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It is obvious that the Court in *Somerville* felt that the public's interest in seeing trials proceed to verdict was capable of tipping the scales in favor of "manifest necessity." It will be interesting to note whether the Court in the future, should it become more concerned with individual liberties, will readjust the balance set here.

Stephen S. Maris

A Problem for the School Systems: Are Mandatory Maternity Leave Rules Enforceable?

Three public school teachers individually initiated suits in different federal district courts seeking to invalidate mandatory maternity leave regulations which had been enforced against them by their respective boards of education. In each case a board of education regulation removed pregnant teachers from their classroom posts four or five months prior to the anticipated date of delivery. Each displaced pregnant teacher challenged the rule in a civil rights suit[1] by contending that the rule was repugnant to the equal protection clause of the fourteenth amendment of the United States Constitution. Plaintiffs asserted that the maternity leave rules were unconstitutional because the rules created a sex-based classification which was not reasonably related to any purpose for the rule. Further, plaintiffs urged that sex should be treated as a suspect criterion because the effect of the rule was an invidious discrimination against women teachers. Two of the three district courts held the regulations to be constitutional[2] while the other held the rule to be unconstitutional.[3] On appeal, two circuit courts *held*: Local school board rules prescribing mandatory maternity leaves are arbitrary sex-based classifications in violation of the equal protection clause. *LaFleur v. Cleveland Board of Education*, 465 F.2d 1184 (6th Cir. 1972), *cert. granted*, 411 U.S. 947 (1973) (No. 72-777), and *Green v. Waterford Board of Education*, 473 F.2d 629 (2d Cir. 1973). Another circuit court *held*: Local school board regulations prescribing mandatory maternity leaves are not a classification by sex, but rather a classification by maternity, which is not an invidious discrimination as it rationally furthers the school board's interest in maintaining continuity of classroom instruction. *Cohen v. Chesterfield County School Board*, 474 F.2d 395 (4th Cir.), *cert. granted*, 411 U.S. 947 (1973) (No. 72-1129).[4]

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[1] Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970):

> 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.

[2] Green v. Waterford Bd. of Educ., 349 F. Supp. 687 (D. Conn. 1972); LaFleur v. Cleveland Bd. of Educ., 326 F. Supp. 1208 (N.D. Ohio 1971).

[3] Cohen v. Chesterfield County School Bd., 326 F. Supp. 1159 (E.D. Va. 1971).

[4] The result of these decisions is a clear conflict among the circuits.

I. THE EQUAL PROTECTION HERITAGE

The constitutional requirement of equal protection[5] of the laws requires that classifications drawn by the state in the exercise of the police power "be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[6] The dilemma of selecting which legislative classifications are constitutionally acceptable is resolved by rejecting classifications which are irrational or directed at an impermissible purpose. Once the purpose of the classification has been determined to be permissible,[7] the constitutionality of the classification depends upon the existence of a rational relation between the classification and its permissible purpose.[8] The underlying purposes of the clause are to nullify discriminatory legislation, to impose substantive limits to classifying legislation, and to regulate the orderly exercise of the police power.[9]

To ascertain the constitutionality of legislative enactments the United States Supreme Court has applied two standards for compliance with the equal protection clause.[10] These standards are applied in what have been described as two distinct tiers.[11] The strict scrutiny standard, placing the burden of justification upon the state,[12] is the higher tier and is properly applied whenever the questioned statute applies a classification involving suspect criteria[13] or affects

[5] "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[6] F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). *See also* McLaughlin v. Florida, 379 U.S. 184, 191 (1964), for the proposition that equal application to everyone within a classification is not sufficient; the classification must be reasonable in relation to the purpose of the law.

[7] If a law has "no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional." United States v. Jackson, 390 U.S. 570, 581 (1968). *See also* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 358 (1949). These authors used the phrase "demand for purity of motive" to describe the equal protection requirement that the purpose of a law must be permissible.

[8] Morey v. Doud, 354 U.S. 457, 463-64, 469 (1957); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 70-71 (1911).

[9] *See* Tussman & tenBroek, *supra* note 7, at 342-43.

[10] *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (higher standard for suspect criteria and fundamental interests); Morey v. Doud, 354 U.S. 457 (1957) (the lower standard rational basis test).

[11] *See* 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, 8 (1972).

[12] *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 9 (1967).

[13] Race, national origin, lineage, and alienage are considered the traditional "suspect criteria" by the Supreme Court. The Court has stated that "[i]t should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny." Korematsu v. United States, 323 U.S. 214, 216 (1944). *See also* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (classification based on illegitimacy); Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Loving v. Virginia, 388 U.S. 1 (1967) (racial classifications); Oyama v. California, 332 U.S. 633 (1948) (national origin); Hirabayashi v. United States, 320 U.S. 81 (1943) (ancestry). In Frontiero v. Richardson, 411 U.S. 677 (1973), four Justices created the latest controversy in this area by expressing the opinion that sex should be added to the list of "suspect criteria."

It has been asserted that criteria are suspect because of the political weakness of the group classified, the unchangeable nature of the class characteristic which is an accident of birth and not a measure of worth, and the stigma which attaches to such a classification. *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1124-27 (1969).

fundamental interests.[14] The strict scrutiny standard obligates the state to demonstrate a legitimate purpose for the challenged law and a classification or restriction which is not only rationally related to, but necessary for the purpose of, furthering a compelling state interest.[15] The lower tier of review, a more permissive standard, gives greater weight to the judgment of the legislature,[16] and is applied in testing state actions which involve neither suspect criteria nor fundamental interests. Under this standard of review, a classification is considered constitutional unless a litigant demonstrates that it is not rationally related to a legitimate state purpose.[17] The challenger's task is further complicated by judicial exegesis of conceivable rationales to justify legislative enactments.[18] The two-tiered formula for equal protection analysis was designed to place the burden of decision-making responsibility with the legislature, while reserving an opportunity for judicial judgment to invalidate unreasonable legislative discriminations.[19]

II. SEX-BASED CLASSIFICATION AND THE RATIONAL BASIS STANDARD

The United States Supreme Court has historically viewed sex as a permissible classification and never as a suspect criterion.[20] The judiciary's unarticulated premise, in harmony with traditional beliefs concerning the role of women, has relegated them to a special position characterized by the need for the shelter of the home and protection from the apparent dangers of the competitive world.[21] In *Goesaert v. Cleary*,[22] the leading case involving classification by

[14] *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (the right to travel and residency requirements); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (the right to vote); Sherbert v. Verner, 374 U.S. 398 (1963) (classifications affecting religion); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to procreate). *See also* Comment, *The Evolution of Equal Protection—Education, Municipal Services and Wealth*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 105, 117-19 (1972), indicating that "fundamental interests" are protected because of the intense personal harm to the individual if the classification is sustained and the necessity to preserve collective societal freedoms.

[15] Loving v. Virginia, 388 U.S. 1, 11 (1967).

[16] "The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary." Lindsey v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

[17] Morey v. Doud, 354 U.S. 457, 464 (1957). Placing the burden of proof on the litigant challenging the statute means that many will fail. Therefore, both litigants and the states are vitally concerned with which standard of the two-tiered formula is applied in their area of interest, since it can clearly affect the outcome.

[18] "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 426 (1961). *See also* Morey v. Doud, 354 U.S. 457, 464 (1957).

[19] *See* Cox, *The Supreme Court 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 94-95 (1966).

[20] *See, e.g.*, Reed v. Reed, 404 U.S. 71 (1971); Goesaert v. Cleary, 335 U.S. 464 (1948).

[21] "The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator." Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring). *See also* Muller v. Oregon, 208 U.S. 412, 422 (1908), discussing the rationale for applying a maximum hour law to women: "Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained"; Comment, *"A Little Dearer Than His Horse": Legal Stereotypes and the Feminine Personality*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 260 (1971); Note, *Sex, Discrimination, and the Constitution*, 2 STAN. L. REV. 691 (1950).

[22] 335 U.S. 464 (1948).

sex and exemplifying the traditional attitude toward women, the Court upheld a Michigan law which forbad any woman not the wife or daughter of a tavern-keeper from being employed as a bartender, notwithstanding statutory sanction of the excluded women serving as cocktail waitresses in the same taverns. Although the primary purpose of the statute was probably the impermissible one of insuring a monopoly of male bartenders,[23] the Court applied the permissive lower tier review to hold the legislation constitutional, attributing to the Michigan legislature the conceivable purpose of protecting women from the evils of the tavern.[24] Thus, a reasonable relation between the classification and the attributed purpose was found, although there was no rational relation between the classification and the most probable purpose.[25] The posture which the Court traditionally assumed, that classifications by sex were to be tested by the lower standard of review, naturally resulted in dissatisfaction and opposition.[26]

A major expansion of the concept of equal protection in the area of women's rights resulted from the Court's recent decision in *Reed v. Reed*.[27] The plaintiff in *Reed* challenged the validity of an Idaho statute which, in appointing administrators for decedents' estates, specified a preference for males over equally qualified females. The Court examined the equal protection challenge from the permissive lower tier but concluded that the classification by sex, in such a patently violative situation, was not rationally related to the efficient administration of decedents' estates, the asserted purpose of the statute.[28] It was clear that the Idaho statute reduced the workload of the probate courts by eliminating the need for a hearing on the individual merits of competing men and women. However, it was just as clear to the Court that the legislative choice was arbitrary and, as such, violated the equal protection clause.[29] The result in *Reed* can be interpreted only as an indication that the Court is presently more willing to question traditionally acceptable sex-based classifications.[30]

The Court's willingness to look more closely at sex-based classifications which would have been acceptable previously is exemplified by its decision in *Frontiero v. Richardson*,[31] which was handed down after the maternity leave cases were decided by the courts of appeals. In *Frontiero* the classification[32] in

[23] *See Developments in the Law—Equal Protection*, *supra* note 13, at 1079.

[24] 335 U.S. at 466.

[25] *See Developments in the Law—Equal Protection*, *supra* note 13, at 1076-79. *See also* Two Guys From Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961) (economic regulatory powers of the state and Sunday "blue laws" ordinances).

[26] It has been asserted that the use of this permissive style of review means that women's rights are not sufficiently protected by the Constitution, and that sex should be a suspect criterion subject to the strict scrutiny standard of review in order to incorporate women's rights fully as a constitutionally protected area. *See, e.g.*, Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U.L. REV. 675-76 (1971); Note, *Constitutional Law—Equal Protection—Sex-Based Classification*, 1972 WIS. L. REV. 626.

[27] 404 U.S. 71 (1971).

[28] *Id.* at 75-76.

[29] *Id.* at 76.

[30] *See* Gunther, *supra* note 11, at 30-34. Professor Gunther noted that the *Reed* Court did not reach the issue whether sex was a suspect criterion, since the Court disposed of the challenged statute as not being rationally related to its purpose. He stated that "[i]t is difficult to understand that result without an assumption that some special sensitivity to sex as a classifying factor entered into the analysis." *Id.* at 34.

[31] 411 U.S. 677 (1973).

[32] The sex-based classification was applied in determining eligibility for quarters allow-

question was required by federal law, justified by the administrative convenience which it allegedly promoted,[33] and could have been invalidated, as in *Reed*, by applying the lower standard. While eight of the Justices agreed that the law was invalid under the due process clause of the fifth amendment,[34] they could not agree on what standard should properly be applied.

Four Justices stated that they could "only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny."[35] Three other Justices stated that "[i]t is unnecessary for the Court in this case to characterize sex as a suspect classification, with all of the far-reaching implications of such a holding . . . . [W]e can and should decide this case on the authority of *Reed* and reserve for the future any expansion of its rationale."[36] These Justices thought that it was inappropriate to characterize sex as a suspect classification when the equal rights amendment[37] was being considered for ratification by the states.[38] The feeling of these three Justices was that "democratic institutions are weakened, and confidence in the restraint of the Court is impaired, when we appear unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under consideration within the prescribed constitutional processes."[39]

The position taken by Mr. Justice Stewart in *Frontiero* may well be important in considering what the Court may do when it is confronted with the maternity leave question. While he felt, as did the three Justices in *Frontiero*, that *Reed* offered sufficient basis for declaring the sex-based classification invalid,[40] he chose not to concur in their opinion that any decision as to whether sex should be a suspect criterion should be deferred so long as the equal

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ances, medical services, and dental care for the uniformed services. In permitting members of the uniformed services to claim their spouses as dependents, males could qualify for the increased allowance by virtue of their wives' dependency regardless of the amount that she contributed towards her own support. However, a female service member could qualify under the statutes only if her husband relied upon her for more than half his support. Thus males qualified by merely claiming to have a dependent wife, but females had to demonstrate the dependency of their husbands. *Id.* at 677-80.

[33] The Government contended that because the vast majority of the uniformed service personnel are men it would be reasonable for Congress to grant them dependency benefits by presumption, and only in the rare instance of a female member would there be need for proof of actual dependency. Close scrutiny of the supposed administrative convenience led four of the Justices to reject this argument, noting that the Government had not carried the burden of persuasion that administration by presumption favoring men is cheaper than making an actual determination, especially in light of the use of mere affidavits by men to secure the dependency allowance for their wives. 411 U.S. at 688-90.

[34] The Court cited Schneider v. Rusk, 377 U.S. 163, 168 (1964): "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" 411 U.S. at 680 n.5. *See also* Shapiro v. Thompson, 394 U.S. 618, 641-42 (1969); Bolling v. Sharpe, 347 U.S. 497 (1954).

[35] 411 U.S. at 688. The four Justices, concurring in an opinion written by Mr. Justice Brennan, stated that their reason was that the sex characteristic frequently has no relation to a person's ability to perform or contribute to society. *Id.* at 686.

[36] *Id.* at 691-92. These three Justices were Mr. Chief Justice Burger, Mr. Justice Powell, and Mr. Justice Blackmun.

[37] U.S. CONST. amend. XXVII (proposed), H.R.J. Res. 208, 92d Cong., 2d Sess., 118 CONG. REC. S.4612 (daily ed. Mar. 22, 1972). The proposed amendment reads in part: "Equality of rights under the law shall not be denied or abridged by the United States or by any State or on account of Sex." *Id.* at S.4582.

[38] 411 U.S. at 692.

[39] *Id.*

[40] *Id.* at 691.

rights amendment is being considered. Significantly, only one more Justice is necessary for a majority of the Court to reach the conclusion that sex is a suspect criterion. Perhaps under a different fact situation, Mr. Justice Stewart may side with the four Justices who would have taken that far-reaching step in *Frontiero.*

III. The Maternity Leave Cases

The classification delineated by the boards of education regulations[41] divided teachers into two groups: the first consisting of those who are pregnant and the second those who are not. The pregnant group is forced from the job four or five months prior to becoming disabled, in contrast with the non-pregnant group which is not forced to leave prior to suffering any disability. According to the board rules, a pregnant teacher was given no voice in deciding when she should cease teaching because of her condition, whereas personal discretion was permitted individual non-pregnant teachers in determining temporary absences for illness or elective surgery.

The three plaintiffs contended that the classification based upon sex was inherently a suspect criterion requiring the strict scrutiny standard of review. The courts of appeals, constrained by precedent of the Supreme Court which had not, at that time, given any indication that sex was a suspect criterion,[42] reviewed the maternity leave rules by applying the lower tier, permissive standard.

Is the Classification Based Upon Sex? In *Cohen v. Chesterfield County School Board*[43] the Fourth Circuit said that the mandatory maternity leave rule "does not apply to women in an area in which they may compete with men"[44] and concluded that the classification was not based upon sex but was sui generis.[45] In contrast, however, the Sixth Circuit in *LaFleur v. Cleveland Board of Education*[46] stated that "we deal with a rule which is inherently based upon a classification by sex. Male teachers are not subject to pregnancy, but they are subject to many types of illnesses and disabilities."[47] In accord with the Sixth

[41] *See, e.g.,* the Waterford Board of Education agreement with the Waterford Education Association, the collective bargaining unit for all Waterford teachers, which reads, in part:

> Art. XIV—*Maternity Leave*
>
> As soon as any teacher shall become aware of her pregnancy, she shall forthwith apply in writing to the Superintendent of Schools for a maternity leave of absence, and shall accept a leave of absence as provided by the Board of Education.
>
> A maternity leave shall begin not less than four months prior to expected confinement or at such earlier time as a replacement becomes available.

473 F.2d at 631 n.1. The Cleveland Board of Education rule, in part, dictates:

> *Application.* A maternity leave of absence shall be effective not less than *five (5) months before the expected date* of the normal birth of the child. Application for such leave shall be forwarded to the Superintendent at least *two (2) weeks* before the effective date of the leave of absence. A leave of absence without pay shall be granted by the Superintendent for a period not to exceed *two (2) years.*

465 F.2d at 1185 (emphasis in original).

[42] *See* note 20 *supra,* and accompanying text.

[43] 474 F.2d 395 (4th Cir.), *cert. granted,* 411 U.S. 947 (1973) (No. 72-1129).

[44] *Id.* at 397.

[45] *Id.* at 398.

[46] 465 F.2d 1184 (6th Cir. 1972), *cert. granted,* 411 U.S. 947 (1973) (No. 72-777).

[47] *Id.* at 1188.

Circuit, the Second Circuit in *Green v. Waterford Board of Education*[48] decided that the classification was based upon sex, reasoning that "[b]ecause male teachers are not forced by defendant Board to take premature leave because of a known forthcoming medical problem, female teachers should not be treated differently."[49]

The theory of the *Cohen* opinion, that since women do not compete with men in the area of requiring a maternity leave and thus this is not a classification by sex, is valid only within a narrow context. Although men do not and cannot become pregnant, in broader perspective women compete with men, not for the privilege of taking such a leave, but to earn income and promotion. A teacher absent from the job for several months suffers a disadvantage in job competition. The effect of the maternity leave is to dismiss a pregnant teacher prior to the time dictated by the disability.[50] The focus of the *Cohen* decision is, thus, narrow in contrast to the perspective attained by the *LaFleur* and *Green* courts.

The broad perspective taken by the Sixth and Second Circuits[51] recognizes the distinction between pregnancy and employment regulations:[52]

> [S]ingling out childbirth for special treatment does not discriminate on the basis of sex even though the law refers only to women because men cannot give birth. But if in referring to childbirth the law goes beyond to spheres other than the reproductive differences between men and women (e.g., employment), the law must treat women who give birth the same as men are treated in respect to the area of regulated employment (e.g., absence from work for temporary disability.).[53]

The maternity leave rules should be viewed from a broad perspective as

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[48] 473 F.2d 629 (2d Cir. 1973).

[49] *Id.* at 634.

[50] *See* Note, *Striking Down the Legal Bastion of "Maternal Protection,"* 36 ALBANY L. REV. 589, 597 (1972), which discusses competition between men and women for jobs. *See also* Comment, *Love's Labors Lost: New Conceptions of Maternity Leaves*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 260, 261-63 (1971), suggesting ways to handle maternity leaves fairly. This comment indicates that only fair and rational maternity policies will maintain women's incentive to work on an equal level with men. Rational maternity leaves, according to this comment, are especially necessary to the large numbers of working women who make significant contributions to their family's income.

[51] *See also* Buckley v. Coyle Public School Sys., 476 F.2d 92 (10th Cir. 1973). *Buckley* involved a fact situation similar to the three maternity leave cases discussed here, except that it also involved allegations of racial discrimination on the part of the school board. Because of this additional factor, *Buckley* cannot be treated on an equal basis with the three principal cases. However, it should be noted that the Tenth Circuit was of the opinion that such a board rule penalized a female teacher for being a woman, and remanded the case to the district court with instructions that the higher standard should be applied. The Tenth Circuit thought that the board regulations affected fundamental interests by impinging on the teacher's right to bear children, and by forcing the teacher to choose between employment or pregnancy. *See also* Pocklington v. Duval County School Bd., 345 F. Supp. 163 (M.D. Fla. 1972) (preliminary injunction against board maternity leave rule made final); Williams v. San Francisco Unified School Dist., 340 F. Supp. 438 (N.D. Cal. 1972); Jinks v. Mays, 332 F. Supp. 254 (N.D. Ga. 1971) (granting of maternity leave to tenured but not to non-tenured teacher violated equal protection), *modified*, 464 F.2d 1223 (5th Cir. 1972) (where plaintiff failed to comply with school system rules governing departure and notice of return no back pay would be awarded).

[52] *See* Note, *Fair-Employment—Is Pregnancy Alone a Sufficient Reason for Dismissal of a Public Employee?*, 52 B.U.L. REV. 196 (1972).

[53] Eastwood, *The Double Standard of Justice: Women's Rights Under the Constitution*, 5 VAL. L. REV. 281, 312 (1971). *See also* Murray & Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 240 (1965).

affecting teacher employment, in accord with the reality of competition between men and women teachers for advancement rather than as a classification by maternity among women teachers.

Are the Maternity Leave Rules Constitutional? There can be no doubt that the three boards of education have a legitimate interest in supervising their systems' teachers in order to provide an atmosphere conducive to the learning process. The question crucial to the decisions in the maternity leave cases is whether the rules were rationally related to their purposes. This determination requires the estimation of a point beyond which the rule could not be considered rational. Determination of the substantive limits under which the equal protection clause will sustain a classification's rational relation to a permissible purpose requires an examination of the asserted purposes for the rules, and the effect the operation of the rules has upon those purposes.

In *LaFleur* and *Green* the Cleveland and Waterford boards, respectively, advanced the contention that pregnant teachers might have embarrassing incidents because of students reacting to their pregnancy. The Sixth Circuit in *LaFleur* summarily dismissed this notion saying that "[b]asic rights such as those involved in the employment relationship and other citizenship responsibilities cannot be made to yield to embarrassment."[54] The *Green* decision termed this possibility "trivial" and stated that where the plaintiff taught high school "pregnancy is no longer a dirty word."[55]

The Cleveland board advanced the theory in *LaFleur* that the large numbers of female teachers having children during the school year necessitated the need for such a rule for convenience of administration.[56] The Sixth Circuit acknowledged that the "rule may arguably make some administrative burdens lighter,"[57] but noted that any teacher disability created the same administrative problems, regardless of the teacher's sex or disability.[58] The Second Circuit in *Green* cited *Reed* as analogous, and rejected the administrative convenience argument, saying that "[w]hile it might be easier for the Board to handle all maternity leave problems on an arbitrary, blanket basis, a reduced administrative workload is constitutionally insufficient to sustain this discriminatory treatment of pregnant women."[59]

[54] 465 F.2d at 1187. The opinion also noted that the Cleveland board rules permit pregnant students to continue their education in the classroom. This seems to imply that the board of education was not of the opinion that the presence of a pregnant woman in the classroom was disruptive.

[55] 473 F.2d at 635.

[56] 465 F.2d at 1187. Judge Phillips' dissent in *LaFleur* pointed to the problems of administration when, of the 5800 teachers in the system, 225 were on maternity leave at any given time.

[57] *Id.*

[58] *Id.*

[59] 473 F.2d at 636. The Second Circuit in *Green* noted that administrative convenience could justify a harsher rule in order to avoid disagreements in situations where a teacher's private physician certified her as able to continue teaching and a school physician claimed she was not physically fit. The court went on to note that the board only set up rules which avoided disagreements between physicians in the case of pregnancy. Finally, the court stated that despite the fact that maternity leaves composed the largest group of teacher disabilities requiring an absence, there was no basis to support handling all maternity questions as a class. Indeed, the court noted that the Waterford maternity leave rule had been changed to provide individual consideration on a case-by-case basis. The new contract between the Waterford Board of Education and the Waterford Education Association in part reads:

The major premise which formed the basis of the boards' justification for the rule was an extension of the principle that a teacher leaving the classroom for a disability disrupts the students' education. The continuity of classroom instruction is a primary objective of the educational system. The issue created by the regulations was not whether continuity is a permissible purpose, for clearly it is,[60] but rather, whether or not the classification drawn by the boards was constitutionally sustainable as being rationally related to the purpose of fostering continuity. The school systems' administrators reasoned that, in order to preserve the continuity of instruction, they should decide when a pregnant teacher should be placed on maternity leave; this could be accomplished by setting a determinable date in advance of delivery when a substitute teacher should be procured for an extended period and acquainted with the class and curriculum. The effect of the board rules, however, has not always preserved the continuity of the classroom instruction.[61] Whenever the four-month-prior-to-delivery period is calculated and falls within the school year, the imposition of the rule disrupts classroom continuity more than if the teacher were allowed to continue teaching until a convenient break, such as a vacation or end of a semester. More careful planning would foresee when the class had finished a particular subject or chapter, and at that point a substitute teacher could enter into the class.

More importantly, the rationality or reasonable relation of the provision requiring displacement four or five months before delivery to the purpose of continuity is questionable. The Sixth Circuit decided *LaFleur* on a record which strongly indicated the medical problems of pregnancy, yet stated that "[u]nder no construction of this record can we conclude that the medical evidence presented supports the extended periods of mandatory maternity leave required by the rule . . . ."[62] In the *Green* decision, the Second Circuit thought that the rule establishing the maternity leave four months prior to delivery would be less certain to preserve continuity of education than a rule permitting the pregnant teacher to teach until just prior to delivery. This court noted that the board of education has more time to hire a qualified substitute teacher when

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26. *Maternity Leave*: Upon positive notification of pregnancy from a physician, the teacher shall forthwith notify the Superintendent in writing and shall apply for maternity leave. The effective date and length of the maternity leave shall be determined by the Board upon consideration of the following criteria:
1. The continuity of the education process particularly as it affects the classes to which the teacher is assigned.
2. The health of the teacher and her physical ability to fulfill the responsibilities of her position.
3. The desires of the teacher with respect to the effective date and length of the maternity leave.

Brief for Appellant at 28, Green v. Waterford Bd. of Educ., 473 F.2d 629 (2d Cir. 1973).

[60] The value of continuity of education in the classroom was credited by all the circuit courts as being a permissible objective. *See* 474 F.2d at 397; 473 F.2d at 635; 465 F.2d at 1187.

[61] *See, e.g.*, Green v. Waterford Bd. of Educ., 473 F.2d at 635-36 n.17: The Second Circuit discussed the possibility that the *Green* rule actually disrupted the class, but that the record was not clear enough for the court to determine whether the school system was on a semester basis. If the school were on a semester basis and the plaintiff wished to teach until January 31, the end of the semester, but was dismissed on November 17, the result would clearly be more disruptive than allowing her to continue teaching.

[62] 465 F.2d at 1188.

the pregnant teacher is allowed to remain in the classroom for the maximum period prior to actual disability.[63]

The Fourth Circuit in *Cohen* is the only court which deemed the classification to be rationally related to the asserted purpose of maintaining continuity, which in part is due to the fact that the Fourth Circuit, unlike the other two circuits, viewed the classification as based upon pregnancy instead of sex. The *Cohen* court reasoned that, in the instance of pregnancy absences, the disability was predictable, of longer duration than temporary illnesses, and that such longer absences were objectionable as they disrupted the students' education. The Fourth Circuit reached the conclusion that the rule was rationally related to maintaining continuity of education and, thus, constitutional.[64]

The reasoning in the *Cohen* opinion avoids the broader perspective from which it can be seen that predictable and long-term disabilities can befall male teachers, whom the rule treats differently by prescribing disability leave at the time of disability. If the purpose for the rule is to maintain continuity of classroom instruction, the rule should apply equally to all teachers who become disabled. The key element in maintaining continuity of education is not the nature of the disability which befalls a teacher, but the fact that a teacher can no longer remain in the classroom. The board pregnancy rules can be criticized because they isolate female teachers for special treatment when they become pregnant. This isolation is no more related to continuity of education than is the disability of any male teacher. In order for the boards' rules to be rationally related to the purpose of maintaining continuity, they must focus upon the treatment of disabled teachers, and not the nature of the teacher's disability. The Second Circuit in *Green*, in a succinct summation of the continuity issue stated: "We do not denigrate the Board's interest in providing 'orderly transition between teachers,' but the relationship between the maternity leave rule and that interest seems insufficiently 'fair and substantial' to pass constitutional muster."[65]

In *Cohen* the board raised the issue of school safety, since a teacher must not only be able to defend herself but also must be capable of assuming a leadership role in an emergency.[66] The Second Circuit in *Green* addressed this question by stating that "any rational rule motivated by interests in safety should logically take account of variations in the location of schools and in the age of students; the Board's maternity leave provision does not do so."[67] This suggestion of a sliding scale type of analysis, providing that each situation be individually evaluated, reflects a more sensible approach to the maternity leave rules than did the inflexible approach of the boards' regulations.

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[63] According to the Second Circuit, the value of continuity of instruction is preserved whenever the teacher gives notice of a set date for the start of her maternity leave. 473 F.2d at 635.

[64] 474 F.2d at 399.

[65] 473 F.2d at 636.

[66] *See, e.g.*, Respondent's Brief in Opposition to Certiorari at 4, Cohen v. Chesterfield County School Bd., 474 F.2d 395 (4th Cir.), *cert. granted*, 411 U.S. 947 (1973) (No. 72-1129), wherein evidence is cited that the school system was concerned about the safety of school children in a fire or other emergency when their teacher was pregnant. Additionally, fear was expressed that the pregnant teacher might be injured by being jostled in the halls.

[67] 473 F.2d at 635.

The Maternity Leave Cases and Sex as a Suspect Criterion. The specific statement in *Frontiero* by four Justices that sex should be considered a suspect criterion, and the strong indication by four other Justices of a sensitivity to sex as a classifying factor has set the stage for a possible decision by the Court on the broad issue of sex as a suspect classification. The maternity leave cases presently before the Court may be an ideal situation for just such a decision. It would be entirely logical for the Court to consider which standard should be applied to test the constitutionality of the maternity leave regulations, as the appropriate standard will determine the proper burden of justification and which party must bear the burden.

The maternity leave regulations could be invalidated under the rational basis standard,[68] but nevertheless the Court should give serious consideration to approaching these cases from the higher strict scrutiny standard. *Frontiero* demonstrated that several Justices desire to defer a pronouncement on the issue of whether sex is a suspect criterion until after the political process has had the opportunity to decide upon the ratification of the equal rights amendment. These Justices, quite properly, place great emphasis upon the public's confidence in judicial restraint. Although this reasoning is most persuasive, if the sex trait is analogous to the other suspect criteria under current law, then sex should be added to the list of classifying factors which are inherently suspect.[69]

The thrust of the suspect criteria standard which requires strict judicial scrutiny has been to prevent detrimental discrimination against groups on the basis of race, alienage, ancestry, and national origin. Classifications involving each of these criteria are suspect because each trait is readily identifiable, the individual is marked as a member of the group from birth, and the individuals possessed of the trait suffer the prejudice and discrimination of others.[70] More importantly, each of the suspect traits bears no relation whatsoever to the individual's ambitions, goals, performance, or ability to contribute to society. It is sufficiently clear that sex, as with the other suspect classifications, is such a trait. Since sex is analogous to the other suspect criteria and women are frequently discriminated against solely on this basis, it is appropriate for the Court to extend to women the protection of the suspect criteria standard.[71]

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[68] *See* Comment, *Mandatory Maternity Leave of Absence Policies—An Equal Protection Analysis*, 45 TEMP. L.Q. 240, 258 (1972).

[69] *See Developments in the Law—Equal Protection*, *supra* note 13, at 1174 n.61, wherein the authors indicate that the list of suspect criteria could expand over time. These authors stated "[t]hus 'sex' under current law may not be a suspect classification as long as experience teaches that the biological differences between the sexes are often related to performance. . . . But as the truth of the latter proposition is drawn into question, so too is the nonsuspect nature of sexual classifications." *Id.*

[70] *Id.* at 1123-27, 1173-76.

[71] *See* Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (en banc) (the Supreme Court of California reviewed the entire field of equal protection and sex-based classifications and pointedly held that sex is a suspect criterion under the California Constitution); Comment, *Sex Discrimination and Equal Protection: Do We Need A Constitutional Amendment?*, 84 HARV. L. REV. 1499, 1507 (1971) (the author suggests that "the suspect classification approach would seem more promising as the basis for the kind of sweeping attack on sex discrimination which even the opponents of an amendment agree is necessary"); Comment, *supra* note 50, at 276 (suggesting that the two-tiered standard of review should mean that the stricter standard should be employed as it would place the burden of proof where it should be: "upon the state-authorized bodies that invoke

The major issue in the selection of the proper standard to test the maternity leave cases is whether or not the Court should positively declare sex a suspect criterion. It appears from a consideration of the maternity leave cases that the board rules could be invalidated by the rational basis standard, thus making it unnecessary for the Court to extend the suspect classification status to sex under the factual situation at issue in the maternity leave cases. Nevertheless, a declaration that sex is a suspect criterion could easily be justified by the Court on the ground that sex is so like the other suspect classifications that it is in fact entitled to the same protection as is afforded the other suspect criteria. If the maternity leave rules are tested by the suspect classification standard of strict judicial scrutiny there would be little doubt that the board rules are unconstitutional, for there is no ground upon which the boards could demonstrate a compelling governmental interest being furthered by rules which are at best upon the borderline of irrationality.

IV. CONCLUSION

Local school board rules prescribing mandatory maternity leave four to five months prior to delivery are sex-based classifications which bear no rational relation to their purposes and, as such, are unconstitutional under the rational basis standard of the equal protection clause of the fourteenth amendment. Unquestionably, the most preferable constitutional view of the maternity leave rules is that they are unconstitutional because they arbitrarily force physically capable women from their jobs before the time they are required to leave for a medical disability. The board rules, in the context of the equal protection clause should treat the disabilities of teachers, male or female, alike, whether the disabilities are sudden illnesses or foreseen problems such as pregnancy or elective surgery.

Notwithstanding the fact that the maternity leave rules are probably unconstitutional under the rational basis standard, it would be appropriate for the Court to culminate the trend established by *Reed* and *Frontiero* by examing the maternity leave regulations under the strict scrutiny standard by declaring sex a suspect criterion. A declaration of sex as a suspect classification would be in harmony with the development of a national women's rights movement and the establishment of a national government policy towards ending sex discrimination.

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classifications based on historical stereotypes"). *But see* Comment, *Are Sex-Based Classifications Constitutionally Suspect?*, 66 NW. U.L. REV. 481, 496 (1971) (indicating that sex-based classifications are made upon the individual's status and "to the extent that biological differences between the sexes may be safely related to performance by the group *as a class*, a classification based upon sex is not invidious").