Constitutional Law—Women's Rights—Mandatory Pregnancy Leave Unconstitutional

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CASE COMMENTS

CONSTITUTIONAL LAW—WOMEN’S RIGHTS—MANDATORY PREGNANCY LEAVE UNCONSTITUTIONAL

In two separate actions brought under title forty-two, section 1983 of the United States Code, plaintiffs, pregnant public school teachers, challenged the constitutionality of the mandatory maternity leave rules of the Cleveland, Ohio, and Chesterfield County, Virginia, school boards. The Cleveland rule required a pregnant teacher to take unpaid maternity leave five months before the expected childbirth, with application for leave required at least two weeks prior to departure. Eligibility to return was not accorded until the next regular semester after the child was three months old and, then, only with a doctor’s certificate attesting to the teacher’s good health.

Chesterfield County’s rule required that the pregnant teacher stop work at least four months, and give notice at least six months, prior to the expected childbirth. Re-employment was guaranteed no later than the first day of the school year after the date she had submitted a physician’s written statement attesting to her physical fitness and had given assurances that the child would cause minimal interferences with her duties as a teacher.

A divided panel of the United States Court of Appeals for the Sixth Circuit reversed the decision of the district court and found that the Cleveland rule violated the equal protection clause of the fourteenth amendment. On the other hand, the Chesterfield County rule ultimately was held constitutional by the Court of Appeals for the Fourth Circuit, which reversed the decision of the

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


3 LeFleur v. Cleveland Bd. of Educ., 465 F.2d 1184 (6th Cir. 1972).

4 Cohen v. Chesterfield County School Bd., 474 F.2d 395 (4th Cir. 1973). A divided panel of the Fourth Circuit affirmed the decision of the district court, but on rehearing en banc, a four-three decision reversed.

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United States District Court for the Eastern District of Virginia. Therefore, the United States Supreme Court granted certiorari in both cases. Held, affirmed in part, reversed in part. The manatory termination provisions of both maternity leave rules are unconstitutional as violating the due process clause of the fourteenth amendment. The arbitrary cutoff dates set forth in the mandatory leave regulations have no rational relationship to the state’s interest in preserving continuity of instruction, keeping physically unfit teachers out of the classroom, and protecting the health of mother and child. Moreover, such regulations employ an irrebuttable presumption that all pregnant teachers who reach the fifth or sixth month of pregnancy are physically incapable of teaching. This presumption unnecessarily restricts the exercise of protected constitutional rights by penalizing a female teacher for deciding to bear children. Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974).

Unlike the lower courts who justified their holdings on the basis of equal protection, Justice Stewart, in delivering the majority opinion, found sufficient basis in the due process clause to dispose of the constitutional issues in this case. The Court commenced by recognizing freedom of choice in matters of marriage and the family as a right protected by the due process clause. Quoting from Eisenstadt v. Baird, the majority defined this right as the freedom “from unwarranted govermental intrusion into matters so fundamentally affecting a person as the decision whether to bear . . . a child.” The majority saw the mandatory maternity leave regulations as penalizing the pregnant teacher for deciding to bear children, thereby forcing women to choose between the right to work and the fundamental right to bear children.

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6 LaFleur was affirmed; Cohen was reversed and remanded. The Cleveland return rule, with its three-months-age provision, was held unconstitutional. However, since the return provision of the Chesterfield County School Board rule served legitimate state interests without employing unnecessary presumptions, that part was held to be constitutional.
7 Once the basic fact is proved, the presumed fact is accepted as true regardless of any evidence to the contrary. Note, The Irrebuttable Presumption Doctrine in the Supreme Court, 87 Harv. L. Rev. 1534 n.7 (1974).
8 U.S. Const. amend. XIV, § 1: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .”
9 But see Note, supra note 7, at 1547.
11 414 U.S. at 640.
12 Id.
In a concurring opinion, Justice Powell, joined by Justice Douglas, criticized the emphasis on fundamental interests. He agreed that these regulations do add to the burdens of childbearing but rejected the majority's conclusion that the mandatory leave regulations impair any right to bear children. First, the rules did not directly affect the right to procreate but had only a "deterrent impact... wholly incidental [to this right]." Second, even if the infringement were direct, the regulations could not be held unconstitutional in view of Dandridge v. Williams, in which the Court upheld the state's intentional effort to penalize childbearing.

Once the Court found that this fundamental right was directly affected, due process attached to the interests at stake, affording two basic protections:

(1) one cannot be deprived of constitutional liberties without procedural safeguards such as notice and hearing, and (2) any encroachment on the individual's rights must be justified by a compelling state interest.

Since a fundamental right was affected, the question for the Court was whether the interests promoted by the rules justified the procedures that burdened the women's right to bear children. The majority used a balancing test, weighing the interest of the pregnant teachers against the concerns of the school boards.

The boards of education offered two justifications for the mandatory maternity leave rules—continuity of instruction and protecting the health of the teacher and the unborn child. The Court

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13 Id. at 652 (Concurring opinion).
15 In Dandridge, the Court upheld a Maryland maximum grant regulation imposing a ceiling of $250 per month on Aid to Families with Dependent Children (AFDC) grants, regardless of the size of the family and its actual need. Since the Maryland regulation would necessarily tend to discourage the bearing of children, Justice Powell interprets Dandridge as a constitutional sanctioning of a state's intentional effort to penalize childbearing. 414 U.S. at 651-52.
recognized the advance notice provisions of the rules as wholly rational and necessary to serve these objectives. However, the absolute termination requirements were deemed to have no rational relationship to the valid state interest of preserving continuity and protecting the health of the teacher. The cutoff dates actually promoted discontinuity by forcing pregnant teachers to leave at some arbitrarily set date that might come, as it did in the plaintiffs’ cases, only a few months before the end of a school term. The Court noted that later cutoff dates would serve the boards’ objectives just as well and infringe less on this fundamental right.

Where the freedom affected was so valuable, a heavy burden was placed on the school boards to prove that the means used imposed the least burden on a woman’s freedom to bear children. The school boards argued that the mandatory leave provisions were necessary to keep unfit teachers out of the classroom. The Court responded that the rules created an irrebuttable presumption that all pregnant teachers in their fifth or sixth month of pregnancy are physically incapable of teaching. Such a presumption is forbidden when it is “not necessarily or universally true in fact” and when the state has “alternative administrative means, which do not so broadly infringe upon basic constitutional liberty, in support of their legitimate goals.” Although the presumption served to promote the boards’ objective to keep unfit teachers out of the classroom, it swept too broadly by keeping out many teachers who were fully capable of teaching. This presumption of physical incompetency not only persisted in the face of countervailing medical evidence of a woman’s physical health but also operated to deny women a fair opportunity to rebut the presumption.

In a strong dissent, Justice Rehnquist, with whom Chief Justice Burger concurred, found the use of the words “irrebuttable presumption” misleading. He emphasized that all general gov-

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18 414 U.S. at 643.
19 Id.
20 Id at 644.
21 Id. at 644; accord, Vlandis v. Kline, 412 U.S. 441, 452 (1973).
22 414 U.S. at 647.
23 Id. at 657-60 (dissenting opinion); accord, Vlandis v. Kline, 412 U.S. 441, 462 (1973) (dissenting opinion). In Vlandis, Chief Justice Burger spoke against the Court’s use of the irrebuttable presumption: “There will be, I fear, some ground for a belief that the Court now engraves the ‘close judicial scrutiny’ test onto the Due Process Clause whenever we deal with something like ‘permanent irrebuttable presumptions.’”
ernmental classifications are inherently unfair for someone and inevitably draw lines that might prove arbitrary cases. The majority opinion was not clear as to what judicial standard would determine when a classification reached the conclusive presumption stage and when, in turn, such presumption would be unnecessary. Justice Powell, recognizing the merits of this dissent, saw the Court's return to the conclusive presumption analysis as embarking upon a road that has no foreseeable end.24

The school boards argued more persuasively that the mandatory termination dates served the interests of administrative convenience. In view of the strong interest to protect the fundamental right to bear children, however, the Court declared that mere administrative convenience is insufficient to justify the presumption of unfitness. It recognized that administrative efficiency is secondary to the purpose of the due process clause to protect the fundamental rights of a vulnerable citizenry from "the overbearing concern for efficiency and efficacy."25

Although presuming is more convenient than proving, the due process clause requires that the means chosen must be those that least infringe on a basic constitutional liberty. The majority suggested the use of a more individualized determination would promote the school boards' objectives without infringing unduly on the pregnant teacher's rights.26 Medical experts who testified in these cases unanimously agreed that pregnancy is an individual matter that should be dealt with as such. Medical examinations by school board physicians or certification from the woman's obstetrician could be means for determining the woman's physical condition and the time at which she should discontinue work. Each school board already relied upon similar procedures when evaluating the teacher's physical ability to return to work after childbirth.

Justice Powell viewed the majority's emphasis on individual treatment as not only impractical but also at war with the need for discretion in administrators to effectively discharge their duties.27 And according to Justice Rehnquist, the Court's insistence on individual determinations in this and other cases "is in the last analysis nothing less than an attack upon the very notion of law-

24 414 U.S. at 652 (concurring opinion).
25 Id. at 646; accord, Stanley v. Illinois, 405 U.S. 645, 656 (1972).
26 414 U.S. at 647 & n.13.
27 Id. at 658-57 (concurring opinion).
making itself." It would call into question such commonly accepted laws as those requiring persons to be eighteen to vote or twenty-one to buy liquor and civil service rules with mandatory retirement ages.

The majority opinion did not preclude the use of line drawing. Instead, it pointed out that any set terminations for purposes of administrative convenience alone would not suffice under the due process clause. Therefore, the Court did not strip the boards of their latitude for dealing with problems presented by teacher pregnancies. It merely placed the burden of justification upon the school boards to prove that more reasonable alternatives were not available. The LaFleur holding reiterates the test set forth by Justice Marshall in United States Department of Agriculture v. Murry:

Where the private interests affected are very important and the governmental interest can be promoted without much difficulty by a well-designed hearing procedure, the Due Process Clause requires the Government to act on an individualized basis, with general propositions serving only as rebuttable presumptions or other burden-shifting devices.

The constitutional problem with the rules, then, lies in the early cutoff dates, not necessarily in the concept of a fixed termination date. This leaves open the question of where the line between a permissible cutoff date and an overly restrictive one lies. The majority offered no definite criteria for determining that line; however, it did set out several general considerations that might justify an imposed termination date, for example, proof of widespread medical concensus about the disabling effects of pregnancy on a teacher's performance or evidence showing that such cutoff dates were the only reasonable means of preventing labor in the classroom. Other considerations might include the duties to be performed and the place of work. For example, an early cutoff date could be justified when the woman's work requires frequent exposure to radiation or heavy lifting. Under these circumstances, which are hazardous for the fetus, the purpose would be considered sufficiently compelling to justify an early cutoff date.

23 Id. at 680 (dissenting opinion).
24 Id. at 658-59 (Dissenting opinion).
26 Id. at 518.
27 414 U.S. at 647 n.13.
28 See Comment, Love's Labors Lost: New Conceptions of Maternity Leaves,
One of the most interesting aspects of *LaFleur* is the Court's choice in analyzing the case on due process grounds and avoiding the equal protection issue, that would directly involve the problem of sex discrimination. The Court could have determined that the boards' use of the conclusive presumption failed to recognize that a disability on the part of any teacher, male or female, poses similar administrative problems. For example, men are subject to crises of the body, such as prostatectomy, which, like pregnancy, gives ample warning. This condition is dealt with under general sick-leave requirements on an individual basis. Pregnancy alone is dealt with under blanket presumptions based on the fallacious idea that all pregnant women are unable to perform after the fifth or sixth month. Therefore, the mandatory maternity leave rules could have been declared unconstitutionsl as a denial of equal protection.

Justice Powell saw the case as best analyzed in the framework of equal protection, not due process. He perceived the constitutional difficulty not in the boards' attempt to deal with the problem by classification but in their choice of irrational classifications that were "invalid under rational-basis standards of equal protection review." The *LaFleur* decision has been called a strange hybrid between due process and equal protection scrutiny. Note, supra note 7, at 1548.

The majority, although using the due process concept, appears to rely largely on equal protection precedents. For example, by focusing on the fundamental right to bear children, the majority established grounds for using the strict scrutiny test of equal protection analysis. Thus, the review entailed a much closer exam-

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24 414 U.S. at 651 (concurring opinion).
25 Id. at 653 (concurring opinion).
26 The *LaFleur* decision has been called a strange hybrid between due process and equal protection scrutiny. Note, supra note 7, at 1548.
27 Two standards of review have evolved to determine whether a classification is constitutional. See generally Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065 (1969). The strict scrutiny test or "active review" entails a much closer examination and places a heavy burden of justification on the state. This test requires that the state not only use the least onerous means to attain its objective but also show some compelling interest for doing so. Id. at 1087-131. Active review is used whenever a fundamental interest supra note 16, is affected or a suspect classification such as race, McLaughlin v. Florida, 379 U.S. 184 (1964), is invoked. "Permissive" or "restrictive" review usually upholds a classification if it is reasonably related to a legitimate purpose. Applying this test, the court will ask two questions: (1) Was the purpose of the regulation valid? and (2) Does the classification have a reasonable relation to that purpose? Id. at 1077-87.
ination and placed a heavy burden of justification on the state. The school boards were required not only to use the least onerous means to attain their objectives but also to show some compelling state interest for doing so.\textsuperscript{38}

\textit{LaFleur} leaves unanswered several important questions concerning maternity leave. Should pregnancy be treated as any other temporary disability and, therefore, entitle the woman to disability insurance, sick leave pay, and other fringe benefits? Equal Employment Opportunity Commission (EEOC) guidelines answer this question in the affirmative.\textsuperscript{39} However, recent lower court decisions are split on this issue,\textsuperscript{40} the different results apparently turning on the courts' attitudes toward EEOC guidelines and their differing concepts of the term disability.\textsuperscript{41}

The Court expressed no opinion regarding the validity of maternity leave policies issued by EEOC and other federal agencies.\textsuperscript{42}

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\textsuperscript{38} The Court's unique approach to the due process concept indicates that it is no longer so preoccupied with "the ghost of old due process." \textit{LaFleur}, as did \textit{Roe v. Wade}, 410 U.S. 113 (1973), and \textit{Doe v. Bolton}, 410 U.S. 179 (1973), seems to carry the due process doctrine to "lengths few observers had expected." Tribe, \textit{The Supreme Court, 1972 Term- Foreword: Toward a Model of Roles in the Due Process of Life and Law}, 87 HARV. L. REV. 1, 2 (1973). Justice Rehnquist's dissent in \textit{Vlandis v. Kline}, 412 U.S. 441 (1973), merits additional consideration, especially his belief that the Court "relies heavily on notions of substantive due process" and "harks back to a day when the principles of Substantive Due Process had reached their zenith in this Court." \textit{Id.} at 463, 467.

\textsuperscript{39} EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.10(b) (1972): "Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment . . . ."


\textsuperscript{41} The \textit{Newmon} court rejected the EEOC guidelines and concluded that pregnancy is not a disability or sickness. Defining sickness in terms of being affected with disease or not well or healthy, the court could not justify classifying pregnancy, which is usually voluntary and evidence of a woman's normal health, as a disability. On the other hand, the \textit{Wetzel} court did give deference to EEOC guidelines and defined pregnancy as a disability that, for medical reasons, prevents a person from working. The court also observed that the disability plan was discriminatory in that it singled out pregnancy, a disability limited to women, but did not single out prostate troubles, a disability limited to men.

\textsuperscript{42} See, e.g., \textsc{Citizens Advisory Council on the Status of Women, Job-Related Maternity Benefits} 1 (1970); \textsc{Manpower Administration, Dep't of Labor, Unemployment Inc. Program Letter No.} 1097 (1971).
Nevertheless, the Court previously has said that these guidelines should be given "great deference." It is very possible, therefore, that the Court will uphold these guidelines and, in so doing, further the cause of women's rights in general.

If the Supreme Court follows EEOC guidelines and agrees that pregnancy should be treated as any other disability, the result could be that many other regulations will need to be revamped. For example, many state unemployment plans have special provisions that explicitly disqualify women unemployed due to pregnancy or implicitly disqualify them under the presumption that pregnant women are unable to, and are unavailable for, work or have voluntarily left work without good cause. In West Virginia an individual is disqualified for benefits if she either voluntarily quit or was laid off from employment because of pregnancy. If pregnancy is treated as any other disability, this law appears to be invalid. The validity of policies excluding pregnancy from personal leave coverage is also questionable. The West Virginia Board of Education, for example, has stated that an absence from duty for pregnancy is not covered by personal leave.

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43 The Court notes that the practical impact of its decision may have been lessened by the subsequent Title VII amendments. 414 U.S. at 638-40 n.8. At the time the cases arose, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-15 (1970), did not apply to state agencies and educational institutions. Shortly after the amendments, the EEOC promulgated guidelines providing that maternity leave policies presumptively violate Title VII. The Court's decision supports this EEOC guideline on sex discrimination. Since the Title VII amendments fill the gaps left open by the prior exemptions of educational institutions and state agencies, the Court will more than likely make any subsequent decisions on the basis of Title VII, not on due process or equal protection.
44 W.Va. Code Ann. § 21A-6-3(7)(b) (1973 Replacement Volume). Under this section a woman unemployed because of pregnancy is disqualified for benefits until she returns to covered employment and has been employed therein at least thirty working days; except that such disqualification shall last no longer than six weeks prior to and six weeks subsequent to the date of birth of the child, provided such individual furnishes to the department certificates from a physician that she is physically able to work.
46 W. Va. Board of Educ., Responses to Employee Questions (Dec. 10, 1971): The personal leave law, "18A-4-10, is a broad one, and seems to say that a local board could allow personal leave for pregnancy or for "other cause authorized or approved by the board." However, in the absence of a policy allowing such usage, once an employee has assumed a leave of absence for pregnancy, she is not eligible for that emolument of her position until she returns to duty.
Another major area that would be affected is insurance, in which pregnancy is almost universally treated differently from other disabilities. In a study conducted by the Pennsylvanian Insurance Commissioner, inadequate maternity coverage was found to be one of the major areas of discrimination against women. Maternity benefits are usually far below the average costs of pregnancy and childbirth, and female employees in group insurance plans often receive smaller maternity benefits than wives of male employees.

Since the LaFleur opinion completely ignores any classification of the case in terms of sex discrimination, it sheds no light on the question of whether sex is a suspect classification requiring strict scrutiny. Nevertheless, the Court’s decision could be considered a major victory for women’s rights advocates. First, the Court rejects the myths and stereotypes of pregnant women, especially in terms of their health and ability to remain on the job. Cultural sex role conditioning has generated a certain stereotype of the proper female response to pregnancy—a helpless, incapacitated woman who is to be “protected” not only from work but from the embarrassment that her condition may prompt and who, in any case, is only working until she gets pregnant. As one court stated, the fact that a woman does not fit neatly into this stereotype “should not redound to her economic or professional detriment.” Although some women are incapacitated by pregnancy, to say this is true of all women defines much of our population in artificial, stereotypical terms, that “are no less invidious than racial or religious ones.” Second, the Court discounts the outmoded moral

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44 Id. at col. 5. See generally Love’s Labors Lost, supra note 33.
45 Two recent Supreme Court decisions have invoked questions concerning whether sex has been classified as “suspect,” thereby requiring strict judicial scrutiny. Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971). An analysis of these two cases seems to place sex in the “near suspect” or, perhaps, “suspiciously suspect” classification, thus requiring a test more stringent than rational relation. See supra note 37. Professor Gunther suggests that the Court imported “some special suspicion of sex-related means” into its analysis in Reed. Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972).
48 Id. at 506n.1.
49 Id. at 505.
stigma attached to pregnancy,\textsuperscript{55} concluding with a reference to the language in \textit{Green v. Waterford Board of Education}: "Whatever may have been the reaction in Queen Victoria's time, pregnancy is no longer a dirty word."

Because of the Court's decision, the woman worker no longer should be required to choose between the right to work and the right to bear children. Statistics show that forty-seven percent of pregnant women work into their third trimester with no ill effects.\textsuperscript{57} An early forced maternity leave for these women could likely result in grave financial burdens due to loss of wages and fringe benefits.\textsuperscript{58} Many policies will have to be examined in light of the Court's decision.\textsuperscript{59} Since the Cleveland and Chesterfield County rules are "typical of a national pattern,"\textsuperscript{60} maternity leave policies of school

Interesting to note is the study by anthropologist Ashley Montaque in regard to other societies' responses to woman's pregnancy. For example, in some nonliterate societies many women take less than four or five days after childbirth to return to normal chores. In cultures such as the bushmen of South Africa and the Australian aborigines, a woman's pregnancy or recent childbirth is no reason for deviation from the normal manner of living, except for the additional task of nursing. A. Montaque, \textit{The Natural Superiority of Women 16-17} (rev. ed. 1970). See generally Women's Bureau, \textit{Employment Stds. Admin., Dep't of Labor, The Myth and the Reality} (1972).

\textsuperscript{55} 414 U.S. at 641n.9.
\textsuperscript{56} 473 F.2d 629, 635 (2d Cir. 1973).
\textsuperscript{57} 22 Dep't of Health, Educ. and Welfare, Vital & Health Statistics, No. 7, Employment During Pregnancy-1963, at 2 (1968). The percentage of women employed during pregnancy increases as the woman's educational level increases. Eighty-two percent of women with college degrees were employed during pregnancy.

\textsuperscript{58} In 1971 thirty-eight percent of the United States work force were women. Fifty-eight percent of those were married, twenty-three percent single, nineteen percent widowed, divorced, or separated. Women's Bureau, \textit{Employment Stds. Admin., Dep't of Labor, Women in the Labor Force} 1-2 (1972).

Approximately sixty-five percent of all working women, whom mandatory maternity leaves would affect, would have, at most, only seven thousand dollars supplemental income.

\textsuperscript{59} See, e.g., 16 Education U.S.A. No.22 (1974), where the decision is said to have possible implications in other areas of teachers' rights, such as rules against blind or overweight teachers.

\textsuperscript{60} Washington Post, Jan 22, 1974, at 4A, col.1.

On Nov. 12, 1971, the West Virginia Board of Education adopted a new maternity leave policy that allows voluntary maternity leave for a period of one year and requires mandatory leave when "in the opinion of the employee's attending physician, she is unable to continue her duties." W. Va. Bd. of Educ., Maternity Leave Policy for School Employees (Nov. 12, 1971). This replaced a 1942 policy that required at least four months pre-birth and seven weeks post-birth leave; refusal
boards must be reviewed. In addition, maternity leave policies in union contracts must also be scrutinized.\

As Justice Rehnquist forewarned, there is a possibility that the ratio decidendi of the decision may have far reaching effects on many other regulations that draw lines on the basis of broad classifications. Yet, the LaFleur decision will wield the most significant impact in the area of women’s rights. In this era of women’s liberation and the Equal Rights Amendment, this decision is a positive indication of the Court’s willingness, in similar cases brought under Title VII, to eliminate unfair maternity leave practices based on stereotype classifications that sweep too broadly.

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