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The Impact of Geduldig v. Aiello on the EEOC Guidelines on Sex Discrimination

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The Impact of *Geduldig v. Aiello* on the EEOC Guidelines on Sex Discrimination

The status of women's rights under the fourteenth amendment has remained generally unclear due to the Supreme Court's unwillingness to designate the constitutional implications of classifications which differentiate according to sex-based criteria. This confusion is compounded in the area of labor market discrimination, particularly when pregnancy issues are involved, by the strong policies suggested by the Equal Employment Opportunity Commission (EEOC) *Guidelines on Discrimination Because of Sex*[1] promulgated under Title VII of the Civil Rights Act of 1964.[2]

The Supreme Court's decision in *Geduldig v. Aiello*,[3] which refused to invalidate under the fourteenth amendment a state income maintenance program that excluded pregnancy from its coverage, shed uncertainty on the continuing viability of the *Guidelines*' provisions on pregnancy, which demand that pregnancy disabilities be treated the same as any other physical disabilities. This note will examine the criteria applicable to sex discrimination under the fourteenth amendment and the Civil Rights Act of 1964 and explore the significant differences existing between these two sources of law. It is argued that although the fourteenth amendment may not currently require standards such as those found in the *Guidelines*, neither does it prohibit them.

Title VII Pregnancy Policies Under the Guidelines

Title VII[4] of the Civil Rights Act of 1964 proscribes, in general, discrimination in the job market based on race, religion, color, national origin, and sex. The *Guidelines* expressly state that an employer may not refuse to hire a woman or terminate her employment because the

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[1] 29 C.F.R. § 1604 (1974).

[2] 42 U.S.C. § 2000e (1970). The Act grants the Commission rulemaking authority in 42 U.S.C. § 2000e-12(a) (1970):

> The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter. Regulations issued under this section shall be in conformity with the standards and limitations of the Administrative Procedure Act.

[3] 417 U.S. 484 (1974).

[4] For a comprehensive analysis of Title VII, its legislative history, procedure, and remedies see Note, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109 (1971).

woman is pregnant.[5] While an employer is not required to provide health insurance, disability insurance, sick leave or job guarantees, if any such plan is offered, it must treat pregnancy, miscarriage, abortion, childbirth, and recovery therefrom the same as any other temporary disabilities.[6] Moreover, the *Guidelines* state that if termination of an employee occurs under an employment policy allowing insufficient leave or no leave, it violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity.[7]

TITLE VII VS. THE FOURTEENTH AMENDMENT

An aggrieved party contemplating a suit over sexually discriminatory employment practices must be concerned with substantive law under the fourteenth amendment and Title VII. Where the necessary degree of state action is present, a plaintiff may have a choice between equal protection and Title VII theories of recovery. Of course, both may be simultaneously available. Where the dispute is wholly between an individual and a private employer, however, only Title VII will be available. Nonetheless, the fourteenth amendment remains crucial in determining the permissible reach of Title VII, particularly in the areas of affirmative action and reverse discrimination.

Scope of Application

The narrowness of Title VII contrasts with the breadth of the equal protection and due process clauses of the fourteenth amendment. Title VII specifically proscribes discrimination based on race, religion,

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[5] (a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in prima facie violation of title VII.

(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

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

29 C.F.R. § 1604.10 (1974).

[6] *Id.* § 1604.10(b).

[7] *Id.* § 1604.10(c).

color, national origin, and sex only in the employment situation. The fourteenth amendment is not restricted to prohibiting discrimination based on these characteristics, nor is its application limited to the labor market.[8] The equal protection clause imposes a duty upon the states to treat all persons similarly situated in a fair and equivalent manner. It has been construed as requiring not only fair or equal enforcement of laws, but also that the law itself be equal.[9]

Initially, the equal protection clause was applied only to racial discrimination exclusively directed against blacks,[10] then to other racial groups and to economic affairs.[11] More recently, the equal protection clause has transcended race relations to include such areas as legislative reapportionment,[12] voting,[13] criminal process,[14] and school financing.[15]

Standards of Review

A variety of standards of review are available under the fourteenth amendment. The choice of standard may have the effect, among others, of shifting the burden of persuasion from the petitioner to the state. The "rational basis" test was created to determine whether there was a rational reason for treating people differently. Under this relatively narrow standard of review the statute or regulation is presumed valid, leaving it to the plaintiff to demonstrate its invalidity.[16]

A stricter standard of review was established when the Supreme Court became discontented with the results of traditional equal protection analysis in some areas. The Court developed the "compelling state interest" test to be employed where discrimination is based upon

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[8] For comprehensive analyses of the fourteenth amendment principles related to equal protection as a technique of judicial review see Bartlett, *Pregnancy and the Constitution: The Uniqueness Trap*, 62 CALIF. L. REV. 1532, 1537-47 (1974); Gunther, *Foreword: In Search of an Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949); Note, *supra* note 4.

[9] The Court has frequently cited with approval Justice Matthews' statement that "the equal protection of the laws is a pledge of the protection of equal laws." Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

[10] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873).

[11] Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1069 (1969).

[12] *E.g.*, Reynolds v. Sims, 377 U.S. 533 (1964).

[13] *E.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

[14] *E.g.*, Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

[15] *E.g.*, San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

[16] *See* notes 22, 25 *infra* & text accompanying; *see also* Lamber, *A Married Woman's Surname: Is Custom Law?*, 4 WASH. U.L.Q. 779, 803 n.100 (1973).

a "suspect" classification[17] or impinges on a "fundamental right."[18] Under this standard demanding strict judicial scrutiny, a court appears to presume that the regulation or law is invalid, and the state has the burden of establishing its validity,[19] much as an employer must do under Title VII.

In *Reed v. Reed*[20] the Court established yet a third standard of review, stricter than the rational basis standard but less strict than the standard of strict scrutiny. The *Reed* test refines the meaning of "rational," requiring that a classification be "reasonable, not arbitrary,"[21] and that it rest upon some distinction having a "fair and substantial" relationship to the object of legislation.[22] The existence of these differing standards of review is the court's way of stipulating how much discretion the policymaker may use in making classifications. The more discretion permissible, the lower the standard of review used.

In contrast, there is but a single standard employed under Title VII. That standard permits only two justifications for sex discrimination. One is the statutorily created test of bona fide occupational qualification (BFOQ).[23] The second is the judicially created defense of

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[17] *E.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Loving v. Virginia, 388 U.S. 1 (1967); Brown v. Board of Educ., 347 U.S. 483 (1954) (race); Korematsu v. United States, 323 U.S. 214 (1944) (national origin).

[18] *E.g.*, Dunn v. Blumstein, 405 U.S. 330, 336 (1972); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966) (voting); Shapiro v. Thompson, 394 U.S. 618 (1969) (travel); Eisenstadt v. Baird, 405 U.S. 438 (1970) (privacy).

> If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Eisenstadt v. Baird, *supra*, at 453.

[19] *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 638 (1969); Loving v. Virginia, 388 U.S. 1, 9 (1967); Griffin v. Illinois, 351 U.S. 12, 16 (1956).

[20] 404 U.S. 71 (1971) (holding unconstitutional Idaho's mandatory preference for men in estate administration positions).

[21] *Id.* at 76.

[22] *Id.*

[23] Sex as a bona fide occupational qualification.

> (a) The Commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly. Labels—"Men's jobs" and "Women's jobs"—tend to deny employment opportunities unnecessarily to one sex or the other.
>
> (1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:
>
> (i) The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turn-over rate among women is higher than among men.
>
> (ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of non-discrimina-

"business necessity," under which the employer must satisfy each of three standards:

> [T]he business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.[24]

Further, under Title VII, the presumption runs against the validity of the challenged practice or policy, leaving the employer with the heavy burden of proof—the opposite of all but the strictest fourteenth amendment standards.[25]

> tion requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.
>
> (iii) The refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers except as covered specifically in subparagraph (2) of this paragraph.
>
> (2) Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification; e.g., an actor or actress.
>
> (b) Effect of sex-oriented state employment legislation.
>
> (1) Many States have enacted laws or promulgated administrative regulations with respect to the employment of females. Among these laws are those which prohibit or limit the employment of females, e.g., the employment of females in certain occupations, in jobs requiring the lifting or carrying of weights exceeding certain prescribed limits, during certain hours of the night, for more than a specified number of hours per day or per week, and for certain periods of time before and after childbirth. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and, therefore, discriminate on the basis of sex. The Commission has concluded that such laws and regulations conflict with and are superseded by Title VII of the Civil Rights Act of 1964. Accordingly, such laws will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.

29 C.F.R. § 1604.2 (1974). See also Bartlett, *supra* note 11, at 1545 n.77, 1546 for the view that a person has less protection with the irrebuttable presumption approach than under the equal protection strict scrutiny test and for a comparison of the BFOQ exception and irrebuttable presumptions.

[24] Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971) (footnotes omitted).

[25] A significant aspect of the fourteenth amendment analysis is that courts "presume" that the state policy is valid unless shown to the contrary. The heavy burden of establishing that a regulation is arbitrary is on the petitioner. For example, in Dandridge v. Williams, 397 U.S. 471, 486 (1971), the Court held that in the realm of social welfare programs, it is reasonable for a legislature to select one phase of a problem and attempt to remedy it in any one of several constitutionally valid ways. In contrast, Title VII grants no such "presumption" of validity in favor of the policymaker. Once the petitioner has alleged she has been treated differentially the burden of justifying the treatment is on the employer. The petitioner is not required, under Title VII, to show the differential treatment is not reasonable or necessary to a compelling interest, as she would be under the equal protection clause. For example, in Wetzel v. Liberty Mut. Ins. Co.,

Thus, Title VII standards are more stringent and permit the policy-maker less discretion than does the fourteenth amendment. While a fixed policy of classification regarding conditions of employment may survive an equal protection challenge, it may still violate Title VII.[26] For example, the finding in *Aiello* that a state-administered, employee-funded health insurance program that excluded pregnancy did not violate the fourteenth amendment might not be controlling under Title VII.[27]

Available Defenses

Still other differences in fourteenth amendment and Title VII analyses arise in terms of available defenses. In *Hutchison v. Lake Oswego School District*,[28] the district court stated that the following defenses, which defendant had attempted to assert against both the Title VII and equal protection claims, might be valid under the equal protection clause, but not in a Title VII action:

> (1) plaintiff must show dissimilar treatment of persons similarly situated, (2) pregnancy is *sui generis*, (3) pregnancy is voluntary, (4) the maternity sick-leave policy does not apply to women in an area in which they compete with men, and (5) benefits could not

372 F. Supp. 1146 (W.D. Pa. 1974), the district court held that the income protection plan which provided income for long-term illnesses discriminated against female employees by excluding pregnancy, while including illnesses whose incidence among males is predominant, did not comply with Title VII *Guidelines*. *Id.* at 1158. The court indicated that the employer had not met its burden of proving validity since it failed to show that cost, its business purpose, was sufficiently compelling, that it was precisely serving that objective, and that it was the best alternative available. Similarly, the District Court for the Eastern District of Virginia in Gilbert v. General Electric Co., 375 F. Supp. 367 (E.D. Va. 1974), recently declined to presume that the policy of excluding pregnancy-related benefits from its sickness and accident plan was valid under Title VII analysis. In fact, the court in *Gilbert* held that to isolate pregnancy disabilities for less favorable treatment in General Electric's sickness and accident plan, purportedly designed to relieve the economic burden of physical incapacity, was discrimination based on sex. *Id.* at 382.

[26] *See, e.g.*, Wetzel v. Liberty Mut. Ins. Co., 372 F. Supp. 1146, 1159 (W.D. Pa. 1974), *citing* Schattman v. Texas Employment Comm'n, 459 F.2d 32 (5th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973), and Newmon v. Delta Air Lines, Inc., 475 F.2d 768 (5th Cir. 1973).

[27] Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199 (3d Cir. 1975) held that an employer-offered income protection plan which excluded pregnancy benefits from coverage while including other kinds of temporary disabilities and a maternity leave policy which treats pregnancy differently from other temporary disabilities violates Title VII. The Third Circuit rejected Liberty Mutual's argument that after *Aiello*, Title VII does not require the employer to include pregnancy benefits in its income protection plan, distinguishing the *Wetzel* situation as requiring statutory interpretation rather than a constitutional analysis. The court indicated the reliance on *Aiello* was improper not only on that distinction, but also because in *Aiello* it had been necessary to balance social welfare interests with the Constitution. *Id.* at 203.

[28] 374 F. Supp. 1056 (D. Ore. 1974).

> be fairly awarded because of the varying lengths of incapacity among women due to childbirth.[29]

Further, *Hutchison* held that the administrative burden and the cost of providing sick-leave benefits for pregnancy-related disabilities offer no defense to a Title VII action,[30] whereas these may be defenses in equal protection cases not employing the strict scrutiny standard of review.

Requirement of Motive

It is arguable that the main thrust of the constitutional proscription of employment discrimination is toward deliberate acts of discrimination.[31] Title VII *Guidelines* go beyond such a proscription to stipulate that a policy neutral on its face is discriminatory if it has a disparate effect on a protected class. Indeed, the first time the Supreme Court had occasion to construe the scope of Title VII, it held that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."[32] The most that can be said for the equal protection analysis is that it is not clear if it would proscribe a policy neutral on its face but with a differential impact. There can be no question that such a policy is prohibited by Title VII since the *Guidelines* were so interpreted in *Sprogis v. United Air Lines, Inc.*[33]

Pregnancy and Employment Under the Fourteenth Amendment: The Effect of Aiello on Title VII

In *Geduldig v. Aiello* the Supreme Court first considered the relation of the equal protection clause to the treatment of pregnancy.[34]

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[29] *Id.* at 1061.

[30] *Id.* at 1063.

[31] Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

[32] Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

[33] 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971) (no-marriage rule for airline stewardesses violates Title VII).

[34] In the past, many lower federal courts have considered the issue. *Compare* Green v. Waterford Bd. of Educ., 473 F.2d 629 (2d Cir. 1973) *and* Buckley v. Coyle Pub. School Sys., 476 F.2d 92 (10th Cir. 1973) (invalidating sixth and fourth month mandatory maternity leave rules for teachers), *with* Schattman v. Texas Employment Comm'n, 459 F.2d 32 (5th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973) (upholding a compulsory leave policy after seven months of pregnancy). *See also* Seamon v. Spring Lake Park Ind. School Dist., 363 F. Supp. 944 (D. Minn. 1973); Heath v. Westerville Bd. of Educ., 345 F. Supp. 501 (S.D. Ohio 1972); Williams v. San Francisco Unified School Dist., 340 F. Supp. 438 (N.D. Cal. 1972); Monell v. Department of Soc. Serv., 357 F. Supp. 1051 (S.D.N.Y. 1972); Bravo v. Board of Educ., 345 F. Supp. 155 (N.D. Ill. 1972); Robinson v. Rand, 340 F. Supp. 37 (D. Colo. 1972).

The challenge alleged that the exclusion of normal childbirth from coverage under a state-administered, employee-funded disability insurance program[35] violated the equal protection clause.[36] Justice Stewart, writing for the majority, viewed this case as a *Dandridge*[37] situation and stated that as long as the legislature establishes a rationally supportable classification, courts cannot force it, under the authority of the equal protection clause, to address all aspects of a problem rather than selecting certain areas or neglecting the problem altogether.[38] The Court held that the state's reasons for not granting benefits to women for normal pregnancy[39] provided a reasonable and wholly noninvidious basis for not providing a more comprehensive insurance program.[40]

There are three possible effects *Aiello* might have on the EEOC *Guidelines.*

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[35] CAL. UNEMP. INS. CODE § 2601 (West 1972) provides:

> The purpose of this part is to compensate in part for the wage loss sustained by individuals unemployed because of sickness or injury and to reduce to a minimum the suffering caused by unemployment resulting therefrom. This part shall be construed liberally in aid of its declared purpose to mitigate the evils and burdens which fall on the unemployed and disabled worker and his family.

CAL. UNEMP. INS. CODE § 2626.2 (West Supp. 1975) (disabilities arising from pregnancy) provides:

> Benefits relating to pregnancy shall be paid under this part only in accordance with the following:
>
> (a) Disability benefits shall be paid upon a doctor's certification that the claimant is disabled because of an abnormal and involuntary complication of pregnancy, including but not limited to: puerperal infection, eclampsia, caesarean section delivery, ectopic pregnancy, and toxemia.
>
> (b) Disability benefits shall be paid upon a doctor's certification that a condition possibly arising out of pregnancy would disable the claimant without regard to the pregnancy, including but not limited to: anemia, diabetes, embolism, heart disease, hypertension, phlebitis, phlebothrombosis, pyelonephritis, thrombophlebitis, vaginitis, varicose veins, and venous thrombosis.

[36] 417 U.S. at 486.

[37] *See* note 25 *supra.*

[38] 417 U.S. at 495.

[39] The state argued that the reasons for not granting benefits to women for normal pregnancy were to distribute the available resources in such a way as to keep benefits at an adequate level for those disabilities that were covered, to maintain the self-supporting nature of the program, and to hold the contributions at a level that would not unduly burden participating employees who might be most in need of the disability insurance. *Id.* at 495–97.

[40] *Id.* at 496. The holding seems to be based on the lack of certain evidence. The appellee failed to meet her burden of proof that the choice of risks in the program discriminated against a definable class with respect to the total risk protection received by that class from the program. Neither did she show that "distinctions involving pregnancy were mere pretexts designed to effect an invidious discrimination against the members of one sex or the other . . . ." *Id.* at 496–97 n.20. Consequently, the Court said, legislators, on any reasonable basis, were free to offer or not offer coverage in this kind of legislation. As an evidentiary matter, the "rational basis" standard of review and its presumption of validity make such proof almost impossible. *See* text accompanying note 16 *supra.*

Guidelines Are Constitutional

Initially, it could be argued that *Aiello* will have no effect on the validity of the *Guidelines*. While *Aiello* holds that normal childbirth benefits may constitutionally be withheld, it does not say they must be. The *Guidelines*, by requiring that any employer-offered plan must treat pregnancy as any other temporary disability,[41] merely go further than *required* by equal protection. It should always be permissible to provide for more than the constitutional minimum amount of protection.[42] Thus Title VII, and the *Guidelines*, are still valid and reflect different congressional powers and policies.

Guidelines Exceed EEOC Authority

If *Aiello* is interpreted broadly to stand for the proposition that classifications based on pregnancy do not constitute sex-based discrimination,[43] it could be argued that the *Guidelines* exceed the authority granted the EEOC pursuant to Title VII. Under this interpretation, the EEOC is authorized to act in the employment area only where there is some sex-based discrimination. Because pregnancy classifications do not discriminate on the basis of sex, the EEOC is powerless to act. Thus the *Guidelines*, as they relate to pregnancy, are void.[44]

It is not clear from *Aiello* when pregnancy is a sex-based classification and when it is not. One possible distinction may be the area in which the different treatment is accorded. That is, differentiation in eligibility for state-administered disability benefits is not sex-based, but differing policies affecting leave or other conditions of employment, such as hiring, firing, or seniority, might well be.[45] The *Guidelines* can

[41] 29 C.F.R. § 1604.10(b) (1974).

[42] *But see* text accompanying notes 62–63 *infra*, where the opposing argument is presented.

[43] One commentator has interpreted the *Guidelines* as intending without requiring that pregnancy classifications should be treated as sex-based discrimination under Title VII. *See* Bartlett, *supra* note 8, at 1564. *But see* Communication Workers of America v. American Tel. & Tel. Co., Long Lines Dep't, 379 F. Supp. 679, 683 (S.D.N.Y. 1974). The court indicates that *Aiello* is not "a retreat from the Court's modern view as to discrimination on grounds of sex (or gender), but—as footnote 20 plainly indicates—a finding that disparity of treatment based on pregnancy does not in and of itself constitute such discrimination." This determination precludes relief under Title VII, which deals only with sex discrimination.

[44] In Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199 (3d Cir. 1975), the court did not find any congressional intent contrary to the *Guidelines*. The court distinguished Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973), which held that the guidelines on national origin, although entitled to deference, were inconsistent with congressional intent that citizenship not be a requirement for federal or private employment. Nor did the *Wetzel* court find any compelling indications that the *Guidelines* are wrong.

[45] *See* Memorandum from Women's Rights Project, American Civil Liberties Union, New York, to Affiliates, Nov. 21, 1974. The argument is made that state laws presuming

be saved by limiting the *Aiello* holding to its facts: normal pregnancies may be treated differently from other disabilities under a *state*-administered program which is only *tangentially related* to employment. This would be in accord with Justice Stewart's treatment of *Aiello* as a social welfare case, in which the state's policies limiting coverage were presumed valid.[46] Different facts, involving a *private* insurance plan *directly tied* to the employment relationship, should be viewed as presenting a wholly different case, thereby leaving the EEOC free to regulate such programs.

Even if *Aiello* is interpreted broadly, it can be argued that the Court erred in not finding that the exclusion of normal pregnancy from the program was a sex-based classification.[47] Justice Stewart avoided this finding by determining that the classification was pregnant persons as opposed to nonpregnant persons. The status of being pregnant, rather than the status of being a woman, was held to be the determinative classification. However, since surely only women become pregnant, the Court determined in effect that the classification was based on sex plus the additional factor of pregnancy. Interpreting the Court's analysis in this way makes it, as least arguably, inconsistent with the holding of *Phillips v. Martin Marietta Corp.*[48] There, the Court struck

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that a pregnant woman is not available for employment and therefore is ineligible to receive unemployment insurance solely because she is pregnant may be found to violate the due process clause. *See also* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (mandatory maternity leave policies at the fourth or fifth month violate the due process clause of the fourteenth amendment).

[46] In line with this argument, the decision does not seem to turn on whether the exclusion of pregnancy from the state program was a form of sex discrimination or not. In either case, the Court concluded that under the rational basis tests, the policy of excluding pregnancy is rationally related to the legitimate state purposes.

[47] The Court specifically, but enigmatically, rejected the plaintiff's argument that discrimination on the basis of pregnancy was discrimination on the basis of sex. One can only wonder at such conclusory footnote statements as "[w]hile it is true that only women become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those contained in *Reed* . . . and *Frontiero* . . . ." 417 U.S. at 496 n.20.

For the view that as a basis of classification sex is similar in many respects to race, and reasons for giving both the same special scrutiny, see Bartlett, *supra* note 8, at 1557–60.

[48] 400 U.S. 542, 544 (1971), *vacating* 411 F.2d 1 (5th Cir. 1969). The Court in *Phillips* indicated that the discrimination against the plaintiff mother was based on two factors: "sex" *plus* "pre-school aged children." The coalescence of these two elements was the reason she was denied employment. A per se violation of Title VII was found, and the case was remanded. The relevant classification was determined to be women with pre-school age children and men with pre-school age children. The Court remanded, however, for an evidentiary hearing on the company's justification for its policy, presumably to be presented under the BFOQ exception. The House had rejected an amendment to Title VII which would have qualified the Civil Rights Act of 1964 to prohibit only employer practices based *solely* on sex, race, national origin, or religion. 110 CONG. REC. 2728 (1964) (amendment offered by Rep. Dowdy). See Note, *supra* note 4, at 1172,

down, under Title VII, a classification which discriminated against women with pre-school age children but not against men with children of the same age. In *Aiello* the same result would be warranted if the classifications were viewed as women with female disabilities and men with male disabilities.[49] Had the Court interpreted the exclusion of pregnancy benefits in this way, it could not have ignored *Phillips*. Moreover, given the context of a disability program which extended coverage to numerous disabilities unique to men, such a definition of the classification is compelling. The Court's failure to accept this definition represents a serious flaw in its opinion, a flaw that should vitiate the use of *Aiello* as a precedent.

It can also be argued that the Supreme Court in *Aiello* returned to an outdated standard of review by applying the "reasonableness" test instead of applying the intermediate standard requiring a "fair and substantial" relationship to the object of the legislation.[50] The exclusion of pregnancy from this state disability program might be said to have had a fair and substantial relationship to the state fiscal purposes in maintaining a self-supporting program. However, by excluding pregnancy, the program's explicit purpose of mitigating "the evils and burdens which fall on the unemployed and disabled worker and his family"[51] was not satisfied for women while it was for men. Moreover, the program would fail to meet the *LaFleur* requirment that the regulations not unduly infringe upon a person's constitutional rights.[52] It seems reasonable, as the district court observed, that the self-supporting nature of the program in *Aiello* could have been achieved in less drastic, sexually neutral ways. For example, reasonable changes could have been made in the maximum benefits provided and in the contribution rates.[53]

Although the Court's standard in *Reed* was stricter than that generally applied in cases involving commercial and economic matters,[54] special judicial scrutiny would nevertheless be appropriate here owing to the interest of procreation and its interaction with established constitu-

for the argument that a statistical analysis that 75 percent of those holding the jobs were women is inconsistent with the purpose of civil rights legislation—"to protect the individual from being treated differently because she is a member of a wider group, sex-defined in this case, and not to protect simply a majority of that group to the exclusion of the rest."

[49] For a discussion of the "sex-plus" doctrine, see Bartlett, *supra* note 8, at 1155–56.

[50] *See* Reed v. Reed, 404 U.S. 71, 76 (1971).

[51] CAL. UNEMP. INS. CODE § 2601 (West 1972).

[52] *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 647 (1974).

[53] *See, e.g.*, the recommendations of the district court in Hansen v. Aiello, 359 F. Supp. 792, 798 (N.D. Cal. 1973).

[54] *E.g.*, Dandridge v. Williams, 397 U.S. 471, 486 (1970); Flemming v. Nestor, 363 U.S. 603, 611 (1960).

tional rights of privacy.[55] For example, prior to the *Aiello* case, the Court struck down a state workmen's compensation provision which relegated unacknowledged illegitimate children of the deceased to a lesser status with respect to benefits than that occupied by the legitimate children because the equal protection clause forbids laws based on the status of birth.[56] The biological reproductive capacity of a woman, like the status of birth, it something over which the individual has no control. Arguably, then, to deny a woman disability benefits because of her biological status and her exercise of her right to procreate should be a violation of the equal protection clause.[57] No woman should be denied an opportunity to enjoy the benefits of this state disability program or penalized for exercising her right to procreate. The majority opinion in *Aiello*, in applying the "reasonableness" test, forced this case into the same category as decisions involving discrimination affecting commercial interests and thus ignored both the constitutional importance of the interest at stake and the invidiousness of the classifications—factors that call for more than lenient scrutiny.

An even stricter standard of review, the "compelling state interest" test,[58] could have been applied under the suspect classification rationale. Since only women become pregnant, to exclude pregnancy from the disability benefit program creates a classification based on sex. Such sex-based classifications are arguably suspect.[59]

A second way in which the compelling state interest test could have been invoked would have been to find that the challenged regulation impinged on a "fundamental" right, the right to procreate.[60] If the

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[55] *E.g.*, Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma, 316 U.S. 535 (1942). *See* Buckley v. Coyle Pub. School Sys., 476 F.2d 92, 96 (10th Cir. 1973) (woman's privacy is invaded by requiring her to choose between employment and pregnancy, thus curtailing her interest in procreation).

[56] Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175–76 (1972).

[57] Such an argument would follow the analysis suggested in the abortion decisions, Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973).

[58] *See* note 17 *supra* & text accompanying.

[59] *See* the plurality opinion in Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (statutes which provided the wife of a male serviceman with dependents' benefits but not the husband of a servicewoman unless she proved that she supplied more than one-half of her husband's support violated the due process clause of the fifth amendment). Several state and federal courts have followed the *Frontiero* "suspect" classification approach in invalidating sex-based classifications. *E.g.*, Johnston v. Hodges, 372 F. Supp. 1015 (E.D. Ky. 1974) (state requirement that father with custody of minor child, but not mother, sign driver's license application and assure responsibility for minor while driving); Ballard v. Laird, 360 F. Supp. 643 (S.D. Cal. 1973) (service tenure differential); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (exclusion of women from employment as bartender); Hanson v. Hutt, 83 Wash. 2d 195, 517 P.2d 599 (1973, 1974) (denial of unemployment benefits to pregnant women).

[60] *E.g.*, Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

classification in *Aiello* were subjected to "strict scrutiny," it would likely fare no better than have classifications in other cases where the Court adopted this rigorous standard of review.[61] Because of these weaknesses in the *Aiello* analysis, attempts to read the decision broadly should be resisted.

Guidelines Are Unconstitutional

Finally, it might be argued that the analysis in *Aiello* makes the *Guidelines* unconstitutional as a form of reverse discrimination against men. This argument is tenable only if one assumes that *Aiello* defines what equal protection means—not that it merely delineates what equal protection permits. Arguably, anything that goes beyond the dictates of the equal protection clause, as Title VII *Guidelines* seemingly do in protecting pregnant women, would be discrimination against men. The language in the majority opinion contrasting the program's higher annual claim cost and annual claim rate for women with the lesser claim cost and rate for men reflects such a concern about preferential treatment.[62] Similarly, the conclusion that risks protected for men are the same as those protected for women also suggests the objective of maintaining equality.[63]

If *Aiello* is interpreted broadly, and is read as stating what equal treatment in the area of pregnancy constitutionally requires, and if the *Guidelines* are to require "more equal" treatment of women, an unconstitutional discrimination against men results. This argument substantially undercuts that made earlier on the permissibility of exceeding constitutional minimums.[64]

Such an extreme interpretation of *Aiello* should be avoided in favor of a narrow reading based upon the compelling policies supporting the *Guidelines*. First, the *Guidelines* explicitly state that employment policies shall be applied to pregnancy disabilities on the same terms (not different terms) as applied to other disabilities.[65] This is consistent with the purpose of Title VII to provide equal employment opportunity and conditions of employment by not penalizing women with a pregnancy disability whereas those with other disabilities are not denied benefits. Second, even assuming the Court's comparison of women's contributions to the program with those made by men is appropriate in the

[61] *E.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966); Reynolds v. Sims, 377 U.S. 533, 561–69 (1964); Skinner v. Oklahoma, 316 U.S. 535, 541–42 (1942).

[62] 417 U.S. at 497 n.21.

[63] *Id.* at 496–97.

[64] *See* text accompanying note 42 *supra*.

[65] 29 C.F.R. § 1604.10(b) (1974).

equal protection analysis, the fact that women receive lower salaries than men[66] would account for their 1 percent contributions being 28 percent of the total disability insurance whereas they receive approximately 38 percent in benefits,[67] and would suggest that women are therefore actually denied equal results for the same work efforts. Third, males, being partners in the procreative process, would not have to share medical expenses out of their own incomes or share even part of the burden of the loss of a woman's wages due to childbirth. The fact that a man does not bear children does not mean that the man and other members of the family should be denied benefits from the California disability program. Finally, the California disability program, despite its stated purpose,[68] operates, as did the statutes in *Weinberger v. Wiesenfeld*[69] and *Frontiero v. Richardson*,[70] to deprive women of protection against income loss for their families which men receive for their families when they are temporarily disabled. Like Stephen Wiesenfeld,[71] the plaintiff in *Aiello* was denied the opportunity to show that her family, as may have been the case, was dependent on the plaintiff for support. Thus, not only do women receive less pay than men, but women are denied the same protection for their families as a male worker would receive for his family and are deprived of part of their earnings out of which benefits would be paid to men for such temporary sex-specific disabilities as prostatectomies.[72] For these reasons, *Aiello* must be interpreted at most to state what the equal protection clause *permits*, not what it requires. This would allow the EEOC *Guidelines* to surpass the protection given in *Aiello*, as argued earlier.

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[66] In 1971, among fully employed workers, women's median income was only three-fifths that of men. The earnings differential, taking into account the differences in education and work experience, is about 20 percent. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, WOMEN WORKERS TODAY 6 (1973).

[67] 417 U.S. at 497.

[68] *See* note 51 *supra* & text accompanying.

[69] 95 S. Ct. 1225 (1975) (holding that benefits under the Social Security Act, 42 U.S.C. § 402(g) (1970), based on the earnings of a deceased husband and father are payable to the widow and to the couple's minor children whereas the benefits based on the earnings of a deceased wife are payable only to the minor children and not to the widower is indistinguishable from the classification held invalid in *Frontiero* and therefore the challenged section violates the due process clause).

[70] 411 U.S. 677 (1973).

[71] *Compare* Weinberger v. Wiesenfeld, 95 S. Ct. 1225 (1975), *with* Frontiero v. Richardson, 411 U.S. 677 (1973).

[72] Workers are compensated for almost every other disability, including costly disabilities such as heart attacks, voluntary disabilities such as cosmetic surgery or sterilization, and sex and race unique disabilities such as prostatectomies. 417 U.S. at 499–500 (Brennan, J., dissenting).

CONCLUSION

The minimal protection afforded by the fourteenth amendment should not preclude the stricter mandate of Title VII to eliminate vestiges of sex discrimination in the job market. *Geduldig v. Aiello* should be read narrowly to state only what equal protection permits, not what it requires, and should be confined to its facts to permit EEOC regulation of the immediate employer-employee relationship. The weaknesses of the opinion and its potential policy implications militate against a broad reading which might bring about the demise of the EEOC *Guidelines on Discrimination Because of Sex.* Until the Supreme Court is willing to treat pregnancy as a sex classification and subject regulations which affect pregnancy to the stricter scrutiny they deserve, the *Guidelines* are the best available alternative to ensure equality of treatment by employers to pregnant women.

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