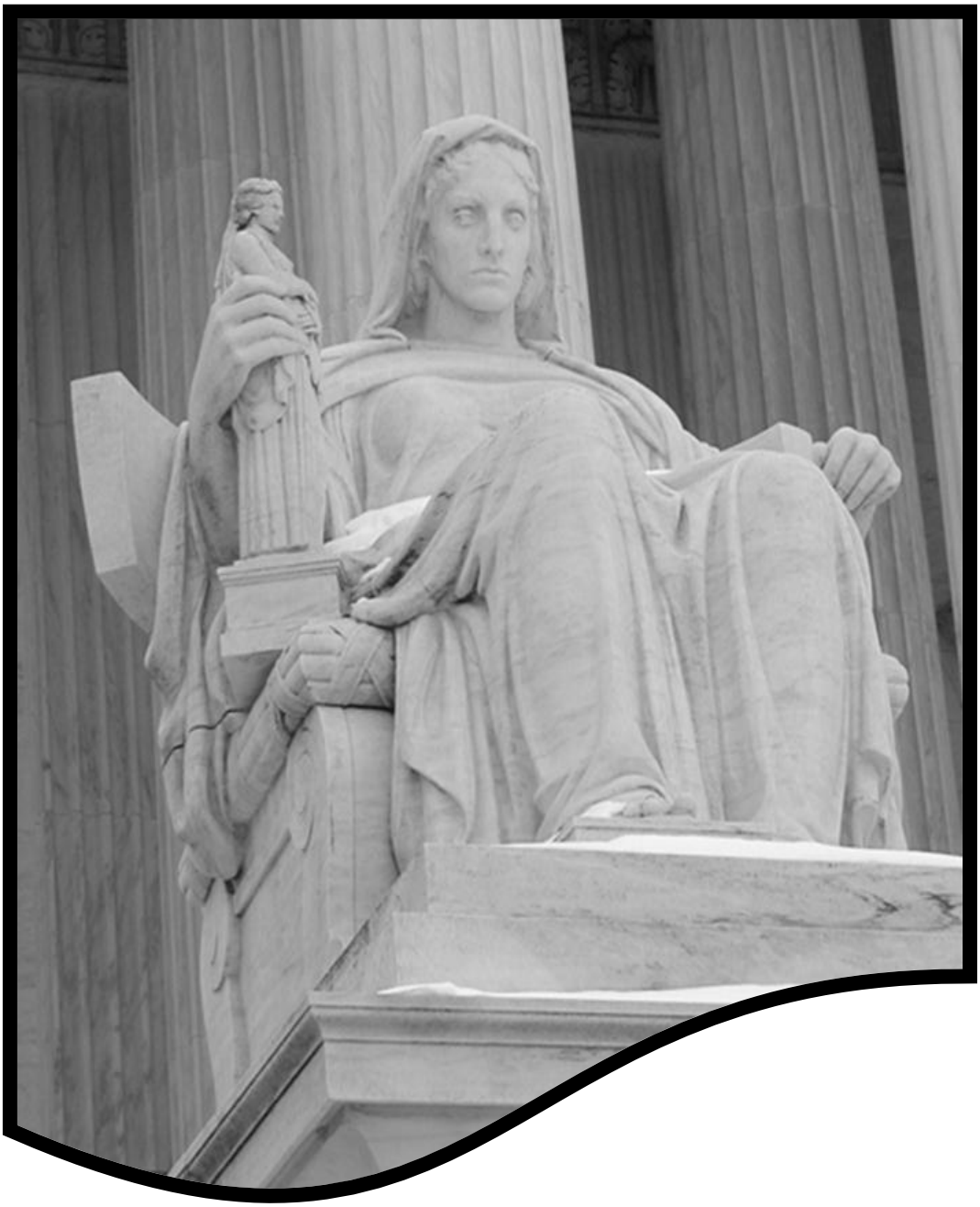

Law-Related Education
Supreme Court Case Book

Women's Rights

Special appreciation is extended to the following people and organizations:

The inspiration of all Law-Related Education projects: Dr. Isidore Starr.

Special thanks to the Scholar Staff:

Professor Jerry Perry
Dr. Mel Hailey
Dr. Jerry Polinard
Dodie Kasper, LRE Coordinator

Special thanks to the State Bar of Texas Law-Related Education Department for their support and skills in making this activity guide come to life. The staff includes:

Jan L. Miller, Director
Dodie Kasper, LRE Coordinator

Developed in 1995 and revised in 2019 by the Law-Related Education Department, State Bar of Texas.

Minor v Happerset

88 US 162 (1875)

The state constitution of Missouri provided: “Every male citizen of the U. S. shall be entitled to vote.” Under a Missouri statute, any person wishing to vote had to have previously registered. On October 15, 1872, Virginia Minor, a native born, free, white citizen of Missouri and the U. S., over 21, wishing to vote in the general election in November, applied to Happerset, the registrar of voters, to register to vote. He refused to register her and gave as his reason the fact that she was not “a male citizen of the U. S.” Minor sued Happerset in a lower Missouri court which returned a judgment in Happerset’s favor. The Missouri Supreme Court affirmed the lower court’s judgment, and Minor appealed to the U. S. Supreme Court.

Issue: Does a state’s failure to permit an otherwise qualified citizen to vote solely because that citizen is not a male violate the privileges and immunities clause of the Fourteenth Amendment?

The Supreme Court unanimously ruled “No,” a state’s failure to permit an otherwise qualified citizen to vote solely because that citizen is not a male does not violate the privileges and immunities clause of the Fourteenth Amendment. Speaking for the Court, Chief Justice Morrison Waite wrote: “The direct question is, therefore, presented whether all citizens are necessarily voters. The Constitution does not define the privileges and immunities of citizens. For that definition we must look elsewhere. In this case we need not determine what they are, but only whether suffrage is necessarily one of them. It certainly is nowhere made so in express terms. The United States has no voters in the States of its own creation. The elective officers of the U. S. are all elected directly or indirectly by State voters. … It is clear, therefore, we think, that the Constitution has not added the right of suffrage to the privileges and immunities of citizenship as they existed at the time it was adopted. … In respect to suffrage in the several States it cannot for a moment be doubted that if it had been intended to make all citizens of the U. S. voters, the framers of the Constitution would not have left it to implication. … No such change was intended. … Women were excluded from suffrage in nearly all the States by the express provision of their constitutions and laws. … Certainly, if the courts can consider any question settled, this is one. For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. … Being unanimously of the opinion that the Constitution of the U. S. does not confer the right of suffrage upon anyone, and that the constitutions and laws of several states which commit that important trust to men alone are not necessarily void, we affirm the judgment.”

Muller v Oregon

208 U. S. 412 (1908)

In 1903 Oregon adopted a law one section of which provided that females could not be employed in any factory or laundry in the state for more than ten hours per day. In September, 1905, in an Oregon circuit court, a charge was filed against Curt Muller, the owner of a laundry, alleging that he had required a female to work more than ten hours. At trial, Muller was convicted and ordered to pay a $10 fine. The Oregon Supreme Court affirmed the conviction, and Muller then appealed to the U. S. Supreme Court.

The Issue: Does a state law limiting the number of hours per day that females can be employed in a factory or laundry violate the privileges and immunities, the due process of law, or the equal protection of the laws clause of the Fourteenth Amendment?

The Supreme Court unanimously ruled "No," a state law limiting the number of hours per day females can be employed in a factory or laundry does not violate any provision of the Fourteenth Amendment. Speaking for the unanimous Court, Justice David Brewer wrote: "It is the law of Oregon that women, whether married or single, have equal contractual and personal rights with men. Putting to one side the elective franchise, in the matter of personal and contractual rights they stand on the same plane as the other sex. Their rights in these respects can no more be infringed than the equal rights of their brothers. … It may not be remiss, in the present case, before examining the constitutional question, to notice the course of legislation as well as expressions of opinion from other than judicial sources. In the brief filed by Mr. Louis D. Brandeis … is a very copious collection of all these matters…" Mr. Brandeis calls attention to statutes of several nations as well as "extracts from over 90 reports of committees, bureaus of statistics, commissioners of hygiene, inspectors of factories, both in this country and in Europe, to the effect that long hours of labor are dangerous for women, primarily because of their special physical organization. … It is undoubtedly true, as more than once declared by this court, that the general right to contract in relation to one's business is part of the liberty of the individual protected by the Fourteenth Amendment to the Federal Constitution; yet it is equally well settled that this liberty is not absolute and extending to all contracts, and that a State may, without conflicting with the provisions of the Fourteenth Amendment, restrict in many ways the individual's power of contract. … That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. … Still again, history discloses the fact that woman has always been dependent upon man. … She will still be where some legislation to protect her seems necessary to secure a real equality of right."

Hoyt v Florida

368 U. S. 57 (1961)

Gwendolyn Hoyt was convicted by an all-male jury in a Florida court of second-degree murder of her husband. A Florida statute provided that no woman would be taken for jury service unless she volunteered for it. Since the statute was adopted, only a minimal number of women had volunteered. Hoyt claimed that her conviction by an all-male jury violated rights guaranteed by the Fourteenth Amendment. She claimed that the nature of her crime peculiarly demanded inclusion of citizens of her own sex on the jury. As described by the Florida Supreme Court, the affair occurred in the context of a marital fight involving among other things the suspected infidelity of Hoyt's husband and culminating in his final rejection of her efforts at reconciliation. She asserted that women jurors would have been more understanding or compassionate than men in assessing her actions and her defense of 'temporary insanity. The Florida Supreme Court affirmed her conviction, and Hoyt appealed to the U. S. Supreme Court.

Issue: Does a state law which provides that women will only be called for jury service if they have volunteered for such, often resulting in all-male juries, deny a female defendant her right to an impartial jury of her peers and thus her rights under the Fourteenth Amendment?

A unanimous Supreme Court answered "No." Speaking for the unanimous Court, Justice John Marshall Harlan II wrote: "…the right to an impartially selected jury assured by the Fourteenth Amendment … does not entitle one accused of a crime to a jury tailored to the circumstances of the particular case, whether relating to the sex or other condition of the defendant or to the nature of the charges to be tried. It requires only that the jury be indiscriminately drawn from among those eligible in the community for jury service, untrammeled by any arbitrary or systematic exclusions. … Manifestly, Florida's law does not purport to exclude women from state jury service. Rather, the statute 'gives to women the privilege to serve but does not impose service as a duty.' … In the selection of jurors Florida has differentiated between men and women in two respects. It has given women an absolute exemption from jury duty based solely on their sex, no similar exemption obtaining as to men. And it has provided for its effectuation in a manner less onerous than that governing exemptions exercisable by men: women are not to be put on the jury list unless they have voluntarily registered for jury service; men, on the other hand, even if entitled to an exemption, are to be included on the list unless they have filed a written claim of exemption s provided by law. … In neither respect can we conclude that Florida's statute is not 'based on some reasonable classification,' and that it is thus infected with unconstitutionality. … woman is still regarded as the center of home and family life. … Florida is not alone in so concluding. … Of the forty-seven states where women are eligible, seventeen besides Florida, as well as the District of Columbia, have accorded women an absolute exemption based solely on their sex… The relative paucity of women jurors does not carry the constitutional consequence appellant would have it bear. … We cannot hold this statute as written offensive to the Fourteenth Amendment."

NOTE: Fourteen years later, the Supreme Court in *Taylor v Louisiana (419 U. S. 522, 1975),* by an 8-1 vote, with only Justice Rehnquist dissenting, essentially overruled *Hoyt v Florida.* Louisiana's requirement that a woman should not be selected for jury service unless she had previously filed a written declaration volunteering to serve could not stand when the consequence was that criminal juries were almost all male. The requirement that a jury be selected from a representative cross-section of the community is fundamental to the jury trial guaranteed by the Sixth Amendment and the Fourteenth Amendment which are violated by the exclusion of women from juries. "The contrary implications of prior cases, e. g. *Hoyt v Florida,* cannot be followed."

ESTELLE T. GRISWOLD, ET AL. v. *STATE OF CONNECTICUT*
381 U. S. 479 (1965)

Estelle Griswold was Executive Director of the Planned Parenthood League of Connecticut. At its New Haven Center, Planned Parenthood was providing information, instruction, and medical advice as to the means of preventing conception to married persons. Wives were physically examined, and the Center suggested the best contraceptive device or material for her use. Fees were usually charged, although some couples paid no fee. Griswold and Buxton, a medical doctor who worked with Planned Parenthood, were arrested on November 10, 1961, for violating two state statutes. One statute in effect since 1879 provided that “any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.” Another statute also in effect since 1879 provided that “any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.” Griswold and Buxton were found guilty as accessories and fined $100 each. Their conviction was affirmed by the Appellate Division of the Circuit Court and the Supreme Court of Errors for the State of Connecticut.

ISSUE: Does an individual's right to privacy under several amendments of the Bill of Rights preclude a state from making criminal advice concerning the use of, and prescription for, contraceptive devices for married couples?

Justice Douglas authored the opinion of the Court. By a 7-2 vote, the Court held that the Connecticut law forbidding use of contraceptives unconstitutionally intruded upon the right of marital privacy. Justice Douglas explained that although the right to privacy does not appear anywhere in the Bill of Rights, it exists as part of other rights which are given. Justice Douglas wrote: “Specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.... Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." Douglas added that the present case concerns a relationship lying within the zone of privacy created by certain fundamental constitutional guarantees and went on to say that the "right of marital privacy" is even "older than the Bill of Rights."

In a concurring opinion, Justice Goldberg wrote: "*Although I have not accepted the view that "due process" as used in the Fourteenth Amendment includes all of the first eight Amendments ..., I do agree that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights...."* Goldberg went on to say that he based his vote in this case solely on the Ninth Amendment.

Justice Black filed a dissenting opinion which Justice Stewart joined: "I feel constrained to add that the law is every bit as offensive to me as it is my brethren of the majority. … The Court talks about a constitutional 'right of privacy' as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the 'privacy' of individuals. But there is not."

Justice Stewart also authored a dissenting opinion in which he wrote: "The Connecticut law is an uncommonly silly law and is obviously unenforceable. However, we are not asked in this case to say whether this law is unwise, or even asinine. We are asked to hold that it violates the U. S. Constitution. And that I cannot do. … To say that the Ninth Amendment has anything to do with this case is to turn somersaults with history."

REED v REED
404 U. S. 71 (1971)

An Idaho statute gave preference to males over females as administrators of the states of individuals who died intestate (without a will). Richard Reed, a minor, died intestate in Idaho in 1967. His adoptive parents had separated prior to his death. His mother, Sally Reed, filed a petition in the Probate Court asking to be appointed administrator of her son's estate. His father, Cecil Reed, filed a competing petition asking that he be appointed administrator of his son's estate. The Probate Court held a joint hearing on the two petitions, and following the Idaho statute, the court determined that Cecil Reed should be appointed administrator of the son's estate because he was a male. There was no indication that the probate judge had attempted to determine the relative capabilities of the competing applicants. Sally Reed appealed, and an Idaho District Court held that the Idaho statute violated the equal protection of the laws clause of the Fourteenth Amendment. The District Court ordered that the case be sent back to the Probate Court for determination as to which of the two applicants was better qualified to administer the estate. This order was never carried out because Cecil Reed appealed to the Idaho Supreme Court. That court reversed the District Court and reinstated Cecil Reed as the administrator. Sally Reed the appealed to the U. S. Supreme Court.

Issue: Does a state law which gives preferences to make over females as administrators of the estates of individuals who die intestate violate the equal protection of the law clause of the Fourteenth Amendment?

In an opinion written by Chief Justice Warren Burger, the U. S. Supreme Court unanimously held that the Idaho statute violated the equal protection of the law clause of the Fourteenth Amendment. The Chief Justice noted that the Idaho law did provide different treatment for applicants on the basis of their sex and that it thus established a classification subject to scrutiny under the equal protection clause. He then wrote:

> In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to states the power to treat different classes of persons in different ways. ..... The equal protection clause of that amendment does, however, deny to states the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' .... The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the statute.

Chief Justice Burger concluded with these remarks:

> To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the equal protection clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding interfamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex.

FRONTIERO v. RICHARDSON
411 U. S. 677 (1973)

Under relevant congressional statutes, Sharron Frontiero, a married female Air Force Lieutenant, sought increased dependent benefits for her husband, a full- time student. Those statutes provided that spouses of male members of the uniformed services were dependents for purposes of obtaining increased quarters allowances and medical and dental benefits, but that spouses of female members were not dependents unless they were in fact dependent for over one-half of their support.

After her application was denied for failure to satisfy the statutory dependency standard, she and her husband brought suit in a District Court in Alabama against U. S. Secretary of Defense Elliott Richardson. The Frontieros argued that the congressional statutes discriminated against women and thus violated the due process of law clause of the Fifth Amendment. (Although the U. S. Constitution does not contain an equal protection clause aimed at the federal government, the U. S. Supreme Court in *Bolling v Sharpe*, 347 U. S. 497 (1954) ruled that the due process clause of the Fifth Amendment, which is directed at the federal government, forbids discrimination that is so unjustifiable as to violate due process of law.) The three-judge U. S. District Court rejected the Frontieros' contention and upheld the constitutionality of the congressional statutes. The Frontieros then appealed to the U. S. Supreme Court.

Issue: Does a congressional statute, which provides greater spousal benefits for male members of the armed forces than for female members violate the due process of law clause of the Fifth Amendment?

With only Justice William Rehnquist dissenting, the Supreme Court by an 8-1 vote agreed with the Frontieros and declared the statutes unconstitutional. The Court, however, split 5-4 on the question of whether or not gender is a "suspect" classification and what standard the Court should use when deciding cases involving gender discrimination.

Justice William Brennan wrote the opinion of the Court, but this opinion was joined by only three other justices: William O. Douglas, Byron White, and Thurgood Marshall. These four justices agreed that "classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny." Brennan wrote:

> There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage. ..... As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes.Brennan then noted that moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility....' And what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions

between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members. Brennan concluded with these remarks:

> *Moreover, the Government concedes that the differential treatment accorded men and women under these statutes serves no purpose other than mere 'administrative convenience.' In essence, the Government maintains that, as an empirical matter, wives in our society frequently are dependent upon their husbands, while husbands rarely are dependent upon their wives. Thus, the Government argues that Congress might reasonably have concluded that it would be both cheaper and easier simply conclusively to presume that wives of male members are financially dependent upon their husbands, while burdening female members with the task of establishing dependency in fact. ..... however, there is substantial evidence that, if put to the test, many of the wives of male members would fail to qualify for benefits. ..... In any case, our prior decisions make clear that, although efficacious administration of governmental programs is not without some importance, 'the Constitution recognizes higher values than speed and efficiency.' And when we enter the realm of 'strict judicial scrutiny,' there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality.*

Justice Potter Stewart concurred in the judgment and filed a brief statement in which he agreed that the statutes worked an invidious discrimination in violation of the Constitution.

Justice Lewis Powell, joined by Chief Justice Warren Burger and Justice Harry Blackmun, wrote a concurring opinion in which he agreed that the statutes were unconstitutional but disagreed with Brennan's argument that gender, like race, was a "suspect" classification. In Powell's view, the Court should simply decide the case on the basis of *Reed v Reed* and "reserve for the future any expansion of its rationale." In addition, Powell noted that the proposed Equal Rights Amendment was awaiting ratification and if adopted would resolve the substance of the precise question involved here. Therefore, Powell argued, the Court should restrain itself and allow the issue to be resolved by the elected representatives of the people.As noted above, Justice William Rehnquist dissented alone and simply wrote that he did so for the reasons stated by Judge Rives in his opinion for the District Court.

NOTE: Ruth Bader Ginsburg, a future U. S. Supreme Court justice, argued in favor of the Frontieros' position in an amicus curiae brief submitted by the American Civil Liberties Union.

Cleveland Board of Education v LaFleur
and
Cohen v Chesterfield County School Board
414 U. S. 632 (1974)

During the 1970-1971 school year Jo Carol LaFleur and Ann Nelson, two pregnant junior high teachers in Cleveland, Ohio, and Susan Cohen, a pregnant teacher in Chesterfield County, Virginia, informed their school boards that they were pregnant. Each was compelled by a mandatory maternity leave rule to quit her job without pay several months before the expected birth of her child. None of the three wanted unpaid maternity leave. Cleveland's rule required a pregnant teacher to take leave five months before the expected childbirth and leave application at least two weeks before departure. The teacher was not eligible to return to work until the next regular semester after the child was three months old. Chesterfield County's rule required the teacher to leave work at least four months and to give notice at least six months before the anticipated childbirth. Re-employment was guaranteed no later than the first day of the school year after the date she is declared re-eligible. Both school districts require a physician's certificate of physical fitness prior to return. The Cleveland school district did not promise a teacher on maternity leave re-employment but would be given priority in reassignment to a position for which she was qualified. Failure to comply with the district's mandatory maternity leave provisions was grounds for dismissal. The Chesterfield County School District further provided that a reemployed teacher after mandatory maternity leave had to submit a written notice from a physician that she was physically fit for reemployment and to give assurance that care of the child would cause only minimal interference with her job.

LaFleur and Nelson filed suit in U. S. District Court challenging Cleveland's mandatory leave policy. The District Court heard their cases together and rejected their arguments. A divided panel of judges of a U. S. Court of Appeals reversed the District Court's judgment and ruled that Cleveland's policy violated the Equal Protection of the Laws Clause of the Fourteenth Amendment. Susan Cohen also filed suit in a different U. S. District Court which held that Chesterfield County's policy violated the Equal Protection Clause. A divided panel of a U. S. Court of Appeals affirmed that judgment, but when the entire Court of Appeals reheard the case, the Court upheld the school district's policy. The U. S. Supreme Court agreed to hear both cases together.

Issue: Do the school boards' mandatory maternity leave regulations violate the Due Process of Law Clause of the Fourteenth Amendment?

By a 7-2 vote, the Supreme Court ruled "Yes," that the Cleveland and Chesterfield County School Boards' mandatory maternity leave policies did violate the Due Process of Law Clause of the Fourteenth Amendment. Justice Potter Stewart authored the opinion of the Court, which Justices Brennan, White, Marshall, and Blackmun joined. Justice Douglas concurred in the result. Justice Powell authored an opinion concurring in the result. Justice Rehnquist filed a dissenting opinion which Chief Justice Burger joined.

Justice Stewart wrote: "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 of the Fourteenth Amendment. … By acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the

exercise of these protected freedoms. Because such public school maternity leave rules directly affect 'one of the basic civil rights of man,' … the Due Process Clause of the Fourteenth Amendment requires that such rules must not needlessly, arbitrarily, or capriciously impinge upon this vital area of a teacher's constitutional liberty. … The school boards in these cases have offered two overlapping explanations for their mandatory maternity leave rules. First, they contend that the firm cutoff dates are necessary to maintain continuity of classroom instruction. … Secondly, the school boards seek to justify their maternity rules by arguing that at least some teachers become physically unable to adequately perform some duties during the latter part of pregnancy. … While the advance-notice rules of the Cleveland and Chesterfield County boards are wholly rational and may well be necessary to serve the objective of continuity of instruction, the absolute requirements of termination at the end of the fourth or fifth month of pregnancy are not. … We conclude that the arbitrary cutoff dates embodied in the mandatory leave rules before us have no rational relationship to the valid interest of preserving continuity of instruction. … But the question is whether the rules sweep too broadly. … That question must be answered in the affirmative. … While the medical experts in these cases differed on many points, they unanimously agreed on one – the ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter. … 'The Constitution recognizes higher values than speed and efficiency.'"

Concurring in the result, Justice Powell wrote: "I concur in the result, but … it seems to me that equal protection analysis is the appropriate frame of reference. … In my opinion, such class-wide rules for pregnant teachers are constitutional under traditional equal protection standards. … School boards … must be accorded latitude in the operation of school systems. … But despite my reservations as to the rationale of the majority, I nevertheless conclude tha in these cases the gap between the legitimate interests of the boards and the particular means chosen to attain them is too wide." Dissenting, Justice Rehnquist wrote: "The Court rests its invalidation of the school regulations involved in these cases on the Due Process Clause of the Fourteenth Amendment, rather than on any claim of sexual discrimination and the Equal Protection Clause of that amendment. … If legislative bodies are to be permitted to draw a general line anywhere short of the delivery room, I can find no judicial standard of measurement which says the ones drawn here were invalid. I therefore dissent."

UNITED STATES v VIRGINIA
518 U. S. 515 (1996)

Founded in 1839, Virginia Military Institute (VMI) in 1996 was the sole single-sex school among Virginia's fifteen public institutions of higher learning. From its establishment as one of the nation's first state military colleges, VMI had remained financially supported by the state of Virginia. VMI's distinctive mission was to prepare men for leadership in civilian and military life. Entering students were incessantly exposed to the "rat line" which is comparable in intensity to a Marine Corps boot camp. In 1990, prompted by a complaint filed with the Attorney General of the U. S. by a female high school student seeking admission to VMI, the United States government sued the state of Virginia and VMI in a U. S. District Court. The United States argued that VMI's policy of only admitting males violated the Equal Protection of the Laws clause of the Fourteenth Amendment. In the two years preceding the lawsuit, VMI had received inquiries from 347 women but had responded to none.

The District Court found that "sufficient constitutional justification had been shown for continuing VMI's single-sex policy." The U. S. Court of Appeals for the Fourth Circuit disagreed with the District Court and vacated its judgment. The Court of Appeals gave the state three options: admit women; establish parallel institutions or programs for women; or abandon state support, leaving VMI free to exist as a private institution.

Virginia responded to the Court of Appeals by proposing a comparable program for women: Virginia Women's Institute for Leadership (VWIL) to be located at Mary Baldwin College, a private liberal arts school for women. Virginia returned to the District Court seeking approval for its proposed remedial plan. This court decided that the proposed plan met the requirements of the Equal Protection Clause. A divided U. S. Court of Appeals affirmed the District Court's judgment, and that decision was then appealed to the U. S. Supreme Court.

Issue: Does a state college or university, which admits only male students, violate the equal protection of law clause of the Fourteenth Amendment?

With Justice Clarence Thomas not participating because his son was a student at VMI at the time and with only Justice Antonin Scalia dissenting, the Supreme Court by a 7- 1 vote overturned the judgment of the Court of Appeals. The Court ruled that Virginia's refusal to admit women to VMI was a violation of the Equal Protection Clause of the Fourteenth Amendment and that the state's proposed remedial plan did not afford both sexes comparable benefits.

Justice Ruth Bader Ginsburg authored the opinion of the Court. "We note, once again," she wrote, "the core instruction of this Court's path marking decisions in J. E. B. v Alabama ex rel. T. B. and Mississippi University for Women v Hogan: Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." Ginsburg went on to remind readers that for half a century after women gained the right to vote, "it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any 'basis in reason' could be conceived for the discrimination." Then she wrote:

> Without equating gender classifications, for all purposes, to classifications based on race or national origin, the Court, in post-Reed decisions, has carefully inspected official action that closes a door or denies opportunity to women (or to men). .....To summarize the Court's current directions for cases of official classification based on gender: Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is 'exceedingly persuasive.' The burden of justification is demanding and it rests solely on the state. The state must show 'at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of these objectives.' The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.

Chief Justice William Rehnquist concurred with the Court's judgment that Virginia had violated the Equal Protection Clause but disagreed with the majority's analysis.

As noted above, Justice Antonin Scalia dissented alone. According to Scalia, "our current equal-protection jurisprudence... regards this Court as free to evaluate everything under the sun by applying one of three tests: 'rational basis' scrutiny, intermediate scrutiny, or strict scrutiny. These tests are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely up to us which test will be applied in each case."

Then Scalia wrote:

> It is my position that the term 'fundamental rights' should be limited to 'interests traditionally protected by our society,' but the Court has not accepted that view, so that strict scrutiny will be applied to the deprivation of whatever right we consider 'fundamental.' We have no established criterion for 'intermediate scrutiny' either,but essentially apply it when it seems like a good idea to load the dice. ..... But in my view the function of this Court is to preserve our society's values regarding (among other things) equal protection, not to revise them; to prevent backsliding from the degree of restriction the Constitution imposed upon democratic government, not to prescribe, on our own authority, progressively higher degrees. For that reason it is my view that, whatever abstract tests we may choose to devise, they cannot supersede and indeed ought to be crafted so as to reflect - those constant and unbroken national traditions that embody the people's understanding of ambiguous constitutional texts. More specifically, it is my view that 'when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down.'