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Constitutional Law--Equal Protection Discrimination Against Pregnancy Is Not Sex Discrimination--Geduldig v. Aiello

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chilling effect of unjustified damage awards, yet the injured plaintiff would be afforded the opportunity to vindicate his good name and to be compensated for his injured business and reputational interests. The result of this approach would be a more equitable balance between the competing interests of freedom of the press and the right of an individual to recover for harm to his reputation.[58]

IV. Conclusion

The Court in *Gertz* set about to clarify the constitutional ramifications of libel that have arisen from *New York Times* and its progeny. This objective may not have been achieved as *Gertz* now presents additional problems of determining what type of evidence is competent to establish actual injury and how courts will apply the discretion accorded them in limiting unjustified jury awards. Rather than being a definitive ruling on the state of the law, as Justice Blackmun asserts, *Gertz* may create confusion and uncertainty in the law of defamation if courts do not adequately deal with the new challenges posed by this ruling.

Constitutional Law —Equal Protection — Discrimination Against Pregnancy Is Not Sex Discrimination — *Geduldig v. Aiello,* 417 U.S. 484 (1974).

In a 6-3 decision, the United States Supreme Court held in *Geduldig v. Aiello*[1] that four California women who were refused state insurance benefits for pregnancy-related disabilities were not denied equal protection of the laws under the fourteenth amendment.[2] Moreover, in the opinion of the majority, disparate treatment of pregnant persons vis à vis nonpregnant persons was not sex discrimination.[3]

I. The Case

Carolyn Aiello and three other women, each suffering from a pregnancy-related disability,[4] were denied state disability insurance

[58]If the premise that freedom of the press needs more protection than it presently receives is rejected, the approach suggested becomes oppressive to the libel victim. As with all balancing problems, however, a line must be drawn. The approach detailed represents one believed to be equitable to both interests.

[1]Geduldig v. Aiello, 417 U.S. 484 (1974).

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

[3]417 U.S. at 496-97 & n.20.

[4]The four disability claims consisted of an ectopic pregnancy, a tubal pregnancy, a miscarriage, and a claim of physical incapacitation. Aiello v. Hansen, 359 F. Supp. 792, 794-95 (N.D. Cal. 1973).

benefits solely because section 2626 of the California Unemployment Insurance Code exempted pregnancy-related work losses from coverage until 28 days past the termination of pregnancy.[5] Contending that the exclusion violated the equal protection clause of the fourteenth amendment, the women brought a class action against the California Department of Human Resources. The plaintiffs sought to enjoin the department's enforcement of the exclusion and to compel a reevaluation of their insurance claims, arguing before a three-judge federal panel[6] that they had suffered sex discrimination. The women further asserted that sex is a suspect classification requiring a strict judicial scrutiny. Alternatively, they urged the court to adopt a standard which would be more stringent than the rational basis standard of judicial review traditionally used in determining the constitutionality of sex discrimination.[7] Two of the three judges found that the exclusion of pregnancy-related disabilities was not based upon a classification having a rational and substantial relationship to a legitimate state interest; the court held that the pregnancy exclusion unconstitutionally denied the women equal protection of the laws.[8]

Shortly before the federal district court's decision, the California Court of Appeals in *Rentzer v. California*[9] construed section 2626 to prohibit only the payments of benefits for disabilities resulting from normal pregnancies.[10] The Department of Human Resources called *Rentzer* to

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

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

[6] A three-judge court must be convened whenever an injunction against the enforcement of a state statute is sought as a remedy. 28 U.S.C. § 2281 (1970).

[7] Aiello v. Hansen, 359 F. Supp. at 796.

[8] *Id.* at 801.

[9] 32 Cal. App. 3d 604, 108 Cal. Rptr. 336 (2d Dist. Ct. 1973).

[10] Subsequent to the court's interpretation, section 2626 was amended to read: "Disability or disabled includes . . . *to the extent specified in* § 2626.2 pregnancy."

Section 2626.2 was added. It reads:

Benefits relating to pregnancy shall be paid under this part only in accordance with the following:

(a) Disability benefits shall be paid upon a doctor's certification that the claimant is disabled because of an abnormal and involuntary complication of pregnancy, including but not limited to: puerperal infection, eclampsia, caesarian section delivery, ectopic pregnancy, and toxemia.

(b) Disability benefits shall be paid upon a doctor's certification that a condition possibly arising out of pregnancy would disable that claimant without regard to the pregnancy, including but not limited to: anemia, diabetes, embolism, heart disease, hypertension, phlebitis, phlebothrombosis, pyelonephritis, thrombophlebitus, vaginitis, varicose veins, and venous thrombosis.

the court's attention and moved for a reconsideration of its decision in light of the state court's construction of the statute. The federal panel refused to reconsider, and the Department appealed to the United States Supreme Court.

The Supreme Court, in recognition of *Rentzer,* restricted its decision to the issue of nonpayment of benefits for pregnancy-related disabilities.[11] It rejected the lower court's view that such an exclusion constituted sex discrimination violative of the equal protection clause. According to the majority, the discrimination was not based on sex, but on the status of pregnancy, and was rationally related to the fiscal solvency of the state insurance program.[12]

The dissenters, Justices Brennan, Marshall, and Douglas, asserted that the pregnancy exclusion did constitute sex discrimination and that sex is a suspect classification requiring a strict judicial scrutiny.[13] They concluded that while California had a valid interest in preserving the fiscal integrity of its insurance program, that interest was not compelling enough to justify the state's use of a suspect classification in its insurance plan.[14]

II. Divergent Judicial Approaches

Prior to the Supreme Court's decision, lower state and federal courts were divided as to whether discrimination based on pregnancy was a form of sex discrimination;[15] however, until 1971 courts usually applied the rational basis test to both pregnancy and sex discrimination cases.[16] If the classifications drawn were found to be rationally related to the furtherance of either an actual or conjectured state interest, they were upheld.[17] Then in 1971 a unanimous Supreme Court in *Reed v. Reed*[18] determined that an Idaho statute giving males preference over females in the appointment of inheritance administrators violated the equal protection clause. Chief Justice Burger stated:

Cal. Unemp. Ins. Code § 2626 (West 1972), *as amended,* (Supp. I, 1974).

[11]417 U.S. at 491-92.

[12]*Id.* at 496 & n.20.

[13]*Id.* at 503.

[14]*Id.* at 504. The state's interest in saving money, by itself, does not justify the use of a suspect classification. Graham v. Richardson, 403 U.S. 365, 374-75 (1971); Shapiro v. Thompson 394 U.S. 618, 633 (1969).

[15]*See* Green v. Waterford Bd. of Educ., 473 F.2d 629 (2d Cir. 1973); Cohen v. Chesterfield County School Bd., 474 F.2d 395, 397 (4th Cir. 1973); *rev'd,* 414 U.S. 632 (1973); Hutchison v. Lake Oswego School Dist., 374 F. Supp. 1056, 1063 (D. Ore. 1974); Wetzel v. Liberty Mut. Ins. Co., 372 F. Supp. 1146, 1158-59 (W.D. Pa. 1974); Bravo v. Board of Educ., 345 F. Supp. 155, 157 (N.D. Ill. 1972); Hansen v. Hutt, 83 Wash. 2d 205, 517 P.2d 599, 602 (1974).

[16]*E.g.,* Hoyt v. Florida, 368 U.S. 57 (1961); Goesaert v. Cleary, 335 U.S. 464 (1948); Muller v. Oregon, 208 U.S. 412 (1908).

[17]Cases cited note 16 *supra.*

[18]404 U.S. 71(1971).

> The Equal Protection Clause . . . [denies] to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of that legislation . . . ."[19]

Two years after *Reed,* the Supreme Court in *Frontiero v. Richardson*[20] declared unconstitutional a federal statute which provided dependent benefits to male Air Force officers, but denied benefits to female officers, unless their husbands were in fact dependent upon them for over one-half of their financial support. The four justices joining in the Court's plurality opinion agreed that classifications based on sex are inherently suspect, subject to close judicial scrutiny, and sustainable only if they advance compelling state interests.[21]

The *Frontiero* plurality based their conclusion on a comparison of the characteristic of sex to that of race, and they admitted being influenced by recent congressional actions[22] such as the passage of Title VII of the Civil Rights Act of 1964,[23] the Equal Pay Act of 1963,[24] and the proposed Equal Rights Amendment.[25] Justice Stewart concurred that the discrimination was invidious but did not explain his rationale. Justices Powell, Burger, and Blackmun joined in the result but based their view on the belief that the case should be decided using the standard of judicial review enunciated in *Reed,* reserving for the future the question of whether sex should be labeled a suspect classification. They further reasoned that the proposed Equal Rights Amendment, if adopted, would resolve the issue and hence the plurality had acted prematurely in

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

[20] 411 U.S. 677 (1973).

[21] *Id.* at 688.

[22] *Id.* at 686-87.

[23] 42 U.S.C. § 2000e-2(a) (1970):

> It shall be an unlawful employment practice for an employer — (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

[24] 29 U.S.C. § 206(d) (1970):

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays to employees of the opposite sex in such establishment for equal work . . . .

[25] Article 1 of the proposed Equal Rights Amendment reads, "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." H.R.J. Res. 208, 92d Cong., 1st Sess. § 1 (1972).

deciding that sex was a suspect classification.

Following *Frontiero,* lower courts were divided, not only in determining whether discrimination based on pregnancy was sex discrimination, but also in deciding the standard of judicial scrutiny to be applied under the equal protection clause to sex discrimination cases.[26] In *Geduldig,* both issues were presented to the Supreme Court.

III. Pregnancy Discrimination as Sex Discrimination

In a footnote, the *Geduldig* majority reasoned that the California insurance program was not sex discriminatory. Justice Stewart stated:

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

The dissenting justices contended that the exclusion did discriminate on the basis of sex, arguing that:

> [A] limitation is imposed upon the disabilities for which women workers may recover, while men receive full compensation for all disabilities suffered, including those that affect only or primarily their sex, such as prostatectomies, circumcision, and hemophilia and gout. In effect, one set of rules is applied to females and another to males.[28]

Noting that the Equal Employment Opportunity Commission had taken the same position,[29] the minority argued that the crucial difference between the pregnancy-related disabilities excluded from coverage and other disabilities covered by the insurance program was that women suffered from pregnancy-related disabilities and men did not; hence, Cali-

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[26]*See, e.g.,* Robinson v. Board of Regents, 475 F.2d 707 (6th Cir. 1973); Eslinger v. Thomas, 476 F.2d 225, 231 (4th Cir. 1973); Johnston v. Hughes, 372 F. Supp. 1015 (E.D. Ky. 1974); Hanson v. Hutt, 83 Wash. 2d 205, 517 P.2d 599 (1974); Warshafski v. Journal Co., 63 Wis. 2d 130, 216 N.W. 2d 197 (1974).

[27]417 U.S. at 496 n.20.

[28]*Id.* at 501.

[29]In guidelines issued for the interpretation of Title VII of the Civil Rights Act of 1964, the Commission declared:

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

29 C.F.R. § 1064.10(b) (1973).

fornia discriminated on the basis of sex.[30]

The analysis of the majority in rejecting the plaintiffs' sex discrimination contention may be faulted for focusing on the class benefited rather than the class denied.[31] In *Frontiero,* for example, all the male officers but only some female officers with dependents were eligible for benefits, and only the female officers were required to show that they provided over one-half of the family support. Thus the class ultimately denied dependent benefits consisted only of women, and the Court concluded that women were being discriminated against on the basis of sex.[32] Similarly, in *Geduldig* the Court confronted a scheme granting benefits to all men and some women, and denying benefits to a class consisting only of women. However, rather than following the *Frontiero* rationale which found discrimination because only women were denied benefits, the *Geduldig* Court determined that the California coverage drew no sex distinctions among the class *receiving* the benefits and was therefore not discriminatory.[33] This emphasis seems contrary to the express language of the fourteenth amendment, which provides that no person shall be *denied* the equal protection of the laws.

The Court offered no explanation for its departure from the approach set out in prior decisions,[34] and the departure cannot be explained in terms of the disability excluded. To argue that pregnancy-related disabilities can be rationally excluded because the individual chooses to become pregnant is not persuasive, for California covers other disabilities over which the victim has control.[35] For example, compensation is provided for disabilities caused by obesity, a physical condition often created by voluntary acts.[36] Disabilities resulting from a barroom brawl initiated by the disabled are also compensable, as are disabilities caused by cosmetic surgery. Even disabilities as a result of a discretionary sex change operation are compensated by California's insurance program.[37] Further, the economic effects of pregnancy-related disabilities are similar to those of compensated disabilities. Because of pregnancy-related disabilities, women require hospitalization, incur medical expenses, are unable to work, and suffer diminished incomes.[38]

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[30]417 U.S. at 501.

[31]*See, e.g.,* Frontiero v. Richardson, 411 U.S. 677, 678-79 (1973); Reed v. Reed, 404 U.S. 71, 75 (1971); Gomillion v. Lightfoot, 364 U.S. 339, 341 (1968).

[32]411 U.S. at 678-79.

[33]*See* note 27 *supra* and accompanying text.

[34]*See* cases cited note 31 *supra.*

[35]417 U.S. at 499.

[36]Brief for Appellees at 21, Geduldig v. Aiello, 417 U.S. 484 (1974).

[37]*Id.*

[38]417 U.S. at 500; nearly two-thirds of all women who work do so out of necessity because they are unmarried, or because their husbands earn less than $7,000 annually. 417 U.S. at 501 n.5, *citing* WOMEN'S BUREAU, U.S. DEP'T. OF LABOR, WHY WOMEN WORK (Rev. ed. 1972).

The Court's class definitions are also subject to criticism. The majority posits pregnant persons and women as two separate classes, when in fact the class of pregnant persons is a subclass[39] within the larger class of women.[40] By comparison, it can hardly be doubted that a classification which denied benefits to a subclass of blacks (e.g., those with sickle-cell anemia)[41] while granting them to all whites (including those with other forms of anemia) would be unconstitutional racial discrimination.[42]

In an attempt to show that women were not discriminated against on the basis of sex, the majority noted that women contribute only 28 percent of the insurance premiums yet receive 38 percent of the benefits.[43] California, however, did not establish its insurance program on an actuarial basis,[44] but structured it to provide a disproportionate share of the benefits to those who receive smaller incomes and thus contribute smaller premiums.[45] Therefore, because wages for women in California average only 60 percent of those for men,[46] women receive a disproportionate share of the insurance benefits. This dividend is *not* received because they are women, but because they are economically less well off. Blacks also probably receive a disproportionate share of benefits[47] for the same reason. The extra benefits received by low-income women employees in general cannot be used to excuse the state's refusal to pay benefits to women disabled by pregnancy.

Furthermore, the majority's argument that women are discriminated against because they receive a disproportionate share of the benefits pre-

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[39]There are 105,000,000 women in the United States, and women within the child-bearing age make up 43.5 percent of the total female population. The annual fertility rate of women within the child-bearing age is 69 births per thousand women. Wetzel v. Liberty Mutual Ins. Co., 372 F. Supp. 1146, 1157-58 (W.D. Pa. 1974).

[40]Wetzel v. Liberty Mutual Ins. Co., 372 F. Supp. 1146, 1157 (W.D. Pa. 1974).

[41]Sickle-cell anemia is a hereditary disease suffered predominantly by blacks. *See* A. CERAMI & E. WASHINGTON, SICKLE CELL ANEMIA 75-81, 85-89 (1974).

[42]*See generally* Griffin v. County School Bd., 377 U.S. 218 (1964); Gomillion v. Lightfoot, 364 U.S. 339 (1960); Hall v. St. Helena Parrish School, 197 F. Supp. 649 (E.D. La. 1961), *aff'd mem.*, 368 U.S. 515 (1962).

[43]417 U.S. at 497 n.21. In other words, women receive $1.36 in benefits for every dollar they contribute to the insurance program.

[44]The contribution rate for a particular group of employees is not tied to that group's rate of disability claims. Aiello v. Hansen, 359 F. Supp. at 800. *See also,* CAL. UNEMP. INS. CODE § 2655 (West 1972).

[45]The full-time year-round employee making $50 per week is eligible for $31 per week in benefits or replacement of 62 percent of weekly wage loss. The $100 per week employee gets $57 weekly, or a 57 percent replacement. The $200 per week employee gets $105 per week or 52.5 percent replacement, and workers making more than $200 also get $105 or less than 50 percent of the weekly wage loss. Brief for Appellees, *supra* note 36, at 19-20.

[46]*See* WOMEN'S BUREAU, U.S. DEP'T OF LABOR, ECONOMIC REPORT OF THE PRESIDENT 106 (1973).

[47]Blacks receive smaller incomes than whites and would therefore receive a larger percentage of the benefits. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORT SERIES p. 60, No. 85, 533-35 (1971).

sumes that the classification at issue is male-female and is therefore inconsistent with their prior assertion that the classification is pregnant-nonpregnant.

IV. Standard Of Review

In *Geduldig*, the majority's conclusion that the exclusion of pregnancy-related disabilities was not sex discrimination avoided the necessity of specifying the standard of judicial review to be applied in future sex discrimination litigation. The dissenters, however, asserted that strict scrutiny should be applied in all such cases.[48] The dissenters' position is arguably incorrect.

Under the traditional analysis, a classification must undergo strict judicial scrutiny if the Supreme Court has declared that the right infringed is a fundamental right or that the basis of classification is suspect.[49] Although procreation has been established as a fundamental right,[50] here California has not prohibited persons from exercising the right to procreate; it has merely refused to pay for the normal bearing of children. Traditionally, states have been given great leeway in structuring their social programs to meet constitutional standards.[51] As the majority in *Geduldig* correctly stated, "There is nothing in the Constitution . . . that requires the State to subordinate . . . its . . . interests solely to create a more comprehensive social insurance program than it already has."[52] It is difficult to base a strict standard of judicial scrutiny on the presence of procreation as a factor in the case.

The creation by a state of a suspect classification can also trigger a strict standard of review. However, a clear majority of the Supreme Court has never labeled disparate treatment on the basis of sex a suspect classification.[53] Classifications have typically been labeled suspect when they impact on persons who are relatively powerless to protect their interests in the political process.[54] Whether this is true of women, or of pregnant women, is arguable, but only four members of the Court were convinced of the proposition in *Frontiero*.

Even if a strict standard is inapplicable, this does *not* mean that the sex discrimination in *Geduldig* can be constitutionally justified. The *Reed* decision requires that disparate treatment of the sexes must rest

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[48]417 U.S. at 503.

[49]*See, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 40, 97-98 (1972); Dunn v. Blumstein, 405 U.S. 330, 336-43 (1972); Graham v. Richardson, 403 U.S. 365, 371-72 (1971).

[50]Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

[51]Jefferson v. Hackney, 406 U.S. 535, 549-51 (1972); Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).

[52]417 U.S. at 496.

[53]Four Justices have done so, however. Frontiero v. Richardson, 411 U.S. 677 (1973).

[54]*See* Graham v. Richardson, 404 U.S. 365, 372 (1971).

upon some ground of difference having a fair and substantial relation to a legitimate state interest.[55] In *Geduldig*, the Court determined that the pregnancy exclusion was reasonably related to California's interest in prohibiting burdensome contributions from the employed.[56] It is doubtful, however, that the increased premium costs necessary to provide coverage for pregnancy-related disabilities would have been burdensome. Cost estimates for extending coverage to pregnancy-related disabilities varied between 49 and 131 million dollars,[57] but even by accepting the most expensive estimate, the state could have covered pregnancy by increasing the employee contribution rate from 1 percent to 1.364 percent of the employee's salary and by raising the premium ceiling from $85 to $119.[58] For example, an employee who earned $5,000 annually would have had to pay $1.50 in additional premiums per month;[59] the largest possible increase for any worker would have been $2.83 per month.[60] Thus, under the majority's argument California can exclude women from insurance coverage for normal pregnancy-related disabilities in order to save the average worker less than $2.83 per month.

The majority also asserted that the state has valid interests in maintaining a self-supporting program and in maintaining present benefit coverage.[61] However, by moderately increasing the insurance premiums, California could not only maintain the insurance program as self-supporting, but could also exceed the present level of benefit coverage.[62] Further, it cannot be seriously argued that the program was adequate when *Geduldig* arose. It provided basic benefits ranging from $25 to $105 per week. If the disability required hospitalization, an additional $12 per day was paid to the disabled,[63] but the hospital costs in California averaged over $149 per day in 1972.[64] In summary, California could

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[55]404 U.S. at 76.

[56]417 U.S. at 496.

[57]417 U.S. at 494 n.18.

[58]417 U.S. at 499 n.1, 505.

[59]Under the present program, a person earning $5,000 must contribute 1 percent of his annual wages or $50. Geduldig v. Aiello, 417 U.S. at 499 n.1. If California were to cover pregnancy-related disabilities, the individual would have to pay 1.364 percent of his annual income, which amounts to $68.20, an increase of $18.20 per year or approximately $1.50 per month.

[60]Prior to 1974, the maximum annual premium an individual had to pay was $85. Geduldig v. Aiello, 417 U.S. at 499 n.1. If California were to cover pregnancy-related disabilities, the most an individual would be required to pay is $119, or a yearly increase of $34, which is a monthly increase of approximately $2.83 per month. An individual who paid less than $85 prior to 1974 would have his premiums increased by .364 percent. This always works out to less than $2.83 per month.

[61]417 U.S. at 496.

[62]417 U.S. at 505; Aiello v. Hansen, 359 F. Supp. at 798.

[63]CAL. UNEMP. INS. CODE §§ 2655, 2801 (West 1972).

[64]BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT 1974, at 72 (95th ed.).

easily have expanded insurance coverage to normal pregnancy-related disabilities and still maintained its interests in prohibiting burdensome contributions, continuing the program as self-supporting and providing the same level of benefits.

In cases where the strict scrutiny standard of judicial review is inapplicable, the Supreme Court has traditionally interpreted the fourteenth amendment as allowing the states great leeway in establishing social programs.[65] Certainly, the amendment cannot be read to require a state to establish a maternity insurance program and to tax its citizens in support of such a program. The Court has said:

> [A] 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."[66]

Nevertheless, California's insurance program covers all disabilities that require hospitalization except one — the disability resulting from a normal pregnancy.[67] Exclusion of pregnancy-related disabilities amounts to a saving of less than $2.83 per month for the average worker and can hardly be considered to bear a fair and substantial relationship to a goal of avoiding burdensome insurance premiums, particularly in light of the coverage provided for voluntary and involuntary male sex-related disabilities.[68] The *Reed* decision would seem to proscribe discrimination against pregnant women for such a slight sum.

V. Conclusion

Because the majority denied that the exclusion of pregnancy-related disabilities was sex discrimination, the Court did not specify a standard of judicial review to be applied in future sex discrimination conflicts. Nevertheless, the *Geduldig* decision will affect prospective sex discrimination litigation. In *Communication Workers of America v. AT&T*,[69] the district court utilized the *Geduldig* rationale to hold that an employer's disparate treatment of pregnant employees did not, in and of

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[65]Cases cited note 51 *supra*.

[66]Geduldig v. Aiello, 417 U.S. at 495 (citations omitted).

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> While the act technically excludes from coverage individuals under court commitment for dipsomania, drug addiction, or sexual psychopathy, Unemp. Ins. Code § 2678, the [Supreme] Court was informed by the Deputy Attorney General of California at oral argument that court commitment for such disabilities is "a fairly archaic practice" and that "it would be unrealistic to say that they constitute valid exclusions."

Geduldig v. Aiello, 417 U.S. at 499 n.3.

[68]Some examples are: prostatectomies and circumcisions, sex change operations, vasectomies, and hemophilia. Geduldig v. Aiello, 417 U.S. at 501, Brief for Appellees *supra* note 36 at 21, 23.

[69]2 CCH Emp. Pract. G. (8 EPD) 9615, at 5637 (S.D.N.Y. Aug. 2, 1974).

itself, violate the ban on sex discrimination contained in Title VII of the Civil Rights Act of 1964.[70] The court stated:

> The threshold question is whether disparity of treatment between pregnancy-related disabilities can be classified as discrimination based on sex. If, as footnote 20 [in Geduldig] seems to suggest, it cannot be so classified, then the further question of whether such disparity is justified — or less justified in the employment context than in some other context — can never be reached.[71]

Thus, pregnant women appear to have lost the protection formerly guaranteed them under Title VII of the Civil Rights Act of 1964. This need not have occurred. In allowing California to refuse to insure coverage for pregnancy, the Court did not have to deny that discrimination against pregnant women is sex discrimination.

Constitutional Law — MOOTNESS — *DeFunis v. Odegaard,* 416 U.S. 312 (1974).

Marco DeFunis applied for admission to the University of Washington Law School for the 1971–72 school year but was denied admittance.[1] After his rejection, DeFunis, a white, learned that several minority applicants had been preferentially considered and accepted with lower academic qualifications than his.[2]

DeFunis commenced an action in a Washington state court seeking to compel his admission. The trial court granted DeFunis a temporary injunction allowing him to enter law school in September of 1971, and subsequently ruled that the admissions procedures violated the equal protection clause.[3] The Supreme Court of Washington reversed the lower court, ruling DeFunis had not demonstrated, as a matter of fact, that the law school's admissions procedures were unconstitutional.[4] The United States Supreme Court granted certiorari[5] and the judgment of

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[70] 42 U.S.C. § 2000e-2(a) (1970).

[71] 2 CCH EMP. PRACT. G. at 5639.

[1] The class was to be limited to 150 students; 1601 applications were received. 416 U.S. 312, 314 (1974).

[2] Certain minority groups are given preferential treatment by the admissions committee. These groups include Black, Chicano, Native, and Filipino Americans. In determining the probability of success in law school, less weight was placed on the grade-point averages and admission test scores of members of these groups than of other applicants. DeFunis v. Odegaard, 82 Wash. 2d 1121, 507 P.2d 1169, 1175 (1973) (en banc).

[3] DeFunis v. Odegaard, No. 741727 (Wash. Super. Ct. King Co. 1971) (oral decision), found in 1 A. GINGER, DEFUNIS VERSUS ODEGAARD AND THE UNIVERSITY OF WASHINGTON, THE UNIVERSITY ADMISSIONS CASE 115 (1974).

[4] 82 Wash. 2d 11, 507 P.2d 1169 (1973) (en banc).

[5] 414 U.S. 1038 (1973).