PREGNANCY AND THE CONSTITUTION: THE UNIQUENESS TRAP

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This analysis of judicial responses to laws and practices that single out pregnant women for discriminatory treatment focuses on one of the most troublesome—the United States Supreme Court's ruling in Geduldig v. Aiello that because pregnancy is unique, discrimination on the basis of pregnancy is not discrimination on the basis of sex. The author argues that the reasoning behind the special constitutional protection extended to sex discrimination is particularly applicable in the case of pregnancy, and that the Court's reliance on the uniqueness of pregnancy reflects an incomplete understanding of one form of sex discrimination affecting all *women.*

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*If you can think of something which is inextricably related to some other thing and not think of the other thing, you have a legal mind.**

Pregnancy is unique. Only women may experience pregnancy; most women can, and in the United States approximately 84 percent of the married women do at least once. A married woman in the United States is pregnant an average of two and one-half times in her life.[1] The normal pregnancy lasts nine months. It disables temporarily. It is, at least at the present time, necessary for the perpetuation of humankind.

That women may and do become pregnant is the most significant single factor used to justify the countless laws and practices that have disadvantaged women for centuries. Woman's role as childbearer has given rise to many of the most common Western stereotypes about women. These stereotypes have often been characterized as part of the divine order:

> The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. . . . The paramount destiny and mission of

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* Professor Thomas Reed Powell, *quoted in* Wetzel v. Liberty Mutual Ins. Co., 372 F. Supp. 1146, 1157 (W.D. Pa. 1974).

1. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1970 CENSUS OF POPULATION: DETAILED CHARACTERISTICS, P.C.(1)-D1, United States Summary Table 212, 1-671 (1973). These statistics are derived from 1970 Bureau of the Census data on the number of children born; they do not take into account pregnancies not resulting in the birth of a child, those resulting in multiple births, or those of women who have never been married.

> woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.[2]

Courts have repeatedly reaffirmed the notion that woman is above all meant to be a mother. In her role as mother, woman is disabled periodically and thus needs the protection of the stronger sex:

> That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. . . . [H]er physical structure and a proper discharge of her maternal functions — having in view not merely her own health, but the well-being of the race — justify legislation to protect her from the greed as well as the passion of man.[3]

With childbearing came the duties of childraising and taking care of the home, and the skill and habit which resulted from practice fed stereotypes that women prefer to stay at home and have children; that they make better parents than their husbands; that they don't want to do real work anyway. In 1961, the United States Supreme Court renewed legal support of these stereotypes. In upholding a statute which permitted females in effect to exempt themselves from jury duty, it wrote:

> Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life.[4]

Recently, laws and practices based on these stereotypes have come under attack. The field of employment has been the most common battleground, upon which women have fought discrimination in hiring, promotion, pregnancy leave policies, and unemployment compensation and disability insurance programs. This concentration in employment reflects not only the considerable importance to women of equality in this area,[5] but also the greater likelihood of finding the constitutional prerequisite of state action here than in other equally discriminatory fields, such as credit.[6] In addition, the major federal laws limiting sex-based discrimination—Title VII of the Civil Rights Act of 1964[7] and

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2. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (concurring opinion) (upholding denial by the Supreme Court of Illinois of admission of women to the practice of law).

3. Muller v. Oregon, 208 U.S. 412, 421-22 (1908) (upholding Oregon limitation on hours women were permitted to work in laundries).

4. Hoyt v. Florida, 368 U.S. 57, 61-62 (1961).

5. See notes 140-144 *infra* and accompanying text.

6. For a discussion of sex discrimination in extending credit, see Littlefield, *Sex-Based Discrimination and Credit Granting Practices*, 5 CONN. L. REV. 575 (1973); *The Discredited American Woman: Sex Discrimination in Consumer Credit*, 6 U.C. DAVIS L. REV. 61 (1973). Federal legislation now prohibits any creditors from denying credit to women on the basis of sex. 15 U.S.C. § 1691 (1974).

7. 42 U.S.C. § 2000e-2 (Supp. 1972).

the Equal Pay Act[8]—have been directed at providing equality in employment.

Many of these challenges have been successful,[9] but a few courts have continued to uphold discriminatory job-related practices, most notably in cases where the challenged law or practice affects women in their childbearing capacity. For example, an unsuccessful challenge was directed against a Texas rule prohibiting women from working during the last two months of pregnancy.[10] And in the recent case of *Geduldig v. Aiello*,[11] the primary focus of this Comment, the United

8. 29 U.S.C. § 206(d) (1970).

9. *E.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Buckley v. Coyle Pub. School Sys., 476 F.2d 92 (10th Cir. 1973); Green v. Waterford Bd. of Educ., 473 F.2d 629 (2d Cir. 1973); Seaman v. Spring Lake Park Indep. School Dist., 363 F. Supp. 944 (D. Minn. 1973); Heath v. Westerville Bd. of Educ., 345 F. Supp. 501 (S.D. Ohio 1972); Pocklington v. Duval County School Bd., 345 F. Supp. 163 (N.D. Fla. 1972); Bravo v. Board of Educ., 345 F. Supp. 155 (N.D. Ill. 1972); Williams v. San Francisco Unified School Dist., 340 F. Supp. 438 (N.D. Cal. 1972); Robinson v. Rand, 340 F. Supp. 37 (D. Colo. 1972) (all involving school board's policies requiring mandatory pregnancy leave; these policies are now covered by the 1972 amendments to Title VII which eliminated the exemption for state and local government employers. 42 U.S.C. § 2000e-2 (Supp. 1972); Bowen v. Hackett, 361 F. Supp. 854 (D.R.I. 1973) (discriminatory unemployment compensation law); Hanson v. Hutt, 83 Wash. 195, 517 P.2d 599 (1974) (same); Cheatwood v. South Central Bell Tel. & Tel. Co., 303 F. Supp. 754 (M.D. Ala. 1969) (under Title VII, all women cannot be excluded from consideration for employment because some may become pregnant); Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1971), *cert. denied*, 404 U.S. 991 (1971) (under Title VII, unlawful to terminate women from employment upon marriage on the assumption they are likely to become pregnant).

10. Schattman v. Texas Empl. Comm., 459 F.2d 32 (5th Cir. 1972), *cert. denied*, 409 U.S. 1107, *reh. denied*, 410 U.S. 959 (1973). *Contra*, cases cited at note 9 *supra*. State laws prohibiting pregnant women from working within a specified time before and after childbirth have only recently been repealed in Connecticut and Missouri. Law of May 26, 1913, ch. 112, § 31-26, [1913] Conn. Acts 1701 (repealed 1972) (four weeks before and four weeks after); Law of May 30, 1919, § 290.060, [1919] Mo. Stat. 442 (repealed 1973) (three weeks before and three weeks after). In Massachusetts, a law prohibiting pregnant women from working is still on the books, MASS. GEN. LAWS ANN. ch. 149, § 555 (1971) (four weeks before and four weeks after), although it has not been enforced since the state's Attorney General in 1971 issued an opinion that this prohibition conflicted with Title VII. Comment, *Love's Labors Lost: New Conceptions of Maternity Leaves*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 260, 278 n.94 (1972). In at least one state, pregnant women are prohibited by statute from working for a specified time after childbirth without special dispensation by a doctor. *See* N.Y. LABOR LAW § 206-b (McKinney Supp. 1973) (four weeks).

Cf. Struck v. Secretary of Defense, 460 F.2d 1372 (9th Cir.), *cert. granted*, 409 U.S. 947, *vacated and remanded for consideration of mootness*, 409 U.S. 1071 (1972); Gutierrez v. Laird, 346 F. Supp. 289 (D.D.C. 1972). In *Struck*, a pregnant officer was discharged from the Air Force rather than given temporary leave, although medical leave was allowed as a matter of course for other disabilities. By the time the case reached the Supreme Court, however, the Air Force had changed its regulation, allowing pregnant officers to obtain a waiver of discharge in certain circumstances. The Court thus remanded the case for consideration of mootness "in light of the position presently asserted by the Government." 409 U.S. at 1071.

11. 94 S. Ct. 2485 (1974), *upholding* CAL. UNEMPL. INS. CODE § 2626 (West

States Supreme Court upheld a state disability insurance plan that excludes claims related to normal pregnancy. Other states have similar laws. Unemployment compensation programs of 10 states deny benefits to pregnant women, some expressly deeming them unavailable or unable to work for a specified interval of time during the pregnancy;[12] in addition, some states impose special conditions on women returning to the work force after having left it to bear a child.[13]

Laws and practices that single out pregnancy for special treatment are not limited in their effect to pregnant women. A woman who might become or wish to become pregnant is also affected. Further, the myriad job-related regulations that disadvantage pregnant women —the exclusion of pregnancy from disability insurance coverage, mandatory pregnancy leaves, dismissals on account of pregnancy, the denial of temporary pregnancy disability leaves, the withdrawal of seniority rights from those who return to work after bearing a child, and so on—not only cannot help but affect a woman's decision to enter or return to the labor force,[14] but also serve as a constant reminder to every woman of society's judgment that she does not really belong in the labor force, but rather at home bearing and raising children.

A thesis of this Comment is that the same considerations which have recently impelled courts to look carefully at classifications based

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Supp. 1974). Two states which include pregnancy in their disability programs impose special limits on the amount pregnant women can receive in benefits. *See* GEN. LAWS OF R.I. ANN., tit. 28, ch. 41, § 8 (Supp. 1972) ($250); N.J. STAT. ANN., tit. 43, ch. 21, § 29 (1962) (benefit period limited to four weeks before and after childbirth). Only Hawaii imposes no such limitations. HAWAII REV. STAT., tit. 21, ch. 392, § 3(5) (Supp. 1973).

12. COLO. REV. STAT. ANN. § 82-4-8(2)(e) (Supp. 1965) (30 days before and 30 days after); DEL. CODE ANN. tit. 19, § 3315(9) (Snpp. 1970) (eight weeks before and six weeks after); ILL. ANN. STAT. ch. 48, § 420(C)(4) (Supp. 1974) (eight weeks before if discharged because of pregnancy, 13 weeks if voluntarily left work); KAN. STAT. ANN. § 44-705(c) (1973) (90 days before and 30 days after); LA. REV. STAT. ANN. § 23-1601(6) (Supp. 1974) (12 weeks before and six weeks after); MO. ANN. STAT. § 288.040(6) (Supp. 1974) (three months before and four weeks after); N.J. STAT. ANN. § 43:21-4(c)(1) (Supp. 1974) (four weeks before and six weeks after); OKLA. STAT. ANN. § 40-215(g) (1954) (six weeks before and six weeks after); PA. STAT. ANN. § 43-801(d)(2) (Supp. 1974) (30 days before and 30 days after); UTAH CODE ANN. § 35-4-5(h) (Supp. 1973) (12 weeks before and six weeks after). *See also* D.C. ENCYCL. ANN. § 46-310(h) (1973) (six weeks before and six weeks after).

13. ALA. CODE tit. 26, § 214(B)(1) (Supp. 1973); COLO. REV. STAT. ANN. § 82-4-8(2)(e) (Supp. 1965); GA. CODE ANN. § 54-609(h) (Supp. 1973); MINN. STAT. ANN. § 268.09(2) (Supp. 1974); OHIO REV. CODE ANN. § 4141.29(D)(2)(c) (1973); TENN. CODE ANN. § 50-1324(a) (Supp. 1974); W. VA. CODE ANN. § 21A-6-3(7)(a) (1973). For a detailed, though already somewhat out-of-date, summary of these laws, see MANPOWER ADMIN., U.S. DEP'T OF LABOR, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS: COMPARISON REVISION 4-45 to 4-47 (Rev. Jan. 1974).

14. For a discussion of the relationship between denial of job-related benefits and the incentive to work, see Comment, *Love's Labors Lost: New Conceptions of Maternity Leaves*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 260, 261 (1972).

on sex apply with equal force to classifications based on pregnancy. When laws or practices require special treatment for women simply because they are pregnant, there is always a danger that stereotypes about women form the sole basis for the classification. Certain classifications based on pregnancy may indeed be justified, but in most instances the same unsupported—and unsupportable—assumptions about women that underlie sex-based discrimination underlie pregnancy-based discrimination. Treating pregnancy classifications like sex classifications for the purpose of judicial review is a logical concomitant to the reality that discrimination on the basis of sex-role stereotyping can be eliminated only by subjecting classifications based on pregnancy to the same scrutiny given classifications based on sex.

In *Geduldig v. Aiello*,[15] decided in June, 1974, the Supreme Court failed to recognize this compelling logic. It declined to treat a case involving discrimination on the basis of pregnancy as it had generally treated recent cases involving sex discrimination.[16] *Aiello* involved a challenge to the provision of California's state disability insurance program which singles out pregnancy as virtually the only disability for which insurance coverage is not provided. In upholding the pregnancy exclusion, the Court concluded that because pregnancy is "an objectively identifiable physical condition with unique characteristics,"[17] a classification based on pregnancy is not sex-based. Paradoxically, the uniqueness of pregnancy is probably the most important reason why it warrants special protection, for pregnancy's unique identifiability facilitates drafting laws and regulations based on exactly those generalizations, stereotypes, and assumptions that constitutional doctrine in the area of sex discrimination was intended to curb.

This Comment first explores the constitutional tools available for analyzing regulations which accord different treatment to pregnant women. It then focuses on *Aiello* to show more specifically how one of these tools, equal protection, has been twisted to accommodate the stereotypes associated with pregnancy—stereotypes that permeate the most subtle and tenacious forms of sex discrimination and are so deeply ingrained that judges have not yet learned to recognize them. It concludes by examining the implications of *Aiello* and the possibilities for combatting its most damaging effects.

I

THE CONSTITUTIONAL FRAMEWORK

There are three constitutional models appropriate in reviewing a

15. 94 S. Ct. 2485 (1974).
16. See text accompanying notes 88-98 *infra*.
17. 94 S. Ct. at 2492 n.20.

law or practice that singles out pregnant women for special treatment—equal protection, substantive due process, and the irrebuttable presumption model. These models are derived from related notions of equality and fairness, and overlap in many respects.[18] Nevertheless, each model has a history of its own, a history partially developed as courts have sought to avoid the implications of using one of the other models, and each approach emphasizes different aspects of the complex set of rights guaranteed by the fifth and fourteenth amendments. By selecting and applying one approach, a court is sometimes able to avoid dealing with other constitutional considerations that might dictate a contrary result. Often the choice of model seems arbitrary and calculated to facilitate a predetermined result. This is possible because the choice of model may in fact decide the case, crucially influencing whether a court will find a constitutional violation and, if it does, what corrective steps it will require. Because challenges to laws and practices affecting pregnant women could almost uniformly be handled under any one of these three models, any analysis of the constitutional status of pregnancy must begin with a discussion of the distinctions and interrelationships between them.

A. Equal Protection

The equal protection model is invoked to ensure that every classification made by the state in its laws or practices bears an adequate relationship to the purpose this classification is either purported or presumed to serve. The standard of review by which constitutional adequacy is adjudged varies considerably, depending upon the nature of the classification and the groups or rights affected. Equal protection analysis is thus a three-step process. First the classification is examined to determine on what basis it discriminates; then a standard of review appropriate to that basis of discrimination is chosen; finally, the classification is tested according to that standard of review.

Where the classification is drawn along economic or social policy lines, as in the case of laws imposing price controls[19] or advertising restrictions,[20] the equal protection requirement is satisfied when the state advances a rational basis for the classification.[21] In some early cases, such laws were upheld when the court on its own was able to conceive of a rational basis.[22] To uphold these classifications, courts do not

18. *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1130-32 (1969); Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 361-65 (1949).

19. Nebbia v. New York, 291 U.S. 502 (1934).

20. Railway Express Agency v. New York, 336 U.S. 106 (1949).

21. Dandridge v. Williams, 397 U.S. 471 (1970).

22. McGowan v. Maryland, 366 U.S. 420 (1961); Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

require proof that empiricial realities dictate the particular solution chosen, nor do they scrutinize the over- or under-inclusiveness of the classification. Occasionally courts overturn an economic regulation after purporting to apply the rational basis test,[23] but to the extent that a court has chosen to overlook a possible rational basis, it has strayed from at least the most lenient rationality test.

In cases where a challenged regulation classifies on the basis of "suspect" criteria, such as race,[24] alienage,[25] or national origin,[26] or involves an infringement of a constitutionally protected "fundamental" right, such as voting[27] or procreation,[28] judicial deference gives way to a more rigorous standard of review. In order for a classification to be upheld under this standard, which has become known as "strict scrutiny," the state must show that it has a *compelling* interest served by this classification and that the classification is *necessary* in order to carry out this interest.[29] This standard has been satisifed only once in an equal protection case reviewed by the Supreme Court.[30] Because of the near inevitability of the result under both the rationality test and the compelling state interest test, the characterization of the rights and groups affected rather than the application of the appropriate test is usually the more critical part of equal protection analysis.

In recent years, challenges have been brought asserting the need for special protection of additional groups, such as illegitimate children,[31] women,[32] and the poor,[33] and additional rights, such as education[34] and housing.[35] In response to these challenges, many courts have departed substantially from the traditional equal protection model and have used an an intermediate standard of review. One commenta-

23. *See, e.g.*, Morey v. Doud, 354 U.S. 457 (1957).

24. Korematsu v. United States, 323 U.S. 214 (1944).

25. Graham v. Richardson, 403 U.S. 365 (1971).

26. Oyama v. California, 332 U.S. 633 (1948).

27. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

28. Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

29. Graham v. Richardson, 403 U.S. 365 (1971).

30. Korematsu v. United States, 323 U.S. 214 (1944) (national security interests justified federal internment of Japanese during World War II). No state law has ever satisfied this test. Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972) (Burger, C.J., dissenting).

31. *E.g.*, Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); Labine v. Vincent, 401 U.S. 532 (1971); Levy v. Louisiana, 391 U.S. 68 (1968).

32. *E.g.*, Reed v. Reed, 404 U.S. 71 (1971).

33. *E.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973); United States v. Kras, 409 U.S. 434 (1973); James v. Valtierra, 402 U.S. 137 (1971); Boddie v. Connecticut, 401 U.S. 371 (1971); Griffin v. Illinois, 351 U.S. 12 (1956).

34. *E.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973); Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

35. *E.g.*, Lindsey v. Normet, 405 U.S. 56 (1972).

tor, noting the treatment of equal protection cases by the United States Supreme Court in its 1971 term, described this new standard as one of "modest interventionism," a means-oriented review which demands a tighter relationship between a classification and its purpose than is required by the rationality standard, but not one so strict that it can never be met.[36] Another scholar identified what he called the "demonstrable basis" standard which is applied in those cases where members of a "neutral class," such as women or illegitimate children (in contrast to the "prohibited class" of race or a "permissive class," such as truck drivers), assert that their interests have been prejudiced. Under this standard, the court conducts a factual review of the state interest that would not be appropriate to the rationality standard, but that does not require the closest possible relation between a compelling state interest and the classification under review.[37]

The contours of this new standard have not been articulated as fully by the Supreme Court as they have been by commentators. Often the Court, both in upholding and invalidating legislative classifications, lapses into the familiar lingo of the two-tiered equal protection model when it is actually using an intermediate standard of review.[38] In addition, the Court has occasionally applied different tests in cases affecting similar or identical rights and classifications.[39]

The absence of clear guidance from the Supreme Court has encouraged a great deal of confusion in the area of sex discrimination. Support can be found for using any of the existing equal protection standards of review in sex discrimination cases. Four Supreme Court justices in *Frontiero v. Richardson*[40] found sex to be a "suspect" classification warranting strict scrutiny in denying effect to a federal statute which required female members of the Armed Services, but not male members, to prove the dependency of their spouses in order to receive increased medical, dental, and living expense benefits. A number of state and federal courts have followed this example in invalidating sex-based classifications.[41] Four other members of the Court in *Frontiero*

36. Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1 (1972).

37. Nowak, *Realigning the Standards of Review under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071 (1974).

38. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972).

39. *Compare, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973); *and* Reed v. Reed, 404 U.S. 71 (1971) *with* Geduldig v. Aiello, 94 S. Ct. 2485 (1974); *compare* Jimenez v. Weinberger, 94 S. Ct. 2496 (1974); Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164 (1972); *and* Levy v. Louisiana, 391 U.S. 68 (1968) *with* Labine v. Vincent, 401 U.S. 532 (1971).

40. 411 U.S. 677 (1973).

41. Johnston v. Hodges, 372 F. Supp. 1015 (E.D. Ky. 1974) (state requirement

reaffirmed the position taken in *Reed v. Reed*[42] that sex-based classifications require a "fair and substantial relation" between the classification and its purpose.[43] In *Reed* the Court had held that administrative convenience did not justify an Idaho statute which discriminated against women in the appointment of estate administrators. Many courts have followed this standard both in upholding and invalidating sex-based classifications.[44] Other courts have applied this standard while purporting to use the traditional rationality standard,[45] which is in fact what *Reed* claimed to be doing, or failing to state what test they were using.[46] Still other courts have upheld sex-based classifications using a traditional rationality test.[47]

Since equal protection requires that similar groups be treated equally, it follows that an equal protection defect is removed if the treatment of these groups is equalized. Realistically, it is unlikely that a state will remedy every defect by totally eliminating its discriminatory program or practice. Most likely, where a state benefit is involved, this benefit will be extended to the class found to be unconstitutionally disadvantaged. Theoretically, however, the defect is curable either by ex-

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that father with custody of a minor but not mother sign driver's license application and assume responsibility for minor while driving); Wiesenfeld v. Secretary of H.E.W., 367 F. Supp. 981 (D.C.N.J. 1973) (Social Security survivor's benefits for widows caring for children but not widowers); Ballard v. Laird, 360 F. Supp. 643 (S.D. Cal. 1973) (service tenure differential); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (exclusion of women from employment as bartenders); Hanson v. Hutt, 83 Wash. 2d 195, 517 P.2d 599 (1974) (denial of unemployment benefits to pregnant women). *Contra*, Husband M. v. Wife M., 42 U.S.L.W. 2550, — A.2d — (Del. Sup. Ct., April 18, 1974) (Delaware statute which authorizes courts to award a wife but not a husband a reasonable share of spouse's property in a divorce action does not deny equal protection under either a rational basis or a compelling state interest test).

42. 404 U.S. 71 (1971).

43. 411 U.S. at 691-92 (Stewart & Powell, J.J., concurring separately).

44. *See, e.g.*, Green v. Waterford Bd. of Educ., 473 F.2d 629 (2d Cir. 1973) (invalidating mandatory pregnancy leave policy); Gutierrez v. Laird, 346 F. Supp. 289 (D.D.C. 1972) (upholding discharge of pregnant women from U.S. Army). *See also* Murphy v. Murphy, 206 S.E.2d 458 (Ga. Sup. Ct. 1974) (invalidating Georgia statute that authorized alimony awards to wives in a divorce action but not husbands).

45. Jinks v. Mays, 332 F. Supp. 254 (N.D. Ga. 1971), *modified*, 464 F.2d 1223 (5th Cir. 1972) (invalidating mandatory pregnancy leave for nontenured teachers). *See* Williams v. San Francisco Unified School Dist., 340 F. Supp. 438 (N.D. Cal. 1972) (granting of preliminary injunction against enforcement of mandatory pregnancy leave policy for teachers). *See also* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 651 (1974) (Powell, J., concurring).

46. United States v. Offord, 373 F. Supp. 1117 (E.D. Wis. 1974) (upholding selective service laws from sex discrimination challenge on grounds of national security).

47. Shattman v. Texas Empl. Comm., 459 F.2d 32 (5th Cir. 1972), *cert. denied*, 409 U.S. 1107, *reh. denied*, 410 U.S. 959 (1973) (upholding mandatory pregnancy leave after seventh month); Stanton v. Stanton, 30 Utah 2d 315, 517 P.2d 1010 (1974) (age of majority differential based on sex not a denial of equal protection).

tending it or by withdrawing the benefit altogether.[48] This option is not available in an alternative constitutional approach—substantive due process—under which the inquiry is focused on the infringement of certain rights *per se* rather than on the inequality of people to exercise them.

B. Substantive Due Process

Substantive due process overlaps with equal protection when equal protection concerns itself with protecting the exercise of certain "fundamental" rights.[49] As an independent model, however, substantive due process looks not at comparative classifications but rather at the quality of a right and the extent to which it is burdened by a state law or practice. The interests which the challenged practice or regulation are said to serve are balanced against the interests of the individual or group whose rights are so burdened.

At one time substantive due process was an activist tool used to strike down many laws regulating economic and business practices.[50] Discredited by overuse and lack of judicial restraint,[51] it has for many years taken a back seat to equal protection as a tool for protecting personal liberties and rights. In recent years, it has staged a comeback, but in a way which reflects the structural development of equal protection. Some personal rights are "fundamental" and are heavily weighed, such as the right to vote,[52] to travel,[53] and to enjoy privacy.[54] Only the most compelling state interest can justify infringement of these rights, and then only in the least restrictive way. Other individual interests are "economic," such as the interest in having the freedom to contract for a certain wage level[55] or being able to advertise.[56] Interference with these interests may be justified by a showing or inference of some modicum of rationality.

The designation of rights as fundamental or nonfundamental is reminiscent of the same kind of outcome-determinative labeling found in applications of the traditional equal protection model. Substantive due process, however, is inherently a more flexible model.

48. *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1136 (1969).

49. *See* Tussman & tenBroek, *supra* note 18, at 364. See text accompanying notes 27-28, 34-35 *supra*.

50. *See, e.g.*, Adkins v. Children's Hospital, 261 U.S. 525 (1923); Lochner v. New York, 198 U.S. 45 (1905).

51. *See* Tussman & tenBroek, *supra* note 18, at 364; Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U.L. REV. 670, 672 (1973).

52. Carrington v. Rash, 380 U.S. 89 (1965).

53. Shapiro v. Thompson, 394 U.S. 618 (1969).

54. Griswold v. Connecticut, 381 U.S. 479 (1965).

55. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

56. Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

Once the nature of a right is identified as fundamental or nonfundamental, the magnitude of the infringement on that right is still a relevant consideration. While it has been held that burdens may be unconstitutional as well as prohibitions,[57] courts have been inclined to balance the opposing interests in a substantive due process context and suggest different solutions as the magnitude of the infringement increases or decreases.[58] A right, if fundamental, will trigger strict scrutiny, but a regulation prohibiting a protected activity[59] will require a much stronger justification than one merely making that activity more difficult or expensive.[60] Similarly, although a law or practice affecting a fundamental interest must be closely scrutinized whether it is characterized as a denial of a "right" or a denial of astate "benefit,"[61] the outcome of that scrutiny may be different in each case. Often when burdens rather than prohibitions are involved, a court will identify a similarly-situated class and infuse its analysis with equal protection considerations rather than rely entirely on substantive due process.[62]

The Supreme Court has carved out a sphere of personal rights relating to an individual's decisions about sex, conception, abortion, marriage, and family life. These rights, including the right of married persons to use contraceptives,[63] the right of parents to educate their children in a private or parochial school,[64] and the right of a woman to terminate her pregnancy,[65] have earned special protection under the substantive due process model. Also, in overturning a Massachusetts statute that made it illegal to distribute contraceptives to unmarried women, the Supreme Court has recognized a right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[66] None

57. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963).

58. Roe v. Wade, 410 U.S. 113 (1973); Robinson v. Rand, 340 F. Supp. 37 (D. Colo. 1972). *Cf.* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

59. *Cf.* Roe v. Wade, 410 U.S. 113 (1973).

60. *Cf.* Struck v. Secretary of Defense, 460 F.2d 1372 (9th Cir.), *cert. granted*, 409 U.S. 947, *vacated and remanded for determination of mootness*, 409 U.S. 1071 (1972).

61. *Cf.* Memorial Hosp. v. Maricopa County, 94 S. Ct. 1076 (1974); *see* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960); Note, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144 (1968).

62. *See, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 651 (1974) (Powell, J., concurring); Eisenstadt v. Baird, 405 U.S. 438 (1972).

63. Griswold v. Connecticut, 381 U.S. 479 (1965).

64. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

65. Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973).

66. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972). *Eisenstadt* cannot be considered as strictly a substantive dne process case, for although the Court apparently used a higher standard of review because of the substantive rights involved, the case was decided in the equal protection framework. Moreover, in addition to the privacy issue,

of these rights is absolute, and because each is specifically tailored to the facts of an individual situation, it is extremely difficult to predict how much weight will be assigned to a similar right in a different context.

In addition to the vaguely defined rights involving childbearing and raising a family, several Supreme Court decisions imply that an individual's interest in employment deserves some special constitutional protection. In none of these decisions where a "right to work" is suggested, however, is it developed as an independent interest which warrants the highest standard of constitutional review.[67] While at least one federal court has acknowledged a right to work in support of its rejection of a mandatory pregnancy leave policy,[68] the right to work has not been expanded by the Supreme Court in job-related cases where claims of sex-based discrimination have been raised. In both *Goesaert v. Cleary*[69] and *Cleveland Board of Education v. LaFleur*,[70] for example, the issue was totally ignored.

The Supreme Court has never applied substantive due process in reviewing regulations concerning an ongoing pregnancy or restricting a woman's interest in employment or job-related benefits solely on the basis of her pregnancy. District courts which have done so have come to conflicting results.[71] The Supreme Court, however, has used a var-

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the case raised a First Amendment question since the Court characterized the distribution of contraceptives as a teaching device.

67. In Truax v. Raich, 239 U.S. 33 (1915), the Court protected the rights of aliens to work by overturning an Arizona statute which established criminal penalties for employers hiring more than 20 percent aliens. This decision, while acknowledging the importance of work by equating the opportunity to find a job with the right to live in a particular place, relied on the federal supremacy principle that only the federal government could deny aliens entrance to a state. *Accord*, Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948). Other Supreme Court decisions dealing with the right to work have concerned the exercise of highly protected first and fifth amendment rights. *See, e.g.*, Pickering v. Board of Educ., 391 U.S. 563 (1968) (First Amendment); Keyishian v. Board of Regents, 385 U.S. 589 (1967) (First Amendment); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956) (Fifth Amendment). Where such considerations have not been involved, regulations affecting the "right to work" have been upheld, *e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955), except where clearly arbitrary, *e.g.*, Wieman v. Updegraff, 344 U.S. 183 (1952) (also raises First Amendment problems). It by no means follows from these decisions that a person has a right to a particular job. *See* Gutierrez v. Laird, 346 F. Supp. 289 (D.D.C. 1972).

68. Williams v. San Francisco Unified School Dist., 340 F. Supp. 438, 443 (N.D. Cal. 1972).

69. 335 U.S. 464 (1948) (upholding prohibition against female bartenders).

70. 414 U.S. 632 (1974) (invalidating school board mandatory pregnancy leave policy). For a discussion of the right to work in the mandatory pregnancy leave cases, see Note, *Dismissals for Pregnancy in Government Employment*, 25 MAINE L. REV. 61 (1973).

71. In Struck v. Secretary of Defense, 460 F.2d 1372 (9th Cir.), *cert. granted*, 409 U.S. 947, *vacated and remanded for determination of mootness*, 409 U.S. 1071 (1972), the Ninth Circuit upheld an Army regulation which required that servicewomeu be dis-

iation of substantive due process—the irrebuttable presumption model —in one of its recent decisions involving pregnancy.[72] This variation, which is being used with increasing frequency by the Court, represents a compromise of both the equal protection and substantive due process models.

C. *Irrebuttable Presumptions*

The irrebuttable or conclusive presumption model requires that fair opportunity be granted to an individual to prove that he or she should not be treated as a member of a group which is being regulated in some way. Sometimes referred to as procedural due process,[73] the irrebuttable presumption model assumes that the state has a valid right to regulate individuals with certain characteristics, but it questions the process by which the members of such a regulated class are selected.

The irrebuttable presumption model borrows from both equal protection and substantive due process. Like equal protection, it is concerned with regulations which affect all members of a certain class on the basis of often stereotypical characteristics which only some, if any, of these individuals possess. Like substantive due process, its application requires a substantial infringement of a right of some special significance, for as Justice Rehnquist pointed out in his dissent in *Cleveland Board of Education v. LaFleur*,[74] all legislative classifications are in some way overbroad in that they include some people who do not have the characteristics the legislature intended to curb or encourage.[75]

In many respects, the irrebuttable presumption model is an approach which can be used instead of equal protection or substantive due process to mediate the extreme standards of review which have become associated with these models. Cases in which this model has been applied involve important rights but concern neither the "fundamental"

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charged if they became pregnant. In reaching its holding, the court ignored the extent of the burden of this regulation (irrevocable discharge) on a pregnant woman, the importance of a woman's interest both in bearing children and in keeping her job, and the possibility of less restrictive alternatives.

A more complex approach was taken by a district court in Robinson v. Rand, 340 F. Supp. 37 (D. Colo. 1972), in which an Air Force regulation similar to the one upheld in *Struck* was invalidated. The court's analysis included a rather exhaustive listing of interests on both sides, including the various military interests served by the rule and the burdens placed on the woman's interests both in working and in bearing children. The court's conclusion, explicitly rejecting such labels as "fundamental interest" and "suspect classification," was that, on balance, the Air Force interests should be served by less restrictive means—transferring the pregnant woman out of the combat zone—thereby lessening (but not entirely eliminating) the burden placed on women by the regulation.

72. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

73. *See, e.g.*, Bell v. Burson, 402 U.S. 535 (1971).

74. 414 U.S. 632 (1974).

75. *Id.* at 657-60 (Rehnquist, J., dissenting).

rights nor the "suspect" classifications which have been designated for strict scrutiny.[76] To meet its burden under the irrebuttable presumption model the state has to show more than a rational basis for its classification, but not that its statute is the least restrictive way of accomplishing a compelling purpose.[77]

Once a violation is found under the irrebuttable presumption model, it may be corrected by giving members of the disadvantaged group an opportunity to show they should not be a part of the group to which they have been presumed to belong. It is not necessary, as is the case under equal protection strict scrutiny, that they be treated like members of other similarly-situated groups, because the objection is not the inequality but the irrebuttability of the presumption. Thus, under this model, a statute like that in *Frontiero v. Richardson*,[78] which permitted servicewomen to prove the dependency of their spouses in order to receive increased benefits, might have been upheld, even though servicemen received these benefits without proving spousal dependency. Under the equal protection model, however, this statute was invalidated.

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76. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (held unconstitutional a school board regulation which presumed that teachers in their fifth month of pregnancy were unfit to teach); United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973) (denied effect to a federal law which presumed that a household was not in need of food stamps if one member had been declared a tax dependent of a person in another, ineligible household); Vlandis v. Kline, 412 U.S. 441 (1973) (upset a Connecticut statute which presumed certain entering university students were nonresidents for out-of-state tuition purposes for four years); Stanley v. Illinois, 415 U.S. 645 (1972) (invalidated an Illinois law which presumed unwed fathers to be unfit fathers); Bell v. Burson, 402 U.S. 535 (1971) (invalidated a Georgia law which, by requiring license suspension or posting of bonds without a hearing on probable liability, presumed that uninsured drivers involved in automobile accidents were at fault). *See also* Bowen v. Hackett, 361 F. Supp. 854 (D.R.I. 1973); Pocklington v. Duval County School Bd., 345 F. Supp. 163 (M.D. Fla. 1972).

77. Thus the Court suggested in *Vlandis*, 412 U.S. at 452-53 (1973), that a one-year waiting period for in-state resident status would not be impermissible and, in *LaFleur*, 414 U.S. 632, 637 n.13 (1974), that a cut-off date closer to the date of delivery might pass muster. This burden is much like that imposed by Title VII, which provides that individual determinations are unnecessary only where the employer can show that the generalization is based on a characteristics which is a bona fide occupational qualification (BFOQ). 42 U.S.C. § 2000e-2(e) (1970). Thus, like the irrebuttable presumption model, Title VII's prohibitions are aimed at regulations that substitute generalizations for individual determinations. As in the irrebuttable presumption cases, a defendant in a Title VII case would have to show that it was extremely impractical, but not necessarily impossible, to conduct individual determinations of competence. The BFOQ requirement has been interpreted as demanding a factual showing that "all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969). Compare this analysis with the intermediate equal protection standard discussed in text accompanying note 37 *supra*. The omission of race as a basis for classification covered by the BFOQ exception is one indication that this standard intentionally was not meant to be the equivalent of equal protection strict scrutiny.

78. 411 U.S. 677 (1973).

The irrebuttable presumption model does not give an individual as much protection as he or she would receive under the strict scrutiny test of the equal protection and substantive due process models. An individual may be left with the burden of showing what others need not show, putting him or her at a relative disadvantage to others on whom that burden is not imposed. Moreover, this opportunity to prove that one should not be restricted in a certain way does not mean that the factor which gave rise to the challenged presumption such as pregnancy, may not be weighed heavily in determining whether that individual belongs in the restricted group. To the extent, however, that a court regards strict scrutiny as inappropriate, the irrebuttable presumption model is a compromise doctrine offering more protection than the rationality standard of the equal protection or substantive due process models.

The irrebuttable presumption model has potential applicability to pregnancy regulations for two reasons. First, these regulations treat all pregnant women on the basis of characteristics associated with pregnancy that affect only a small percentage of pregnant women.[79] Second, they burden the fundamental right to bear children.[80] An unemployment compensation law that presumes women who leave their jobs to have children are not serious members of the labor force, a disability insurance program that assumes women have no real need for benefits, a mandatory pregnancy leave policy that presumes pregnant women are unfit to teach—all classify women on the basis of generalizations about pregnancy "neither necessarily [nor] universally true,"[81] and all relate to the substantive right to bear children and make one's own procreative decisions.

The Supreme Court in *Cleveland Board of Education v. LaFleur*[82] used the irrebuttable presumption model in reviewing a school board policy that required teachers to take mandatory pregnancy leave after their fourth month of pregnancy.[83] The Court did not analyze pregnancy as a sex-based classification and apply one of the equal protection standards of review; nor did it identify a fundamental right and apply strict scrutiny under the substantive due process approach. Rather, it looked at the right being limited — the right to "freedom of personal

79. See note 139 and accompanying text *infra*.

80. Skinner v. Oklahoma, 315 U.S. 532 (1942).

81. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 646 (1974).

82. 414 U.S. 632 (1974).

83. In addition, Cleveland's policy required that a teacher remain out of the classroom until the beginning of the first semester after her baby reached the age of three months. Also before the Court was a Virginia school board policy which required pregnancy leave after the fifth month but did not include the same return-to-work restriction. Cohen v. Chesterfield County School Bd., 474 F.2d 395 (4th Cir. 1972), *rev'd*, 414 U.S. 632 (1974).

choice in matters of marriage and family life"[84] — and decided that this right, at least under the circumstances presented, could not be infringed by an irrebuttable presumption of unfitness. The Court did not insist that pregnant teachers be treated the same as teachers with other temporary disabilities. They could be forced to prove their fitness to teach in order to remain in the classroom, even though other potentially unfit or disabled teachers need not do so. Pregnancy still could create a presumption of unfitness, albeit a rebuttable one. Moreover, the Court suggested, in a rather opaque footnote that the defect of the regulation might be cured, given additional supportive evidence, if teachers were not required to take leaves until the last few weeks before childbirth.[85]

There are two explanations for the Court's preference in *LaFleur* for the irrebuttable presumption model over equal protection analysis. First, the Court might have felt that the result would be the same under either approach and that, by choosing the former, it was practicing an appropriate degree of judicial restraint.[86] Alternatively, the Court may have decided that, although they may be constitutionally objectionable, pregnancy classifications are not like classifications drawn explicitly along gender lines, and thus do not warrant the protection extended sex-based classifications under the equal protection clause. If the first explanation is the correct one, the Court revealed an incomplete understanding of the different implications of using the irrebuttable presumption model over equal protection; it also bypassed an opportunity to infuse equal protection analysis with a healthy flexibility and increase its credibility as a meaningful constitutional doctrine by explicitly incorporating the former model into the latter. The second explanation had been the position of the Fourth Circuit in *Cohen v. Chesterfield County School Board*,[87] the companion case that was reversed in *LaFleur*, so at the time it seemed unlikely that this explanation was correct. Just six months later, however, the Court adopted this view in a decision that represents a major step backward in its handling of sex discrimination cases.

II

Geduldig v. Aiello: PREGNANCY AND THE UNIQUENESS TRAP

The Supreme Court has issued a number of decisions in recent

84. 414 U.S. at 639.

85. *Id.* at 647 n.13.

86. By utilizing irrebuttable presumption analysis in *LaFleur*, the Court did not need to recognize sex as a suspect classification or employment as a fundamental right in order to give some protection to a pregnant teacher's wish to remain in her classroom. Unfortunately, the use of the simpler irrebuttable presumption model also allowed the Court to avoid further recognition and elucidation of the intermediate standard of equal protection review. See text accompanying notes 31-38 *supra*.

87. 474 F.2d 395 (4th Cir. 1972), *rev'd*, 414 U.S. 632 (1974).

years protecting interests asserted on behalf of women. A majority of the Court has never agreed that sex is a "suspect" classification for equal protection purposes,[88] but it has twice held that concededly legitimate administrative and financial considerations do not justify regulations which establish preferential treatment for men.[89] It has given substantive protection to the right of a woman to have an abortion[90] and to remain free from government intrusion "in matters of marriage and family life."[91] In the area of women and employment, discriminatory practices challenged on the basis of Title VII[92] and the Equal Pay Act[93] have been carefully examined, and the Court has often, if not uniformly, required strick adherence to both the letter and spirit of these Congressional mandates to end sex discrimination and remedy the effects of past discrimination.[94]

An unfortunate pattern, however, emerges from the way the Supreme Court and other courts have handled sex discrimination cases. Where sex discrimination finds easy parallels to race discrimination, as in a number of cases dealing with hiring,[95] service in public accom-

88. *But see* Frontiero v. Richardson, 411 U.S. 677 (1973) (Brennan, J., plurality opinion).

89. Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).

90. Roe v. Wade, 410 U.S. 113 (1973).

91. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639 (1974). *See also* Eisenstadt v. Baird, 405 U.S. 438 (1972) (equal protection analysis triggered by right to freedom from governmeutal intrusion into procreative decisions).

92. 42 U.S.C. § 2000e-2 (Supp. 1972).

93. 29 U.S.C. § 206(d) (1970).

94. In Corning Glass Works v. Brennan, 94 S. Ct. 2223 (1974), for example, the Court, citing Griggs v. Duke Power Co., 401 U.S. 424 (1971), liberally construed the Equal Pay Act to hold that an employer must equalize the pay scale of employees who worked the day and night shifts, because past discrimination in hiring women for the night shift had resulted in a pattern of unequal treatment which could not be corrected simply by opening the night shift up to women. *Cf.* Pittsburgh Press. Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973) (municipal commission's prohibition against placement of employment advertisements in sex-designated columns does not violate the First Amendment); Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971) (no-marriage rule for airline stewardesses violates Title VII); Schultz v. Wheaton Glass Company, 421 F.2d 259 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970) (flexibility in job tasks does not in itself justify wage differential under Equal Pay Act). *But see* Hodgson v. Robert Hall Clothes, Inc., 473 F.2d 589 (3d Cir.), *cert. denied*, 414 U.S. 866 (1973) (wage differential between salespeople in men's and women's departments of a clothing store not a violation of the Equal Pay Act); Berni v. Leonard, 69 Misc. 2d 935, 331 N.Y.S.2d 193 (Sup. Ct., Nassau County), *aff'd mem.*, 40 App. Div. 2d 701, 336 N.Y.S.2d 620 (1972), *aff'd mem.*, 32 N.Y.2d 933, — N.E.2d —, 347 N.Y.S.2d 198, *cert. denied*, 414 U.S. 1045 (1973) (failure to appoint women as supervising patrolmen not a violation of Executive or Civil Service Laws or equal protection where women had no experience as patrolmen).

95. Eslinger v. Thomas, 476 F.2d 225 (4th Cir. 1972) (exclusion of females as legislative pages); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (exclusion of women from employment as bartenders).

modations,[96] educational opportunities,[97] and criminal sentencing,[98] courts tend to recognize the discrimination and extend some special constitutional protection to women, although not as much as is accorded racial minorities. Where the resemblance to race discrimination is not so clear because the challenged rule discriminates in a way peculiar to sex-based classifications, meaningful review is sparing and unpredictable.

Two recent cases illustrate in quite different ways the Supreme Court's failure to deal properly with sex discrimination where it finds no obvious parallels in the race discrimination context—*Kahn v. Shevin*[99] and *Geduldig v. Aiello*.[100] In *Kahn*, the Court upheld a Florida statute granting widows, but not widowers, a $500 property tax exemption. Justice Douglas, writing for the Court, cited the "fair and substantial relation" test advanced in *Reed*[101] and purported to apply it. He briefly summarized statistics showing that women as a class earn less than men in the job market, and then held that the tax exemption was a constitutional way for Florida to reduce the economic disparity between the earning potentials of men and women. Justice Douglas himself had agreed in *Frontiero* that sex was a suspect classification warranting strict scrutiny; he distinguished *Frontiero*, however, by addressing the justification of the discrimination rather than its basis, pointing out that the statute in *Kahn* served more than "*solely* . . . administrative convenience."[102] Then, perhaps not convinced himself by that explanation, he shifted back to the nature of the discrimination, reasoning that the Court was dealing with a tax law which, like other economic and social legislation, requires only that the classification be reasonable. The statute satisfied the rational basis test, he said, because: "We deal here with a state tax law reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for whom that loss imposes a disproportionately heavy burden."[103]

The Florida law challenged in *Kahn* reflects a stereotype about

96. Bennett v. Dyer's Chop House, Inc., 350 F. Supp. 153 (N.D. Ohio 1972) (exclusion of women from restaurant service); Seidenberg v. McSorley' Old Ale House, Inc., 317 F. Supp. 593 (S.D.N.Y. 1970) (exclusion of females from service at ale house).

97. Brenden v. Independent School Dist. 742, 477 F.2d 1292 (8th Cir. 1973) (exclusion of females from high school sports program); Kirstein v. Rector and Visitors, 309 F. Supp. 184 (E.D. Va. 1970) (exclusion of women from state unviersity).

98. State v. Chambers, 63 N.J. 287, 307 A.2d 79 (1973); Commonwealth v. Daniel, 430 Pa. 642, 243 A.2d 400 (1968).

99. 94 S. Ct. 1734 (1974).

100. 94 S. Ct. 2485 (1974).

101. 404 U.S. 71 (1971). See text accompanying note 42 *supra*.

102. Kahn v. Shevin, 94 S. Ct. 1734, 1737 (1974), *quoting* Frontiero v. Richardson, 411 U.S. 677, 690 (1973) (emphasis in original).

103. 94 S. Ct. at 1737.

woman which has a stronger factual base than most:[104] women earn less than men and therefore are often dependent upon their spouses for support.[105] A state has the right, perhaps even the duty, to attempt to redress such imbalances caused by past and continuing discrimination, and this law no doubt helps many women in need of an economic boost.[106] Regardless of the legislative purpose, however, the constitutional limits applicable to sex-based classifications must still be respected, for there is a danger of perpetuating stereotypes upon which discrimination is founded with *any* law which discriminates on the basis of sex. A tax exemption may be a rational, though imperfect, way of redistributing income, and a state may discriminate between widowed and married individuals in structuring its tax system because this is a convenient way of helping many needy people. A state may not, however, award a tax exemption on the basis of sex alone, even if such a classification provides a statistically accurate means of helping needy people. It is settled under *Reed*[107] and *Frontiero*[108] that administrative convenience alone, though adequate for many types of classification, does not justify sex-based classifications. The result in *Kahn* is especially difficult to justify when one considers that the state had available an easily administrable alternative—setting a minimum income level under which widowed individuals, male and female, would be entitled to a tax exemption—that would more closely achieve the state's purpose of cushioning the financial impact of spousal loss without discriminating on the basis of sex.

In *Geduldig v. Aiello*,[109] the Supreme Court was again presented

104. See also Kohr v. Weinberger, 43 U.S.L.W. 2066, — F. Supp. — (E.D. Pa., July 26, 1974) (Social Security law favoring women over men upheld on the basis of *Kahn*).

105. In 1971, women's median earnings were only three-fifths of those of men. Even accounting for differences in education and work experience. the earnings differential, according to the Council of Economic Advisers to the Presilent, is about 20 percent. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, WOMEN WORKERS TODAY 6 (1973). The stereotype that women are dependent upon men has a long judicial history. It was used in Muller v. Oregon, 208 U.S. 412 (1908), to justify an Oregon law prohibiting women from working in laundries beyond a certain number of hours: "[H]istory discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present." *Id.* at 421.

106. This is by no means to say that the overall effect of this law on women is positive. In reality, such patronizing legislation helps to perpetuate stereotypes about women, salves the consciences of those unwilling to attack directly the conditions which make such patronage necessary, and provides ammunition for those who would argue that women don't need true equality as long as society takes care of its women in other ways. None of these considerations, however, speak directly to the constitutional issues raised by the statute.

107. Reed v. Reed, 404 U.S. 71 (1971).

108. Frontiero v. Richardson, 411 U.S. 677 (1973).

109. 94 S. Ct. 2485 (1974).

with a type of sex-based discrimination not analogous to any racial discrimination case it had decided previously. Again it failed to give sufficient attention to developing a consistent approach to sex-based discrimination as a constitutional problem. Indeed, the Court failed in *Aiello* to recognize the problem before it. The challenged statute singled out pregnancy as the only significant disability not covered by California's comprehensive disability insurance program. Justice Stewart, writing for the six-justice majority, subjected the statute to the rational basis standard of review and upheld it. While the statute under this lenient standard of review was "rational," the Court's decision to apply this standard was not. Pregnancy is a unique condition, but it is one which, in part, defines the female sex. Its uniqueness explains why sex discrimination is in many respects different from other forms of discrimination, but it does not settle the question of whether pregnancy classifications discriminate on the basis of sex.[110] The stereotypes connected with pregnancy are deeply ingrained, and because they can be associated with some objective physical characteristics, they are easy to call "rational," even though these characteristics are usually unrelated to the purpose of laws based on these stereotypes. The remainder of this Comment will analyze the Court's reasoning in *Aiello* in an attempt to put these stereotypes into perspective and clear the way for more realistic treatment of a currently underprotected class.

A. Pregnancy, Welfare Legislation, and Equal Protection

The statute challenged in *Aiello*, section 2626 of the California Unemployment Insurance Code,[111] singles out normal pregnancy[112] as

110. The fact that pregnancy is a unique condition also offers no answer to the question of whether a more stringent standard of review is required for some other reason. For example, discrimination on the basis of pregnancy may affect the fundamental right to make one's own procreative decisions, protected under the substantive due process model. Moreover, such discrimination relies on stereotypical judgments about pregnant women which they should be given an opportunity to rebut under the irrebuttable presumption model. See Section IC *supra*.

111. That section provides:

> "Disability" or "disabled" includes both mental or physical illness, mental or physical injury, and, to the extent specified in Section 2626.2, pregnancy. 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 or customary work.

CAL. UNEMPL. INS. CODE § 2626 (West Supp. 1974).

112. Of the four named appellees, three had experienced abnormal pregnancies and one had had a normal pregnancy. The Court dismissed the suit as to those three appellees who had experienced abnormal pregnancies because an amendment to the Unemployment Insurance Code, that was passed after the suit was brought, had extended the program to cover such pregnancies. *See* CAL. UNEMPL. INS. CODE § 2626.2 (West Supp. 1974). This amendment was prompted by an opinion by the Second District which restricted section 2626 to normal pregnancies by statutory construction. Rentzer v. California Unempl. Ins. Appeals Bd., 32 Cal. App. 3d 604, 108 Cal. Rptr. 336 (2d Dist.

virtually the only disability[113] not covered by California's comprehensive disability insurance program. Central to the Supreme Court's opinion upholding this exclusion was its characterization of this program as economic and social welfare legislation. Having done this, the Court concluded that, absent a showing of discriminatory intent,[114] the statute had only to satisfy a deferential rationality test. The exclusion was adjudged rational because, by excluding pregnancy, California could operate a self-sustaining disability insurance program costing covered employees one percent of their salaries or less.[115] Because California's disability insurance program falls under the rubric of economic and social welfare legislation, wrote the Court, the state " 'may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others.' "[116]

1973). Interestingly, there is nothing in the *Aiello* decision that would have required this result.

113. The program also excludes employees who were committed by a court because of dypsomania, drug addiction, or sexual psychopathy. Justice Brennan in his dissent pointed out that during oral argument the Deputy Attorney General of California informed the Court "that court commitment for such disabilities is a 'fairly archaic practice' and that 'it would be unrealistic to say that they constitute valid exclusions.' " 94 S. Ct. at 2493 n.3 (1974) (Brennan, J., dissenting).

114. Perhaps not entirely comfortable in placing the entire burden of discriminatory intent on pregnant women, the Court noted that there was some positive evidence of an *absence* of discriminatory intent, in that women receive a greater proportion of benefits from California's disability insurance program than do men. 94 S. Ct. at 2492 n.21. Paradoxically, while this fact arguably shows the absence of a deliberate attempt to discriminate against women in setting up the disability insurance program, it reveals the pervasive discrimination that women continue to face in job compensation. For the fact is that the program is structured to grant proportionately greater benefits to workers with lower salaries, *see* CAL. UNEMPL. INS. CODE § 2655 (West Supp. 1974), and women in California, as elsewhere, see note 105 *supra*, are paid far less than men. In 1969, women's median earnings in California were 49.7 percent those of men. CALIFORNIA DEP'T OF HUMAN RESOURCES DEVELOPMENT, WOMEN AT WORK, IN CALIFORNIA 23, Table 7 (1973). More importantly, it should be noted that equality for equal protection puropses is not measured by a ratio of monetary costs and benefits, *cf.* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), but rather by the closeness of the relationship between the purpose of a law and the classifications it draws. The Court's observation thus fails to deal with the charge that the program discriminates on the basis of sex.

115. As the Court expressed it:

> The State has a legitimate interest in maintaining the self-supporting nature of its insurance program. Similarly, it has an interest in distributing the available resources in such a way as to keep benefit payments at an adequate level for disabilities that are covered, rather than to cover all disabilities inadequately. Finally, California has a legitimate concern in maintaining the contribution rate at a level that will not unduly burden participating employees, particularly low-income employees who may be most in need of the disability insurance.

94 S. Ct. at 2491-2.

116. *Id.* at 2491 (1974), *quoting* Jefferson v. Hackney, 406 U.S. 535 (1972); Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).

This analysis is simplistic on at least two levels. First, the "one-step-at-a-time" rationale appropriate in the review of economic or social welfare legislation is inapplicable to the fact situation presented in *Aiello*. Where the legislature is attacking a particular social problem, it makes sense that it should be permitted to experiment with different solutions in a piecemeal fashion.[117] In this case, however, California is not testing solutions to a complicated problem or "select[ing] one phase of one field and apply[ing] a remedy there"; it has adopted a statewide comprehensive insurance program from which virtually only pregnant women are excluded. Instead of taking one step at a time, it has taken steps to cover virtually every disability—voluntary or involuntary, short-term or long—except normal pregnancy.

Secondly and more significantly, to characterize this exclusion as social or economic legislation, even if it were a selected remedy to a wider problem, does not settle the question of whether it warrants special constitutional scrutiny because it discriminates on the basis of sex. To be sure, the Court eventually reaches this question,[118] but when it does the answer is given almost as an afterthought in a short paragraph and a footnote.[119]

Most commonly, the significance of saying that a law is drawn along economic or social welfare lines lies in the unstated corollary that it affects economic interests rather than rights which are accorded special constitutional protection. Accepting, *arguendo*, the appropriateness of this conclusion in *Aiello* (despite the presence of the issue of the right to make one's procreative decisions free from government intrusion), it does not settle the question of whether specially protected *classes* are affected. The two questions—first, what rights are affected, and second, what classes are affected by the way the lines are drawn—must be separated, and *both* must be answered. If the answer to one were permitted to foreclose meaningful examination of the other, it would become all too easy to overlook a protected right or basis of classification.

Absurd consequences would result if the Court's conclusory use of the economic and social legislation label were duplicated in other areas. A court could uphold, for example, a law which required all citizens to speak English in order to receive welfare benefits. The classification could be characterized as part of a welfare program and then upheld as rational because it could be expected to eliminate large num-

117. Tussman & tenBroek, *supra* note 17, at 349. *See also* Griswold v. Connecticut, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring).

118. See Section IIB *infra*.

119. 94 S. Ct. at 2492, 2492 n.20.

bers of people from an underendowed welfare program or encourage poor people to learn English. Both of these purposes are legitimate state purposes, and a tighter relation between the classification and its purposes would not be required because it is only welfare legislation. Any contention that this law discriminated along "suspect" lines could be met with the observation that the classification is drawn along the lines of the ability to speak a language, not national orgin *per se.*

But merely to state this hypothetical statute is to expose the illogic of the Court's analysis. In any other context than sex discrimination, no court today would employ this reasoning, for the fact that a classification may be characterized as economic or social welfare legislation is not dispositive of what relationship the court will require between the classification and its purpose.[120] National origin is a "suspect" classification,[121] and although the classification in this hypothetical example does not expressly discriminate on the basis of national origin, its effect is clearly to disadvantage those of non-English-speaking national backgrounds. For this reason, it would be treated as if it were an express discrimination on the basis of national origin and subjected to strict scrutiny to determine whether it was necessary to carry out a compelling state interest. Similarly, a law which excluded sickle cell anemia from California's disability program would be strictly scrutinized as a discrimination on the basis of race. The character of the law as economic and social welfare legislation would not exempt it from special constitutional scrutiny because virtually the only persons discriminated against by the law are members of the black race.

As in the foregoing hypotheticals, the discrimination challenged in *Aiello* affected only members of a group—women—defined by a characteristic which is designated for special constitutional protection—sex. The characterization of the law in question as economic and social legislation is the first stage of the process by which the Court justified its decision not to treat the discrimination as a discrimination based on sex and thus not to extend this special protection. Not totally blind to the shortcomings of this incomplete analysis, it did respond to the claim that it was faced with a law which discriminated on the basis of sex. Its summary analysis of this claim, however, is misguided; it took into account the unique qualities of pregnancy without the realities and unique aspects of sex discrimination. It is this analysis on which the decision in *Aiello* finally turned.

120. *See, e.g.*, United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973); United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973); Graham v. Richardson, 403 U.S. 365 (1971); Shapiro v. Thompson, 394 U.S. 618 (1969).

121. *See* Korematsu v. United States, 323 U.S. 214 (1944).

B. *Pregnancy, Uniqueness, and Equal Protection*

In arriving at its conclusion in *Aiello* that a statute which discriminates against pregnant women does not necessarily discriminate on the basis of sex, the Court did not abandon the insurance terminology which reinforced its characterization of the program as mere economic and social welfare legislation: "There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not."[122] Only in a footnote did the Court attempt to explain how the classification is not necessarily sex-based:

> 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 like those considered in *Reed, supra,* and *Frontiero, supra.* Normal pregnancy is an objectively identifiable physical condition with unique characteristics.[123]

This language echoes what has become known as the "sex-plus" doctrine. According to this doctrine, the sex-linked basis of a classification is negated where factors, in addition to the fact of being of a particular sex, can be identified as a basis of that classification. This doctrine has been discredited in Title VII cases with respect to characteristics capable of being shared by both sexes such as having pre-school aged children[124] or being married,[125] but it has been applied where the additional factor is unique to one sex, such as a beard[126] or a shapely bustline.[127]

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122. 94 S. Ct. at 2492.

123. *Id.* at 2492 n.20.

124. Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

125. Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir.), *cert. denied,* 404 U.S. 991 (1971).

126. Rafford v. Randle E. Ambulance Serv., Inc., 348 F. Supp. 316 (S.D. Fla. 1972). A number of attempts have been made to distinguish beards and pregnancy as bases of classifications. Pregnancy is more difficult to alter, and the option of abortion raises substantive due process considerations. See text accompanying note 65 *supra.* A beard, on the other hand, may raise first amendment issues. *See* King v. California Unempl. Ins. Appeals Bd., 25 Cal. App. 3d 199, 101 Cal. Rptr. 660 (1st Dist. 1972). The most important difference is that the nature of the stereotyping is different, in that regulations dealing with beards are based on grooming stereotypes while those concerning pregnancy represent an attempt by employees to tie stereotypes to an individual's occupational capabilities. *See* Note, *Employer Dress and Appearance Codes and Title VII of the Civil Rights Act of 1964,* 46 S. CAL. L. REV. 965, 983-85, 990, 996 (1973).

127. State Div. on Human Rights *ex rel.* Chamberlain v. Indian Valley Realty Corp., No. CS 21209-70 (New York, State Human Rights Appeal Board), *aff'd mem.,* 38 App. Div. 2d 890 (1972). For a discussion of the distinction between shared and unshared sex-linked characteristics, see K. DAVIDSON, R. GINSBURG & H. KAY, SEX-BASED DISCRIMINATION 639 (1974).

The Fourth Circuit in *Cohen v. Chesterfield County School Board*[128] used the "sex-plus" doctrine in upholding a mandatory pregnancy leave policy for teachers:

> The fact that only women experience pregnancy and motherhood removes all possibility of competition between the sexes in this area. No man-made law or regulations can relieve females from all of the burdens which naturally accompany the joys and blessings of motherhood.[129]

The Supreme Court overruled *Cohen*, but it avoided the challenge posed by this reasoning by using the irrebuttable presumption model rather than equal protection.

The reliance on the uniqueness of pregnancy to escape a stricter equal protection standard of review reflects a departure from the increasingly compromising equal protection model as well as a misunderstanding of the role of pregnancy in sex discrimination. While the concept of uniqueness is relevant to the determination of whether two groups are similarly situated — that is to say, whether in light of the purpose of a regulation, two groups are closely enough related that they should be treated the same — it is not relevant to the determination of whether a classification is drawn along lines that bear a constitutionally adequate relationship to the purpose sought to be accomplished by the challenged statute.

The "uniqueness" rationale has been used by the Supreme Court in at least one other context. In a case decided the day before *Aiello*, *Morton v. Mancari*,[130] the Court held that legislation giving preferential treatment to Indians from federally-recognized tribes in employment with the Bureau of Indian Affairs was not a discrimination based on race. The preference was characterized as an "employment criterion" rather than as a racial preference in much the same way as the pregnancy exclusion in *Aiello* was handled as part of an insurance program. In *Aiello*, the Court used this rationale to avoid giving the classification greater judicial scrutiny, and invalidating it; in *Mancari*, the Court seems to have been unwilling to uphold a classification identified as "suspect" by finding a compelling state interest,[131] though to do so might have breathed some flexibility into the equal protection model.

In both *Mancari* and *Aiello* the Court observed that the law under challenge did not discriminate against all members of the group entitled to special constitutional protection—that is, the law did not explicitly

128. 474 F.2d 395 (4th Cir. 1973), *rev'd*, 414 U.S. 632 (1974).

129. *Id.* at 397. *See also* Miller v. Industrial Comm'n, 173 Colo. 476, 480 P.2d 565 (1971).

130. 94 S. Ct. 2474 (1974).

131. *Cf.* DeFunis v. Odegaard, 94 S. Ct. 1704 (1974); Shevin v. Kahn, 94 S. Ct. 1734 (1974).

discriminate against all women seeking disability insurance or in favor of all Indians seeking employment. Not all women are pregnant and thus not all women are affected by the pregnancy exclusion; not all Indians belong to federally-recognized tribes, so not all Indians are given employment preferences. This observation is pure makeweight.[132] If the Court's use of this "uniqueness" rationale were duplicated in all equal protection cases, the doctrine's role in protecting special groups and rights would be severely undermined. There are many unique differences between groups similarly situated with respect to legitimate nondiscriminatory legislative purposes. Members of different races, for example, have different color skins and facial features. Equal protection operates to eliminate laws and practices which discriminate according to such differences when these laws are not compelled by legitimate state interests. By declaring that a law does not discriminate along certain lines because it classifies on the basis of a unique characteristic of an otherwise protected group, the Court has sapped the equal protection doctrine of its strength.

A brief examination of the reasons why more explicitly sex-based classifications have been given special constitutional protection illustrates the folly of refusing like treatment to classifications based on characteristics, such as pregnancy, that are unique to one sex. While not accorded the same degree of scrutiny extended to race, sex bears many resemblances to race as a basis of classification, and some of the reasons posited for giving race-based classifications special scrutiny apply with equal force to those based on sex. Race has been singled out as virtually a prohibited basis of classification[133] as a result of a number

132. Fortunately, this argument has not been accepted in the many situations in which it would be equally applicable. For example, in Jimenez v. Weinberger, 94 S. Ct. 2496 (1974), the Supreme Court considered a federal statute which distinguished between different groups of illegitimate children rather than between legitimate and illegitimate children as a classification based on status of birth. Illegitimate children who were not entitled by state law to inherit from their parents were not allowed to receive Social Security disability insurance benefits. The Court denied effect to the statute, which it analyzed under the conclusive presumption model rather than the more permissive "any rational basis" equal protection model that would have been used had the Court not property analyzed the basis of the classification.

In Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971), the Seventh Circuit had no trouble recognizing that a policy which required stewardesses, but not stewards, to be unmarried constitutes sex discrimination in violation of Title VII. "The effect of the staute," it wrote, "is not to be diluted becanse discrimination adversely affects only a portion of the protected class. Discrimination is not to be tolerated under the guise of physical properties possessed by one sex." *Id.* at 1198. This same reasoning seems as appropriate to cases involving alleged violations of the equal protection clause as it is to Title VII claims.

133. *See* Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071 (1974). *But cf.* Korematsu v. United States, 323 U.S. 214 (1944).

of factors: the historical background of the fourteenth amendment; the long history of discrimination against blacks; the fact that many racial groups form "discrete and insular minorities";[134] the fact that race is an immutable characteristic unrelated to legitimate objects of legislation; and the fact that many racial stereotypes have a damaging effect on members of certain races[135] and are easily perpetuated by laws which classify on the basis of race. The fourteenth amendment was not specifically intended to equalize the rights and positions of the sexes, and women are not a discrete and insular minority. Still, women "are vastly underrepresented in this Nation's decision-making councils."[136] Sex is an "immutable characteristic determined solely by the accident of birth" which "frequently bears no relation to ability to perform and contribute to society."[137] Most importantly, sex-based classifications, like race-based classifications, have the dangerous potential for perpetuating empirically unjustified stereotypes and thereby serve the perfidious purpose of keeping women in their supposed place.

If the *raison d'être* for equal protection analysis in the area of racial classifications is to eliminate inaccurate and damaging stereotypes, an identical purpose would be fulfilled, in an area replete with equally strong (or stronger) and equally damaging stereotypes, by extending the protection to sex-based classifications. And, since many of the stereotypes associated with sex are related to the woman's childbearing function,[138] it follows that consistent recognition of the salutary purposes of equal protection would require extending the doctrine's protection to classifications based on pregnancy.

As is true with racial stereotypes, most sex-based stereotypes, including pregnancy stereotypes, bear little or no relation to fact. The notion that all women are disabled long before and after childbirth runs contrary to the weight of current medical authority.[139] The assumption

134. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

135. Brown v. Board of Educ., 347 U.S. 483 (1954).

136. Frontiero v. Richardson, 411 U.S. 677, 686 n.17 (1973).

137. *Id.* at 686.

138. See text accompanying notes 2-4 *supra.*

139. The American College of Obstetricians and Gynecologists, in its Policy Statement on Pregnancy-Related Disabilities (March 2, 1974), set the predicted period of disability at six to eight weeks. Geduldig v. Aiello, 94 S. Ct. 2485, 2494 n.4 (1974) (Brennan, J., dissenting). This compares favorably to the 8.2 weeks average duration of all claims paid to men in California under its state disability insurance program, and the 8.1 weeks average claim paid to women. *See* California Dep't of Human Resources Development, California Disability Insurance Terminated Claims: 1971, Table 6 (Report 1031A, May 22, 1972). *See also* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 645-46 n.12 (1974); Curran, *Equal Protection of the Law: Pregnant School Teachers,* 285 NEW ENGL. J. MED. 336 (1971); Comment, *Love's Labor Lost: New Conceptions of Maternity Leaves,* 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 260, 262 n.11, 267 n.41, 287 n.145, 287-88 n. 146 (1972).

that women are not serious members of the labor force is refuted by statistics showing a high rate of participation by women in the labor force,[140] a rate of absenteeism which is only marginally higher for woman than for men,[141] a lower turnover rate for women than for men,[142] and a disability rate not significantly higher for women than for men.[143] The assumptions that women neither want nor need to work and that they have men to support them are made despite the fact that 62.9 percent of all women who work are either unmarried or have husbands who earn less than $7000.[144]

It might be argued that although these stereotypes do not apply

140. In July 1974, 46.4 percent of the women in the United States (as compared to 81.7 percent of the men) were members of the labor force. BUREAU OF LABOR STATS., U.S. DEP'T OF LABOR, 21 EMPL. & EARNINGS 18, Table A-2 (1974). Moreover, in March, 1973, 50.1 percent of married women with children from the ages of 6 to 17 years were in the labor force, as were 29.4 percent of those with children under the age of 3. Hayghe, *Marital and Family Characteristics of the Labor Force in March 1973*, MONTHLY LABOR. REV., April, 1974, at 21, 24, Table 3. Of all women who gave birth to legitimate children in 1963, the most recent year for which these statistics are available, 31 percent were employed during pregnancy. U.S. NAT'L CENTER FOR HEALTH STATS., PUB. HEALTH SERV., U.S. DEP'T OF HEW, EMPLOYMENT DURING PREGNANCY 5, Table A (Vital and Health Stats., Series 22, No. 7, 1968). In 1970, women made up 43.4 percent of the labor force in the United States and 42.2 percent in California. CALIFORNIA DEP'T OF HUMAN RESOURCES DEVELOPMENT, WOMEN AT WORK IN CALIFORNIA 9 (Sept. 1973).

141. In 1967, the absentee rate for women was 5.6 days per year, as compared to 5.3 for men. In 1968, the rate was 5.9 for women and 5.2 for men. CITIZEN'S ADVISORY COUNCIL ON THE STATUS OF WOMEN, WOMEN IN 1970, 22 (March 1971). Although the absentee rates for women have tended to be higher than for men, this differential is based at least in part on the correlation between absentee rates and wage level, for women have been concentrated in the lower wage levels for which the absentee rate is higher. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, FACTS ABOUT WOMEN'S ABSENTEEISM AND LABOR TURNOVER 4-5 (Aug. 1969); Hedges, *Absence from Work: A Look at Some National Data*, MONTHLY LABOR REV., July, 1973, at 24, 28.

142. *See* Armknecht & Early, *Manufacturing Quit Rates Revised: Secular Changes and Women's Quits*, MONTHLY LABOR REV., Dec. 1973, at 56, 58.

143. In 1970, 9.8 percent of the women in the work force (as compared to 11.8 percent of the men) had some work disability, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1970 CENSUS OF POPULATION, PERSONS WITH WORK DISABILITY, P.C.(2)-6C, at 1, Table 1 (1973). Of the disabled women, 9.2 percent had work disabilities of less than 6 months, as compared to 8.7 percent of the disabled men. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1970 CENSUS OF POPULATION, DETAILED CHARACTERISTICS, P.C.(1)-D1, at 712, Table 220 (1973). One study shows that the average number of days lost from work for disabilities was lower for women than for men from July, 1963, to June, 1966, although it was higher for women from July 1966 to 1968. U.S. NAT'L CENTER FOR HEALTH STATS., PUBLIC HEALTH SERV., U.S. DEP'T OF HEW, TIME LOST FROM WORK AMONG THE CURRENTLY EMPLOYED POPULATION 4, Table A (Vital and Health Stats. Series 10, No. 71, 1972).

144. *See* WOMEN'S BUREAU, U.S. DEP'T OF LABOR, WHY WOMEN WORK (June 1973). Of all married women workers, 32.4 percent have husbands who earn less than $7000. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, MARITAL AND FAMILY CHARACTERISTICS OF THE LABOR FORCE IN MARCH 1973, SPECIAL LABOR FORCE REPORT 164, at 23, Table K (1974).

to all women, at least they are statistically more accurate in characterizing women as a class than are racial stereotypes in characterizing the racial minority as a class. But to the individual woman, burdened by a regulation which presumes all women to have a characteristic she does not possess, the damage is the same regardless of the number of her sisters who are likewise burdened.

A more persuasive way of phrasing the argument is that the unique characteristics, such as pregnancy, upon which these stereotypes are based are more apt to be related to legitimate objects of legislation than the unique skin color or genetic makeup of a racial minority. Conceding an element of truth to the underlying premise, this argument has no constitutional significance. If the unique features of pregnancy truly justify differential treatment in a particular case, equal protection analysis, especially under an "intermediate" standard of review where the outcome is not predetermined by the attachment of labels, should support that conclusion.[145]

Without this analysis, however, to accept the close relationship between the purposes of California's disability insurance program and the exclusion of pregnancy-related disability from this program is to jump to just those kinds of stereotype-based conclusions that equal protection analysis was developed to prevent. The argument that pregnancy is a more "objectively identifiable physical condition"[146] than having a certain colored skin makes this analysis even more necessary to guard against the all too natural but illogical assumption that visible differences between people justify differential treatment. Where laws and practices which classify along pregnancy lines are reviewed under a loose rationality standard, they will be upheld regardless of the disparity between the underlying assumptions and the facts. If some of the more deep-rooted and pernicious of these stereotypes are to be extirpated, as they must be if sexual equality is to be more than a shibboleth, courts must be willing to scrutinize—at a depth greater than that afforded by the rationality standard—laws and practices whose only claim to rationality is their underlying unjustified stereotypes.

If section 2626 of the California Unemployment Insurance Code had been subjected to the standard of review appropriate after *Reed* and *Frontiero* to sex-based classifications, the Supreme Court would have been forced to invalidate it, for the state's asserted interest in keeping costs down would not have justified the sex-based discrimination. Excluding pregnancy may make it possible to operate the program at a lower cost, either to its participants or to the state; this would

145. To the extent that a sensibly applied intermediate standard would avoid a result such as *Aiello*, it must be considered a desirable alternative to the two-tiered equal protection model.

146. 94 S. Ct. at 2492 n.20.

also be true, of course, if non-English-speaking people or Blacks were excluded. Concern for cost factors, however, was exactly the sort of justification for sex-based classifications that *Reed* and *Frontiero* rejected.

Reed and *Frontiero* require at least a "substantial relation" between the classifications made by a statute and its purposes.[147] The purpose of California's disability insurance program is stated plainly by the legislature:

> to compensate in part for the wage loss sustained by individuals unemployed because of sickness or injury and to reduce to a minimum the suffering caused by unemployment resulting therefrom. This part shall be construed liberally in aid of its declared purpose to mitigate the evils and burdens which fall on the unemployed and disabled worker and his family.[148]

Employees disabled because of pregnancy are similarly situated with respect to other disabled employees in light of this purpose. There is no question that pregnancy is a disabling condition.[149] In some respects it may be different from some other disabilities. Many women no doubt seek to become pregnant.[150] Pregnancy is not a rare occurrence, and in one sense could be considered "normal," though the average woman in the United States is pregnant only twice in her life.[151] Pregnancy may be expensive, and is often predictable. California's disability insurance program, however, was deliberately structured to ignore just these kinds of factors. The program's costs are not assessed

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147. See text accompanying notes 42-43 *supra.*

148. CAL. UNEMPL. INS. CODE § 2601 (West 1972).

149. *See* Geduldig v. Aiello, 94 S. Ct. 2485, 2494 n.4 (1974) (Brennan, J., dissenting); Green v. Waterford Bd. of Educ., 473 F.2d 629, 634 (2d Cir. 1973); Aiello v. Hansen, 359 F. Supp. 792, 797 (N.D. Cal. 1973), *rev'd sub nom.* Geduldig v. Aiello, 94 S. Ct. 2485 (1974); Heath v. Westerville Bd. of Educ., 345 F. Supp. 501, 506 (S.D. Ohio 1972).

150. According to one study, only 4.2 percent of married women in the United States expect to have *no* children. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, POPULATION CHARACTERISTICS, Series P-20, No. 265, at 3 (1974). It is very difficult, however, to determine just how many pregnancies are unwanted. The rate of failure of contraceptive devices understates the number of unplanned pregnancies. *See* Preston, *The Oral Contraceptive Controversy*, 111 AM. J. OBST. AND GYN. 994 (1971). Perhaps a somewhat more realistic impression is provided by abortion statistics. In California in 1971, under a therapeutic abortion law but before the United States Supreme Court decision in Roe v. Wade, 410 U.S. 113 (1973), 344 legitimate abortions were obtained for every 1,000 live births. Tyler, *Abortion Services and Abortion-Seeking Behavior in the United States,* in THE ABORTION EXPERIENCE 33, Table 2-2 (H. & J. Osofsky eds. 1973). Under more liberal abortion laws in New York City between July, 1971 and June, 1972, there were 470.8 abortions for every 1,000 live births. Pakter, O'Hare, Nelson & Svigir, *A Review of Two Years, Experience in New York City With the Liberalized Abortion Law,* in THE ABORTION EXPERIENCE, *supra,* at 56-57.

151. 1970 CENSUS, *supra* note 1.

and its benefits not distributed according to actuarial principles;[152] benefits are not conditioned on present or future or full-time participation in the work force;[153] virtually every other disabling condition is covered by the program regardless of its voluntariness, predictability, uniqueness, or "normalcy." (Included, for example, are voluntary sterilization, sickle-cell anemia, cataract operations, prostatectomies,[154] sex-change operations, and injuries resulting from accidents while drunk.) Even if it is argued that more of these variables are present in most pregnancies, when no single factor has been thought relevant with respect to any other disability, it is arbitrary to summon them in their totality as justification for excluding pregnancy.

If the disability program's stated objectives had not been so all-inclusive or if special consideration had been given to excluding certain high-risk individuals or excluding particularly expensive or frequently occurring disabilities (evidencing a legislative desire to tailor the program to individual differences), or if disabilities of a "voluntary" nature had been specifically excluded (evidencing a state policy to compensate only those struck by unforeseen tragedy), then the sex-neutrality of the program would have been manifest and the exclusion of pregnancy more easily justified.[155] But none of these indicia was present. The Court relied solely on the state's argument that it was necessary to exclude pregnancy to maintain the program as "self-sustaining." Why pregnancy? The program's fiscal integrity relates to a balance of cred-

152. Geduldig v. Aiello, 94 S. Ct. 2485, 2493 n.2 (1974) (Brennan, J., dissenting). *See also* California State Legislature, Joint Comm. on Unemployment Compensation Disability Insurance, Final Report 27-28 (1967). California's clear intention to create a pooled fund rather than a risk-based insurance plan is underlined by parallel provisions restricting the extent to which private plans may select risks. *See* CAL. UNEMPL. INS. CODE § 3254(i) (West Supp. 1974). *See also* 22 CAL. ADMIN. CODE § 3254(i)-2(k)(l)(B) (West 1972).

153. This fact is illustrated by its provision for benefits to those who die before making a claim, CAL. UNEMPL. INS. CODE § 2705 (West 1972); its failure to exclude the disabled unemployed; its biases in favor of part-time workers and workers with lower incomes, CAL. UNEMPL. INS. CODE § 2655 (West Supp. 1974); and its failure to tie benefits to age, which, to a greater extent than sex, has a close relation to return to employment after disablement. *See* California Dep't of Employment Report 1000, No. 12 (Dec. 1966), reprinted in Final Report, *supra* note 152 at 112-16.

154. Geduldig v. Aiello, 94 S. Ct. 2485, 2493-94 (1974) (Brennan, J., dissenting).

155. Even a more neutral program might, in another day, face constitutional obstacles. To the extent that a disproportionate number of women were affected by a different kind of exclusion, a court, if forced to give strict scrutiny to sex-based classification, might be obligated to apply an impact analysis, *see* Griggs v. Duke Power Co., 401 U.S. 424 (1971), and conclude that the exclusion unconstitutionally discriminated on the basis of sex. Alternatively, to the extent that such an exclusion disadvantaged poor women with respect to their decisions whether or not to bear a child, it might suffer from a substantive due process defect. *See* Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law, The Supreme Court, 1972 Term*, 87 HARV. L. REV. 1, 45 (1973) (developing this line of reasoning in the abortion context).

its and debits which has no inherent connection to pregnancy.[156] Practices have often been found constitutionally defective despite the fact that changing the disputed practice would disturb a government's budget.[157] Moreover, there is some conflict in *Aiello* as to how much the inclusion of pregnancy would cost.[158] The trial court, having decided the statute discriminated on the basis of sex, accepted the state's estimate of increased cost and noted that only modest increases in employee contributions and decreases in benefits across the board were necessary in order to accommodate pregnancy.[159] Thus, the Court need not have been discouraged from applying the standard dictated by *Reed* and *Frontiero* by any mathematical complications in fashioning an alternative to California's discriminatory program.

III

PROSPECTS OF EQUALITY DESPITE UNIQUENESS

The Court's failure to recognize the flimsy justification for a law which disadvantages many women suggests that the Court itself is blinded by certain stereotypes about pregnancy. The decision in *Kahn* reveals an apparent inability to see through the stereotype that all women are more financially dependent upon their husbands than their husbands are upon them. The Court's decision in *Aiello* reflects an ill-defined perception that pregnancy is profoundly different from all other disabling conditions that plague or bless humankind. The notion that pregnancy is different from other disabilities with respect to a state disability insurance program suggests the familiar set of stereotypes—that women belong in the home raising children; that once women leave work to have babies, they do not return to the labor force; that pregnancy, though it keeps women from working, is not a "disability" but a blessing which fulfills every woman's deepest wish; that women are and should be supported by their husbands, not themselves or the state. These stereotypes appear to be so deeply ingrained, so tied to

156. Moreover, to the extent that the state shared the Court's concern for the poor as a reason for preserving the 1 percent rate, 94 S. Ct. at 2491, this justification is inconsistent with the regressive rate structure resulting from the $85-90 monthly ceiling. CAL. UNEMPL. INS. CODE § 985 (West Supp. 1974).

157. *E.g.*, Fuentes v. Shevin, 407 U.S. 67, 90 n.22 (1972); Bell v. Burson, 402 U.S. 535, 540 (1971); Goldberg v. Kelley, 397 U.S. 254, 265-66 (1970). *But see* United States v. Kras, 409 U.S. 434, 447-48 (1973).

158. Appellants argued that the incremeutal cost of extending coverage to pregnancy would be $120.2 million; appellees estimated the cost to be $48.9 million. 94 S. Ct. at 2490 n.18. This disparity is due principally to a dispute as to the projected birth rate and the average length of pregnancy disability. *See* Brief for Appellees at 85-89, Geduldig v. Aiello, 94 S. Ct. 2485 (1974).

159. Aiello v. Hansen, 359 F. Supp. 792, 798 (N.D. Cal. 1973), *rev'd sub nom.* Geduldig v. Aiello, 94 S. Ct. 2485 (1974).

fundamental beliefs about woman's place in the world as childbearer, that the Court apparently did not notice that they have nothing to do with the express purposes of the disability insurance program.

Undoubtedly many judges have more difficulty comprehending sex discrimination than they do race discrimination. The problems of a black man being edged out of a job, an equal education, or the opportunity to vote are easier for a white male judge to understand than the struggles of a woman seeking a different role in life than the one gratefully accepted by his grandmother, mother, and wife.[160] Sex roles today are more deeply entrenched than race roles; it is still acceptable, after all, to teach sex roles at home and in school, long after instruction in racial bias has gone underground. The ease with which sex discrimination may go unnoticed, resulting both from the familiarity of these stereotypes and from the uniqueness of certain aspects of sex discrimination, makes it all the more imperative that the constitutional mechanisms developed to sensitize the judiciary to sex stereotypes—often the unarticulated bases of discriminatory laws and practices—are not short-circuited.

The Supreme Court's decision in *Aiello* not only threatens the level of constitutional protection extended to sex discrimination; it will doubtless also affect the treatment of regulations or practices that classify on the basis of single-sex characteristics in the private employment sector under Title VII of the Civil Rights Act.[161] The Guidelines issued pursuant to Title VII, to which judicial deference is owed,[162] provide that disability from pregnancy and pregnancy-related conditions should be treated for all job-related purposes like any other disability.[163] They imply that employment policies that have a disparate impact on members of one sex, even if not all members of one sex, violate the Act.[164] Despite the obvious intent of these Guidelines, however, they do not provide specifically that pregnancy classifications should be treated as sex-based discrimination under Title VII. Thus, although Title VII is entitled to independent interpretation as a legislative mandate, *Aiello* may well influence the interpretation of this legislation and its administrative guidelines. One federal district court, for example,

160. Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U.L. REV. 675, 743-44 (1971).

161. 42 U.S.C. § 2000e-2 (Supp. 1972).

162. Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971); Udall v. Tallman, 380 U.S. 1, 16 (1965).

163. 29 C.F.R. § 1604.10 (1974); *cf.* 41 C.F.R. § 60-20.3(g)(1)-(2) (1974) (similar guidelines issued pursuant to Executive Order 11246, which prohibits sex discrimination by employers with government contracts).

164. *See, e.g.*, 29 C.F.R. § 1604.4 (1974). The guidelines were so interpreted in Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971).

in *Communication Workers of America v. A. T. & T.*,[165] has already interpreted *Aiello* to mean that singling out pregnant women for disparate treatment does not discriminate on the basis of sex for Title VII purposes. Other cases, where discrimination based on pregnancy was considered at the district court level to violate Title VII, may likewise be affected on appeal by analogy to the constitutional reasoning in *Aiello*.[166]

Passage of the Equal Rights Amendment[167] may provide one escape from the illogic of *Aiello*. While there is some confusion about the ERA's effect on classifications based on single-sex characteristics,[168] the most sensible interpretation has been suggested by Professor Emerson and three of his students.[169] This authoritative analysis has become part of the amendment's legislative history.[170] It asserts the basic principle that sex-based classifications under the ERA are *per se* invalid and a subsidiary principle that classifications based on single-sex characteristics are to be given strict scrutiny. The latter is essential to give teeth to the former, for without such a safeguard it is all too easy either intentionally or unintentionally to camouflage discrimination on the basis of characteristics unique to one sex.[171] *Aiello*, in fact, is a perfect example of this danger.

If the ERA fails to pass, or if it should be given an interpretation duplicative of the reasoning in *Aiello*,[172] women may have to wait for full equality until judges make the leap of faith which must often precede the shocking realization[173] that one's assumptions are unsupport-

165. 43 U.S.L.W. 2076, — F. Supp. — (S.D.N.Y., July 30, 1974).

166. *See, e.g.*, Gilbert v. General Elec. Co., 375 F. Supp. 367 (E.D. Va. 1974), *appeal docketed*, No. 74-1557, 4th Cir., May 15, 1974; Wetzel v. Liberty Mut. Ins. Co., 372 F. Supp. 1146 (W.D. Pa. 1974), *appeal docketed*, No. 74-1233, 3d Cir., March 5, 1974. *But see* Vineyard v. Hollister Elem. School Dist., 43 U.S.L.W. 2217, — F. Supp. — (N.D. Cal., Nov. 1, 1974).

167. As of September, 1974, 33 states have ratified the Amendment. Ratification by five more states is necessary before it will become part of the Constitution. It should be noted, however, that two states which have ratified, Tennessee and Nebraska, have attempted to rescind their action. Whether these states will be counted or will be able to rescind remains an unresolved question.

168. Hillman, *Sex and Employment under the Equal Rights Amendment*, 67 NW. U.L. REV. 789, 799-800 (1973).

169. Brown, Emersou, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 893-94 (1971).

170. 117 CONG. REC. 35012, 35016-17 (1971).

171. *Id.*

172. For the view that the ERA does not provide its own standards for settling the status of classifications based on single-sex characteristics, see Getman, *The Emerging Constitutional Principle of Sexual Equality*, 1972 SUP. CT. REV. 157, 173-4.

173. Judge Feinberg of the Second Circuit reveals part of the process by which such recognition is reached: "One realizes with a shock what so many women now proclaim: Old accepted rules and customs often discriminate against women in ways that have long

able stereotypes—roles assigned by man—rather than a part of the unchangeable divine order. This realization is all the more difficult when the overwhelming majority of men and women seem to take their respective roles for granted and when there seems to be much objective evidence supporting those stereotypes. But it must be recognized that stereotypes are essentially irrational and emotional reflexes which cannot always be destroyed by reason. As John Stuart Mill, writing about female stereotypes in 1869, stated: "So long as an opinion is strongly rooted in the feelings, it gains rather than loses in stability by having a preponderating weight of argument against it."[174]

The Court's recent tendency to bear down hard on sex discrimination in cases where it resembles aspects of race discrimination[175] indicates a willingness to implement some equality between the sexes. However, until that willingness is sparked by flashes of deeper insight into the unique characteristics of sex discrimination, women may expect equality only as long as they do not venture into those activtities, of which bearing a child is the most obvious example, that make them, well—somehow—different.

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been taken for granted or have gone unnoticed." Green v. Waterford Bd. of Educ., 473 F.2d 629, 634 (2d Cir. 1973).

174. J.S. MILL, *The Subjection of Women,* in ESSAYS ON SEX EQUALITY 126 (A. Rossi ed. 1970).

175. See text accompanying notes 88-98 *supra.*