Towards a Feminist Jurisprudence

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Although the conjunction of the terms "feminist" and "jurisprudence" might be said to indicate the dogma resulting from the common orientation of a political interest group, the purpose of this article is not to postulate a theory of law which is inherently self-interested. Instead, this article demonstrates the necessity of making a feminist evaluation of our jurisprudence and of taking a jurisprudential view of feminism.²

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¹ The conjunction of the terms "feminist" and "jurisprudence" may make the reader justly nervous. After all, "feminism," ignoring for the moment the fact that there is no agreement as to what values and goals inform the concept, might be said to boil down to the common orientation of a political interest group. And "jurisprudence" is the theory of law in the broadest sense, such that the concerns of women constitute only a small part of its coverage. Therefore, to speak of a feminist jurisprudence is to postulate a dogma which is inherently self-interested. One might just as well suggest a "black," "Chicano," "garment workers" or "gay" jurisprudence which would reflect its own concerns at the expense of neutrality, generality and principle.

² In April of 1978, the women of Harvard Law School conducted a conference entitled "Celebration 25: A Generation of Women at Harvard Law School" in Cambridge, Massachusetts, to commemorate the silver anniversary of Harvard's first class to include women.

More than a year before, it was decided by the planning committee that one of the five panel discussions to be offered during the April weekend should be intentionally esoteric. It should offer to alumnae returning from the working world a synthetic, perhaps even inspirational experience. Hence, Towards a Feminist Jurisprudence was born, the original description of which read: "Reasonable women will differ on whether there is or should be such a thing. A wildly philosophical exploration of the impact of feminism on the structures and principles that support the legal system." Though the astute panelists concluded that there is not, and perhaps should not be, such a thing as a "feminist jurisprudence," the title has been retained, due in part to the admiration, affection and historically threatening attitude generated by this panel and by the entire weekend.
The need for a feminist jurisprudence is focused most sharply by the issue of pregnancy. In the words of one commentator, pregnancy is "the final and decisive battleground" in the struggle for the just treatment of both sexes. The response of the law to the issue of childbearing marks a pivotal point in the history of the emergence of women as first class citizens. This article postulates that the modes of response presently available are inadequate to this historical challenge, that an inquiry into the substructures of the legal order is required and that nothing less will do, if the law is to be reconciled to the experience of women everywhere.

First, this article analyzes the three cases in which the Supreme Court declined to extend disability or sick leave benefits to pregnant workers. Those cases isolate pregnancy as the ultimate obstacle to judicial protection of the rights of women. The Supreme Court's attitude towards pregnancy as manifested in mandatory pregnancy leave cases and equal protection clause cases which are not related to pregnancy is explored to determine whether these developments signal any changing values among the Justices that could bring about a more just treatment of pregnancy. The article concludes that the present Court has taken an apparently inexorable position at a polar extreme when it addresses the place of women in society.

Second, the article describes the congressional reaction to General Electric Co. v. Gilbert—a clash between the judicial and legislative branches which culminated in an amendment to Title VII of the Civil Rights Act of 1964, forbidding discrimination on the basis of pregnancy. The article argues that, although the 95th Congress displayed a far more sophisticated and compassionate view of pregnancy than did the majority of the Supreme Court, the Congress, too, fundamentally failed

The panelists were the Honorable Shirley S. Abrahamson, Justice, Wisconsin Supreme Court; Brenda Peigen Fasteau, Attorney, New York City, former Director, ACLU Women's Rights Project; Stewart B. Oneglia, Director, Task Force on Sex Discrimination, Department of Justice; and Wendy Webster Williams, Assistant Professor of Law, Georgetown University Law Center. The author "moderated" the discussion.


8 U.S. Const. amend. XIV, § 1.

to grapple with the underlying dilemma. In this context, the probable and possible limitations in the coverage of the amendment are considered.

Next, the article examines the probable impact, or lack of impact, the proposed Equal Rights Amendment⁹ would have on the pregnancy benefits dilemma. The article argues that either because there is something inherent in the proposed amendment which restricts its coverage or because the amendment will only be given as broad an interpretation as the Supreme Court, which is already empowered to protect women's rights under the fourteenth amendment, chooses to give it, the amendment cannot be relied on to meet the real challenge raised by the issues of pregnancy and childrearing.

Finally, this article describes the theories of some radical and not-so-radical feminists in order to illuminate the substantive, historical issue of childbearing. This section suggests that, since the Supreme Court and the Congress have not demonstrated an effective vision of justice for women, some other vision of equality must be incorporated into the litigation and decisionmaking process. It is argued that a legislative and judicial policy should be developed which would account fully, economically as well as legally, for the sex-unique aspects of procreation, namely childbearing and breastfeeding. Such an incorporation of women's capabilities into the legal and social mainstream need not be understood as a special favor to women; nor would it degrade women in the way that many egalitarian schemes would do.

THE SUPREME COURT AND PREGNANCY

In the last decade, the Supreme Court has on three occasions considered the question of whether either the equal protection clause or Title VII prohibits the exclusion of pregnancy-related disabilities from disability insurance or sick leave coverage.¹⁰ Although it is necessary to describe these cases briefly, this article is not intended to be a fully developed criticism of them. Rather, the cases are here presented in order to illustrate a particular judicial attitude towards women in their procreative capacities, and to explore whether, and in what circumstances, the outcomes of these cases would have been different.

⁹ U.S. CONST. amend XXVII (proposed), H.R.J. Res. 208, 118 CONG. REC. 9544 (1972).
¹⁰ The issue of the availability of benefits to pregnant workers was one of three related issues that emerged in the Supreme Court in the 1970's. The other two were mandatory maternity leave and the denial of accumulated seniority upon a worker's return from a pregnancy-related absence. Although the latter two issues are touched on in this article, the focus is on the benefits that would impose an immediate cost upon the employer or insurer. The other questions are nominally resolved. But see, e.g., notes 123-33 & accompanying text infra.
The Pregnancy-Related Disability Cases

In *Aiello v. Hansen,* the plaintiffs sought to enjoin the enforcement of California's state-administered disability insurance plan which excluded from its coverage the payment of insurance benefits for wage loss resulting from the disability accompanying normal pregnancy and childbirth. The plan, which was funded entirely by contributions from participating employees, also excluded coverage of individuals under court commitment for dipsomania, drug addiction or sexual psychopathy. It included heart attacks, cosmetic surgery, sterilization, prostatectomies, circumcision, hemophilia, gout, sickle-cell anemia, cataracts and wisdom tooth removal. The plaintiffs claimed that the plan denied equal protection of the laws to pregnant women, and the district court began its analysis with the assumption that alleged discrimination on the basis of a sex-linked characteristic is the equivalent of discrimination on the basis of sex. Using the “slightly altered” rational basis test required by *Reed v. Reed,* the three-judge district court formulated the issue: “The question whether the exclusion of pregnancy-related disabilities from the program is arbitrary or rational depends upon whether pregnancy and pregnancy-related illness substantially differ from the included disabilities in some manner relevant to the purposes of the disability insurance program.” The court held the exclusion unconstitutional because, although pregnancy disabilities differ from other disabilities, such differences were not found to be rationally related either to the express purpose of the California disability program.

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12 *CAL. UNEMP. INS. CODE* § 2626 (West 1972).

13 “Disability” or “disabled” includes both mental or physical illness and mental or physical injury. An individual shall be deemed disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular . . . work. In no case shall the term “disability” or “disabled” include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter.

14 *Id.* 359 F. Supp. at 794.

15 *CAL. UNEMP. INS. CODE* § 2678 (West 1972).


18 *Id.* at 797.


20 359 F. Supp. at 797.

21 The statute recites that its purpose 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.” *CAL. UNEMP. INS. CODE* § 2601 (West 1972). The lower court found that the articulated purpose was not served by the exclusion of pregnancy since “the economic hardship pregnant women suffer when they cannot work is identical to the hardship of other disabled workers.” 359 F. Supp. at 797.
insurance program or to the “unexpressed purposes” behind the exclusion of pregnancy from the coverage of that program.

Although the case was presented and decided in the trial court as a sex discrimination case, the Supreme Court, in *Geduldig v. Aiello*, framed the issue in a dramatically different way. Referring to those choices made by the California legislature which, the state asserted, explained the solvency of the program, it stated: “The essential issue in this case is whether the Equal Protection Clause requires such policies to be sacrificed or compromised in order to finance the payment of benefits to those whose disability is attributable to normal pregnancy and delivery.” Thus, the Supreme Court construed the challenge fundamentally to be that the statutory scheme was underinclusive in insuring some risks and not others.

The Court found that California had three legitimate interests at stake: maintaining the self-supporting nature of the program, distributing resources so as to cover included disabilities adequately as opposed to covering all disabilities inadequately and maintaining the employee contribution rate at a low level for the benefit of “particularly low-income employees who may be most in need to the disability insurance.” It also stated: “There is nothing in the Constitution . . . that requires the State to subordinate or compromise its legitimate interests solely to create a more comprehensive social insurance program than it already has.” Moreover, it was found that these objectives were achieved by a permissible means. Speaking in terms of the actuarial benefits of the entire insurance program, the Court touched on the sex discrimination claim, continuing: “There is no risk from which men are protected and women are not. Likewise, there is no risk from which

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21 Counsel for the state asserted four additional purposes which were not articulated by the California legislature. Counsel asserted, first, that the exclusion was necessary to preserve the solvency of the program. The district court, however, found that the increased cost of expanding it to include pregnancy “would not destroy the program,” and held that, in any case, the equal protection clause could not allow exclusion of pregnancy just because the cost of inclusion might be prohibitive. 359 F. Supp. at 798-99. Second, counsel asserted that female workers already collected a disproportionate share of benefits (28% of contributions versus 38% of benefits collected), and that to cover pregnancy would give women an even greater share. The court, however, held that California could not limit benefits to women on an actuarial basis if benefits to other groups were not limited by the same method. *Id.* at 800. Third, counsel asserted that the benefits program would be subject to abuse by women since pregnancy is voluntary. However, since not all pregnancy is voluntary and since other “voluntary” disabilities were covered by the program, the court held that the scheme was not rationally related to achieving the stated purpose. *Id.* Fourth, counsel asserted that it is difficult to determine objectively when a worker is truly disabled by a pregnancy-related condition. However, the court held that such disabilities are no more susceptible to problems of proof than other claims. *Id.* at 800-01.

23 *Id.* at 494.
24 *Id.* at 496.
25 *Id.*
women are protected and men are not." The Court’s most forthright treatment of the sex discrimination issue was relegated to the now infamous footnote 20:

[T]his case is ... a far cry from cases ... involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification ... . Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.27

Thus, under Geduldig, “the link of the excluded disability with gender was to be treated as essentially coincidental.”28

After Geduldig, the question became whether its tortuous reasoning could be untangled or confined to its facts, or whether the Court would extend the “pregnant women/nonpregnant persons” distinction into other factual and legal contexts. Since Geduldig concerned the availability of benefits to female workers, the focus was naturally on Title VII, the statutory prohibition against sex discrimination in employment. Section 703(a)(1) of that statute provides that an employer is forbidden “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”29 The first question, then, was whether discrimination against women under Title VII would be understood in the pregnancy context as the same kind of dissimilar treatment of persons similarly situated which the equal protection clause is taken to forbid. If so, then the Supreme Court’s reasoning in Geduldig would preclude section 703(a)(1) from hav-

27 Id. at 496-97 (footnote omitted).
28 Id. at 496 n.20.
ing any effect on pregnancy discrimination; the statute prohibits only sex discrimination, and, under Geduldig, classifications based on pregnancy are not sex discrimination.

Equally important was whether section 703(a)(2)\textsuperscript{30} would be construed in the gender or gender-related context in the same way in which it had been in the racial context in Griggs v. Duke Power Co.\textsuperscript{31} Under section 703(a)(2) an employer may not “limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.”\textsuperscript{32} The Griggs Court construed this section to prohibit the requirement that potential employees take a standardized intelligence test, when such a requirement had a disproportionately negative impact on black applicants, stating: “What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.”\textsuperscript{33} That is, according to Griggs, even when a classification is racially neutral on its face, the showing of a disproportionate impact of that classification on a group protected by section 703(a)(2) is enough to establish a prima facie violation of Title VII. The disproportionate impact method of proof in Title VII cases, or “effects test,” as it is sometimes called, was drastically elevated in significance after the decision in Washington v. Davis\textsuperscript{34} precluded a similar method of proof in equal protection clause cases. Davis established that a showing of disproportionate impact without a showing of a discriminatory purpose would be insufficient to sustain the constitutional claim.

Before the Supreme Court considered the issues, there were authoritative indications that Geduldig should have no effect on a Title VII claim of pregnancy discrimination. A guideline promulgated in 1972 by the Equal Employment Opportunity Commission (EEOC)\textsuperscript{35} stated unequivocally that disability and sick leave benefits should be available for pregnancy-related disabilities and absences on the same basis as for other disabilities.\textsuperscript{36} Moreover, seven courts of appeals had addressed,
directly or indirectly, the question of whether Geduldig would control the outcome of a Title VII pregnancy discrimination claim and unanimously concluded that it would not.\footnote{37} Perhaps most persuasive, after Geduldig, the Supreme Court itself indicated the broad reach of Title VII in comparison to constitutional causes when, in discussing the “disproportionate impact” method of proof in Title VII cases, it stated: “We are not disposed to adopt this more rigorous standard for the purposes of applying the Fifth and Fourteenth Amendments in cases such as this.”\footnote{38} Interestingly, in spite of this accumulation of authority in the immediate post-Geduldig era, commentaries of the time burgeoned with warnings about the possible effects of Geduldig on Title VII claims.\footnote{39} The most farfetched of these predictions were imminently to come true.

The questions of the meaning of sex/pregnancy discrimination under Title VII and of the application of the disproportionate impact analysis in pregnancy cases came before the Court in \textit{General Electric Co. v. Gilbert}\footnote{40} in 1976. The suit was a Title VII challenge to an employees' disability insurance plan similar to that upheld in Geduldig. Two months before Geduldig was decided, the district court had struck down the plan on the grounds that the program was sex discriminatory on its face.\footnote{41} The Fourth Circuit affirmed after Geduldig was decided, holding that Geduldig did not control in a Title VII challenge.\footnote{42} The Supreme Court disagreed. Noting that Congress has nowhere defined “discrimi-

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29 C.F.R. § 1604.10(b) (1973).
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42 429 U.S. 125 (1976).
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519 F.2d 661 (4th Cir. 1975).
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nation” for Title VII purposes, Mr. Justice Rehnquist found that the equal protection cases “afford an existing body of law analyzing and discussing that term in a legal context not wholly dissimilar to the concerns which Congress manifested in enacting Title VII.” Having made this connection between equal protection and Title VII analyses, the Court could simply state: “Absent a showing of gender-based discrimination, as that term is defined in Geduldig, or a showing of gender-based effect, there can be no violation of § 703(a)(1).” Thus, in Gilbert the Court found that the exclusion of pregnancy from General Electric’s disability plan, itself much like the plan at issue in Geduldig, was not a gender-based discrimination at all.

With regard to the disproportionate impact section of Title VII, the Gilbert Court found that the respondent-plaintiffs had not met their burden of proof. Relying explicitly on the Geduldig aggregate risk protection analysis, the Court stated:

The Plan, in effect . . . , is nothing more than an insurance package, which covers some risks, but excludes others . . . . As there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme simply because women disabled as a result of pregnancy do not receive benefits; that is to say, gender-based discrimination does not result simply because an employer’s disability-benefits plan is less than all-inclusive. For all that appears, pregnancy-related disabilities constitute an additional risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded inclusion of risks.

\[429\text{U.S. at 133. For criticism of this transplantation, see House Hearings, supra note 3, at 39-40 (statement of Susan D. Ross); Block, Pregnancy Disability Benefits, 1978 Ann. Survey Am. L. 431.}\]

The Court noted that the Fourth Circuit Court of Appeals was “wrong in concluding that the reasoning of Geduldig was not applicable to an action under Title VII.” 429 U.S. at 136. It may indeed be that the circuit court misread Geduldig. It distinguished that case on the ground that classifications under such an equal protection challenge needed only to be “rationally supportable,” whereas Title VII’s prohibition on discrimination is for all practical purposes absolute. 519 F.2d at 667. That is, the circuit court suggested that even the Geduldig Court found the California program discriminatory, just not discriminatory enough to sustain the equal protection challenge. Id. at 666-67. It is clear now, of course, that when the Geduldig Court found no discrimination, it was being altogether literal. Thus, the harder question which might have been put to the Supreme Court in Gilbert was whether, given that no sex discrimination existed for constitutional purposes, Congress might have deemed such to be sex discrimination under its commerce clause power or, alternatively, under its “enhanced” power under § 5 of the fourteenth amendment. For discussion of the latter, see Katzenbach v. Morgan, 384 U.S. 641 (1966). These considerations are of some importance with regard to the scope of the 1978 Title VII amendment prohibiting pregnancy discrimination. See notes 150-220 & accompanying text infra.

\[429\text{U.S. at 137 n.15.}\]

\[Id. at 136.\]

\[429\text{U.S. at 138-39 (citation & footnotes omitted). The third means of making a prima}\]
Thus, the Court suggests that the plaintiffs would have had to show that the entire package was worth more to men than to women in order to prove a discriminatory effect. In light of the subsequent holding in *City of Los Angeles Department of Water & Power v. Manhart,* it is not clear that a reallocation of burdens or benefits based on this group averaging technique would be permissible. While criticizing that method of analysis is not the aim of this article, it is important to point out that the group averaging, or “inclusion-focused analysis,” has at least two failures: first, it does not account for the fact that disabilities exclusive to men were covered by the plan; and second, it fails to consider that an individual woman may never have the opportunity to take advantage of any benefits so that the notion of total “worth” is irrelevant to her rights. It thus ignores the principle of equal individual treatment under the law.

The convolutions of *Geduldig* and *Gilbert* reached new heights in *Nashville Gas Co. v. Satty.* In that case, an employee challenged two features of the employer’s pregnancy policy on Title VII grounds. First, under the policy, an employee on pregnancy leave could receive no sick leave pay even though employees were compensated when absent due to other nonoccupational illnesses or disabilities. Second, the employer, although requiring pregnancy leave of indeterminate length, denied accumulated seniority to female employees returning to work after childbearing. If an employee was absent due to any other disability, he or she not only retained accumulated seniority but continued to accrue seniority while absent.

Following *Gilbert,* the Court found neither policy on its face to be sexually discriminatory. On the question of disproportionate impact under section 703(a)(2), however, the Court had to draw a line which, although

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facie Title VII case is to show that the policy in question is a mere pretext for invidious discrimination. As in *Geduldig,* the *Gilbert* Court found no evidence of pretext in the equal protection context. See id. at 136; text accompanying notes 26-28 supra. This conclusion in *Gilbert* is highly questionable since the trial court had specifically found that the exclusion of pregnancy was at least partially discriminatorily motivated. See *375 F. Supp.* at 383, 386.


"[The] plan also insures risks such as prostatectomies, vasectomies, and circumcisions that are specific to the reproductive system of men and for which there exist no female counterparts covered by the plan." *429 U.S. at 152* (Brennan, J., dissenting).


*Id. at 140, 143-44.*
bizarre, was consistent with the reasoning of Geduldig and Gilbert. On one hand, the Court held that the refusal to allow sick leave pay to pregnant workers did not affect women disproportionately. With regard to the deprivation of seniority, however, the Court did find an impermissibly disproportionate impact on women in violation of section 703(a)(2). The Court distinguished Gilbert by saying:

Here, by comparison, petitioner has not merely refused to extend to women a benefit that men cannot and do not receive, but has imposed on women a substantial burden that men need not suffer. The distinction between benefits and burdens is more than one of semantics. We held in Gilbert that § 703(a)(1) did not require that greater economic benefits be paid to one sex or the other “because of their differing roles in ‘the scheme of human existence.’” . . . But that holding does not allow us to read § 703(a)(2) to permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different role.52

The Court further distinguished its holdings with respect to the seniority policy and the sick leave policy by its conclusion that the sick leave policy could be challenged under section 703(a)(1) but not under section 703(a)(2).53 The plaintiff in Satty could not, as a matter of law, attempt to utilize the disproportionate impact doctrine as it is established under section 703(a)(2), and did not prove disproportionate impact under section 703(a)(1) since the sick leave policy in question was “for all intents and purposes, the same as the . . . plan examined in Gilbert.”54 Thus,

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52 Id. at 142 (citation & footnote omitted).
53 The Court drew this conclusion from a narrow construction of the words “employment opportunities or . . . status as an employee” in § 703(a)(2):

[It] is difficult to perceive how exclusion of pregnancy from a disability insurance plan or sick-leave compensation program “would deprive any individual of employment opportunities” or otherwise adversely affect his status as an employee in violation of § 703(a)(2). The direct effect of the exclusion is merely a loss of income for the period the employee is not at work; such an exclusion has no direct effect upon either employment opportunities or job status. . . . [Section] 703(a)(2) . . . appear[s] to be the proper section of Title VII under which to analyze questions of sick-leave or disability payments.

434 U.S. at 144-45. That is, the Court concludes that sick leave or disability benefits could be challenged only as “compensation, terms, conditions, or privileges of employment” under § 703(a)(1).

54 Id. at 145. The plaintiff in Satty conceded the similarity of the GE and Nashville Gas plans. A commentator, however, has persuasively argued that, even within the strictures of Gilbert, sick leave should not be treated the same as disability benefits. See Erickson, Pregnancy Discrimination: An Analytical Approach, 6 WOMEN’S RIGHTS L. REP. 83, 100-01 (1979). Sick leave is available in a limited quantity to be used for any purpose, and is therefore like money in the bank as opposed to risk protection; hence, it would be impossible for a female employee to use more than her share of sick leave; a challenge to a sick leave policy is not subject therefore to the claim that to allow sick leave for pregnancy would discriminate against men. Id. The force of this argument depends on how much the Supreme Court relied on this reverse discrimination argument in Gilbert and Satty. See notes 144-49 & accompanying text infra.
the Satty decision rests on two express distinctions, one between burdens and benefits and the other between sections 703(a)(1) and (a)(2). These distinctions are at best tenuous. This reasoning has been roundly criticized, and other more illuminating distinctions have been suggested. One commentator has argued, for example, that the Court appropriately perceived the seniority deprivation as somehow more egregious than the refusal to allow sick leave pay, which results “merely in loss of income.” The commentators rightly point out that such a gut reaction is hardly an appropriate basis for decision; their endorsement of such a distinction on any level, however, belies ignorance of the real status of women in the labor force. While seniority may be more important than a few days’ pay for the long-term company executive with ample savings, regular compensation has at least as much meaning for a person like the plaintiff in Satty, an underpaid female clerk who is less likely than a male employee to see any rewards of the seniority system. Another commentator has suggested that the operative distinction in the case is between benefits such as seniority which impose no cost on the employer and sick leave benefits which do. The Court could not rely on this distinction because cost differential is theoretically not a


57 434 U.S. at 145.

58 Women have been less likely than men to stay on a job, which naturally has an effect on the benefits, including seniority, to which each woman will be entitled. In 1973, for example, the median female worker, in each of several age groups, had held her current job for about half as long as the median male worker in the same age group had held his job. See U.S. Dept of Labor & Japanese Ministry of Labor, The Role and Status of Women Workers in the United States and Japan 91 (1976) [hereinafter cited as Women Workers]. This is partly so because women who are fully-employed in private industry receive only 59% of men’s earnings, see note 106 infra, and therefore have less incentive to stay on a job than men do, see note 188 & accompanying text infra. Further, in 1977, only 5.9% of non-postal white collar federal government workers in grades earning $26,000 per annum or more were women, whereas women comprised 72.2% of workers in the lower grades, earning from $6,219 to $14,431 per annum. U.S. Office of Personnel Management, Occupations of Federal White-Collar Workers (1977). Also in 1973, approximately 35% of employed women had part-time status, as opposed to only 16% of employed men. Women Workers, supra, at 84. Normally, part-time workers take much longer to acquire seniority, and many are not eligible for seniority benefits at all.

59 It can be argued that seniority systems impose a type of tax on the employer, and it can be argued with equal force that seniority systems result in measurable economic gain from, for example, increased motivation and improved efficiency for the employer. In any given seniority situation, answers to the questions of what rewards are generated and for whom will depend on the details of the system and the way in which the particular labor force is described for purposes of measurement.
defense to a prima facie Title VII violation. In reality, of course, the specter of paying women to have children is rife in the three decisions and haunts the subsequent congressional deliberations as well. The cost differential distinction comes close to explaining the contortions of Satty.

In his concurrence, Justice Stevens suggests a disturbing rationale which comes most near the heart of this matter. Believing that programs restricting benefits for pregnancy are facially sexually discriminatory to begin with, Stevens dissented in Gilbert. Although bound by that decision to concur in Satty, Justice Stevens thought that the distinctions advanced by the majority were “illusory,” and therefore found it necessary to search for a less convoluted method by which to determine how, under the majority’s general analysis, a facially neutral seniority policy could have a discriminatory effect. Justice Stevens suggests that the distinction advanced should actually be discrimination against pregnancy as opposed to discrimination against women, explaining: “This distinction may be pragmatically expressed in terms of whether the employer has a policy which adversely affects a woman beyond the term of her pregnancy leave.” Thus, the “formerly pregnant person” may not be permanently disadvantaged. Since the group permanently disadvantaged would be exclusively female, a seniority policy such as that in Satty would be sexually discriminatory.

If Justice Stevens is correct that, regardless of the details of the challenged policy, our legal framework allows “the employer to treat pregnancy leave as a temporal gap in the full employment status of a woman,” Satty goes a step beyond Geduldig and Gilbert. It not only shows pregnancy to be a judicially isolated phenomenon, but it also draws the contours of that isolation: it shows how, to the judicial mind, pregnancy fits into the flow of social life. One authority has termed Satty a “ludicrous but predictable resolution” of the problem of interpreting pregnancy issues within the meaning of Title VII. Satty is consistent with the Geduldig distinction between nonpregnant persons and pregnant women and with the Geduldig result that the former are equal under the law while the latter are not. In effect, the Court says that women are protected in any situation only when pregnancy itself is eliminated from that situation. The practical message to employers is:

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60 See note 171 infra.
61 See notes 174-81 & accompanying text infra.
62 See 429 U.S. at 160-62.
63 434 U.S. at 154 (Stevens, J., concurring).
64 Id. at 155.
65 Id. at 156.
66 Id.
67 Telephone conversation with Wendy W. Williams, Assistant Professor of Law, Georgetown University Law Center (April 18, 1978).
“If a woman is pregnant, you may treat her as you please. Once she’s no longer pregnant, treat her as a person.”

Of course, pregnancy cannot be eliminated from the scenario if the law is to respond to the real experience of women. Next, this article addresses the question of whether the “progress” achieved in the Supreme Court during the last decade lays a foundation for a more just treatment of pregnancy.

Judicial Attitudes Towards Women: Are They Really Changing?

The pregnancy decisions arguably stem from the Court’s biases and failure to comprehend the realities of working mothers’ situations. If this is the case, other Justices with open minds and better information would produce different results.88

The Standard of Review in Equal Protection Cases

In the days following the decision in Reed v. Reed,69 there was speculation that the Court was beginning to be concerned seriously with sex discrimination. At least, it was thought, the Court had formulated in Reed an intermediate standard of review,70 one not as rigorous as “strict scrutiny,”71 but still more searching than the “rational relationship”

88 Some optimism is generated by facts portraying ever-increasing numbers of women in law schools, in law practice and on the bench. Whatever changes may be wrought by female litigators and jurists are eagerly anticipated, but it is not wise to rely on that process for two obvious reasons. First, there is no guarantee that female judges will have any particular sympathies by virtue of their gender. As the bloody battle over ratification of the ERA demonstrates, women are no more likely than men to agree on any issues, including those which most profoundly affect their lives. Second, even the recently fantasized all-female Supreme Court would be subject to many constraints. See Sweet, Shirley Hufstedler and the Supremes, Ms., May, 1980, at 53 (listing Hon. Betty B. Fletcher, Hon. Ruth Bader Ginsburg, Sec’y Patricia Roberts Harris, Sec’y Shirley Mount Hufstedler, Prof. Barbara Jordan, Prof. Herma Hill Kay, Hon. Constance Baker Motley, Hon. Eleanor Holmes Norton and Hon. Patricia McGowan Wald). As one female state supreme court justice has described her situation:

You have to remember, and I have to remember, that I do not write on a clean slate. I write on a slate that’s been marked up . . . . For a consistent jurisprudence in my state I must fit within the marks on that slate. It doesn’t mean I can’t erase, it doesn’t mean I can’t write large. It just means that I write on that slate in a particular context.


69 404 U.S. 71 (1971) (statute favoring males over females as probate administrators cannot be justified on grounds of administrative convenience).


71 If the challenged legislative classification is inherently “suspect” or infringes on a “fundamental right,” the Court will subject the legislation to the strictest scrutiny, requiring the state to show that the classification is necessary to achieve a compelling state interest. See L. Tribe, supra note 28, §§ 16-12 to -13.
test,72 which had so undermined the cause of women's rights in *Goesaert v. Cleary*73 and *Hoyt v. Florida.*74 The *Reed* Court stated that a classification based on sex “must rest upon some ground of difference having a fair and substantial relation to the object of legislation.”75

Finding implicit support in *Reed,* four Justices declared two years later in *Frontiero v. Richardson*76 that classifications based on sex should be suspect. Justice Brennan, speaking as well for Justices Douglas, White and Marshall, thought the higher level of scrutiny justified due to: first, “the high visibility of the sex characteristic”;77 second, our “long and unfortunate history of sex discrimination . . . rationalized by an attitude of ‘romantic paternalism’ which, in practical effect, put women not on a pedestal, but in a cage”;78 third, the persistence of sex discrimination; fourth, the immutable nature of the sex characteristic; fifth, the fact that women “are vastly underrepresented in this Nation's decisionmaking councils”;79 and sixth, the fact that “Congress has itself manifested an increasing sensitivity to sex-based classifications.”80 Underlying this enumeration of factors was the Justices’ perception that “the sex characteristic frequently bears no relation to ability to perform or contribute to society.”81

The next women’s rights case82 before the Supreme Court on an equal

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72 Basically, a legislative classification not based upon any suspect criterion nor infringing upon a fundamental right need only bear a rational relationship to any legitimate state objective in order to survive an equal protection challenge. See id. § 10-12.
73 395 U.S. 464 (1969) (law precluding most females from being barmaids reasonably related to preventing moral and social problems).
74 368 U.S. 57 (1961) (statute requiring females to preregister in order to be eligible for jury service rationally related to purpose of allowing women time for home and family responsibilities).
75 404 U.S. at 76 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).
76 411 U.S. 677 (1973) (plurality decision) (equal protection violated by regulation requiring male dependents of female army officer, but not female dependents of male officer, to prove dependency).
77 Id. at 686.
78 Id. at 684.
79 Id. at 686 n.17.
80 Id. at 687. The sixth criterion refers to congressional passage of the ERA. Justice Powell, however, stated that the pendency of the ERA militated against applying strict scrutiny to gender classifications, because the Court should not pre-empt “a major political decision.” Id. at 692 (Powell, J., concurring). Commentators have cited Justice Powell’s position as an argument in favor of ERA ratification. See, e.g., Ginsburg, *The Equal Rights Amendment Is the Way,* 1 HARV. WOMEN'S L.J. 19, 24-25 (1978). Although this is probably a realistic assessment of judicial inertia and a sound political stand, it is possible to assert that Justice Powell’s position is a strictly positivist “cop-out.” See also Erickson, *Women and the Supreme Court: Anatomy Is Destiny,* 41 BROOKLYN L. REV. 209, 229 (1974) (arguing that Justice Powell would never have advanced such a rationale in a race discrimination context).
81 411 U.S. 686 (emphasis added).
82 After *Frontiero* and before *Geduldig,* the Supreme Court decided Roe v. Wade, 410 U.S. 113 (1973). Arguably *Roe* is not a women’s rights case at all, and the Court’s failure to decide it as such has made possible the recent disastrous developments in the area of abortion. E.g., Harris v. McRae, 100 S. Ct. 2671 (1980).
protection theory was Geduldig. Since the Court refused to find a classification on the basis of sex, it did not discuss the appellees' argument that sex is a suspect classification.\textsuperscript{33}

The most significant moment in this lengthy effort to achieve a higher standard of review in equal protection sex discrimination cases came two years later in Craig v. Boren.\textsuperscript{84} Though the Court relied for its holding on prior cases, the standard it proclaimed appears distinctly more stringent than those previously applied: “[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”\textsuperscript{85} In Craig, the constitutionality of an Oklahoma statute which prohibited the sale of 3.2% beer to males under the age of twenty-one and to females under the age of eighteen was at issue.\textsuperscript{86} The Court subjected the evidence supporting the state’s justifications to tough statistical scrutiny, demanding a consistent empirical showing of the relationship between ends and means.\textsuperscript{87} The state’s evidence which was examined and rejected by the majority might well have been sufficient for it to have deferred to the legislative judgment under the rational relationship or even the Reed test. However, the Court found the gender-based differential unconstitutional, suggesting a new standard with some real bite. The Court has subsequently applied the Craig standard to invalidate a gender-based classification in Orr v. Orr.\textsuperscript{88} There, the challenge was to an Alabama alimony statute which provided that husbands, but not wives, could be required to pay alimony upon divorce.\textsuperscript{89} The Court, recognizing and rejecting “the baggage of sexual stereo-

\begin{footnotes}
\textsuperscript{84} 429 U.S. 190 (1976).
\textsuperscript{85} Id. at 197; cf. id. 211-14 (Stevens, J., concurring) (arguing that the present three-tiered equal protection scheme is really a way of describing single approach to many kinds of problems, different results depending on gravity of particular challenge).
\textsuperscript{87} The Court concluded, first, the state’s evidence of a substantially disproportionate number of arrests of 18 to 20 year old males for driving under the influence and for drunkenness was not persuasive in that it did not reveal that the disproportion was confined to that age group, 429 U.S. at 200 n.8; second, the state’s evidence of a great number of males aged 17 to 21 killed or injured in traffic accidents drew no correlation between those numbers and levels of intoxication, id. at 201 n.9; third, a random roadside survey allegedly indicating that young males were more inclined to drink and drive was not probative because, inter alia, the differentials between males and females were too small and the age differentials actually suggested a lower “involvement with alcohol” by youths, id. at 201. 203 n.16; fourth, FBI statistics showing more males arrested for driving while intoxicated drew no correlation between the number of arrests and age nor between arrests and beer drinking, as opposed to drinking other intoxicants, id. at 201 n.11; and fifth, statistics from other jurisdictions offered to show the pervasiveness of youthful involvement in accidents following the ingestion of alcohol apparently did not show any gender correlation, id. at 201.
\textsuperscript{88} 440 U.S. 268 (1979).
\end{footnotes}
types,”90 suggested that “[t]here is no reason . . . to use sex as a proxy for need.”91 The line of cases beginning with Reed and Frontiero has been described by one authority as having invalidated laws or regulations which “shared an important characteristic in terms of impact on behavior: All either prevented, or economically discouraged, departures from ‘traditional’ sex roles, freezing biology into social destiny.”92 The same can surely be said of the laws invalidated in Craig and Orr.

Although no enhanced standard of review will make a difference if the Supreme Court persists in its reasoning that classifications based on pregnancy are not gender classifications per se, the new standard articulated in Craig could even change the Geduldig result if this initial hurdle were overcome.93 While it can be assumed that the state interests asserted in Geduldig would today be held to be important governmental objectives, a re-examination of the evidence underlying the decision in Geduldig in light of the decision in Craig reveals that the relationship between the purpose and the actual program is inadequate in a number of ways.

The Geduldig Court seems to have been impressed by three factual assertions. First, California asserted that in recent years the disability plan in its pregnancy-exclusionary form had paid out 90% to 103% of existing revenues.94 If the Court first allowed that the exclusion is a gender classification and then applied Craig-type scrutiny, it presumably would be influenced by this evidence only if the evidence were accompanied by certain other facts, such as to whom and for what disabilities the revenues were paid and the percentage of payments which compensated male-exclusive disabilities. In response to California’s argument that pregnancy disability claims were for unnecessarily long absences and for purposes other than the disability of the employee,95 the Court would ask what measures the state took to prevent abuse by nonpreg-

90 440 U.S. at 283.
91 id. at 281.
92 L. Tribe, supra note 28, § 16-25, at 1065.
93 See notes 109-49 & accompanying text infra.
94 Arguably the Craig standard has not yet undergone a strenuous test; both Craig and Orr involved matters of less than earth-shattering proportions. That is, whether 18 to 21 year-old males in Oklahoma can buy 3.2% beer or whether some Alabama husbands can receive alimony will not have the repercussions that a mandate that all states pay disability benefits to pregnant workers would. Moreover, both Craig and Orr involved discrimination against males, thus perhaps speaking more forcefully to the Court. But cf. Craig v. Boren, 429 U.S. at 219-22 (Rehnquist, J., dissenting) (arguing that rational relationship test should apply to discrimination against males).
95 417 U.S. at 492-93.
nant claimants and what evidence California could produce as to the propensity of pregnant workers to cheat the system.98

Second, the Court stated that, although there was disagreement as to the actual increment,99 the cost to the system of covering pregnancy benefits “would clearly be substantial.”100 In order to decide whether the exclusion of pregnancy disabilities was substantially related to the achievement of the governmental objectives, the estimate of cost would need to be given some content. For example, evidence is needed regarding the length of absence upon which the state’s cost estimates are based. California based its figures on an average absence of thirteen to fifteen weeks,99 while the average time most often quoted by experts is six weeks.100 Furthermore, information indicating the estimated number of pregnancies per year in the work force, any estimated increase in the cost to the state, as compared to the state’s past contribution to the benefits pool, and whether the state takes into consideration savings resulting from reduced welfare payments is needed. The state would also need to account for the differences between its cost estimates and data describing the real experiences in other states. In 1973, for example, Hawaii amended its law to require that pregnancy be treated like any other disability in an employer’s disability benefits package.101 None of the major insurers in that state were compelled to raise their rates due to the inclusion of pregnancy in disability schemes; indeed, those that did so prematurely subsequently lowered their rates because their estimates of increased cost had been grossly inflated.102

98 These arguments asserting new mothers’ tendency to abuse the disability system reappeared in the legislative history of the pregnancy amendment to Title VII, 42 U.S.C. § 2000e(k) (Supp. III 1979). For example, one actuary testified: “We are not talking about a disability that can be checked by a physician to see if the individual is still disabled, and if not she should go back to work.” House Hearings, supra note 3, at 119 (statement of Paul Jackson).

99 The state asserted that cost would increase by $120.2 million (33%) to $131 million (36%) annually; appellees asserted an increase of only $48.9 million (12%) annually. 417 U.S. at 494 n.18.

100 Id. at 493-94.

101 See, e.g., House Hearings, supra note 3, at 60 (statement of Dr. Andre Hellegers) (90-95% of pregnant workers lose six weeks or less). Moreover, the Hawaii experience, see note 101 infra, revealed the average absence for disabled male employees to be 5.1 weeks, while the average absence for female employees, including for pregnancy and pregnancy-related disabilities, to be only 4.4 weeks. House Hearings, supra note 3, at 214 (statement of Ruth Weyand).

102 HAWAII REV. STAT. § 392-3(5) (1976). Though the Hawaii statute involves a requirement of nondiscrimination in employer-provided benefits (much like 42 U.S.C. § 2000e(k) (Supp. III 1979)) rather than a state-administered employee-funded program, such as was at issue in Geduldig, significant differences between the two might have been factored out to arrive at appropriate figures describing the cost of pregnancy, which the Supreme Court, for all practical purposes, just assumed to be “substantial.”

103 House Hearings, supra note 3, at 199-228 (statement of Ruth Weyand).
Third, the Supreme Court noted that female workers in California contributed 28% of the plan's revenues but received 38% of the plan's benefits. Though the Geduldig Court appears not to rely on this statistic, the reasoning made explicit in Gilbert and Satty demonstrates how this notion of possible "discrimination against men" which results from including pregnancy in disability insurance is crucial to the Court's understanding of the pregnancy issue. In attempting to discover what the footnoted statistic reveals, it first should be noted that the contribution rates under the California scheme depend on wages; if a group uniformly earns less, its contributions to the disability program would be less. Moreover, California asserted as one of its purposes the maintenance of lower contribution rates for lower-paid workers. Under the circumstances, the Court might have inquired into the relative earning levels of male and female workers rather than being influenced by a bald statistic. Also in this regard, it is interesting to note that low income workers do submit a disproportionate number of disability claims, a statistic which holds true for both lower paid male and female laborers. Whatever reasons explain this phenomenon, it is clear that income level is a better indicator of predicted disability rates than is gender.

Thus, it is likely that an application of the Craig standard to Geduldig would illuminate the unpersuasiveness of the evidence relied upon in that case. Again, the Craig standard cannot be applied if the Court continues to deny that pregnancy discrimination is sex discrimination. The chances that this initial obstacle can be overcome must be considered next.

The Consistent Posture of the Supreme Court

One of the most encouraging aspects of Orr v. Orr is that it directly, though offhandedly, analogizes race discrimination to sex discrimination. In giving unusually short shrift to a difficult standing problem, the Court stated:

There is no question but that Mr. Orr bears a burden he would not bear were he female. The issue is highlighted, although not altered, by transposing it to the sphere of race. There is no doubt that a state

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103 417 U.S. at 497 n.21.
104 See notes 144-49 & accompanying text infra.
105 See note 24 & accompanying text supra.
106 In 1958, fully-employed women nationwide earned 63% of the amount earned by men; by 1970, this figure had dropped to 59%. U.S. DEP'T OF LABOR, WOMEN'S BUREAU, 1975 HANDBOOK ON WOMEN WORKERS, BULL. No. 297, at 4.
107 House Hearings, supra note 3, at 24 (statement of Wendy W. Williams).
law imposing alimony obligations on blacks but not whites could be challenged by a black who was required to pay. The burden alone is sufficient to establish standing.109

This reasoning, whatever its scope, is a welcome sight to feminist litigators who have attempted to impress such an analogy between race and sex upon the Court for some time. That is, insofar as one's sex, like one's race, is an unalterable, accidental and identifying trait which bears no relation to one's abilities but nonetheless subjects one to disadvantageous treatment, it should be given no legal cognizance. Moreover, the Supreme Court over a quarter of a century ago remotely hinted that it might be open to such an analogy.

In Brown v. Board of Education,110 that Court cited Gunnar Myrdal's An American Dilemma111 for the conclusion that racial segregation retards the development of black children and deprives them of equal educational benefits. In that 1944 classic, Myrdal persuasively argued that there were parallels between race and sex. He asserted that the subjection of both groups resulted from the economic and ideological, paternalistic scheme of life. Because of the stereotypes to which women as well as blacks are subject, they face similar obstacles: "The most important disabilities still affecting [a woman's] status are those barring her attempt to earn a living and to attain promotion in her work."112 Acknowledging that, for blacks and for women, there was "a tremendous difference both in actual status of these different groups and in the tone of sentiment in the respective relations,"113 Myrdal asserted that both groups continued to face problems despite the decline of paternalism as an ideal and the erosion of its economic base.114 If the Court relied on Myrdal for its historic conclusion concerning the inherent evils of race discrimination, it could have done the same for sex discrimination. It is therefore not at all surprising to find Myrdal's study cited by the appellants in Reed v. Reed, who argued that the Court should treat sex discrimination similarly to race discrimination.115

109 Id. at 273 (emphasis added). There were also substantial questions about the timeliness of Mr. Orr's constitutional claim, id. at 274-75, and the existence of independent and adequate state grounds for decision, id. at 275-78. The Court's treatment of these questions may be inconsistent with prior jurisdictional law, see id. at 290-300 (Rehnquist, J., dissenting), but at least for the first time in a sex discrimination case the sort of "damn the torpedoes" approach which claimants have enjoyed in other civil rights contexts was evidenced.


111 G. MYRDAL, AN AMERICAN DILEMMA (20th anniversary ed. 1964), cited in 347 U.S. at 494 n.11.

112 G. MYRDAL, supra note 111, app. 5, at 1077.

113 Id. at 1073.

114 Id. at 1076.

115 Brief for Appellants at 15-19.
That the Court in *Orr* acknowledged the parallel between race and sex is heartening. The analogy, however, will not serve to resolve the pregnancy dilemma for an obvious reason. As Myrdal put it:

In the final analysis, women are still hindered in their competition by the function of procreation; Negroes are laboring under the yoke of the doctrine of unassimilability which has remained although slavery is abolished. The second barrier is actually much stronger than the first in America today. But the first is more eternally inexorable.

The *Reed* appellants also acknowledged this limitation on the analogy between race and sex in a fundamentally ambivalent way. Emphasizing that the legislative classification preferring males as probate administrators was unrelated to any biological difference between the sexes, the appellants quoted the following passage from a seminal law review article: "To the degree women perform the function of motherhood, they differ from other special groups. But maternity legislation is not sex legislation; its benefits are geared to the performance of a special service much like veterans' legislation."

The present question is whether we can rely on the Justices to bridge this traditional separation for females between maternal and other functions. There are three cases which arguably demonstrate an increased sensitivity to the women's dilemma. First, in *Stanton v. Stanton*, a Utah statute set the age of majority for females at eighteen and for males at twenty-one because, among other reasons, males need to be supported while they obtain the education and training necessary to provide for their own families. In invalidating the statute, Justice Blackmun stated for the majority:

No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas .... To distinguish between the two on educational grounds is to be self-serving: if the female is not to be supported so long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed.

The second indication of improved attitudes is Justice Stevens' dissent in *Mathews v. Lucas*. In that case, illegitimate children brought an equal protection challenge to a Social Security Act provision which, in

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116 G. MYRDAL, supra note 111, app. 5, at 1078 (footnote omitted).
118 421 U.S. 7 (1975).
119 *Id.* at 14-15.
providing survivors’ benefits to dependent children, established a presumption of dependency for legitimate children, while illegitimates were forced to prove dependency. The Supreme Court held the classification was reasonably related to the likelihood of dependency at the time of the death of the provider. Justice Stevens stated in dissent:

Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizen, legitimate and illegitimate; for too much of our history there was the same inertia in distinguishing between black and white. But that sort of stereotyped reaction may have no rational relationship—other than pure prejudicial discrimination—to the stated purpose for which the classification is being made.\(^{111}\)

Certainly, it is encouraging to find the above-quoted language in the United States Reports.\(^{112}\)

The third case which arguably demonstrates an increased sensitivity to women’s rights is *Turner v. Department of Employment Security*.\(^{113}\) In *Turner*, the Court invalidated a Utah statute which made pregnant women ineligible for unemployment compensation for a period extending from twelve weeks before the expected date of birth to six weeks after delivery. Unemployment was available to anyone else who was unemployed but available for employment. The ineligibility provision rested on an irrebuttable presumption that women are unable to work during the designated eighteen-week period, which the court found to violate the due process clause of the fourteenth amendment.\(^{114}\)

This decision, though laudable in result, suffers from two major defects. The first is found in the opinion’s only footnote. Utah contended, citing *Geduldig*, that the provision was a limitation on the coverage of the state unemployment compensation system. The Court rejected the contention because the Utah Supreme Court, not having had the *Geduldig* argument before it, had rested its decision on the claim by the respondents that “near term pregnancy is an endemic condition relating to employability.”\(^{115}\) The clear implication of the footnote is that the

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\(^{111}\) Id. at 520-21 (Stevens, J., dissenting).

\(^{112}\) Of course, it has become clear that Justices Blackmun and Stevens are not necessarily representative of a majority of the Supreme Court with regard to some women’s rights issues. See Harris v. McRae, 100 S. Ct. 2671 (1980).

\(^{113}\) 423 U.S. 44 (1975) (per curiam). To suggest that this case demonstrates increased sensitivity on the part of the Supreme Court, however, may be to misconstrue, or at least overestimate, the attitudes of the Justices.

\(^{114}\) Id. at 46. The doctrine prohibiting irrebuttable presumptions under the due process clause is not fully explored in this article. As this section suggests, the doctrine has not produced completely satisfactory results, and, in any case, the Court appears to have tacitly agreed with Justice Rehnquist that the doctrine sweeps too broadly. See Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 657-60 (1974) (Rehnquist, J., dissenting). See also Bezanson, *Some Thoughts on the Emerging Irrebuttable Presumption Doctrine*, 7 IND. L. REV. 644 (1974).

\(^{115}\) 423 U.S. at 45 n.*.
Court would have reached a different result in *Turner* had the Utah opinion mentioned the “coverage limitations on insurance principles central to [Geduldig].”\(^{126}\) This implication hardly argues for a substantive value change on the part of the Justices. The second defect in *Turner* results from the fact that the decision was controlled by *Cleveland Board of Education v. LaFleur,*\(^{127}\) the reasoning of which sharply illustrates the limit of judicial willingness to extend constitutional protection to women in their procreative capacities. There the Supreme Court invalidated on due process grounds a school board regulation which required that a pregnant teacher take unpaid leave five months before the expected delivery and prohibited her return to work until three months after childbirth. Among the purposes recited for such a regulation, the majority found the “necessity of keeping physically unfit teachers out of the classroom” to be legitimate and the only purpose to which the classification was rationally related.\(^{128}\) However, Justice Stewart, writing for the majority, determined that the rule was an overbroad irrebuttable presumption of physical incompetence, “‘not necessarily or universally true in fact,’ ”\(^{129}\) and therefore a violation of the due process requirement of individual determination of fitness. This governmental intrusion was found to be especially unfounded in the realm of marriage and family life.\(^{130}\) The Court invalidated on similar grounds that limitation on a teacher’s ability to return to work.

At least in the case of mandatory leave before delivery, *LaFleur* would seem to have finally put the decisions concerning childbirth in the hands of the woman bearing the child, thus endorsing the feminist tenet that a woman must have the right to control her reproductive life. Unfortunately, a footnote in that decision undermines this apparent incorporation of a crucial feminist value:

> This is not to say that the only means for providing appropriate protection for the rights of pregnant teachers is an individualized determination in each case and in every circumstance. We are not dealing in these cases with maternity leave regulations requiring a termination of employment at some firm date during the last few weeks of pregnancy. We therefore have no occasion to decide whether such regulations might be justified by considerations not presented in these records . . . .\(^{131}\)

The Court went on to suggest that evidence of widespread medical consensus about disabling effects on job performance during the last few

\(^{126}\) Id.


\(^{128}\) Id. at 643.

\(^{129}\) Id. at 644 (quoting Vlandis v. Kline, 412 U.S. 441, 452 (1973)).


\(^{131}\) 414 U.S. at 647 n.13.
weeks or evidence that such a regulation was the only reasonable means to avoid the commencement of labor in the classroom might justify such a regulation.\textsuperscript{132} Not only is the decision as to reinstatement in a physician's hands, but the entire individual determination approach is in principle abandoned to a generalized perception, or "documented" stereotype, of the relation between pregnancy and employment. The stinging footnote phenomenon seems to be chronic.

LaFleur expressly allows that it is appropriate for someone other than the female worker to decide how pregnancy will affect her employment. The traditional arrangements which have the ultimate effect of penalizing pregnancy are left untouched. Moreover, it is possible to speculate that the Justices consciously endorsed the imposition of that penalty by not acknowledging the evidence adduced at trial that the school board allowed pregnant teachers to work on an \textit{unpaid} basis through the eighth month of pregnancy.\textsuperscript{133} This fact belies the state's contention that the purpose of the regulation was to insure physically competent teachers.

In this sense, \textit{Turner} is to \textit{LaFleur} as \textit{Satty} is to \textit{Gilbert}. Taken together, the contours of legal restrictions on women in society are made explicit: there is some quality in the phenomenon of pregnancy that justifies isolating women from the social mainstream and forcing them to be dependent on others. LaFleur, read generously, mandates that lawmakers cannot assume when this divestiture of citizenship attaches. \textit{Turner} makes it clear that once an individual determination shows the specialness to have commenced, there is no longer any dispute as to whether a woman deserves compensation. This is another angle of the picture drawn by \textit{Gilbert} and \textit{Satty}: women need only be treated as persons when they are not engaged in their childbearing function.

Though some of the Justices do show greatly improved understanding and sympathy, the issue of pregnancy demonstrates that their presumptions regarding women have not changed substantially. Decision-makers are becoming aware that women in responsible positions are just as intelligent, competent and effective as their male counterparts. Such recognition is a far cry, however, from realizing the implications the reproductive capability has on one's destiny. No matter how sensitive attitudes are towards women in society, pregnant persons are not in that society.

This fundamental failure to recognize the inequities generated by biological differences is best focused by comparing Justice Rehnquist's

\textsuperscript{132} \textit{Id.}

\textsuperscript{133} Brief for Petitioners at 81-88 app.
opinion in General Electric Co. v. Gilbert with that of the district court judge. Having decided that General Electric's plan was not facially discriminatory, Justice Rehnquist "resolved" the question of discriminatory impact by an actuarial comparison of benefits flowing to women and men. Apparently realizing, however, that this comparison was vulnerable to an inquiry as to why pregnancy should be the excluded risk, he went on to state: "Pregnancy is of course confined to women, but it is in other ways significantly different from the typical covered disease or disability. The District Court found that it is not a 'disease' at all, and is often a voluntarily undertaken and desired condition." That Justice Rehnquist referred to the district court's finding on this topic is ironic, since the finding there led to a diametrically different result. What he omitted to note was that the district court found pregnancy to be a disability, even if not a disease in the commonly understood sense. More important, the district judge stated that "'voluntariness' in this sense is meaningless." Other commentators have thoroughly devastated the Court's reliance on qualities allegedly unique to pregnancy: the disability plans challenged in Geduldig and Gilbert covered almost all other disabling conditions, regardless of the degree of disabling effect, voluntariness, uniqueness to males, predictability, costliness or effect on future participation in the work force. Pregnancy was singled out, not because of any characteristic of the condition itself, but rather because the Justices perceived that a woman's role is to bear children and that women should bear the cost of childbearing just as they have always done.

This perception is demonstrated by the different treatments of the cost issue by the Supreme Court and by the Gilbert district court. The Supreme Court in Geduldig noted in passing that women employees actually received a proportionately greater share than men of the benefits disbursed under the California plan. Again in Gilbert, the Court referred to evidence introduced in the district court that, "with pregnancy-related disabilities excluded, the cost of the Plan to General Electric per female employee was at least as high, if not substantially higher than, the cost per male employee." The Court suggested that to in-

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136 See text accompanying notes 45-46 supra.
137 429 U.S. at 136.
139 Id.
140 See, e.g., Bartlett, supra note 39.
143 429 U.S. at 130 n.10.
clude pregnancy in the risks covered by the plan, if the inclusion resulted in an actuarial imbalance, would amount to sex discrimination against the male employees.¹⁴ In Satty, the Court again intimated that an opposite holding in Gilbert would have constituted preferential treatment for women workers.¹⁵

Assuming that the Court is correct in its economic assessment, and ignoring the legal inadequacies of the actuarial approach, how should this alleged imbalance be treated? The district court judge in Gilbert faced the issue squarely. Although he had found that the inclusion of pregnancy would increase costs by some amount,¹⁶ he observed that under the present policy “the consequence of a female employee exercising her innate right to bear a child may well result in economic disaster [while] [n]o such consequences would befall a male employee who chose to subject himself to a selective operation.”¹⁷ He stated that even upon a showing that the inclusion of pregnancy would operate to discriminate against men economically, his conclusion would be the same:

If it be viewed as a greater economic benefit to women, then this is a simple recognition of women’s biologically more burdensome place in the scheme of human existence. . . . [T]here must be this one exception to the cost differential defense…. Practically speaking, pregnancy is peculiar in that not only is procreation a necessary element of human existence, but it is one which is virtually taken for granted despite the unequal social taxes it imposes.¹⁸

To this candid assessment, the Supreme Court replied in a footnote:

Title VII’s proscription on discrimination does not require . . . the employer to pay that incremental amount. The District Court was wrong in assuming, as it did, that Title VII’s ban on employment discrimination necessarily means that “greater economic benefit[s]” must be required to be paid to one sex or the other because of their differing roles in “the scheme of human existence.”¹⁹

This is not just a disagreement about the scope of Title VII: it is an open conflict of values about women’s place, about substantive equality. It is significant to note that where the district court referred to women’s “biologically more burdensome place,” the Supreme Court replaced the term with “differing roles.” The respective normative implications are unmistakable.

¹⁴ Id. at 140 n.18.
¹⁶ 375 F. Supp. at 378. The district court judge was understandably skeptical of the defendant’s assertion that the inclusion of pregnancy would increase the cost of the disability plan by 300 to 330%. Id.
¹⁷ Id. at 381. The district court judge noted that one employee, having become unintentionally pregnant, had to resort to welfare aid. However, before receiving the aid, her electricity and gas service had been cut off. Id. at 381 n.12. See also House Hearings, supra note 3, at 50 (statement of Sherrie O’Steen).
¹⁸ 375 F. Supp. at 383.
¹⁹ 429 U.S. at 139 n.17.
At the risk of redundancy, it must again be stressed that the Supreme Court's improving attitude extends to women only as long as they are not pregnant: the issue at hand is how the law will account for childbearing and, to some extent, childrearing. Congress has attempted to address the former, but, as will be seen, the values animating that enactment fall somewhere between the polar views expressed by the district court judge and Justice Rehnquist in Gilbert.

THE CONGRESS AND PREGNANCY

The Supreme Court decision in General Electric Co. v. Gilbert,\(^{150}\) announced on December 7, 1976, brought swift reaction in Congress. On March 15, 1977, bills which were expressly intended to overcome the Gilbert result were introduced in both the Senate and the House.\(^{151}\) The original bills and the Pregnancy Discrimination Act (PDA)\(^{152}\) which was eventually adopted had a simple design: to add to the "definitions" section of Title VII a provision which would define pregnancy discrimination as sex discrimination prohibited by the statute. This approach has two advantages: first, it straightforwardly addresses the definitional obstacle created by the Supreme Court; and second, it eliminates the need to rely on the disproportionate impact doctrine in Title VII challenges to pregnancy classifications.\(^{153}\)

As of October 31, 1978, employers are forbidden by the PDA to discriminate on the basis of pregnancy, childbirth or related medical cond-

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\(^{150}\) 429 U.S. 125 (1976).


\(^{152}\) 42 U.S.C. § 2000e(k) (Supp. III 1979). The PDA provides in relevant part:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . . This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

tions with respect to any conditions of employment covered by Title V, including hiring, reinstatement, termination and seniority. Further, employers must provide disability, sick leave and medical benefits to pregnant workers on the same basis as those provided to other workers suffering from other conditions.\footnote{See id. at 4-5, reprinted \textit{in} [1978] U.S. Code Cong. \& Ad. News at 4752-53.} The attitudes manifested in Congress are encouraging. Whereas the Supreme Court's position has evinced ignorance about the role of and the burdens upon women in the labor force, Congress, by comparison, appears to be a veritable fountain of enlightenment.\footnote{Typical of the attitude expressed by many legislators was one statement made by Senator Brooke:} Indeed, some members of Congress demonstrated quite a sophisticated understanding of the various interrelated factors which require the protection of pregnant workers. For example, Senator Williams, the leading Senate proponent, pointed out how the potential of pregnancy tends to "marginalize" women workers:

\begin{quote}
It is a shocking fact that, among full-time workers employed throughout 1975, the median earnings of women were less than three-fifths of the median earnings of men. Our Nation's working women earned only 59 cents for every dollar earned by working men. Women were required to work nearly 9 days to earn the same gross income that men earn in only 5 days.

This legislation is also important because, in the long run, it will permit the 36 million working American women to assume their rightful place, and make a full contribution in our Nation's economy. Too often, sex discrimination has denied working women an opportunity to pursue a career. One reason for the gap between the earnings of men and women is that 90 percent of the entire female work force is concentrated in 10 female occupations.

These shocking statistics cannot be made better unless working women are provided effective protection against discrimination on the basis of their childbearing capacity. [Evidence] has shown that most policies and practices of discrimination against women in the work force result from attitudes about pregnancy and the role of women who become pregnant which are inconsistent with the full participation of women in our economic system.

Because of their capacity to become pregnant, women have been
\end{quote}

\begin{flushright}
\end{flushright}
viewed as marginal workers not deserving the full benefits of compen-
sation and advancement granted to other workers.\textsuperscript{156}

Such a broad view of the disadvantaged status of women would suggest
that Congress perceived a need for the most stringent sort of reform, a
scheme which would guarantee the support of pregnant persons. Indeed,
except for the provision that benefits need not extend to payment
for most abortions,\textsuperscript{157} the PDA purports to be an absolute prohibition of
pregnancy-related classifications. However, it is not clear just how far
the Congress actually intended the statute to go.

\textit{The Ambivalent Contours of the PDA}

The Antidiscrimination Principle

If the legislative history of the PDA may be characterized by a single
theme, it is that the new section reaches no further than the "antidis-
crimination principle" allows.\textsuperscript{158} The PDA does not require employers to
pay any kind of pregnancy benefits if that employer has no benefits pro-
gram.\textsuperscript{159} Further, the congressional opponents emphasized that pregnant

\begin{itemize}
\item \textsuperscript{156} 123 CONG. REC. 29385 (1977) (remarks of Sen. Williams).
\item \textsuperscript{157} See note 152 supra. A challenge was mounted to the Act's requirement that there be
coverage for complications arising from abortion and for abortions themselves when the
mother's life is endangered. The National Conference of Catholic Bishops and the United
States Catholic Conference, Inc., purporting to represent the class of all employers who
have moral, ethical or religious objections to abortion for any reason, sought a declaratory
judgment that the PDA violates their first amendment rights. The suit, however, was
dismissed as not being ripe. See National Conf. of Catholic Bishops v. Bell, 48 U.S.L.W.
\item \textsuperscript{158} Fiss, \textit{Groups and the Equal Protection Clause}, 5 \textit{PHILOSOPHY & PUBL. AFF.} 107, 122
(1976). The antidiscrimination principle has been described by Professor Fiss as the
mediating principle which controls the interpretation of the equal protection clause. Fiss
argues that the emphasis on antidiscrimination, as opposed to an emphasis on equality
itself, gives rise to the method of constitutional adjudication whereby only arbitrary or in-
vidious classifications are prohibited, and whereby permissibility of a classification is
measured by the degree of "fit" between its alleged purpose and the means chosen to
achieve that purpose. \textit{Id.} at 109-11. Although the antidiscrimination principle is appealing
insofar as it allows for the appearance of individual justice and value-neutrality in decision-
making, it may be inadequate to deal with some claims of equality which deserve attention.
\textit{See id.} at 129-46.
\item It must be emphasized that this legislation ... prohibits only discriminatory
treatment. Therefore, it does not require employers to treat pregnant
employees in any particular manner with respect to hiring, permitting them to
continue working, providing sick leave, furnishing medical and hospital
benefits, providing disability benefits, or any other matter. H.R. 6075
in no
way requires the institution of any new programs where none currently exist.
The bill would simply require that pregnant women be treated the same as
other employees on the basis of their ability or inability to work.
\end{itemize}
workers would be entitled to no special dispensations from any existing benefits system. The Senate reported that:

benefits need to be paid only on the same terms applicable to other employees—that is, generally, only when the employee is medically unable to work. For example, if a pregnant woman wishes, for reasons of her own, to stay home to prepare for childbirth, or, after the child is born to care for the child, no disability or sick leave benefits need be paid.\textsuperscript{50}

A pregnant employee of an employer providing no benefits will suffer, as will her co-employees who become sick or disabled. Further, even if the pregnant woman is able to collect existing benefits, her income will cease when she is medically able to work even if she has no choice but to stay out of work to care for the infant herself.\textsuperscript{51} These circumstances, although perhaps unfortunate, are consistent with the principle against discriminatory treatment upon which Congress has apparently acted.

\textsuperscript{10} A proponent in the Senate expressed the same view, explicitly comparing the PDA to a state scheme not subject to the antidiscrimination principle.

The bill requires equal treatment when disability due to pregnancy is compared to other disabling conditions. Although several State legislatures ... have chosen to address the problem of mandating certain types of benefits for pregnant employees, S. 996 does not go that far. Instead, the bill adopts as its standard equality of treatment, and thereby permits the personnel and fringe benefit programs already in existence for other similar conditions to be the measure of an employer's duty toward pregnant employees. It definitely does not require a particular fringe benefits program; it does not require a certain disability benefit level; it does not require an unlimited duration for the benefit period; it does not require [the] employer to hire pregnant women.

\textsuperscript{12} A proponent in the Senate expressed the same view, explicitly comparing the PDA to a state scheme not subject to the antidiscrimination principle.

Nonparental, nonschool child care is expensive and often difficult to find. In 1975, for example, the average cost of day care per year per child was $1,017.12. Bane, Lein, O'Donnell, Stueve & Wells, Child-Care Arrangements of Working Parents, MONTHLY LAB. REV., Oct., 1979, at 53.

No more than 13 percent of children from birth to 2 years spent 30 hours a week or more in the care of someone other than a parent. In fact, no more than 28 percent of the children in this age group spent even 10 hours a week in such care—this despite the fact that 35 percent of mothers with children under 3 years worked or looked for work away from home.

\textsuperscript{16} S. REP. No. 331, supra note 155, at 4.

Only 8.8\% of children ages 3 to 6 in 1975 whose mothers worked full-time were cared for by their fathers. Id. Such statistics reveal the pressure put upon a mother to find alternative child-care arrangements, or else to sacrifice her career. The Supreme Court has recognized the difficulties of child-care faced by a single father in Weinburger v. Wiesenfeld, 420 U.S. 636 (1975). The appellee, Stephen Wiesenfeld, successfully challenged the unavailability of Social Security survivors' benefits to surviving male spouses. "Appellee . . . ascribed his employment difficulties in large part to the difficulties of child-care." Id. at 641 n.7. A recent comparative study of policies toward working parents in the United States, Sweden and China, demonstrated that all three countries suffer acute shortages of child-care facilities. The governments of Sweden and China, however, have made a commitment to provide a place for every child and are working to generate sufficient revenues for that purpose while the United States government is still trying to decide whether it will devote a serious effort to the child-care problem. C. ADAMS & K. WINSTON, MOTHERS AT WORK 49 (1980). See also notes 340-43 & accompanying text infra.
The implementation of the antidiscrimination principle appears to coincide with Congress’ substantive view of pregnancy. Congress, it seems, has either refused to accept the idea that pregnancy is in any way a unique condition, or, at least, has concluded that the law may not take cognizance of any unique aspects of pregnancy. This view is most apparent in the debate concerning the proposed Hatch amendment which provided for a six or eight week “cap” on any disability benefits required to be paid pursuant to the PDA. Senator Hatch’s argument was that, since the proponents of the PDA agreed that disability due to normal pregnancy averaged approximately six weeks, that limitation should be incorporated into the statutory language. Such a limit would promote a more compliant attitude among business persons who would otherwise be reluctant to hire young females due to the substantial cost of pregnancy inclusion and the alleged likelihood that one out of every two new mothers would not return to work. The cap, he argued, would particularly encourage compliance in those industries with a high percentage of female employees. Last, he asserted that the cap on pregnancy benefits was reasonable since disability due to pregnancy is difficult to document. Proponents of the PDA responded that to create a cap for pregnancy would be to create a new kind of discrimination by limiting pregnancy benefits even in programs with no caps on other benefits. Especially in light of the fallacious nature of the “voluntariness” argument, there was no reason to treat pregnancy any differently from any other disability. One senator stated:

I must oppose the selection of this one item on the ground that we are doing the pregnant woman some kind of favor. The fact is what we are doing, what we are dealing with here, is an actual disability which is prejudicial to millions of women, and it is, therefore, a discrimination which we should not accept.

The Hatch amendment was rejected in the Senate by a vote of 13-72. Thus, it appears that Congress acted from the premise that pregnancy is not a special condition and not entitled to special treatment. However,

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163 123 Cong. Rec. 29651 (1977) (remarks of Sen. Hatch). For example, Senator Hatch stated:
What I have a problem with is really centering around the uncertainty that is caused because of our failure to recognize this is not a disease . . . . All I am trying to say is let us do this for the women of America. Let us do it and let us do it even though we acknowledge it is not a disease, and let us do it even though we do not have to because the Supreme Court has said we do not have to do it, but let us do it because maybe it is right to do it, but let us do it with reason.
Id. at 29655.
164 Id. at 29652-53 (remarks of Sen. Williams).
165 Id. at 29653 (remarks of Sen. Javits).
166 Id. at 29660.
there are indications that Congress held this view only ambivalently, and the failure to resolve the ambivalence may have an undermining effect on the impact of the PDA.

**Preferential Treatment for Pregnancy Under the PDA**

The wording of the PDA is ambiguous. In providing that women affected by pregnancy “shall be treated the same for all employment-related purposes” as nonpregnant persons, the Congress allows for a one-way interpretation: the statute by its terms mandates a standard of treatment for pregnant workers, not for nonpregnant workers.\(^{166}\) The “sameness” required by the statute would have the effect of increasing some nonpregnancy-related benefits; the EEOC’s Final Interpretive Guidelines explicitly describe situations where such would be the case.\(^{169}\) In other circumstances, however, the statute would result in

\(^{167}\) See note 152 *supra*.\(^{166}\) The legislative history rarely addresses the possible “reverse discrimination” problem. The Senate report notes: “Employers who provide voluntary unpaid [maternity] leave \(\ldots\) may continue to do so, as long as it is done on a nondiscriminatory basis.” S. REP. No. 331, *supra* note 155, at 4. This statement was made more than a year before passage of the bill.\(^{168}\) 29 C.F.R. § 1604.10 (1979). The guidelines consist principally of 37 questions and answers concerning the PDA. The questions and answers describing the effect of the PDA on nonpregnancy-related benefits read:

29. Q. If an employer’s insurance plan provides benefits after the insured’s employment has ended \(\ldots\) for costs connected with pregnancy and delivery where conception occurred while the insured was working for the employer, but not for costs of any other medical condition which began prior to termination of employment, may an employer (a) continue to pay these extended benefits \(\ldots\) but not for other medical conditions, or (b) terminate these benefits for pregnancy-related conditions?

A. \ldots [E]xtended benefits must be provided for other medical conditions on the same basis as for pregnancy-related medical conditions. Therefore, an employer can neither continue to provide less benefits for other medical conditions nor reduce benefits currently paid for pregnancy-related medical conditions.

30. Q. Where an employer’s health insurance plan currently requires total disability as a prerequisite for payment of extended benefits for other medical conditions but not for pregnancy-related costs, may the employer now require total disability for payment of benefits for pregnancy-related medical conditions as well?

A. \ldots [E]xtended benefits cannot be reduced in order to come into compliance with the Act \(\ldots\). Thus, \ldots in order to comply with the Act, the employer must treat other medical conditions as pregnancy-related conditions are treated.

The Guidelines do not speak to the situation where sex-unique disabilities other than pregnancy had been excluded from coverage prior to the passage of the PDA. The portions of the Guidelines quoted above were challenged in Kansas Ass’n of Commerce & Indus. v. EEOC, 22 Fair Empl. Prac. Cas. 1348 (D. Kan. May 6, 1980), in part on the grounds that they do not comport with congressional intent in that they penalize employers who have voluntarily provided more generous benefits for pregnancy than for other conditions.
preferential treatment for pregnancy. To provide disability benefits for every condition except pregnancy clearly violates the statute; to provide disability benefits only for pregnancy may be permitted. It is, of course, unlikely that an employer would provide a comprehensive pregnancy support scheme without providing other disability benefits. The PDA does allow, however, and perhaps implicitly recognizes, that a pregnancy support system could be different in kind from a disability scheme.

It seems that if the exclusion of pregnancy from a benefits program constitutes sex discrimination by congressional definition, the exclusion of any sex-unique condition should constitute discrimination against that sex to which the condition is unique. The PDA apparently would allow, however, the continued existence of a plan which excluded other sex-unique disabilities. If the employer's program only excludes prostatectomies, no violation occurs; if it excludes pregnancy as well, there is a violation, for pregnancy must be treated like any other disability regardless of its uniqueness to one sex or the other. It is difficult to see why the antidiscrimination principle requires anything more than similar treatment of conditions to which the respective sexes are uniquely subject. Congress by going further has in a sense singled out pregnancy for special treatment.¹⁷⁰

Beyond the ambiguities raised by the actual wording of the pregnancy amendment, Congress’ ambivalence is apparent in its treatment of the cost question. The Gilbert trial court held that even if there were a cost-differential defense to a prima facie Title VII violation,¹⁷¹ such a defense

¹⁷⁰ That some members of Congress are inclined to confer special treatment on pregnancy is manifest in the legislative history of the Equal Rights Amendment (ERA). Throughout the debates, proponents suggested that the ERA was not intended to prohibit gender-specific classifications based on physical characteristics unique to one sex. See note 227 infra. A major purpose of allowing such classifications was to allow women to continue to collect maternity benefits without, presumably, requiring parity in paternity benefits. See infra.

¹⁷¹ Neither Congress nor the courts have recognized such a defense. Los Angeles Dept of Water & Power v. Manhart, 435 U.S. 702, 716-17 (1978). Cost, however, may be relevant to, though not determinative of, the business necessity defense available only upon a showing of a disproportionate impact resulting from a neutral policy. See Robinson v. Lorillard Corp., 444 F.2d 791, 799 n.8 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971); cf. Frontiero v. Richardson, 411 U.S. 677, 689-90 (1973) (suggesting that, while mere administrative convenience is no defense to sex discrimination challenge under equal protection clause, government could prevail if it proves that gender classification results in actual cost savings). It is questionable whether such a cost saving defense would ever be available in a race discrimination case.
should not be available in Gilbert due to the "[i]nherent disabilities deriving from pregnancy susceptibility . . . . It is not clear that this single exception to a differential compensation defense is not within the congressional intent which Title VII embodies." Even now that Congress has specifically considered the costs of prohibiting pregnancy discrimination, the intent of that body regarding the cost issue remains unclear.

The most vehement witnesses during hearings on the PDA argued that cost was not only irrelevant, but also a smokescreen: "The cost argument is an attempt to find an acceptable and neutral explanation for an exclusion rooted in unacceptable stereotypes and assumptions." Some congressional proponents took a similar posture, stating: "[Price]... basically is a non-issue." The Senate Report, while admitting that an accurate estimate of the cost was impracticable, unequivocally states that "even a very high cost could not justify continuation of the policy of discrimination against pregnant women which has played such a major part in the pattern of sex discrimination in this country." Such statements appear, however, only in the early legislative history of the bill; later history emphasizes the nonprohibitive nature of the estimated cost. The bulk of the legislative record is comprised of cost data, with estimates differing by more than four hundred percent; the record is replete with a number of disclaimers, however, to the effect that the real costs of nondiscriminatory disability benefits or medical insurance or both are inestimable. Thus, it is apparent that no agreement was reached in Congress on what the cost of the PDA would be, nor on the principle that the cost should be irrelevant.

Cost is far from a dead issue. Any estimate of costs is irrelevant to the individual employer, since his outlay will be contingent on many variables, including, perhaps most significantly, the composition of his work force. Indeed, this was pointed out in congressional hearings by proponents and opponents alike. Occupationally segregated industries, such as insurance, banking and retail merchandizing, will bear a greater

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173 375 F. Supp. at 383.
177 See id. at 9.
178 See, e.g., id. at 9-10.
179 See, e.g., House Hearings, supra note 3, at 24-25 (statement of Wendy W. Williams); id. at 254-55 (statement of Nat'l Retail Merchants Ass'n).
Though we may applaud any intrusion which serves to jolt those who exploit "women's work," trouble lies ahead. Congress failed to grapple with the disproportionate burden on those employers, and it is highly unlikely that they will relinquish the spoils of occupational segregation without a battle. By failing either to say that cost was no object or to state how much would be too much to pay, Congress has invited challenges based on prohibitive cost with which the Supreme Court may be most sympathetic.181

Further, Congress did not firmly address or repudiate the Gilbert Court's "inclusion focused analysis."182 If the effect of the PDA is uniformly or substantially to give women as a group a greater proportionate share of employment benefits than men as a group, a challenge on that basis is inevitable. In this regard, it must be noted that the Court in Los Angeles Department of Water & Power v. Manhart,183 rejecting the calculation of individual contributions to a pension plan based on actuarial probabilities, claimed not to be overruling or cutting back on Gilbert.184 There is thus an open question as to when actuarial data and calculations of benefits accruing to a group qua group are relevant to a determination of individual rights.

Two other facts must be considered when evaluating the congressional treatment of pregnancy costs. First, as Congress acknowledged, eighty percent of American women become pregnant during their working lives.185 Second, a relatively high percentage of pregnant women do not return to their jobs.186 Congress referred to the "stereotype that all women are marginal workers" as a target to be eliminated by the amendment;187 in so doing, however, Congress did not address these facts which are the basis for the stereotype. Surely, the relationship between pregnancy and marginal status is one for which employers are

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181 See Kansas Ass'n of Commerce & Indus. v. EEOC, 22 Fair Empl. Prac. Cas. 1343 (D. Kan. May 6, 1980). Plaintiffs alleged, inter alia, that the EEOC guidelines, see note 169 supra, which require that all pregnancy and benefits unrelated to pregnancy be brought into parity and that pregnancy-related benefits extend to the spouses of male employees, are beyond the intent of Congress and constitute a taking of property without just compensation. 22 Fair Empl. Prac. Cas. 1343. See also note 169 supra.
182 See note 49 & accompanying text supra.
184 Id. at 714-16.
186 See House Hearings, supra note 3, at 257 (statement of Nat'l Retail Merchants Ass'n); Summary of Responses, supra note 180.
largely to blame; Congress heard testimony to this effect. The phenomenon of the marginality of women workers must be recognized and realistically addressed. In failing to account for the reality of marginality, Congress has made its cost determinations even less convincing and has rendered the PDA more vulnerable. This is all to say that Congress has taken a less than courageous stand about what it was doing. The PDA will increase costs to employers by an amount which may be substantial. It is likely that women as a group will enjoy a disproportionate share of some employment benefits. Employers will probably suffer some losses by virtue of benefits paid to women who do not return to the work force. If Congress intended to permit these effects, as it apparently did, it was misleading to phrase the rhetoric in terms of the antidiscrimination principle.

Congress alone has the power to enact sweeping social policy; with such authority, the Congress could have chosen to elucidate the place of childbearing in society. Instead, the Congress reacted to the Gilbert decision without thinking through the issue of what pregnancy is and how it should be treated. If pregnancy is not unique, the PDA is superficially appropriate, but the issues of preferential treatment and cost are left dangerously open. If pregnancy is unique, some provision must be made for “women’s biologically more burdensome place in the scheme of human existence.” The Congress has failed to clarify the policy of this nation toward pregnancy.

A Possible Unconstitutional Application of the PDA

The confrontation between the Court and Congress which resulted in the enactment of the PDA may produce litigation which not only will provide an opportunity to observe the Supreme Court’s present attitude toward childbearing but could also clarify two of the most difficult decisions of recent times, National League of Cities v. Usery and Katzenbach v. Morgan. A state or political subdivision of a state could

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185 See, e.g., House Hearings, supra note 3, at 211 (statement of Laurence Gold) (because workers are excluded from benefits, “it is little wonder that they do not display that loyalty” which would motivate them to excel in or return to the workforce).


190 The confrontational nature of events leading up to the enactment of the PDA is evidenced by comments of some Congressmen. See, e.g., 124 Cong. Rec. H6,868 (daily ed. July 18, 1978) (remarks of Rep. LaFalce) (“This bill is a necessary measure to counteract recent Supreme Court decisions that have endorsed sex discriminations in employers’ insurance programs.”); 123 Cong. Rec. 7540 (1977) (remarks of Sen. Williams) (“[Working women] are hopeful that the Congress will take prompt action to restore the basic rights the Supreme Court has infringed upon.”).


challenge the new section on the ground that the Congress had neither commerce clause or power nor power under the enforcement clause of the fourteenth amendment to obligate the state or subdivision to provide pregnancy benefits to its employees.

Congress may have transgressed an affirmative limitation on its commerce clause power as interpreted by National League of Cities. That decision found that the 1974 amendments to the Fair Labor Standards Act (FLSA), which purported to extend minimum wage and hour provisions to most employees of states and their subdivisions, impermissibly infringed upon the states' sovereign functions protected by the tenth amendment. That constitutional provision precludes an impairment by Congress of the "functions essential to [the] separate and independent existence" of the states. The sovereignty of the states would be threatened due to the costs and attendant sacrifices imposed upon them by the FLSA amendments and due to the displacement by the statute of the states' ability to make "fundamental employment decisions" affecting the manner in which essential services are rendered to citizens. Thus, if a state or subdivision could demonstrate a high cost imposed by the PDA and could portray fringe benefits arrangements as essential to employer-employee relations, National League of Cities may require the conclusion that Congress lacked commerce clause authority to make the Act effective against the states.

On the other hand, a number of federal courts have read National League of Cities narrowly in upholding under the commerce clause the application of the Equal Pay Act, which forbids sex discrimination in wages to states and their subdivisions. These decisions have held that National League of Cities should be confined to the context of minimum wages and maximum hours, and that the ability to pay unequal wages solely on the basis of sex cannot be considered a sovereign function

183 U.S. CONST. art. I, § 8, cl. 3.
184 Id. amend. XIV, § 5.
186 426 U.S. at 845.
187 Id. at 846.
188 Id. at 847-51.
necessary to the states' separate and independent existence. As one district court colorfully put it: “The argument that the decision to discriminate in pay on the basis of sex is an essential or integral State function is both asinine and an affront to human dignity.”

These decisions serve as authority for the application of the PDA to the states and their subdivisions unless the states prevail on an argument that pregnancy benefits are quite unlike the equal pay for equal work which the Equal Pay Act requires: the former may be more costly, and, rather than equalizing benefits for men and women, may require giving women a disproportionate share of benefits. Thus, to allow pregnancy benefits would be discriminatory rather than vice versa.

Even if the PDA could not be applied to states pursuant to the commerce power, however, the National League of Cities Court expressly declined to comment on congressional power vis-à-vis the states under section 5 of the fourteenth amendment. Moreover, just four days after National League of Cities, the Court held in Fitzpatrick v. Bitzer that, the eleventh amendment notwithstanding, a Title VII backpay award could be imposed against a state because Congress in enacting Title VII was legislating pursuant to section 5.

[W]e think that the Eleventh Amendment, and the principle of state sovereignty which it embodies ... are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce "by appropriate legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority ... We think Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.

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202 See notes 142-49 & accompanying text supra.
203 426 U.S. at 852 n.17. The relevant provisions of the fourteenth amendment are:

SECTION ONE: . . . No State shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION FIVE: The Congress shall have power to enforce, by appropriate legislation, the provisions of the article.

205 Id. at 456 (citation omitted). It is of no present relevance that Fitzpatrick construed the eleventh amendment. Cf. Nilsen v. Metropolitan Fair & Exposition Auth., 435 F. Supp. 1159, 1162 (N.D. Ill. 1977) (holding Fitzpatrick analysis applies with equal force to tenth amendment).
Though Fitzpatrick is taken as a powerful vindication of all provisions of Title VII, its importance for the PDA may be diminished. That is, the issue in Fitzpatrick was sex discrimination against male employees of a state with regard to available fringe benefits, a challenge which clearly would have been cognizable under section 1 of the fourteenth amendment as dissimilar treatment of persons similarly situated. However, an attempt to compel a state to pay pregnancy benefits in our hypothetical case could not be brought as a sex discrimination claim under the equal protection clause due to the holding in Geduldig. As a pregnancy discrimination case, the claim would receive the same low level of scrutiny applied in Geduldig, and hence would fail. Thus, the question arises, can Congress achieve by legislation enacted pursuant to section 5 that which could not be achieved by litigation pursuant to section 1? The Seventh Circuit in Bond v. Stanton recently answered in no uncertain terms: “In exercising these enforcement powers under § 5, Congress is not limited to remedying inequalities which the courts would determine to be violative of the Constitution. It may prohibit conduct which would not otherwise be unlawful, in order to secure the guarantees of the Fourteenth Amendment.”

The Seventh Circuit’s position thus expressed is consistent with that of the plurality in Katzenbach v. Morgan. However, the successful implementation of the PDA against the states is still not assured. Bond upheld as constitutional a statute providing for attorney’s fees in civil rights cases. Soon thereafter, the Supreme Court did the same in another case. Therefore, the Bond context is unlike the pregnancy one in which implementation of the statute faces a Supreme Court decision condoning pregnancy discrimination: although the courts need not have determined yet that conduct is unconstitutional in order for Congress to prohibit it, it is not necessarily true that Congress may prohibit conduct which the Supreme Court has expressly held constitutional. Admittedly, the latter was the situation in Katzenbach, the Supreme Court having previously upheld in Lassiter v. Northampton Bd. of Elections the constitutionality of English literacy requirements for voting which were

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208 555 F.2d 172 (7th Cir. 1977), cert. denied, 438 U.S. 916 (1978).
209 555 F.2d at 174-75.
210 384 U.S. 641 (1966). The plurality expressly declined to consider whether the equal protection clause would nullify the requirement that voters be able to read, and considered instead the issue of whether Congress had enacted “appropriate legislation” within the meaning of § 5. Id. at 649. In sustaining the enactment, the plurality expressly stated that Congress could act in the absence of prior judicial determination. Id. at 648-49.
subsequently prohibited by the statute at issue in *Katzenbach*. Nonetheless, it remains true that a majority of the Supreme Court has not yet held that its decisions may be effectively overruled by Congress' actions under its section 5 authority. Moreover, the Court's decision in *Oregon v. Mitchell* gives reason to consider that the *Katzenbach* plurality opinion is no longer as robust as it once appeared.

The issue presented by the PDA is in some respects analogous to that presented by the Age Discrimination in Employment Act (ADEA). In *Massachusetts Board of Retirement v. Murgia* the Court upheld, using the rational basis test, a state statute mandating retirement of police officers at age fifty. The use of the rational basis test was chosen because government employment is not a fundamental right and age is not a suspect classification. Thus, Congress has acted under section 5 to provide vigorous coverage for the aged while the Supreme Court has extended only minimal equal protection. A federal district court has commented on this discrepancy. In sustaining under section 5 the ADEA as applied to the states, the court stated in *Aaron v. Davis*:

> The Court's decision in *Massachusetts Board of Retirement* . . . is not to the contrary. In that case, the Court did not address the question of the [ADEA], but held only that the Fourteenth Amendment, without any enforcing legislation, did not bar a state law requiring mandatory retirement for some state employees at age 50 since such a law, when tested under the rational basis standard, was not unreasonable in view of the fact that physical fitness generally declines with age. It is well settled that legislation authorized by section 5 of the Fourteenth Amendment can prohibit practices which might pass muster under the Equal Protection Clause, absent an Act of Congress.

As in the age discrimination context, the PDA may be construed only to enforce the rational basis protection already applied in *Geduldig*. Two aspects, however, distinguish the PDA from the ADEA. First, its constitutionality under section 5 may be more likely to reach full review

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214 400 U.S. 112 (1970). This case held that Congress' attempt to lower the voting age in state elections to 18, see Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, §§ 301-302, 84 Stat. 314 (1970), was unconstitutional. Although the majority rationale in *Mitchell*, insofar as it may cut back on *Katzenbach*, is less than clear, it is at least susceptible to the interpretation that Congress is powerless to legislate under § 5 unless invidious discrimination of a sort cognizable by a court is its target. See 400 U.S. at 295-96 (Stewart, J., concurring & dissenting in part).
217 *Id.* at 313.
218 424 F. Supp. 1238 (E.D. Ark. 1976). The court also sustained the ADEA under the commerce clause, holding that prohibiting dissimilar treatment of older employees would not "significantly interfere with the policy choices" of the state with regard to its primary functions. *Id.* at 1241; accord, *Usery v. Board of Educ.*, 421 F. Supp. 718 (D. Utah 1976).
219 424 F. Supp. at 1241 n.2 (citation omitted).
by the Supreme Court insofar as it is not sustainable under the commerce clause. Second, it presents a special problem because of the PDA's definitional character. Congress did not create a separate substantive protection for pregnancy as it did for age; instead, it said that pregnancy discrimination is sex discrimination. The vulnerability thus arises from the definitional disagreement: if the Congress can say pregnancy discrimination is sex discrimination, in spite of heavy authority to the contrary, could the Congress have equated pregnancy discrimination with race or alienage discrimination for Title VII purposes? Absurdly, such inquiry into the rationality of congressional action might arise.

While these concerns may be the result of overreaction, when dealing with the Supreme Court's perception of pregnancy, there is reason for apprehension. It is the Justices of the Supreme Court, not the academics, who have rendered the law relating to pregnancy peculiar, and who are responsible for any peculiarities in other areas of law resulting from having been litigated in the pregnancy context. The Supreme Court's treatment of pregnancy compels the conclusion that the PDA is to be far-reaching and different from anything else the Congress has attempted to do. Those who applaud the congressional urge to wipe out discrimination in every guise should hope that the limits of those congressional powers will not be seriously tested in a pregnancy case. Because of the danger of successful challenge to the congressional solution, Congress has failed to deal adequately with the pregnancy dilemma through Title VII. Surprisingly, the Equal Rights Amendment also fails to resolve the pregnancy dilemma and in fact, has little impact on the pregnancy benefits issue.

THE EQUAL RIGHTS AMENDMENT

During his Senate confirmation hearings, Justice Stevens suggested that the effect of the proposed Equal Rights Amendment (ERA) would be largely symbolic, for the reason that women are already protected against discrimination by the fourteenth amendment. Of course, the argument that women should rely on the fourteenth amendment (and thus avoid cluttering the Constitution with redundancies) has been often made and often rebutted. Justice Stevens' comment, however, coming as it does from a reliable source, suggests two perspectives on the ERA

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20 See notes 195-202 & accompanying text supra.
which give pause in the pregnancy context. Either, one may argue, there is something inherent in the proposed amendment restricting its possible coverage in ways similar to the limitations of the fourteenth amendment, or the ERA, regardless of its abstract potential, will have only as broad an interpretation as the Supreme Court, already empowered by the fourteenth amendment to protect the rights of women, will choose to give it. Each of these notions, when applied to the issue of pregnancy, should dissuade one from blind faith in the transformative power of the proposed twenty-seventh amendment.

First, what did Congress intend the scope of the ERA to be? The legislative history of the amendment, which is liberally threaded with the classic analysis of Brown, Emerson, Falk and Freedman,\(^223\) shows congressional awareness of the danger of compromise. All language concerning privacy, protective legislation or exclusion of women from compulsory military service was fortunately kept out of the text\(^224\) as a result of the view that “‘equality’ can only be soiled by qualification.”\(^225\)

The ERA is inspired by a principle of “absolute” equality which forbids any classification based on gender. The legislative history, however, admits to important exceptions in the amendment's coverage, which, if adopted by the Supreme Court for purposes of interpretation,\(^226\) could lead to consequences wholly irreconcilable with the vision that apparently animated the 92d Congress. The suggested exception which portends ill with regard to pregnancy is one which allows reasonable classifications based on physical characteristics unique to one sex.\(^227\)


\(^224\) The House rejected an amendment exempting women from compulsory military service, approving the resolution in its original form. See 117 CONG. REC. 35813 (1971). The text finally proposed by Congress reads:

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3. This amendment shall take effect two years after the date of ratification.


\(^226\) For the argument that the Court should give great weight to the intent of Congress in interpreting the ERA, see Comment, *Congressional Intent and the ERA: A Proposed New Analysis*, 40 OHIO ST. L.J. 637 (1979). That comment illustrates that most of the so-called “exceptions” seem to have been generated as strategies for passage in response to a parade of “horribles” asserted by opponents. Some of the specific evils thought to be allowed by the ERA were ridiculous and elicited less than judicious responses from proponents. For example, the leading proponent in the Senate, Senator Bayh, was put in the position of assuring the leading opponent, Senator Ervin, that the ERA would not invalidate any law prohibiting the use of obscene language with female telephone operators. See 118 CONG. REC. 9531 (1972) (remarks of Sen. Ervin); id. at 9536 (remarks of Sen. Bayh). Such a law arbitrarily affecting one gender is unquestionably impermissible under the ERA.

\(^227\) The unique physical characteristics exception appears throughout the legislative history. See, e.g., H.R. Rep. No. 359, supra note 225; Brown, Emerson, Falk & Freedman,
"The original resolution does not require that women must be treated in all respects the same as men. 'Equality' does not mean 'sameness.'" As an example of a permitted classification on the basis of the unique physical characteristics exception, the fourteen members of Congress arguing for this exception offered a hypothetical law providing maternity benefits to women. The irony of this illustration did not become evident until the *Geduldig v. Aiello* decision in 1974.

Nothing in the legislative history of the ERA suggests that Congress anticipated the dilemma posed by *Geduldig* and the cases following it. The Congress seems to have been most concerned with allowing for the preservation not only of such maternity benefits but also of forcible rape laws. These concerns, it may be argued, show that Congress saw the unique physical characteristics exception as applying to laws genuinely beneficial to or protective of women. Especially considering the diligence Congress showed in avoiding compromise in the wording of the amendment, the Congress could not have meant the exception to permit invidious discrimination of the sort at issue in the *Geduldig* situation. "The tragedy is that no one bothered to say so." Therefore, the question of the effect of the ERA in the pregnancy/disability context moves to the second issue suggested by Justice Stevens: the scope of interpretation by the Supreme Court.

*Geduldig* and its progeny paint a grim picture for the ERA. What the Court did in *Geduldig* was essentially to articulate just such a unique physical characteristics exception to the doctrine of equal treatment. Footnote 20 of that case, referring to lawmakers' freedom to include or exclude pregnancy within the coverage of an insurance program, could translate in the post-ERA world into lawmakers' freedom to classify according to unique physical characteristics. Strictly speaking, this is not exactly the case, as, under the equal protection rationale of *Geduldig*, the Supreme Court found no classification on the basis of sex from the prohibition of which there could be an exception on the basis of

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*supra* note 223, at 893-96. The other exception which causes concern is that based on "privacy." See H.R. Rep. No. 359, *supra* note 225, at 7; Brown, Emerson, Falk & Freedman, *supra* note 223, at 899. Though the privacy exception does not directly support the result in the pregnancy cases, it may have pernicious effects in that realm insofar as the exception is directed to reinforcing those social arrangements such as marriage, home and family life that buttress the present institution of pregnancy. See notes 253-352 & accompanying text *infra*. Indeed, it may be argued that the privacy exception, carrying with it the threat of a "community moral standards" test, is at once an important strategy for ratification and a means by which the amendment could be rendered toothless.

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2 Id.
5 Comment, *supra* note 39, at 475.
6 417 U.S. at 496 n.20.
a unique physical characteristic. But the convolutions of the constitutional argument are distracting. There is this similarity between the unique physical characteristics exception and the Geduldig approach, and it appears that the ERA would support the Geduldig result. The unique physical characteristics exception and the Geduldig distinction share a logical absurdity: to be a member of a sex is to have the unique physical characteristics of that sex. Absent discrimination on the basis of unique characteristics there would be no such thing as sex discrimination. Absent analysis of what the unique characteristics ideally should mean, there is no stopping place to the legal mistreatment of women.

Some have argued that this apparent crack in the coverage of the ERA will be patched by the more searching standard of review which the ERA entails. This ubiquitous argument has been advanced by certain commentators who state that the principle underlying the ERA is “that the law must deal with particular attributes of individuals, not with a classification based on the broad and impermissible attribute of sex.” It is this principle of individual treatment which yields what has been called the “subsidiary principle” of the permissibility of laws classifying according to unique physical characteristics: “[S]o long as the law deals only with a characteristic found in all (or some) women but no men, or in all (or some) men but no women, it does not ignore individual characteristics found in both sexes in favor of an average based on sex.” These commentators acknowledge that the danger inherent in the subsidiary principle is that it re-introduces into the scheme of absolute equality the dual system of rights which characterizes the historical and current legal situation. They argue that the realm of dualism, however, is extremely limited in that it only applies to “situations where the regulation is closely, directly and narrowly confined to the unique physical characteristic.” A court could determine whether such a law is a subterfuge for sex discrimination by a method closely akin to that now recognized as strict scrutiny. Six factors have been identified as relevant to such a decision: the proportion of women, or

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234 Indeed, the State of California cited the legislative history of the unique physical characteristics exception in support of its argument that the pregnancy exclusion should not be held to be sexually discriminatory. See Brief for Appellants at 22-44, Geduldig v. Aiello, 417 U.S. 484 (1974). Arguably, the unique physical characteristics doctrine does not support the Geduldig result on the ground that the pregnancy exclusion irrationally serves the purpose of protecting workers who must be absent from work. Whether or not this argument, rejected in Geduldig, would prevail in the ERA context depends largely on whether the Court is open to a more sophisticated explanation of costs. See notes 24-26, 94-107 & accompanying text supra.

235 Brown, Emerson, Falk & Freedman, supra note 223, at 889.

236 Id. at 893.

237 Id. at 894.

men, who actually have the characteristic in question; the relationship between the characteristic and “the problem” (the purpose of the legislation); the proportion of the problem attributable to the unique physical characteristic of women, or men; the portion of the problem eliminated by the solution; the availability of less drastic alternatives; and the importance of the problem ostensibly being solved as compared with the costs of the least drastic solution. It is then asserted that how the courts would balance each of these factors is hard to predict, but that nonetheless, “all of these considerations are of the kind that courts constantly deal with in similar cases where reliance upon a legitimate factor is used to achieve illegitimate ends.”

Thus, the prospect for limiting the unique physical characteristics exception is expressly reliant on a favorable inclination of the courts.

It is not within the scope of this article to analyze all the doctrinal difficulties inherent in this six-factor approach, nor even to demonstrate its specific inadequacy as applied to a Geduldig situation. Suffice it to say that, whatever the good intentions of Congress or the symbolic importance of the ERA, nothing in the amendment itself nor in its legislative history mandates that the Supreme Court limit or refuse to apply the unique physical characteristics exception in a pregnancy disability/sick leave case. If this is so, why not just dispense with the unique physical characteristics exception to the ERA? It may be argued that it is an important strategy for ratification. However, in debates over the ERA, this exception is rarely mentioned by proponents, and if mentioned, rarely effective. The latter is true for two reasons. First, it is difficult to explain why the unique physical characteristics doctrine is there or how it should work. Second, it is irrelevant to the argument which has surpassed “unisex bathrooms” as the opponents’ favorite: the proposed registration of young women for possible military service.

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239 Brown, Emerson, Falk & Freedman, supra note 223, at 895-96.

240 Generally, the approach has no meaning unless we can better inform the concept of the “problem” addressed by gender-specific legislation. As Professor Goldberg-Ambrose has asked, what, for example, is the problem addressed by forcible rape laws? Is it the prevention of forcible sexual intrusion or is it the prevention of impregnation? If the second, then a less drastic alternative would be to punish severely only when there is ejaculation or impregnation, which ignores the intent requirement of our criminal law. If the first, then the humiliation arising from forcible intrusion would be arguably as great in rapes of men or women by women, and the law would fail under the ERA. Class discussion in Women and the Law, Harvard Law School (Oct. 12, 1977).

241 See Peratis & Rindskopf, supra note 39, at 31.

242 The privacy exception is more effective against the “unisex bathroom” argument. This exception is also frequently mentioned because it has an independent constitutional basis which can be articulated.

243 In ERA debates, proponents seldom offer any arguments for the justice of including women in a threatened draft, thus forfeiting an opportunity to expose the insidiousness of the opponents’ posture. If the opponent is a pacifist, her goals can be better achieved by giving all Americans a personal stake in resistance; if the opponent is a warmonger, she should go.
Furthermore, the purposes of the unique physical characteristics exception can be achieved through other means. We have seen that, although the exception would preserve maternity benefits, it would also preserve *Geduldig v. Aiello*. Maternity benefits can be justified and *Geduldig* ultimately condemned without resort to such an exception by a more fundamental inquiry into the nature and status of pregnancy.24

In addition, it is possible to postulate classifications which would be used in situations where legislators have traditionally used gender as shorthand, but where unique physical characteristics are actually irrelevant. These are "functional classifications" by which a legislature could, for example, provide state employees with "childrearing leave" rather than "post-maternity leave" much to the benefit of society at large.24 There could be any number of such functional, sex-neutral classifications based on need, education, training, experience, skills or other measurable traits. This approach could easily be used in place of the dangerous unique physical characteristics exception. After all, laws relating to wet nurses and sperm donors, for example, which would be specific candidates for unique physical characteristics insulation,24 could easily be sex-neutralized since significant unique physical characteristics are already operable functional characteristics. By rejecting the physical characteristics doctrine, a dual system of rights defined in sexual terms, which arguably reinforces an inimical overawareness of the separation of the sexes, could be avoided.

The problem with any functional classification is that such a scheme may fall more detrimentally on one sex than the other.247 One example is a sex-neutral law prohibiting adults with primary child-care responsibility from having certain kinds of employment.248 It has been suggested that in such a situation, a court should respond "by looking beyond the adoption of the 'neutral' classification into the realities of purpose, practical operation, and effect."249 Such an approach would bring to the ERA context a system of review analogous to the disproportionate impact doc-

The "women's-privilege-to-stay-home" argument must be shown to have its roots in the most pernicious sort of stereotype, and the only way to demonstrate this is through absolute candor. The Supreme Court addressed these difficult questions during the October 1980 Term in *Rostker v. Goldberg*, 101 S. Ct. 2646 (1981). The lower court had found the male exclusive draft unconstitutional. 509 F. Supp. 586 (E.D. Pa. 1980). The Supreme Court reversed, reasoning that Congress acted within its broad constitutional authority over military affairs. 101 S. Ct. at 2660.

24 See notes 253-352 & accompanying text *infra.*
247 *Id.* at 893.
248 *See id.* at 897.
249 *Id.* at 898.
250 *Id.*
trine of Title VII. It is true that if the ERA requires, perhaps artificially, sex-specific classifications to be expressed neutrally, there is an urgent need for a means of monitoring the real-world effects of those classifications. However, given the wording of the ERA, it may also be true that it is subject to the concerns regarding the fourteenth amendment expressed in Washington v. Davis, requiring proof of discriminatory intent to sustain the constitutional challenge. Moreover, even if the intent requirement were not adopted in the ERA context, success under the disproportionate impact doctrine is not assured. Even given the clearest indication of congressional authority in Title VII, section 703(a)(2) to look into the actual effects of allegedly sex-neutral classifications, the Court in Gilbert found no violation of Title VII though one hundred percent of the burden from the classification in question fell on women. In light of this indifference to congressional mandate, it is not necessarily true that an amendment importing a similar scheme of review would yield a different result. What the Court is empowered to do bears no necessary relation to outcome.

It should be pointed out, however, that the Davis problem would be applicable to all functional classifications, not just to those which should be transformed from nonneutral classifications based on the unique physical characteristics exception. Indeed, those classifications would either create no adverse disproportionate impact, such as in the case of sperm donors, or would be easy to unmask as pretext, such as a law prohibiting all persons ever capable of bearing children from holding public office. The inability to prove a constitutional challenge to a "neutral" classification without proving intent is a burden borne in all discrimination law contexts. The unique physical characteristics exception does nothing to alleviate the Washington v. Davis problem, and otherwise the exception legitimizes the most pernicious view of women in their procreative capacities.

This article has argued that the exception be eliminated, and has further suggested that other avenues must be taken to achieve one of the major congressional purposes behind the exception: the preservation of maternity benefits. It is the thesis of this article that the apparent choice that women must make between benefits and burdens with regard to pregnancy is a constitutional hoax. The real issue rests not on the limits of present constitutional law doctrines, but rather on the

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230 See notes 30-34 & accompanying text supra. See also Peratis & Rindskopf, supra note 39, at 32 (suggesting incorporation of Title VII disproportionate impact analysis into ERA).
231 See note 224 supra.
substantive problem of pregnancy itself. This discussion of the ERA simply illustrates that the amendment and the analytical approach currently taken toward it cannot meet the real challenge of the problem of childbearing.

TOWARDS A FEMINIST JURISPRUDENCE

Thus far, this article has highlighted the biased judicial attitudes toward women, and particularly pregnant women, which inform the Supreme Court’s pregnancy decisions. These decisions isolate pregnancy and endorse the mutual exclusivity of the statuses of motherhood and citizenship. Furthermore, the Court fails to accommodate the realities of the situations of working mothers when, for example, in Nashville Gas Co. v. Satty, it distinguishes between a loss of seniority and “merely a loss of income.”

Likewise, Congress has failed to respond adequately to the sex-unique aspects of childbearing and breastfeeding through Title VII. The ambivalent nature of the PDA has not distinguished the more burdensome position of pregnant women in society and, as a result, the preferential treatment and increased costs aspects of the amendment leave it dangerously open to challenge. Only a congressional proposal which accounts for the sex-unique characteristics of childbearing and distinguishes the historical status of women can resolve the pregnancy dilemma. Justice cannot be achieved unless lawmakers acknowledge that the degraded status of women is a function of the reproductive division of labor. Finally, the preceding section demonstrates that the ERA fails to resolve the pregnancy dilemma.

The State Interest in the Control of Reproduction

The relationship between constitutional law and personal “lifestyle” choices such as decisions concerning marriage and divorce, procreation, extrafamilial associations, personal sexual conduct and personal appearance has been documented. It has been noted with regard to the first three choices that “[t]he state, through its police power, has traditionally regulated popular morality, and the Supreme Court still formally acknowledges that domestic relations ‘ha[ve] long been regarded as a virtually exclusive province of the States.’” Legislative schemes which encourage marriage but discourage divorce, encourage procrea-

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524 Id. at 145.
525 Id. at 566 (quoting Sosna v. Iowa, 419 U.S. 393, 404 (1975)).
tion by discouraging contraception and abortion, discourage nonfamilial living arrangements and prohibit homosexual behavior serve the purpose of preserving the family unit.

[Removal of legal constraints on lifestyle freedoms may jeopardize the most hallowed and basic institutions of society. Thus state regulation of matters such as divorce and sexual conduct becomes a means of fortifying institutions, such as marriage and family, that impart meaning and elevation to human life.

... [T]he state's proper concern derives from the basic functions performed by "family" units in society: from sexual fulfillment and reproduction, to education and rearing of the young, to economic support and emotional security.257

There are other sorts of concerns the state may pursue at the expense of personal choices. _Maher v. Roe_268 established that a state may refuse to fund nontherapeutic abortions through public assistance programs, even if that refusal has the effect of precluding a poor woman from exercising her right under _Roe v. Wade_269 to choose an abortion. After stating that "[t]he State unquestionably has a 'strong and legitimate interest in encouraging normal childbirth,' . . . an interest honored over the centuries,"260 the Court added in a footnote:

In addition to the direct interest in protecting the fetus, a State may have legitimate demographic concerns about its rate of population growth. Such concerns are basic to the future of the State and in some circumstances could constitute a substantial reason for departure from a position of neutrality between abortion and childbirth.261

One gets the impression from such pronouncements, and from some of the commentators' discussions, that these institutional and demographic concerns are ancient and invulnerable.262 However, the broad aim underlying the interest asserted by the state in any given case may not really be legitimate. Moreover, even if the state is properly concerned with a given subject matter, its regulation thereof does not necessarily reflect a just respect for all its citizens. The Constitution, if it is to have meaning for the majority, must take cognizance of the fact that an asserted interest in promoting marriage, encouraging childbirth, protecting the family or engineering the state's demography may actually be, in purpose and effect, a mere defense of the systems of male privilege. Social purposes promulgated by those in power must be measured against the realities of traditional social arrangements.

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257 Wilkinson & White, _supra_ note 255, at 622-23.
261 432 U.S. 113 (1973).
262 432 U.S. at 478 (citation omitted).
263 _Id._ at 478 n.11.
264 See, _e.g._, Wilkinson & White, _supra_ note 255.
The Importance of an Historical View

With regard to any disfavored group, present inequities cannot be measured nor can a just future society be envisioned without some assessment of the historical circumstances which led to that group’s disfavored status. That constitutional analysis can, and should, proceed with a view to history is evinced by landmark developments in race discrimination litigation. It has been said, for example, that in *Brown v. Board of Education*, the Court opened its eyes to “the record of history,” and recognized that a racially segregated order “conveys strong social stigma and perpetuates both the stereotypes of racial inferiority and the circumstances on which such stereotypes feed.” No one can argue that *Brown* completely erased the tragedy of racial injustice, but it did mark a leap in judicial understanding of the issue insofar as that decision synthesized for the first time the history of racism, its present manifestations and the necessity of sweeping institutional rearrangements. Such a synthesis is crucial to the cause of sexual justice. Progress in the legal realm will not be available to women until seminal historical and psychological studies documenting the adverse impact of sex discrimination on women are incorporated into the constitutional argument.

First, it must be recognized that a condition as pernicious as racial segregation exists. The preceding sections of this article have suggested that an oppressive state of segregation does exist; not segregation analogous to that in the case of race, but rather the judicially endorsed segregation of the status of women in their procreative capacities from the status of full citizenship. Next, the pervasive historical underpinnings of the oppression of women must be recognized. It has been argued that the subjection of women is a basic form of dominance in that women have been relegated to the home regardless of their

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283 The literature on women—both feminist and anti-feminist—is a long rumination on the question of the nature and genesis of women’s oppression and social subordination. The question is not a trivial one, since the answers given it determine our visions of the future, and our evaluation of whether or not it is realistic to hope for a sexually egalitarian society. More importantly, the analysis of the causes of women’s oppression forms the basis for any assessment of just what would have to be changed in order to achieve a society without gender hierarchy. Rubin, *The Traffic in Women*, in *Feminist Frameworks* 154-55 (A. Jaggar & P. Struhi eds. 1978).


286 L. Tribe, supra note 28, § 16-15, at 1021. The Court cited various studies documenting the adverse psychological impact of racial segregation. See 347 U.S. at 494 n.11.
racial or socio-economic status. This historical subjection of women is based upon biological differences between the sexes which resulted in a basic division of labor along domestic and nondomestic lines: men were out in the world developing culture and a market, while women, due to pregnancy, nursing and the maintenance of children, were restricted in their function to childbearing and the productive tasks that could be accomplished in the home. This division of labor, originating in biological circumstance, became a necessity: ensuring reproduction and a stable population was necessary to sustain first, an agricultural, and later, an industrial society. Legal sanctions and prohibitions have historically served to reinforce this social framework. The law has regulated methods of giving birth, has allocated and reallocated the financial burdens of childrearing and has allowed those who choose not to conform to the historical stereotype to suffer severe consequences.

Though the historical subjection of women was premised on biological differences, the present institutions and customs which rest on that subjection cannot be justified by reference to the “nature of things.” Whatever the elements of necessity that once prescribed the social order, they no longer exist. The present order, even insofar as it still rests upon the biological division of labor, is a matter not of necessity, but of ideology.

This article postulates that women do comprise a constitutionally cognizable class. It has long been an argument against the recognition of the oppression of women that they are not “insular,” but rather are evenly distributed throughout all strata of society. In fact, all women

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268 It is no accident that the statutes and common law doctrines which conceived of women and children as private property are breaking down only in this century when the social order is not so largely dependent on the supply of workers and heirs.

269 A judicially sanctioned system of disability benefits, for example, which has the greatest adverse impact on a single mother, demonstrates the penalty of not conforming to this reproductive division of labor. See L. GORDON, supra note 267.

270 Poet, critic and philosopher Adrienne Rich has stated this proposition pointedly: How have women given birth, who has helped them, and how, and why? These are not simply questions of the history of midwifery and obstetrics: they are political questions. The woman awaiting her period, or the onset of labor, the woman lying on a table undergoing abortion or pushing her baby out, the woman inserting a diaphragm or swallowing her daily pill, is doing these things under the influence of centuries of imprinting. Her choices—when she has any—are made, or outlawed, within the context of laws and professional codes, religious sanctions and ethnic traditions, from whose creation women have been historically excluded.

A. Rich, supra note 267, at 128.
are functionally lumped together according to their procreative capacities. This is so because, even though only the anatomical differences between the sexes are actually static, it is the functions of those differences in reproduction which are conceived to be static. Thus, women are culturally determined to be necessarily of a different type, and the anatomical differences per se are allowed to have virtually unlimited repercussions in every other sphere in which women participate. Though the pregnancy cases might lead us to conclude that only individual pregnant women suffer the consequences of the reproductive division of labor, in fact the burden is on women as a class, because of the failure to distinguish between static anatomical differences and the potential process of reproduction. In light of these considerations, the differing views of three types of reformers will be analyzed in order to demonstrate the need for a broader framework in which to address the issue of pregnancy.

The Liberal View

John Stuart Mill, liberal feminism's most illustrious proponent, argued strenuously against the arbitrariness of the present system, characterizing it as the product of "custom" and "feeling" which "owed their existence to other causes than their soundness, and . . . derived their power from the worse rather than the better parts of human nature." He recognized that the fundamental nature of the reproductive division of labor had resulted in the sexual and reproductive services of women being treated as commodities in a system of exchange ruled by force, and that these relations between male and female became regularized and institutionalized by law and politics. Although Mill, writing in the mid-nineteenth century, found the law of the strongest to have been abandoned as a general principle of social life, the subjection of women still persisted in his time and continues to persist today. "[I]t is the primitive state of slavery lasting on . . . . [H]ow slowly these bad institutions give way, one at a time, the weakest first, beginning with those which are least interwoven with the daily habits of life."
For Mill, then, the biological differentiation between men and women was the circumstance occasioning the construction of the social order oppressive to women. But Mill does not follow through on his own historical explanation. His concern is ultimately with the contemporary manifestations of inequality, without focusing on the biological underpinnings. He argues for the repeal of laws denying women property rights, suffrage and political rights, rights within marriage and significant employment. The declaration of formal equality through law is the substance of Millian reform.

The pursuit of formal equality also characterizes contemporary liberal feminism. The liberal feminist believes that “an individual woman should be able to determine her social role with as great a freedom as does a man.” This freedom results primarily from the elimination of legal constraints and the achievement of equal civil rights, thus allowing the individual woman to compete equally in the marketplace. The liberal feminist thus emphasizes the equal opportunity for the individual in the here and now, with no consistent focus on the particular historical features of the subjection of women as a group.

This nonhistorical formal equalization of men and women measures the rights extended by a traditional patriarchal standard. It may result in significant employment, but once that is achieved there are numerous other individual struggles to be faced, including the issues of maternity and paternity leave. In contrast, true equality requires not just women in men’s jobs and operating men’s institutions, but also that those institutions be replaced by others broad enough to accommodate the full range of human activities. To demand only the chance to compete is to embrace the status quo in a way that tends to sanction oppressive arrangements—for example, the necessity of choosing between children and career. Moreover, to ask only for equal opportunities to compete is to obscure the fact that the restrictions presently imposed on individual women are functions of class characteristics. The emphasis comes to be on the exceptional woman, on the one who has overcome the obstacle of womanhood, and future change is hindered by throwing the blame for circumstances of class onto individual capabilities. The failings of the liberal feminist’s concept of equality result from the fallacy inherent in the liberal vision: that men are the norm. Maleness continues to be the norm without taking into account the exclusion of

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275 A. Jaggar, Political Philosophies of Women’s Liberation, in Feminism and Philosophy 7 (M. Vetterling-Braggin, F. Elliston & J. English eds. 1977).
276 See notes 340-45 & accompanying text infra.
277 This insistence on individual struggle, it has been argued, is divisive and encourages tokenism. See N. Weston, A Humanist Theory of Feminism: Historical Foundations in John Stuart Mill and Karl Marx (1977) (unpublished honors thesis in humanities, Stanford University).
women from the building of our institutions; maleness continues to be the norm if, without a perception of the effect of class characteristics, the success of women is measured by the performance of individual women within male institutions.

The fallacy precludes further progress in the pregnancy context. For example, the liberal feminist argument may be formulated as follows:

With regard to (possibly paid) maternity leaves and the employer's obligation to reemploy a woman after such a leave, the liberal argues that the bearing of children has at least as good a claim to be regarded as social service as does a man's jury or military obligation, and that childbearing should therefore carry corresponding rights to protection.\[^{27}\]

The importance of this statement is the attempt to analogize pregnancy to any condition or enterprise. In the pregnancy/disability cases, the temptation to analogize was quite strong, not due simply to the facts, but also because argument from analogy preserves the standard of absolute equality and establishes the premise of "similar situation" for equal protection purposes. The Supreme Court, however, did not accept the argument that prostatectomy is like pregnancy in being unique to one sex, nor that cosmetic surgery is like pregnancy in being voluntary, nor that heart attack is like pregnancy in being potentially expensive, but chose rather to emphasize the imperfect fit of all such analogies.\[^{279}\]

Therefore, liberal feminism, in permitting maleness to be the norm and in relying on analogy, seems unable to penetrate the current structure of the pregnancy/disability dilemma.

The Assimilationist View

A creative and more extreme version of the liberal feminist view of equality is the assimilationist solution to the issue of sexism. According to the assimilationist ideal, a nonsexist society would be one in which the sex of an individual would be the functional equivalent of the eye color of individuals in our society today: no legal, institutional, nor even significant personal distinctions would be made on the basis of sex.\[^{280}\]

Those who oppose the assimilationist ideal, the assimilationist argues, rely on biological differences in men and women to justify social differentiation; however, it is sex-role differentiation rather than actual anatomical dissimilarity which underlies present social arrangements. The actual physical dissimilarities have no relevance to those arrangements: measurable differences in strength, for example, are no longer important, since the Industrial Revolution rendered raw physical

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\[^{27}\] A. Jaggar, *supra* note 275, at 8.

\[^{279}\] For a discussion of these cases, see notes 11-67 & accompanying text *supra*.

strength unnecessary in most situations. Strength and other minor physiological differences, like eye color or the physiological characteristics that can be shown to differentiate the races, are not “even relevant to the appropriate distribution of any political, institutional, or interpersonal concerns in the good society.”

Assimilationists concede that pregnancy presents a special obstacle to total assimilation of the sexes. Nevertheless, the assimilationist response is to excise this basic sex-unique capability from the repertoire of female functions. They argue that “[g]iven the present state of medical knowledge and the natural realities of female pregnancy,” the necessity of in utero pregnancy may be avoided. Through the development and implementation of artificial reproduction, or at least extra-uterine gestation, women may be freed “from the tyranny of their reproductive biology by every means available.” In the alternative, the assimilationist argues that even if the respective physiological capabilities are unchanged, “society could still elect to develop institutions that would nullify the effect of the natural differences.”

However, the effects of pregnancy could be nullified only if pregnancy were strictly confined to the category of “disability,” if it were treated like a growth to be removed, if pregnant workers departed from and returned to work without recognition of their new motherly status and if the heterosexual nuclear family were abolished and social institutions for childrearing developed so that the birth would have no effect on the life of the pregnant person. In short, the assimilationist ideal requires the virtual elimination of pregnancy as we know it from the social experience.

Two basic criticisms may be lodged against the assimilationist view. First, it trivializes sex differences which in fact have significant and necessary repercussions. Second, it commits society to creating similarity

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282 Wasserstrom, supra note 280, at 609.
283 Id. at 611-12.
284 S. FIRESTONE, supra note 267, at 206.
286 Wasserstrom argues that pregnancy must be “assimilated” because he believes that unacceptable social differentiation between men and women could always, and perhaps would always, be predicated upon the biological phenomena.

Any nonassimilationist society will have sex roles. Any nonassimilationist society will have some institutions that distinguish between individuals by virtue of their gender, and any such society will necessarily teach the desirability of doing so. Any substantially nonassimilationist society will make one’s sexual identity an important characteristic, so that there are substantial psychological, role, and status differences between persons who are males and
between men and women. Further, practically speaking, this trivializing and institutional engineering approach leaves no room for, and indeed precludes, our enjoyment of sex differentiation. In fact, the assimilationist scheme is no more successful than the liberal view because it too is premised upon an acceptance of maleness as the norm. While the normalization of maleness leads the liberal to analogize pregnancy to other conditions, it leads the assimilationist to argue for the "nullification" of pregnancy in order to achieve similarity in the situations of the sexes. This solution is arguably a result of the failure to follow through on the historical realities. The fundamental circumstance giving rise to the historical subjection of women is "the fact that reproduction of the human species requires that the fetus develop in utero for a period of months," but this historical premise does not necessarily lead to the conclusion that in utero pregnancy must be nullified. Rather, the targets for nullification should be arbitrary conclusions which rest upon the premise of pregnancy. To say that pregnancy should be nullified because it is the one inexorable difference between the sexes is as insulting and unrealistic as to say equality requires that men, uniquely handicapped in their reproductive incapacity when compared to the female norm, should be artificially equipped to bear children.

Like the liberal feminist perspective, the assimilationist argument fails to recognize that invidious sex-role differentiation inevitably results from treating either sex role as a paradigm. As a result,

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\text{[given this state of things, either we have to seek a least common denominator to represent us—which in truth would not be a human representation at all—or we have to identify the concerns of both sexes with the concerns of one—not a propitious beginning for planning a just society. It is a conceptual dilemma.}\]

The Bivalent View

The principle of absolute equality is an alluring one, yet it can have perverse effects, especially in the area of pregnancy. The opposite

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288 Wasserstrom, supra note 280, at 611.
289 E. WOLGAST, supra note 287, at 133.
290 Even without troublesome applications in areas such as pregnancy, the principle of absolute equality can itself be carried to an absurd and frightening extreme. To illustrate this
response from that of the liberal feminists and the assimilationists is a bivalent view which, far from nullifying the distinctions between the sexes, specifically emphasizes the differences. Proponents of the bivalent view argue:

[The implications of biology are pervasive. The idea that, under propitious conditions, sex differences can be flattened out or “nullified” does not seem either necessary or attractive. Nor is it clearly possible. It may be no more possible for us to treat people of different sexes alike than it is for us to treat a baby as an adult, or an elderly man as a youth. Some differences cannot be discounted.]

In thinking about the rights of women, the possibility that real differences between the sexes should be taken into account is often overlooked because it is perceived as being inconsistent with the ideal of equality. Blind adherence to the ideal of equality, however, and the anti-discrimination principle which historically attends it, traps us into the notion that maleness is the norm. Reliance on the ideal of equality led directly to a grotesque and irrational formulation of the issue in *Geduldig v. Aiello.* The Supreme Court could reason that as long as pregnancy benefits were “possessed by everyone in case he or she should ever qualify for them,” a denial of benefits of all did not unconstitutionally deprive any particular group.

The proponents of the bivalent view recommend the development of a dual system of rights—equal rights and “special rights”: “The two kinds of rights, equal and differential (or special), work very differently. With regard to an equal right, taking a person’s individual qualities into account may constitute discrimination. But with special rights, they must be taken into account, for these rights are based on human differences.” The concept of discrimination has no meaning when applied to special rights. To fail to provide wheelchair ramps for the handicapped, for example, is not to discriminate against them, but rather to treat them unjustly by failing to account for their special needs.

idea, Wolgast cites a short story by Kurt Vonnegut. K. VONNEGUT, Harrison Bergerson, in WELCOME TO THE MONKEY HOUSE (1961), cited in E. WOLGAST, supra note 287, at 43. Therein, equality of all citizens in the year 2081 is assured by the United States Handicapper General who, by use of some ingenious hardware, renders all citizens equally stupid, equally inarticulate and equally ugly. Interestingly, the Handicapper General did not attempt to create androgyny. Sexual differentiation must have appeared to her, as it appears to Wolgast, to be an unassimilable phenomenon.

291 E. WOLGAST, supra note 287, at 34 (footnote omitted).
292 “The demand for equal rights, understood as a step toward revising concepts about women and giving them greater importance in social thinking, is an exercise in futility. In using this argument, women undertake to conform to what the model dictates.” Id. at 156.
294 E. WOLGAST, supra note 287, at 48; see id. at 48-49.
295 Id. at 42. As Aristotle once said: “Injustice arises when equals are treated unequally and when unequals are treated equally.” ARISTOTLE, NICOMACHEAN ETHICS V.
296 *See* E. WOLGAST, supra note 287, at 51.
One proponent of the bivalent view argues that the special needs of women which must be accounted for go beyond matters relating to reproduction: "[A] bivalent form of thinking [is needed], a form that distinguishes between the interests of men and the interests of women." The differences between women and men are due not only to culture and conditioning, it is argued, but also due to innate psychological differences which have an "obvious" connection to physiological differences and comfortable sex roles. Thus, it is argued that the law should take many kinds of differential qualities into account: "The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables."

The assimilationist and bivalent perspectives are vastly divergent. The former, even in its least controversial mode, would take account of sex differences only in social interactions and with regard to some nongovernmental institutional arrangements; another assimilationist model would not acknowledge sex differences in any sphere. The bivalent view on the other hand would have a number of political, institutional and social arrangements depend to some extent on sex differences which are argued to be measurable and consequential. While the assimilationist model can be criticized for failing to maintain an historical perspective, for turning the ideal of "equality" into "equalization" in a way that denigrates women, the problem with the bivalent approach as an alternative is that it does just the opposite. For the Supreme Court to utilize the bivalent approach would be a constitutional disaster; that female infants have the tactile response at birth which is a precondition for empathy and imagination, that females mature faster, that young females have greater verbal ability and young males have greater visual-spatial ability, that young males become better at mathematics and that males are more aggressive are inappropriate factors for the Court to consider in rendering its decisions.

There is a substantial controversy over the existence of these differential qualities, but unreliability is not their greatest drawback. The bivalent approach not only precludes a truly visionary account of human possibilities, but without a rule limiting which differences between the

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287 Id. at 16.
288 See id. at 125-31 (citing, e.g., J. BARDWICK, PSYCHOLOGY OF WOMEN 102 (1971); E. MACOBY & C. JACKLIN, THE PSYCHOLOGY OF SEX DIFFERENCES 349-55, 360-63 (1974)).
289 E. WOLGAST, supra note 287, at 127.
300 Taylor v. Louisiana, 419 U.S. 522, 532 (1976), quoted in E. WOLGAST, supra note 287, at 86. It should be noted that it is not clear that the Court intended this language to be used in the way that Wolgast endorses.
301 Wasserstrom, supra note 280, at 603-06.
302 See E. WOLGAST, supra note 287, at 126.
sexes can be taken into account and a requirement that in all other circumstances men and women be treated as equals, its proponents have their feet precariously planted on the slippery slope of judicial stereotyping. For example, in *Kahn v. Shevin*, the Supreme Court upheld a Florida property tax exemption which was available automatically to widows but not to widowers, regardless of the latter's need. Justice Douglas' majority opinion which justified the so-called "benign discrimination" in favor of women is seemingly inconsistent with his conclusion the previous term in *Frontiero v. Richardson* that gender-based classifications should be suspect. This logical inconsistency could be explained away under a bivalent system of special rights, based in this case upon the adverse economic circumstances which result from women being widowed. No one could fail to respond to the plight of poor widows whose "inability to compete for the necessities of life is a legitimate concern of society," but the legitimate concern is typically pursued in a myopic, paternalistic manner. As the dissenters pointed out in *Kahn*, the statute was overinclusive in that it provided for every "financially independent heiress" as well as for needy widows, and underinclusive insofar as it did not provide for poor widowers. Moreover, the statute had the perverse effect of discriminating against women. It is as if the Florida legislature had enacted two statutes: one preferring widows over widowers for tax exemption purposes, and another preferring husbands over wives insofar as either would wish to

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305 Actually, Justice Douglas' apparent inconsistency probably did not result from any such theory, but rather from stereotypes about women to which he subscribed. Benign discrimination was acceptable to him only in favor of women. The day before his decision in *Kahn*, Justice Douglas dissented on the finding of mootness in *DeFunis v. Odegaard*, 416 U.S. 312 (1974), a case involving preferential educational admissions treatment for minorities, and stated: "There is no constitutional right for any race to be preferred." *Id.* at 336. It should also be noted that Justice Brennan's plurality opinion in *Frontiero*, in which Justice Douglas joined, allows that the strict scrutiny in gender cases advocated therein might not apply to classifications "designed to rectify the effects of past discrimination against women." *Id.* at 689 n.22.
307 E. WOLGAST, supra note 287, at 91.
309 E. WOLGAST, supra note 287, at 91.
310 *Id.* at 360-62 (White, J., dissenting). The posture suggested by Justice White's dissent has been greatly elaborated upon in Kanowitz, "Benign" Sex Discrimination: Its Troubles and Their Cure, 31 HASTINGS L.J. 1379 (1980). Professor Kanowitz demonstrates that the majority's analysis in *Kahn* is deficient, among other reasons, because it fails to account for discrimination against males. A widower who, for example, had been dependent solely upon his deceased wife, and thus sorely in need of a tax break, might be said to have been the victim of past discrimination based on stereotypical thinking about men's and women's roles. *Id.* at 1388.
secure the economic well-being of his or her surviving spouse. Finally, the legitimate concern, which proponents of the bivalent view would also endorse, is likely a disingenuous \textit{post hoc} justification.\footnote{Kanowitz, supra note 310, at 1407. The interest of a working person in the financial well-being of his or her surviving spouse has been recognized by the Court to repudiate claims that legislative schemes not unlike that upheld in \textit{Kahn} discriminate only against the surviving spouse. See, e.g., \textit{Wengler v. Druggists Mut. Ins. Co.}, 446 U.S. 142, 147 (1980); \textit{Califano v. Goldfarb}, 430 U.S. 199, 205-07 (1977).}

Of all the defects in \textit{Kahn}, it is the pernicious tendency of the classification to reinforce stereotypical assumptions about the dependency of women that most undermines the bivalent camp's endorsement: "The Court was deluded into thinking that a paternalistic statute, typical of sexist thinking, is actually somewhat akin to an 'affirmative action' statute."\footnote{As Justice Stevens recognized, the Florida statute in \textit{Kahn} originated in 1885: "[A] discrimination of that vintage cannot reasonably be supposed to have been motivated by a decision to repudiate the 19th Century presumption that females are inferior to males." \textit{Califano v. Goldfarb}, 430 U.S. 199, 223 (1977) (Stevens, J., concurring). Rather, "discrimination against a group of males is merely the accidental by-product of a traditional way of thinking about females." \textit{Id.} (Stevens, J., concurring).} If the doctrine of special rights goes so far as to allow legislators to devise any slipshod scheme to "protect" or "compensate" women,\footnote{Erickson, Kahn, Ballard & Wiesenfeld: \textit{A New Equal Protection Test in \textquoteleft Reverse\textquoteright Discrimination Cases?}, 42 \textit{Brooklyn L. Rev.} 1, 11 (1975).} it goes too far. A return to that way of thinking which has only so recently given way must be guarded against. New arguments for change must not play into stereotypical notions about womanhood. Rather, the new approach should carefully account for the historical exclusion of women based on the basic difference in reproductive capabilities and argue for the inclusion of women, with due regard for their reproductive capabilities, in every aspect of society.

\footnote{A particularly troubling decision in this regard is \textit{Vorchheimer v. School Dist.}, 532 F.2d 880 (3d Cir. 1976), \textit{aff'd by an equally divided Court}, 430 U.S. 703 (1977), in which the Third Circuit Court of Appeals rejected the equal protection claim of a young woman who wished to attend the public school for academically distinguished males in a city which also maintains, in an otherwise sexually integrated secondary system, a school for academically distinguished females. In denying her admission, the court rejected an analogy to \textit{Sweatt v. Painter}, 339 U.S. 629 (1950), stating: We are committed to the concept that there is no fundamental difference between races and therefore, in justice, there can be no dissimilar treatment. But there are differences between the sexes which may, in limited circumstances, justify disparity in the law. \ldots [S]pecial emotional problems of the adolescent years are matters of human experience and have led some educational experts to opt for single-sex high schools. While this policy has limited acceptance on its merits, it does have its basis in a theory of equal benefits and not discriminatory denial. 532 F.2d at 886-87. Thus, the court expressly adopted a "separate but equal" policy, reminiscent of the Supreme Court's decision regarding racial segregation in \textit{Plessy v. Ferguson}, 163 U.S. 537 (1896). What is particularly disturbing about \textit{Vorchheimer} is its failure to grapple specifically with alleged differences between the sexes, and its reference to "matters of human experience" as authority for the classification. This general doctrine of differences between sexes has a potentially unlimited application.}
As an alternative to the three foregoing visions of justice, this article proposes that the law should account for sex differences in a strictly limited way. Women should be recognized to have rights different from men only insofar as pregnancy and breastfeeding, the only aspects of childbearing and childrearing completely unique to women, are directly concerned. Recognizing these differences in law is qualitatively different from nullifying them; it is qualitatively different from analogizing childbirth to jury service; it is also a far cry from an approach that projects uniqueness, and therefore social and legal consequences, onto every conceivable sex-specific trait. This proposal embraces the uniqueness of pregnancy and breastfeeding in just the way that Congress failed to do.

The Accommodation of the Experience

The only differences between the sexes which apparently cannot be ignored are in utero pregnancy, and breastfeeding, the one function in the childrearing process which only women can perform. In observing that these are the capabilities which really differentiate women from men, it is crucial that we overcome any aversion to describing these functions as “unique.” Uniqueness is a “trap” only in terms of an analysis, such as that generated in Geduldig v. Aiello, which assumes that maleness is the norm. “Unique” does not mean uniquely handicapped.

The statement that the unique capabilities of pregnancy and breastfeeding should be accounted for is not to say that women should receive a special favor or any boon incommensurate with their rights as citizens. Legal arguments too often revolve merely around the question of whether a particular quality should be “taken into account.” A classification is insidious, however, only when the legal cognizance of that quality has an adverse impact on some recognizable group. Classifications must be evaluated in terms of the real world. What is at stake is not a right to be free from classification, but rather a right not to be classified in a degrading manner.

Viewed from the perspective of social reality it should be clear, too, that racism and sexism should not be thought of as phenomena that

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235 See Wasserstrom, supra note 280, at 611 (“[T]he only fact that seems required to be taken into account is the fact that reproduction of the human species requires that the fetus develop in utero for a period of months.”).
236 See, e.g., Bartlett, supra note 39.
consist simply in taking a person's race or sex into account, or even simply in taking a person's race or sex into account in an arbitrary way. Instead, racism and sexism consist in taking race and sex into account in a certain way, in the context of a specific set of institutional arrangements and a specific ideology which together create and maintain a system of unjust institutions and unwarranted beliefs and attitudes.\footnote{318}

The historical view outlined in this article describes how women's status results from their procreative abilities having been taken into account in a certain degrading way. This article proposes that women's procreative abilities should be taken specially into account, but not in a degrading way. To account for pregnancy and breastfeeding is rather to treat women as equals\footnote{319} by respecting the female gender and by ceasing to impose upon women a bifurcated existence; it is to reject antiquated classifications and to restore to women the opportunity to live a continuous life, integrated with respect to career and procreation just as are the lives of men.

The incorporation of pregnancy and breastfeeding into the social continuum as proposed here has the advantage of reflecting the realities of women's lives. Of course, it may be true that some of the problems generated by the historical differentiation would be eliminated if biological reproduction were eliminated. Nevertheless, it is safe to say, at least for the present, that women will continue to have children and that women will require respect for their procreative choices. The creative equalization or assimilationist approach requires a biological revolution which has not transpired, and which should not be forced upon any woman even when available. The current liberal way of thinking tends to minimize the childbearing process in an unrealistic way. A woman who has a very limited amount of paid leave available, on a level co-extensive with that available for illness or disability, will not always be able to make an immediate reappearance in the work force.\footnote{320} There are

\footnote{318} Wasserstrom, supra note 280, at 591-92 (emphasis added).

\footnote{319} The introduction into this discussion of the concept of equality will fare better if Ronald Dworkin's distinction between the right to equal treatment and the right to treatment as an equal is recalled. See R. DWORKIN, TAKING RIGHTS SERIOUSLY 227 (1977). The former requires the same distribution of a burden or benefit, while the latter requires that each person be treated with the respect and concern shown anyone else:

It I have two children, and one is dying from a disease that is making the other uncomfortable, I do not show equal concern if I flip a coin to decide which should have the remaining dose of a drug. . . . [T]he right to treatment as an equal is fundamental, and the right to equal treatment, derivative. In some circumstances the right to treatment as an equal will entail a right to equal treatment, but not, by any means, in all circumstances.

\footnote{320} A woman in such a situation will not be able to achieve continuity in her life unless she is the stereotypical "squatting Indian" who, by virtue of superior physical, emotional and spiritual strength, disappears from her tribe for a few minutes only to return from the
sometimes physical and psychological traumas connected with childbirth, and a nonsexist society must be able to accommodate them without divesting the mother of her citizenship.

Justice does not require that we reject motherhood. Rather, we must recognize the distinction between the experience of motherhood and the historical institution of motherhood. The experience of childbirth is eminently worth preserving, especially as that experience might transpire in a different political and emotional context.

Ideally, of course, women would choose not only whether, when, and where to bear children, and the circumstances of labor, but also between biological and artificial reproduction. Ideally, the process of creating another life would be freely and intelligently undertaken, much as a woman might prepare herself physically and mentally for a trip across country by jeep, or an archealogical "dig"; or might choose to do something else altogether.  

The historical institution of motherhood with its many restraints and its destructive ideology, treats women as less than full-fledged humans and in so doing alienates women from the experience itself. However, the experience is, or could be, profoundly human and enriching.

Legal Results and Institutional Reforms

The incorporationist approach directs opposite results from those reached by the Supreme Court in the pregnancy cases under both the equal protection clause and Title VII. In light of the historical burdens imposed on women due to their procreative capacities, it would be sex discrimination of the most invidious kind to refuse to provide employment-related benefits to pregnant workers. Likewise, a prohibition on breastfeeding at the workplace would discriminatorily preclude women from carrying out their family responsibilities.

Such reliance on the antidiscrimination principle may strike many as inappropriate and unnecessary. That is, the notion of discrimination is compromised by forcing a comparison between male and female activities where no such comparison is possible. Thus, to attempt to secure pregnancy and breastfeeding rights pursuant to the principle of "equality," as embodied in the fourteenth amendment and title VII, is to set foot again on the primrose path which led to Geduldig v. Aiello.  

bushes with a healthy baby and an appetite for continued labor. Although such women are to be admired, to expect every pregnant person to match them is just as unrealistically and perniciously ideological as to expect a woman to stay at home being the center of the family while her rich spouse pays the obstetrician's bills.

A. Rich, supra note 267, at 174-75. Rich criticizes S. Firestone, supra note 267, for her failure to account for such a positive view of motherhood, see note 284 & accompanying text supra. A. Rich, supra note 267, at 174. Indeed, Firestone, like assimilationists, is inclined to throw the baby out with the bath water.

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Rather, some might argue, it would be more appropriate to premise those rights on a substantive due process theory as did the famous breastfeeding firefighter in Eaton v. City of Iowa City.223

As a practical matter, this argument favoring the use of due process may prevail. Nevertheless, it seems a mere failure of imagination to preclude the application of the principle of equality to the issues discussed herein. It is possible to expand the universe of comparison for equal protection and Title VII purposes: instead of attempting to analogize pregnancy to prostatectomy, for example, one could compare the opportunities of men and women, based upon their relative reproductive capabilities, to participate fully in every human activity. Moreover, though such a comparison might be difficult for constitutional and statutory purposes,224 those relative opportunities really are the issue, and thus, equality is the issue. A right to breastfeed premised on the due process clause would have the practical effect of securing that right, but it would not illuminate the relation of that right to male-created institutions which had previously precluded its exercise. That is, procreative rights premised on the principle of equality have the advantage of the historical perspective. The original inequity, the reproductive division of labor on which all other sexual inequities are premised, must be addressed, or else any vision of a nonsexist society will be inadequate. The principle of equality imposes stringent demands, but the magnitude of the task must not stand in the way of its completion.

The principle of equality has the added advantage, having first forced us to focus on the historical exclusion of women from the institution-building process, of directing our attention to the present manifestations of male dominance within institutions. The incorporationist ideal requires the legislatively-mandated and judicially-enforced restructuring of many institutions.225 First are those changes to be brought about in the workplace. Several reforms relative to working hours are required. Women with children usually cannot conform to the present

223 Equity No. 44750 (Iowa Dist. Ct., Johnson County, dismissed Oct. 3, 1980). The plaintiff, Linda Eaton, sought and obtained a temporary injunction restraining the city and the fire department from prohibiting her from breastfeeding her son at the fire station during her “personal time.” In support of her petition for a temporary writ of injunction, Ms. Eaton relied upon her essential right to direct the upbringing of her child. Brief for Plaintiff (citing Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816 (1977); Wisconsin v. Yoder, 406 U.S. 205 (1972); Prince v. Massachusetts, 321 U.S. 158 (1944); Pierce v. Society of Sisters, 268 U.S. 510 (1925)). She also relied upon her constitutional right to privacy with regard to family matters. Brief for Plaintiff (citing Roe v. Wade, 410 U.S. 413 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965)).

224 See Larson, supra note 39, at 817-20.

225 The institutional arrangements which could be legislated are described in some detail in Frug, Securing Job Market Equality for Women: Labor Market Hostility to Working Mothers, 1979 B.U. L. REV. 55 (1979), and Powers, Sex Segregation and the Ambivalent Directions of Sex Discrimination Law, 1979 Wis. L. REV. 55.
model which offers rewards, such as overtime pay and professional advancement, according to the number of hours worked per week. Only childless people and men who have abdicated most of their family responsibilities are free to become the company’s loyal hero by spending eighty hours per week in the office. Flexible time systems, which allow either for a compressed work schedule or for varying schedules from day to day, would free up both parents, and all other workers, for other responsibilities. Flexible time systems in practice have already shown increased worker productivity without significant increased costs, even though such arrangements have not been widely available. In order to assure the effectiveness of a reorganized work week, the formal work week could be reduced to below forty hours and the Fair Labor Standards Act could be extended to managerial and professional employees. Such reforms would have the effect of equalizing the availability of a male worker with a supportive female at home with that of a female worker with family responsibilities. Similarly, part-time work must be afforded the same respect, compensation and benefits as full-time work. Some full-time jobs could be expediently accomplished by part-time workers, thus increasing the number of jobs and decreasing unemployment.

In order to make this and similar proposals effective, reformers must either seek the coercion of legislative enactment or devise some way to make reduced work hours attractive to men. Otherwise, women will continue to be segregated in part-time and flexible-hour jobs, and men will miss the benefits of the institutional restructuring. The proposals are not designed to advance women but rather to chip away at the system of sex-role differentiation which artificially restricts the choices of women and men. As one authority has noted:

Although some legal change is occurring in the direction of reduced working hours, particularly in connection with flexible scheduling, the emphasis seems to be on facilitating the incorporation of women in the paid work force consistent with their primary responsibilities for work in the private sphere. Instead, the emphasis on the equal participation of women and men stresses the importance of reduced working hours in the public sphere to enable the sexes to participate equally in both the private and public spheres.

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326 See Frug, supra note 325, at 95-96; Powers, supra note 325, at 108-09.
327 Frug, supra note 325, at 95 n.236.
328 Professor Frug suggests that the establishment of flexible time systems be required of government contractors and recipients of federal assistance. Id. at 96.
330 Powers, supra note 325, at 106-08.
331 Frug, supra note 325, at 96; Powers, supra note 325, at 109.
332 Powers, supra note 325, at 109 n.278.
Proposals for formal reform require a concomitant social policy recognizing the importance of unpaid private work for both women and men, including housekeeping, childrearing, home improvement projects, conservation projects and food production. The legitimacy of such activities could be validated, and men attracted to such pursuits, by giving legal status to private work; for example, by conferring independent social security status on private workers and by making it possible for them to establish private pension accounts. Another benefit of equalizing the availability of men and women workers will be to crack the foundations of occupational segregation insofar as an individual woman's time constraints retard her mobility within the labor structure. All reforms must primarily target the pervasive problem of sexual segregation in the work force.

Of central concern are proposals which facilitate continuity between the experience of childbearing and working. At a minimum, the mandate of the PDA must be vigorously enforced, ensuring that disability, sick leave and medical benefits available to other workers through employment are not arbitrarily withheld from pregnant workers. More can be done. It has been noted:

The United States has the distinction of being the only major industrialized country in the world that lacks a national insurance plan covering medical expenses for childbirth and is one of few governments in industrialized nations that does not provide any cash benefits to working women to compensate for lost earnings.

Any proposal for national health insurance must include coverage for pregnancy-related expenses. Congress might also introduce programs for specific pregnancy benefits, as did the Swedish Riksdag as early as 1931 in the recognition that "it was reasonable that public assistance should be given to the person who, at great personal risk and economic sacrifice, assured the continuation of society."

Equally significant are accommodations of childrearing. The only gender-specific aspect of childrearing which must be accepted is the phenomenon of breastfeeding. Its benefits are documented; its naturalness is beyond dispute. The burden of proving that feeding will not disrupt the workplace has too long been shouldered by the breastfeeding worker; rather the burden should be on the individual employer

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333 See 1d. at 110-12.
334 See Frug, supra note 325, at 98.
335 See note 152 supra.
336 C. Adams & K. Winston, supra note 161, at 33.
337 1d. at 28 (quoting O. Wangson, Maternal and Child Welfare, in Social Welfare in Sweden 49 (1939)).
to show the impossibility of allowing a woman one or two thirty-minute breaks in order to nurse her child, to show why breastfeeding cannot be accomplished on the job. With the burden thus reversed, the simplicity of accommodation will be realized. Employers' arguments against breastfeeding will likely be shown to be of the ilk that was rejected in Cleveland Board of Education v. LaFleur. 239

Gender-neutral childrearing supports must also be established. Whatever parental leave an employer offers must be made equally available to men and women. A commitment both to sex equality and to the family experience might be implemented by looking to the Swedish example: the mother and father are entitled to nine months' leave between them, at ninety percent of their regular salaries, for the purpose of raising a child. 240 There must be incentives, such as the other proposals herein might provide, for males to take advantage of such policies. The abdication of fatherly responsibility on any level can no longer be tolerated. 241

As support for ongoing childrearing duties, employers could provide sick leave days for the illnesses of children and paid "family responsibility days," available on an equal basis to male and female workers. 242 Additionally and fundamentally, the government and the private sector must take seriously the issue of child care. Proposals for a national child care program must be revitalized, 243 and Congress should consider requiring the private sector to provide care for children of all workers. Although it is not economically feasible for any combination of public and private resources to finance the parent who chooses to leave work for a number of years to raise a child, the needs of the person who chooses to do so and who then becomes ready to re-enter the labor market must be accommodated. Positive law should be enacted prohibiting discrimination on the basis of labor market absence, establishing and funding re-entry training programs and exploring a system of "parent's preference" which would determine public employment much like veteran's preference provisions do. 244

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239 414 U.S. 632, 641 n.9 (1974) (rejecting argument that pregnant teachers be required to leave work at end of fourth month in order to be spared "embarrassment at the hands of giggling schoolchildren").


241 The new Cuban Family Code, which went into effect on International Women's Day, March 8, 1975, mandates paternal participation in every aspect of family life, including child care and running the home. Such duties are not abrogated by the fact that the father may provide the family's sole financial support. See Cuban Law. No. 1289, arts. 26-27, 83, 85 (1975).


243 See Frug, supra note 325, at 101.

244 Id. at 100.
Some of these reforms, such as national health insurance and national pregnancy insurance, have effects beyond the sphere of employment. Additional reforms are imperative in nonemployment-related areas. Chief among any proposals for reform is the re-evaluation of family law schemes which promote the financial dependence of women upon men and which devolve upon women all the financial risks resulting from the breakup of a relationship. The ideal of making women full social participants requires at a minimum that property acquired during the relationship, whether it is formalized by marriage or not, be equally owned and controlled, that support awards be determined with a commitment to evaluating the real needs of the supported partner and children and that such awards, for the first time, be strictly enforced.\footnote{Powers, supra note 325, at 115-16.}

It must be emphasized that all of the proposals are interdependent: no one program will achieve justice, nor will all such programs taken together do so unless they are pursued fervently. This article has attempted to illuminate the abyss between motherhood and citizenship in a way that demonstrates the necessity of institutional rearrangements. The understanding of society's treatment of pregnancy is the predicate for the required commitment.

The Unjustifiable Traditional Order

Constitutional decisionmakers are reluctant to interfere with the regulations concerning "personal" decisions, including those concerning marriage and divorce, procreation and personal sexual conduct.\footnote{See notes 255-57 & accompanying text supra.}

In areas involving traditional morality, society values law as much for its instructional as for its coercive effect. Law is a vehicle by which democratic majorities reaffirm shared moral aspirations and summon society's allegiance to a common set of behavioral goals. Deploying the Constitution to undermine conventional precepts of domestic morality is a step not lightly taken.\footnote{Wilkinson & White, supra note 255, at 568.}

The reforms endorsed herein are sweeping; admittedly, the implementation of those ideas would shake traditional ideas about family responsibilities and would undermine other artifacts of sex-role differentiation. Those arrangements which are most vulnerable, however, are insidious in that they restrict women and punish women who do not abide by them. The traditional order cannot be justified by reference to the will of democratic society. Such justifications are part of positivist theories of law which neither accurately describe the process of law-making nor account for the historic role of courts in tempering the self-interested
mandates of the powerful. The positivist construct of the "sovereign will" factors out all substantive issues of power and value, thus becoming "a trivial generalization" about social conflicts and decisions and a generalization, moreover, which serves as an all-purpose apology for the status quo. The positivist view would have us believe that judicial decisions affecting social norms are usurpations of the majoritarian process, and are, therefore, anomalous episodes in the story of law. To the contrary, the authority of the judiciary to secure the rights of the powerless is of the essence of the Republic, thus imposing upon those ultimate conservators of the Constitution an obligation to intervene when majoritarian arrangements are shown to be oppressive: "[T]he Court's authoritative responsibility is not to be too readily surrendered to the exigencies of a society which has for the time being taken the market place as its definitive model." Of course, the law will reflect some consensus of values, insofar as any consensus can be ascertained, but in doing so it cannot ignore changing social realities. Legislators' dreams of the American way of life should no longer be enforced at the expense of punishing unmarried persons and imposing even more rigidity on the already inflexible stations of single parents. Women, especially minority women, should no longer pay the lion's share of the cost of antiquated visions.

CONCLUSION

The treatment of pregnancy by the Supreme Court in *Geduldig v. Aiello*, *General Electric Co. v. Gilbert* and *Nashville Gas Co. v. Satty* is a shameful episode in the legal history of sexual justice. Those

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350 *Id.* at 1086. This quote refers specifically to protection of the poor, but the same position is applicable to the plight of pregnant women, especially insofar as their rights are denied on economic grounds.
351 The Census Bureau has reported, for example, that during the last decade the number of single parent families rose by 80%, now comprising 19% of all American families with children. Seventeen percent of this number are maintained by women, and only 2% by men. Among the single-parent families, 38% (as opposed to 29% in 1970) are maintained by divorced women, 15% (as opposed to 7% in 1970) are maintained by never-married women, and 12% (as opposed to 20% in 1970) by widows. In 1979, one-half of black families with children at home were maintained by one parent. Meanwhile, the number of households consisting of a married couple with children declined by about one million. Albuquerque Journal, Aug. 17, 1980, at G-1, col. 1.
352 The Census figures, see note 351 supra, demonstrate that even the coercion of law cannot perpetuate what once was.
decisions serve the purpose, however, of demonstrating what a difficult and decisive issue pregnancy is. The congressional response to that judicial treatment is a major improvement, yet Congress, too, has failed to grasp the substantive dilemma: genuine sexual justice cannot be achieved unless decisionmakers comprehend that the degraded status of women is and always has been a function of the reproductive division of labor. Instead of reinforcing the traditional arrangements which are premised on that historical circumstance, the law must seek to undo the harm occasioned by that most invidious of classifications.

The law can participate in the future rather than dwell in the past by ceasing its attempted regulation of morality and by taking a hand now in the establishment of new institutions which will accommodate the real needs of real citizens. It has been pointed out that “[t]he withdrawal of law from certain areas of moral choice does not inevitably portend a collapse of the social order.”

Governments do have legitimate interests in childbirth, but those interests do not justify coercive arrangements designed to perpetuate an antiquated and inherently unjust social order. Rather, governments should be concerned with facilitating the experiences of motherhood and fatherhood, and with providing a healthy environment for children. Let those interests be expressed by financing childbirth sabbaticals, by enforcing paid maternity and paternity leaves and by reconstructing the patriarchal institutions which bifurcate and undermine the experience of women. If only unattractive and destructive choices are imposed upon women, let the Supreme Court declare the right of women to be treated, for the first time in our history, with the respect afforded to other citizens.

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56 Wilkinson & White, supra note 255, at 624.