court might have viewed the statute challenged in that case as creating
"an irrebuttable presumption that working in bakeries more than 10 hours a day
was unhealthy."269 Because it would allow a court to strike down nearly any
form of legislative classification in the absence of individualized hearings or
other similarly robust process, the irrebuttable presumptions doctrine was
arguably nonsensical. The doctrine, however, also offered an "escape route"

264. 405 U.S. 645, 649 (1972) (invalidating a state law that presumed that unwed fathers are unfit
parents and deprived these fathers of their children, upon the death of the children's mothers, without
giving the fathers individualized hearings in which they might establish their parental fitness).

265. 412 U.S. 441, 453 (1973) (holding that Connecticut's definition of "resident" for the purpose
of reduced tuition fees in the state university system violated the Due Process Clause because it involved
an "irrebuttable presumption" that classes of students living outside the state during the past year were
not "residents").

266. 413 U.S. 508, 513-14 (1973) (invalidating a provision of the Federal Food Stamp Act
containing the "irrebuttable presumption" that a household was not in need if one of its members aged
eighteen years or older had been claimed in the past tax period as a dependent by a non-member
taxpayer ineligible for food stamps).

267. Simson, supra note 263, at 232; see also Note, The Conclusive Presumption Doctrine: Equal
Process or Due Protection?, 72 MICH. L. REV. 800, 811-12 (1974) (comparing the strict scrutiny
standard and the irrebuttable presumptions doctrine).

268. See, e.g., Irving A. Gordon & Marvin A. Tenenbaum, Conclusive Presumption Analysis: The

269. Norman Redlich, A Black-Harlan Dialogue on Due Process and Equal Protection: Overheard
that would “allow[] the Court to eliminate the law under review with only the narrowest of consequences outside the confines of the case before it.”270

B. The Oral Argument

On October 15, 1973, Jane Picker made her first oral argument, in any court, before the highest court of the land. Picker had since left Squire, Sanders & Dempsey and now taught at Cleveland State University’s Cleveland-Marshall College of Law.271 Picker litigated LaFleur in the Supreme Court under the auspices of the Women’s Law Fund with financial support provided by the Ford Foundation.272 The discrimination Picker had faced at her prior firm had shortchanged her of litigation experience. But Picker now possessed something akin to a home court advantage. The courtroom was filled with mostly young women. Although they were not allowed to hold signs or make noise during the arguments, everyone there could tell which side they supported.273

Maybe Picker’s fury also boosted her confidence. When she stood up to begin her argument, she saw that the Justices were passing around the most recent issue of the Harvard Civil Rights-Civil Liberties Journal. She recognized the journal and recalled that the issue contained a comment entitled “Love’s Labors Lost: New Conceptions of Maternity Leaves.”274 The comment critiqued the “procrustean choice” “between what become mutually exclusive alternatives: having a family or continuing to participate in the labor force.”275 The authors argued that developments under Title VII, state Fair Employment Practice legislation, and Fourteenth Amendment jurisprudence all counseled in favor of the rights of pregnant women and suggested that the Supreme Court should make sex a suspect classification under the Constitution.276 As Picker began her argument, the Justices were looking at the comment and chuckling. Picker remembers, “I was livid because I thought they were not taking the issue seriously.”277

Picker’s indignation regarding the Justices’ apparent insensitivity to the case’s gravity only increased as the argument began. Justice Harry Blackmun opened the questioning by asking about the parallels between the LaFleur case

270. Simson, supra note 263, at 227.
271. Because her prior firm had waived any assertion of a conflict of interest, Picker herself could now sign the briefs for the teacher respondents and argue before the Court. Interview with Jane M. Picker & Sidney Picker, supra note 96, at 3.
272. HARTMANN, supra note 3, at 162.
273. Interview with Jane M. Picker & Sidney Picker, supra note 96, at 5.
275. Id. at 260.
276. Id. at 264-76.
277. Interview with Jane M. Picker & Sidney Picker, supra note 96, at 4.
and cases in which courts rejected challenges to beard and mustache regulations in the workplace, reasoning that these regulations did not discriminate on the basis of sex because they regulated a sex-unique characteristic.\textsuperscript{278} Sidney Picker and Liz Moody had mooted Picker on this very point, but Jane had told them she thought it would be "beneath the dignity of the Court" to compare the regulation of beards and mustaches with "the importance of repopulating the species."\textsuperscript{279} Now, arguing before the Court, Picker responded that the analogy was "ludicrous."\textsuperscript{280} Sidney Picker was terrified that Jane might be jeopardizing her case by insulting the Court.\textsuperscript{281}

The oral argument in LaFleur did not want for dramatic tension. In 1973, the Justices sat in a straight line unlike the semi-circle in which they are now positioned. Picker soon tired of volleying questions from Justices she could not see on either end of the row. She stepped back from the podium to gain a better view, but no longer had the use of a microphone and needed to shout to answer questions. The largely female audience murmured at key moments.\textsuperscript{282} At the conclusion of oral argument, however, the result remained obscure. Phinaes Indritz—the aging civil rights lawyer who had argued on behalf of the defendant in Korematsu v. United States,\textsuperscript{283} which upheld the detention of Japanese Americans during World War II—predicted that the case would go seven to two in favor of the plaintiffs.\textsuperscript{284} He was the only one to envisage a positive outcome. A few weeks later, however, Justice White contacted the dean of Cleveland State University, with whom he had played college football, and told him that one of the University's law professors had argued before the Court and performed well. Picker recalls that when she heard word of the phone call, she thought she might have won the case.\textsuperscript{285}

\begin{center}
\textit{C. Sex Equality and Reproductive Liberty}
\end{center}

When the Court handed down the LaFleur decision on January 21, 1974, Picker rejoiced in the result but expressed disappointment in its rationale.\textsuperscript{286} Justice Stewart wrote the majority opinion, joined by Justices Blackmun, Brennan, Marshall, and White. Justice Douglas concurred in the result without writing an opinion.\textsuperscript{287} The majority opinion held that the challenged regulations

\begin{itemize}
\item \textsuperscript{278} Id.
\item \textsuperscript{279} Id.
\item \textsuperscript{280} Id.
\item \textsuperscript{281} Id.
\item \textsuperscript{282} Id. at 5.
\item \textsuperscript{283} 323 U.S. 214 (1944).
\item \textsuperscript{284} Interview with Jane M. Picker & Sidney Picker, supra note 96, at 5.
\item \textsuperscript{285} Id.
\item \textsuperscript{286} Id.
\item \textsuperscript{287} Douglas's voting pattern in prior irrebuttable presumptions cases suggested that he agreed with the result in LaFleur, but wanted neither to venture into the realm of sex equality under the Equal Protection Clause nor to reaffirm the propriety of an irrebuttable presumptions analysis.
\end{itemize}
violated the Due Process Clause of the Fourteenth Amendment "because they employ[ed] irrebuttable presumptions that unduly penalize a female teacher for deciding to bear a child."

While ostensibly decided according to a theory of procedural due process, the LaFleur opinion began with an affirmation of substantive law: "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause." The majority next reasoned that terminating pregnant teachers at the end of the fourth or fifth month of pregnancy did not serve the school board's asserted interest in the continuity of classroom instruction. Citing Vlandis and Stanley, the opinion stated that the irrebuttable presumption that women became physically unfit to teach in the classroom at the mid-way point in their pregnancies deprived women of the opportunity to demonstrate that the presumption did not apply in their individual cases. The opinion noted that the medical experts who had provided testimony on both sides "unanimously agreed . . . [that] the ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter." Likewise, the Cleveland Board of Education's three-month prohibition on teachers' return following childbirth created an irrebuttable presumption of unfitness, when in fact an individual teacher might be capable of returning to work much earlier. The majority held that the school board's administrative convenience in using the overbroad classifications could not outweigh the deprivation of the female teachers' due process rights.

Although disappointed and even angered by the Court's reluctance to decide the case on equal protection grounds and to make sex a suspect class, feminists and the general public recognized LaFleur as an "important victory for women's rights." The American Federation of Teachers Director of Collective Bargaining, John Oliver, remarked about the decision: "Even though the Court ignored the whole issue of sex discrimination and equal protection (one more reason why we need to work for passage of the Equal Rights Amendment!), it did rule that certain maternity leave policies violated the 14th Amendment." Marjorie Stern circulated among Federation locals an analysis

289. Id. at 639.
290. Id. at 642-43.
291. Id. at 644-46.
292. Id. at 645.
293. Id. at 648-49.
294. Id. at 646-47.
by a Federation attorney stating that extant pregnancy dismissal policies were now unconstitutional and, consequently, were immediately nonbinding. Lawyers believed the ruling would also "strengthen the hand" of the EEOC in enforcing its pregnancy discrimination guidelines against private employers, even though the opinion directly applied only to government employees. Nine months after the LaFleur decision, Jo Carol LaFleur began studies at Utah College of Law. She autographed the case bearing her name in the textbooks of her classmates in a first-year constitutional law class.

1. LaFleur and the Sex Equality Dodge

The Justices' reluctance to understand LaFleur as a sex equality case stemmed in significant part from their formalist interpretation of sex equality. Like many of the lower federal courts analyzing pregnancy discrimination cases, the Justices understood the regulation at issue in LaFleur to implicate some classification other than that between men and women. On the day of the oral argument, Justice Blackmun wrote a memo noting that equal protection would provide an "easier" and "cleaner" basis for the decision than due process. Blackmun, however, did not think that the mandatory maternity regulations constituted sex discrimination. From his perspective, the maternity rules distinguished not between male and female teachers but "between those who are disqualified to teach for reasons of pregnancy and those who are disqualified for other medically indicated reasons." Equal protection mandated that the school boards treat pregnancy the same as other medical disabilities, granting leave according to the facts of each individual's case. According to Blackmun's conference notes, all the Justices with the possible exception of Thurgood Marshall agreed with him that the LaFleur case did not concern sex discrimination. Thus, eight of the Court's Justices, including those who would join the majority, concur, and dissent, failed to see the case as one about sex equality. Rather than investigating whether the pregnancy

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298. Id.
300. Memorandum from Harry A. Blackmun to the Conference (Oct. 15, 1973) (Harry A. Blackmun Papers, box 175, folder) (on file with the Library of Congress).
301. Id.
302. See id.
303. Justices Burger, Brennan, Stewart, and White stated explicitly that LaFleur was not a case implicating a sex-based classification. Justice Powell analyzed the case as one triggering rational basis scrutiny under the Equal Protection Clause. Justice Douglas stated that he would vote to affirm, without further discussion of the basis for his vote. Blackmun's notes for Justice Marshall read: "Pregnant woman is the only one singled out." And his notes for Justice Rehnquist read: "will be arbitrary at some point anyway." Harry A. Blackmun, Notes on Conference (Oct. 19, 1973) (Harry A. Blackmun Papers, box 175, folder 1) (on file with the Library of Congress).
dismissal policies entrenched sex-role stereotypes, the Court employed a formalist interpretation of the classifications at issue.

The Court’s upcoming docket provided an incentive not to interpret LaFleur as a sex equality case. The month before deciding LaFleur, the Justices had accepted an appeal from a case in the United States District Court for the Northern District of California.\(^{304}\) Geduldig v. Aiello involved a challenge to California’s temporary disability insurance scheme, which provided comprehensive coverage for all temporary disabilities except pregnancy. Plaintiffs had won the argument in the district court that the exclusion of pregnancy constituted sex discrimination in violation of the Equal Protection Clause.\(^{305}\) The case had sparked a heated legal and political controversy. The director of the California Department of Human Resources had predicted that extending temporary disability benefits to pregnancy would cost $120 million and would bankrupt the state’s insurance plan.\(^{306}\) Just down the road, the Supreme Court faced a daunting battle over the status of pregnancy- and sex-based classifications under the Equal Protection Clause, which would involve the Court in complex questions of distributive justice. Ample reason existed for the Court to avoid ruling in LaFleur in a manner that might logically commit the Court to finding for the plaintiffs in Geduldig.

The majority’s dodge of the equal protection interests at issue in the case did not go without notice. Justice Powell wrote a concurrence pointedly stating, “equal protection analysis is the appropriate frame of reference.”\(^{307}\) Powell made clear upfront in his opinion what the majority had only hinted at: “that a principal purpose behind the adoption of the [challenged maternity] regulations was to keep visibly pregnant teachers out of the sight of schoolchildren.”\(^{308}\) Powell was troubled by “the implications of the [irrebuttable presumptions] doctrine for the traditional legislative power to operate by classification.”\(^{309}\) Powell wrote in his concurrence that the selectivity with which the Court deemed some laws, but not others, to involve “irrebuttable presumptions” suggested that “the concept at root often will be something else masquerading as a due process doctrine. That something else, of course, is the Equal Protection Clause.”\(^{310}\) Powell did not reach the questions of whether the pregnancy dismissal policies constituted sex discrimination or whether sex-based classifications should trigger strict scrutiny.\(^{311}\) Rather, Powell argued that


\(^{306}\) Disability Payment on Pregnancy Held Peril to Coast Plan, N.Y. TIMES, June 3, 1973, at 27.


\(^{308}\) Id. at 653.

\(^{309}\) Id. at 652. Powell had earlier expressed his concerns with the doctrine in a letter to Justice Stewart. Letter from Lewis Powell to Potter Stewart (Dec. 11, 1973) (Harry A. Blackmun Papers, box 175, folder 1) (on file with the Library of Congress).

\(^{310}\) LaFleur, 414 U.S. at 652.

\(^{311}\) Id. at 653 n.2.
the attenuation of the school boards’ stated goals and the means they employed to achieve them made the mandatory maternity leave policies arbitrary and thus a violation of the constitutional right to equal protection.312 Thus, Powell’s approach resurrected the kind of searching means-ends inquiry characteristic of the “newer equal protection.”

Contemporaneous legal commentary critiqued the LaFleur opinion as equal protection masquerading as due process. The commentary went beyond Powell’s concurrence to discuss not only the rationality of the school’s policy but also the sex equality interests of the plaintiffs. For example, a student note observed that although Stewart cloaked his opinion in the gowns of due process, the majority had also taken note of sex equality concerns, specifically the “stereotypical and irrational notions about women” that motivated the pregnancy dismissal policies.313 A commentator described the motivation behind the decision: “Desiring to invalidate the regulations, but still unwilling to accept the consequences of declaring sex a suspect class, the Court retreated to the due process clause and the open-ended notion of irrebuttable presumptions . . . .”314 Another critic viewed LaFleur as indicating that a majority of Justices “intend[ed] to leave the ultimate resolution of the issue of sex classifications up to popular mandate by way of acceptance or rejection of the Equal Rights Amendment.”315

Despite having resorted to a controversial and flawed doctrine to avoid deciding LaFleur under the Equal Protection Clause, the majority opinion also evinced a cautious recognition of the sex equality concerns at stake in the case. The opinion buried in footnotes several comments about the sex-role stereotypes at play in the pregnancy dismissal policies. Footnote nine acknowledged that the challenged regulations reflected the schools’ preoccupation with “insulat[ing] schoolchildren from the sight of conspicuously pregnant women.”316 Footnote fifteen conceded that the Cleveland rule prohibiting women from returning to teaching for three months following childbirth may have derived from the school board’s belief “that new mothers are too busy with their children within the first three months to allow a return to work.”317 The Court also recognized that the LaFleur case occurred against the backdrop of expanding sex equality norms under Title VII. In yet another footnote, the majority opinion noted that “[t]he practical impact of our decision in the present cases may have been somewhat lessened” by the

312. Id. at 655.
316. 414 U.S. at 641 n.9.
317. Id. at 649 n.15.
extension of Title VII’s applicability to state agencies and educational institutions as well as the promulgation of EEOC regulations prohibiting pregnancy discrimination.138 Even though equal protection did not form the doctrinal basis for the holding, a concern with the invalidity of the gender stereotypes underlying the pregnancy dismissal policies inflected the majority opinion.

Although a circumspect endorsement of equal opportunity for childbearing women, LaFleur must also be understood as a milestone on the path to an equal protection jurisprudence that excised pregnancy from the scope of constitutional sex equality. As Jane Picker predicted, in deciding Geduldig v. Aiello,319 the Court would “not be able to escape the issue [of sex classifications under the Equal Protection Clause] as readily as it did in LaFleur [sic].”320 The Court’s June 1974 decision in Geduldig held that the singular exclusion of pregnancy- and childbirth-related disability from an otherwise comprehensive state temporary disability insurance plan did not violate women’s rights to equal protection. Writing again for the majority, Justice Stewart held that pregnancy-based classifications did not necessarily constitute sex discrimination under the Equal Protection Clause.321

In upholding the pregnancy exclusion, Geduldig ratified a constellation of sex-role stereotypes. The defendant state of California, sympathetic amici, and political commentators had argued that women did not need disability benefits because they did not work to support their families;322 that childbearing women belonged in the home;323 that mothers did not make loyal workers;324 and that breadwinning men would resolve the costs of reproduction.325 The Court’s willingness to invalidate sex-role stereotypes in LaFleur but not Geduldig may

318. Id. at 638 n.8 (citing 29 C.F.R. § 1604.10).
322. See, e.g., Brief for Gen. Elec. Co. as Amicus Curiae at 9, Geduldig, 417 U.S. 484 (No. 73-640) (arguing that pregnancy disability benefits would not serve “the purpose of disability insurance protection . . . to protect employee earnings” because only half of new mothers returned to the workforce).
323. See, e.g., Brief for Appellant at 20, Geduldig, 417 U.S. 484 (No. 73-640) (arguing that new mothers would abuse pregnancy disability leaves by requesting such leave beyond the period of physical incapacity to care for children in the home).
324. See, e.g., Brief of the Am. Tel. & Tel. Co. as Amicus Curiae at 12-13, Geduldig, 417 U.S. 484 (No. 73-640) (arguing that the low return rate of childbearing women to the workforce distinguishes pregnancy and childbirth from temporary disabilities).
325. Brief for Gen. Elec. Co., supra note 322, at 22 n.13 (discussing a news magazine article describing contemporary couples as making a voluntary, joint decision to have children and suggesting, then, that the costs of women’s dependence during pregnancy and childbirth should remain the burden of the private family).
have derived from the fact that the latter but not the former case involved a claim to state resources. The plaintiffs in LaFleur asked the Court to prohibit market-irrational forms of pregnancy discrimination. By contrast, a finding for the plaintiffs in Geduldig would have implicated the Court in restructuring a social-welfare program to render the program’s allocation of the financial burdens of disability more compatible with an interpretation of constitutional sex equality. Like the labor feminists who struggled to achieve paid pregnancy disability and parental leave, legal feminists discovered that the liberalization of sex discrimination law stopped short of an interpretation of sex equality that entailed affirmative rights to state resources.

By the time the Court came to apply intermediate scrutiny to sex under the Equal Protection Clause, in the 1976 case of Craig v. Boren, the Court had thus placed the legal regulation of pregnancy at a considerable distance from the boundaries of constitutional sex equality. Undoubtedly, the Court found granting heightened scrutiny to sex a safer bet once that standard could be certain not to reach the regulation of pregnancy. Geduldig is thus an important part of the story of the origins of equal protection standards. Not until the 2003 case of Nevada Department of Human Resources v. Hibbs would the Court hold for the first time that the legal regulation of pregnancy on the basis of sex-role stereotypes violated constitutional sex equality.

2. LaFleur and the Precipice of Substantive Due Process

Having approached LaFleur’s implications for constitutional sex equality with great trepidation, the majority strode more boldly toward the precipice of substantive due process. Significant differences set the majority opinion in LaFleur apart from the three prior cases decided based on an irrebuttable presumptions analysis. To begin, in Stanley, Vlandis, and Murry, which concerned individual interests related to childrearing, education, and food stamps, respectively, the Court had not explicitly highlighted the presence of a fundamental right at stake. By contrast, Stewart’s opinion began with the affirmation of a substantive, fundamental right to reproductive liberty protected

326. See Dinner, supra note 52.
327. See supra Part I.B.
328. 429 U.S. 190 (1976). Craig v. Boren involved the politically banal question of whether a state could set the minimum age to purchase 3.2% beer at twenty-one years for males and at eighteen years for females. Id. at 191-92. Brennan’s opinion set forth an intermediate-scrutiny standard for analyzing sex-based classifications under the Equal Protection Clause: “classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.” Id. at 197.
329. For further discussion, see Dinner, supra note 52.
330. 538 U.S. 721 (2003) (upholding the provision of the Family Medical Leave Act of 1993 that allows state employees to sue their employers for violations of the Act as a valid exercise of Congress’s power under Section Five of the Fourteenth Amendment).
by the Due Process Clause. Furthermore, the three prior opinions had all held that conclusive presumptions under the law had to give way to hearings that would afford individuals the opportunity to rebut the presumptions. In *LaFleur*, however, Stewart included a footnote explaining that the majority’s holding did not require “an individualized determination in each case and in every circumstance” to determine whether a pregnant teacher had the capacity to continue working. Stewart suggested that a tighter nexus between the classification and the class of disadvantaged persons would satisfy constitutional requirements. For example, “widespread medical consensus” regarding the disabling effects of pregnancy in the last few weeks before childbirth might justify a categorical regulation. Stewart’s opinion in *LaFleur*, at its core, did not concern procedure so much as the infringement of an overbroad, irrational classification on a substantive right.

Several commentators considered *LaFleur* a substantive due process case. That conclusion represented three distinct strands of analysis. First, legal analysts noted that for a deprivation of liberty or property to violate procedural due process—as the irrebuttable presumptions doctrine suggested—the individual had to possess an underlying entitlement to the interest at stake. Determination of which interests in liberty and property represented such entitlements and which did not entailed a substantive judgment. Thus, the majority in *LaFleur* held that the plaintiffs possessed a fundamental interest in reproductive freedom infringed upon by the pregnancy dismissal policies.

Second, legal scholars argued that substantive due process employed a means-ends analysis that reflected the moral judgments of the Court. On occasion, the defendant government entity would attempt to hide a law’s patently illegitimate objectives by arguing that the law served other legitimate objectives. Distinguishing whether the challenged law served the alleged legitimate objective or the real, illegitimate one would involve courts in normative conclusions characteristic of substantive due process. The majority opinion in *LaFleur* performed this kind of analysis when it suggested that the pregnancy dismissal policies did not serve the stated interest in

334. Id.
336. Comment, supra note 335, at 93, 98.
339. Id. at 425-26.
continuity of classroom instruction and when it hinted in footnotes that other, illegitimate objectives had actually motivated the policies.

Third, scholars saw the LaFleur opinion as simply an extension of the substantive due process right to privacy recognized in Roe. A comment in the California Law Review described LaFleur as a paradigm case of judicial protection of privacy in “intimate decision thinking.” 340 Stewart’s opinion had listed a string of privacy-related cases from Skinner v. Oklahoma to Roe without ever mentioning the word privacy. 341 Yet, LaFleur had extended the privacy right to involve freedom not only from direct prohibitions on certain intimate, reproductive decisions but also from “oblique interference.” 342

Critics as well as supporters of the opinion believed that it affirmed substantive due process rights to reproductive liberty as well as to protection of one’s tenure in public employment against dismissal on the basis of legislative classifications that could be characterized as irrebuttable presumptions. Rehnquist’s dissent in LaFleur quoted Stewart’s concurring opinion in Roe that “the ‘liberty’ protected by the Due Process Clause . . . covers more than those freedoms explicitly named in the Bill of Rights.” 343 Rehnquist then noted that Stewart had relied for this statement on a 1915 case, Truax v. Raich, commonly viewed as a nascent expression of a substantive due process right to work. 344 Rehnquist concluded in his dissent to LaFleur: “Since this right to pursue an occupation is presumably on the same lofty footing as the right of choice in matters of family life, the Court will have to strain valiantly in order to avoid having today’s opinion lead to the invalidation of mandatory retirement statutes for governmental employees.” 345 Although Rehnquist did not view LaFleur as supporting a substantive due process right to work per se, he did understand the majority opinion to imply a substantive due process right to tenure in one’s public employment.

Some progressive advocates celebrated this dimension of the opinion. Had LaFleur held only that the challenged policies infringed on the right to bear a child without adequate procedure, in that case the decision would have stood simply for the proposition that “an aggrieved employee is only entitled to freedom from arbitrary procedures when a substantive right defined elsewhere

341. Id. at 1468-69.
342. Id. at 1468. The pregnancy dismissal policies invalidated by the Court had not prohibited women from deciding to bear children but had deterred exercise of that right by requiring women to sacrifice their jobs and wages to exercise it. Id.
344. Id. (quoting Truax v. Raich, 239 U.S. 33, 41 (1915) (“It requires no argument to show that the right to work for a living . . . is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.”)).
345. Id. at 658-60.
in the Constitution is threatened." The decision went "well beyond" that holding, however, to question "the substantive rationality of the pregnancy rule itself." The opinion "hint[ed] at" a substantive due process right to "protection from arbitrary government dismissal [from public employment], independent of any other right granted by the Constitution." Constitutional scholar Mark Tushnet outlined a framework that might guide the Court's discretion in identifying substantive due process rights such as "a constitutional right to civil service tenure for lower-level bureaucrats." Another commentator went further to argue that *LaFleur* and *Vlandis* together rendered mandatory retirement statutes, in the absence of individualized hearings, unconstitutional.

Regardless of their position on *LaFleur*'s consequences for mandatory retirement statutes, progressive scholars and advocates understood *LaFleur* as sustaining individual self-determination against the bounds of state power. A colleague of Jane Picker wrote to her: "If the dissent is correct regarding the decision of the majority, then it would be a landmark decision, though not the one you wanted. But it would put 'a new shine on the concept of individuality and the survival of the individual in a world bent on his (her) destruction.'"

Harvard Law Professor Laurence Tribe argued that *LaFleur* exemplified a form of "structural due process." In cases of peculiar social and moral disagreement and intense cultural contest, Tribe argued, the state could not apply categorical rules to individuals' disadvantage but must engage in dialogue with individuals about the nature of such rules and their application. The affirmation of individual self-realization that progressive advocates identified in *LaFleur* represented an instantiation of the self-determination ideal central to the legal liberalism of the era. Although the decision did not further equal protection doctrine, it did advance the status of women as rights-bearing individuals within a liberal polity that set constitutional limits on the ability of the state to regulate according to group characteristics.

In 1974, the *LaFleur* case had multiple, expansive meanings that the existing historical and constitutional scholarship has forgotten. Though not decided on the basis of equal protection, the decision represented the culmination of labor and legal feminist campaigns against the sex
discrimination exemplified by pregnancy dismissal policies. The majority opinion hinted at the sex equality interests at stake in the case. And commentators on the opinion ranging from Justice Powell in concurrence, to feminist attorneys, to legal scholars, noted that the “irrebuttable presumptions” doctrine formed a thin veil for the equal protection concerns implicated by *LaFleur*. Likewise, though decided on the basis of an illogical theory of procedural due process, which would subside within less than two years, the decision came notably close to an explicit expansion of substantive due process. The majority opinion drew upon the line of substantive due process cases reaching their apex in *Roe* to articulate a fundamental right to bear children and applied a searching means-ends inquiry, influenced by the weight of the right at stake, to invalidate the challenged policies. Commentators ranging from Justice Rehnquist in dissent to advocates on the opposite end of the legal spectrum interested in expanding workers’ rights understood *LaFleur* to imply a substantive due process right to public employees’ protection in their job tenure against arbitrary dismissal. Although Justice Stewart had likely viewed the “irrebuttable presumptions” doctrine as a ready escape from the thicket of equal protection and a narrow basis for a politically non-controversial opinion, *LaFleur* possessed potentially radical implications.

Perhaps the most significant meaning of the decision is one not recognized at the time but that is visible in hindsight. *Cleveland Board of Education v. LaFleur* contained a nascent recognition of the relationship between women’s rights to sex equality and to reproductive liberty. The labor and legal feminist campaigns against pregnancy dismissal policies had argued that the right to equal employment opportunity would ring hollow if conditioned upon a woman’s disavowal of childbearing. And the right to bear children should not require women’s socioeconomic dependence within the home. The labor and legal feminist campaigns challenged conservative sexual mores, stereotypes regarding women’s capacity for work, and the family-wage ideal that underpinned pregnancy dismissal policies. In recognizing the justness of these campaigns, the *LaFleur* opinion also affirmed the feminist vision for equality and liberty as mutually dependent conditions of women’s personhood under the Fourteenth Amendment.

*LaFleur* cautiously, sloppily, even surreptitiously stitched together the equality and liberty interests that *Roe* had driven apart and that *Geduldig* would again sever. Justice Stewart’s opinion held that policies that excluded pregnant women and new mothers from the workplace infringed upon women’s reproductive liberty. This conclusion depended upon a transformation of the legal construction of the family, from the family-wage ideal to one premised on women’s right to act as both mothers and workers. From the perspective of the family-wage ideal, pregnancy dismissal policies did not infringe upon women’s reproductive rights because childbearing women were supposed to be the
economic dependents of breadwinning males. Only if one recognized women's rights to compete as equals with men for employment opportunities did one see that the pregnancy dismissal policies infringed upon women's reproductive liberties. In holding unconstitutional the legal regulation of pregnancy on the basis of sex-role stereotypes, LaFleur recognized the interdependence of women's rights to equal employment opportunity and to reproductive liberty.

CONCLUSION

The social and legal history of Cleveland Board of Education v. LaFleur, which I have recovered in this Article, reveals multiple insights that our neglect of LaFleur in the constitutional canon has obscured. The history of the labor and legal feminist campaigns against pregnancy dismissal policies, which form the backdrop to LaFleur, illustrate the symbiosis that existed among union activism for women's rights, feminist litigation, and evolving sex discrimination law in the early 1970s. The lower federal court decisions which preceded LaFleur show judges grappling with the meaning of pregnancy within nascent principles of civil rights and sex equality. The law evolved to delegitimize pregnancy dismissal policies, even as judges subscribed to formalist interpretations of sex equality and to the ongoing legal salience of biological sex difference. This history, in conjunction with that of the right to abortion, reveals how feminists began to experiment with fundamental rights arguments challenging pregnancy dismissal policies and how Roe threw open the door to substantive due process arguments regarding the right to bear children. Finally, recovering the history of the Court's deliberation in LaFleur, as well as the reaction to the opinion, demonstrates the richer implications of the opinion that we have forgotten in criticizing the doctrinal basis for the decision. Ultimately, the LaFleur doctrine challenges us to consider the implications for today's legal dilemmas of the fact that the Court once recognized the interdependence of women's equality and liberty interests.