THE CONSTITUTIONALITY OF PREGNANCY DISCRIMINATION: THE LINGERING EFFECTS OF *GEDULDIG* AND SUGGESTIONS FOR FORCING ITS REVERSAL

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INTRODUCTION

In the 1974 opinion of *Geduldig v. Aiello*,[1] the Supreme Court ruled that discrimination on the basis of pregnancy is not, under the equal protection clause of the Fourteenth Amendment, discrimination on the basis

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1. 417 U.S. 484 (1974).

of sex. In upholding a California state disability insurance program which denied benefits for pregnancy-related needs,[2] the Court reasoned that the program did not treat women differently from men. Instead, the program differentiated between the categories of pregnant and non-pregnant people.[3]

The public and legal community reacted to this decision with anger and skepticism. Yet the immediate impact of *Geduldig* was blunted as the lower federal courts quickly began to limit the ruling's implications by distinguishing cases arising under Title VII of the Civil Rights Act of 1964.[4] These courts refused to apply the logic of *Geduldig* to cases in the employment context, reasoning that *Geduldig* applied only to constitutional cases brought under the equal protection clause.[5] However, just two years later, in *General Electric Co. v. Gilbert*,[6] the Supreme Court closed this escape

2. The governing statute provided that: "In no case shall the term 'disability' or 'disabled' include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter." *Id.* at 489 (quoting CAL. UNEMP. INS. CODE § 2626). Since a California state court had previously ruled that this provision did not bar benefits for a disability resulting from medical complications arising during pregnancy, *see* Rentzer v. California Unemployment Insurance Appeals Board, 108 Cal. Rptr. 336 (Cal. Ct. App. 1973), only claims connected to normal pregnancy were at issue in the case.

3. The Court justified this doctrinal development in an infamous footnote:

> 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 . . . The program divides potential recipients into two groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.

Geduldig, 417 U.S. at 497 n.20.

4. 42 U.S.C. §§ 2000e to 2000e-17 (1996). All six circuit Courts of Appeal which considered the issue found *Geduldig* inapplicable to cases brought under Title VII. *See* Communications Workers, AFL-CIO v. AT&T Long Lines Dep't, 513 F.2d 1024 (2d Cir. 1975); Wetzel v. Liberty Mutual Ins. Co., 511 F.2d 199 (3d Cir. 1975), *vacated on other grounds*, 424 U.S. 737 (1976); Gilbert v. General Electric Co., 519 F.2d 661 (4th Cir. 1975), *rev'd*, 429 U.S. 125 (1976); Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975); Satty v. Nashville Gas Co., 522 F.2d 850 (6th Cir. 1975), *rev'd in part and upheld in part on other grounds*, 434 U.S. 136 (1977); Hutchison v. Lake Oswego Sch. Dist., 519 F.2d 961 (9th Cir. 1975).

5. These decisions were supported by the Equal Employment Opportunity Commission's guidelines, 29 C.F.R. § 1604.10(b), which interpreted Title VII to prohibit discrimination on the basis of pregnancy: "[Benefits] shall be applied to disability due to pregnancy, childbirth, or related medical conditions on the same terms and conditions as they are applied to other disabilities." The lower courts were persuaded that the Supreme Court could not have intended such a major revision in prevailing statutory interpretation with just a passing reference in a footnote. *See, e.g., AT&T*, 513 F.2d at 1028. In Vineyard v. Hollister Elementary School District, 64 F.R.D. 580, 585 (N.D. Cal. 1974), a district court based its distinction on the fact that Title VII "addresses the problems of employment discrimination based on sex and race more specifically than the broad mandate of the equal protection clause. . . ."

6. 429 U.S. 125 (1976).

hatch by extending *Geduldig*'s reasoning to Title VII.[7] This time, the public was furious.[8]

Congress quickly overruled the *Gilbert* decision with the Pregnancy Discrimination Act of 1978 (PDA).[9] This law amended Title VII to make explicitly clear that, under the statute, pregnancy discrimination constitutes sex discrimination.[10] In *Newport News Shipbuilding & Dry Dock Co. v. EEOC*,[11] the Court acknowledged that Congress overruled *Gilbert* by passing the PDA and held that an employer could no longer deny insurance coverage for pregnancy if it provides employees with an otherwise comprehensive health insurance plan.

Despite the far-reaching effects of the PDA in the employment context,[12] the rule of *Geduldig* still applies to all situations not covered by Title

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7. In *Gilbert*, the Court acknowledged that *Geduldig* was not binding on Title VII cases but nevertheless adopted *Geduldig*'s reasoning, which it found "quite relevant":

> While there is no necessary inference that Congress . . . intended to incorporate into Title VII the concepts of discrimination which have evolved from court decisions construing the equal protection clause of the Fourteenth Amendment, the similarities between the congressional language and some of those decisions surely indicate that the latter are a useful starting point in interpreting the former. Particularly in the case of defining the term "discrimination," which Congress has nowhere in Title VII defined, those cases afford an existing body of law analyzing and discussing that term in a legal context not wholly dissimilar to the concerns which Congress manifested in enacting Title VII.

Gilbert, 429 U.S. at 133. Even after *Gilbert*, many states still avoided the Court's ruling by distinguishing their own anti-discrimination statutes from the Federal Title VII, even when the language was very similar. *See infra* note 155 and accompanying text.

8. Because the lower courts were unanimous on the issue, the Supreme Court was not resolving a split among circuits but instead overturning well-agreed upon law. Justice Brennan vigorously noted this point in his dissent. *See Gilbert*, 429 U.S. at 146 (Brennan, J., dissenting). Soon after the opinion was issued, a coalition of feminist advocates, labor unions, and civil rights groups established the Campaign to End Discrimination Against Pregnant Workers, which worked to reverse the decision legislatively. *See* Wendy S. Strimling, *The Constitutionality of State Laws Providing Employment Leave for Pregnancy: Rethinking* Geduldig *After* Cal Fed., 77 CAL. L. REV. 171, 187 (1989).

9. Pub. L. No. 95-555, § 1, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1996)).

10. The PDA added a provision to the definitions section of Title VII, explaining that:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.

Id.

11. 462 U.S. 669 (1983).

12. Although it was an important advance over *Gilbert*, the PDA's ability to help pregnant women in the workplace is still severely limited. Its anti-discrimination model leaves several basic problems unaddressed. For example, the Eighth Circuit has ruled that an employer who does not hire a woman because she is pregnant does not necessarily violate Title VII if the employer would not have hired anyone who needed to take a leave so soon after starting work. *See* Marafino v. St. Louis County Circuit Court, 707 F.2d 1005 (8th Cir. 1983). More recently, the Seventh Circuit similarly held that an employer is not in violation of Title VII for firing a woman just before her maternity leave if the employer does not

VII.[13] This anomalous doctrine not only has practical detrimental implications in a variety of legal settings, but it also creates a conceptual barrier to the development of a more progressive feminist approach in the Supreme Court's jurisprudence. Over the years, many commentators have called on the Court to overrule *Geduldig*.[14] Despite its unpopularity, the decision has persisted.

Although discussion of this issue may have subsided somewhat in the last decade, now would be a good time to reopen the challenge. Current circumstances—including the addition of women's rights crusader Justice Ruth Bader Ginsburg to the Supreme Court, the continued attempts by state and lower federal courts to avoid the *Geduldig* doctrine, and the development of law in related areas that could isolate the doctrine—may make it possible for the Court to revisit the decision.

This article explores approaches that advocates could use to persuade the Court to overrule *Geduldig*. Part I begins by investigating the current effects of *Geduldig*'s continued existence—first, its concrete implications and, second, the broader doctrinal difficulties it poses. Part I concludes by addressing the propriety of openly attempting to force this already-resolved issue before the Court, rather than confronting it in another forum, such as Congress, the states, or a constitutional amendment effort.

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think she will return to work after her leave is over. *See* Troupe v. May Dep't Stores Co., 20 F.3d 734 (7th Cir. 1994). Chief Judge Posner explained that under the PDA, "[e]mployers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees." *Id.* at 738.

Some courts and commentators have argued that the PDA should be construed more broadly. *See, e.g.*, Abraham v. Graphic Arts Int'l Union, 660 F.2d 811 (D.C. Cir. 1981) (finding inadequate employee leave policy itself violates Title VII as amended by the PDA); Andrew Weissmann, *Sexual Equality Under the Pregnancy Discrimination Act*, 83 COLUM. L. REV. 690 (1983) (arguing that based on the statute's text, legislative history, and judicial interpretations of the statute, proper analysis of sex discrimination under the PDA requires taking differences between the needs of women and men into account, for example by providing parental leave).

The Family and Medical Leave Act of 1993 (FMLA) has begun to address the need for both women and men to take time off from work for childbirth and other health-related family reasons. 29 U.S.C. § 2601 (1993). However, since the leave mandated under this law is unpaid, brief, and applies to only about half of American workers, it is still far from adequate in reducing the disproportionate family-related burdens carried by working women. For a discussion of the limitations of the FMLA, see Samuel Issacharoff & Elyse R. Rosenblum, *Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154 (1994).

13. It might now be possible, however, to convince the Court to recognize the PDA's relevance to constitutional law development, just as the Court looked to analogous constitutional law to interpret Title VII in *Gilbert*. *See* Lorraine Hafer O'Hara, *An Overview of Federal and State Protections for Pregnant Workers*, 56 U. CIN. L. REV. 757, 777 n.43 (1987) (stating that the PDA has implicitly overruled *Geduldig*); and *see infra* text accompanying notes 80-89.

14. Professor Sylvia Law has called *Geduldig* "the false step that Congress, nearly every commentator, and the Court itself have regarded it," and has pointed out that a "cottage industry" has grown up around criticizing the holding. Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 983, 1037 (1984).

Part II analyzes other Supreme Court decisions. It looks at some open doors and internal inconsistencies in the Court's opinions which might enable the Court either to reconsider *Geduldig* or to narrow substantially the decision's implications. It also provides a brief analysis of how the current Justices on the Court might respond to such a challenge. Part III considers state court opinions which have circumvented or weakened the *Geduldig* doctrine and suggests how these decisions might be broadened or persuasively presented to the Supreme Court.

Finally, Part IV briefly examines a variety of areas which raise similar conceptual issues to the problem in *Geduldig* and evaluates the potential usefulness of each issue in challenging *Geduldig*. The section then provides a fuller discussion of how current challenges to last year's federal welfare law and various states' responses to that law might be used to attack the *Geduldig* holding. The paper concludes with some brief thoughts about how advocates who are interested in pursuing the goal of overruling *Geduldig* might consolidate their efforts into a plan for action.

I.
CONTINUING EFFECTS OF *GEDULDIG*

A. Concrete Implications

The California disability insurance statute upheld in *Geduldig* has been amended so that it no longer discriminates on the basis of pregnancy.[15] Also, other states with similar laws removed their pregnancy exclusion provisions from disability, unemployment, and workers' compensation statutes long ago.[16] In fact, in recent years, controversy over pregnancy discrimination has concentrated more on the issue of whether states can extend *more* benefits to pregnant women than to other people.[17]

However, not all states have made these changes. For example, a Michigan state court has recently relied on *Geduldig* to hold that the state Workers' Disability Compensation program is not required to extend benefits to pregnant women, who, but for their pregnancies, would be capable of working.[18] Furthermore, with fiscal pressures continually forcing states to find new ways of tightening their budgets, there is a distinct risk under

15. In fact, in 1973, before *Geduldig* even reached the Supreme Court, the California legislature added a provision to the California statute allowing for limited benefits for pregnancy-related disabilities. The current statute, as amended in 1979, now explicitly defines disability to include "any illness or injury resulting from pregnancy, childbirth, or related medical condition." CAL. UNEMP. INS. CODE § 2626(b)(1) (Deering 1996).

16. *See, e.g.*, WASH. REV. CODE ANN. § 50.20.030 (West 1962) (excluding pregnant women from unemployment compensation) (repealed 1975); N.J. REV. STAT. § 43:21-39(e) (1962) (excluding pregnant women from disability benefits) (*amended by* P.L. 1980, c. 90 (1980)).

17. *See* California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) [hereinafter *Cal.Fed.*] (upholding state statute requiring employers to provide leave and reinstatement for pregnant workers). *See also infra* Part II.A.

18. Lee v. Koegel Meats, 502 N.W.2d 711 (Mich. Ct. App. 1993).

the *Geduldig* doctrine that any voluntary legislative advances in this area may have only represented a temporary shift in attitudes. Without a change in constitutional law, states are free to reenact measures that deny benefits to pregnant women, as long as they do not fall into the employment arena covered by Title VII or parallel state laws.

In the many employment situations not regulated by state or federal anti-discrimination statutes, *Geduldig* still leaves pregnant women vulnerable to unfair denials of benefits and equal treatment. Although federal and state employment anti-discrimination statutes cover a broad field, they do not protect pregnant women from discrimination by health insurance plans not offered through employers,[19] small employers who are exempt from anti-discrimination statutes,[20] and, in some cases, government employers.[21] In addition, the lack of constitutional protection may influence courts' common law decisions. For example, upon finding no statutory or constitutional prohibition against pregnancy discrimination in Arkansas, the Eighth Circuit recently refused to create a public policy exception to the employment-at-will doctrine which would have prevented an employer from firing a pregnant worker.[22] In addition to allowing the denial of pregnancy benefits, the *Geduldig* reasoning has also been used to justify state-sponsored insurance plans that do not cover women's other health needs, such as pap smears and gynecological examinations.[23]

19. According to a recent study by the American Hospital Association, currently only about 55 percent of the nation's workers and their dependents are covered by employer-provided health insurance. *See* John G. Carlton, *A Regional Problem: People Without Medicaid or Health Insurance Still Get Sick, Still Need Care, Still Can't Pay*, ST. LOUIS-POST DISPATCH, May 4, 1997, at 1B. This figure is down from the 56.8% in 1995 and 61% in 1991 according to data from the Employee Benefit Research Institute. *See* Henry L. Davis, *Two Years Later, No Health Care Reform in Sight*, BUFF. NEWS, Nov. 19, 1995, at C1. For the remainder of the population, no comprehensive law protects against pregnancy discrimination in insurance. *See, e.g.*, Scott v. American Bar Association, 652 F. Supp. 1419, 1421 (E.D. Pa. 1987) (holding that a law student had no legal grounds to challenge her insurance company's elimination of maternity benefits from its group health plan) (citing *Geduldig*).

20. Title VII does not apply to employers with less than fifteen employees. 42 U.S.C. § 2000e(b) (1996). While some state laws cover even smaller employers, *see, e.g.*, California Fair Employment and Housing Act (FEHA), CAL. GOV'T CODE § 12926(d) (Deering 1996) (covering employers with five or more employees), not all states have enacted a parallel PDA or judicially interpreted their employment discrimination statutes to have incorporated the PDA. For example, until 1988, the Colorado state anti-discrimination statute did not prohibit pregnancy discrimination because the state statute had not been amended by a provision parallel to the federal PDA.

21. In a relatively recent case, one district court held that it would be bound by *Geduldig* to deny a claim by state employees challenging their denial of disability benefits during high-risk pregnancies on equal protection grounds. Osterberg v. Bd. of Trustees of the State Employees' Retirement System, 722 F. Supp. 415, 416 (N.D. Ill. 1989). Until the recent passage of the Congressional Accountability Act of 1995, Pub. L. No. 104-1, 109 Stat. 3 (1995), Congressional staff were exempt from Title VII protection.

22. Hughes v. Matthews, 986 F.2d 1168, 1170 (8th Cir. 1992).

23. *See, e.g.*, Bond v. Va. Polytechnic Inst. & State Univ., 381 F. Supp. 1023 (W.D. Va. 1974) (holding no equal protection violation in a student health plan which did not include these services). The *Bond* court reasoned that the plaintiffs were not able to name any risks

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996,[24] which abolished a nationwide minimum guarantee of benefits for welfare recipients and requires states to implement their own welfare programs, is already having an impact on pregnant women. For example, with certain exceptions, states are now required to bar benefits for unmarried pregnant teenagers and teenage mothers who do not live with approved adults, such as their own parents. In addition, a number of states have begun to implement or strengthen requirements that unmarried pregnant women and mothers provide information to state officials regarding absent fathers or lose a portion of their benefits.[25] Under *Geduldig*, states may now enact measures such as these that discriminate on the basis of pregnancy without violating the equal protection clause.[26]

Finally, *Geduldig* has continued to influence state constitutional law, acting to inhibit the emergence of state constitutional grounds for recognizing pregnancy discrimination as sex discrimination.[27] Although states are free to interpret their own constitutions more expansively than the Supreme Court interprets the Federal Constitution,[28] state courts often rely on federal constitutional law when confronted with novel state constitutional issues.[29]

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from which men were protected but women were not. *See also* Women Prisoners of the District of Columbia Dept. of Corrections v. District of Columbia, 93 F.3d 910 (D.C. Cir. 1996) (availability of fewer programs to female inmates than to male inmates, including inadequate gynecological and prenatal care, did not violate equal protection clause).

24. Pub. L. 104-193, § 101, 110 Stat. 2105 (1996).

25. *See, e.g.*, Doris Sue Wong, *Weld Retreats on Welfare Mothers Rule*, BOSTON GLOBE, April 6, 1996, at 1 (describing a class-action lawsuit challenging such a requirement in Massachusetts). See *infra* Section IV.G. for further discussion of the impact of the new welfare law on pregnant women.

26. *See* Douglas v. Sullivan, 792 F. Supp. 1030, 1035 (E.D. Mich. 1991) (finding no equal protection violation in a state scheme which denied AFDC benefits to women who did not cooperate in helping the state determine their children's paternity). The *Douglas* court used the rational basis test to uphold the distinction between women who were eligible only for pregnancy benefits (who did not have to cooperate) and women who were eligible for pregnancy as well as other benefits (who did have to cooperate). Thus the court avoided the *Geduldig* issue which would have been raised if it had, more logically, viewed the distinction to be between pregnant women who needed non-pregnancy related benefits and non-pregnant people who needed non-pregnancy related benefits.

27. *See, e.g.*, Lee v. Koegel Meats, 502 N.W.2d 711, 714 (Mich. Ct. App. 1993) (relying on *Geduldig* to uphold a discriminatory worker's compensation disability benefits program).

28. In some cases, state courts have seized upon relatively minor differences in language to find broader intentions by state constitutional framers. *See, e.g.*, Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980) (upholding California Supreme Court decision which found greater free speech guarantee under state than under Federal Constitution). The increasingly conservative federal courts have led many civil rights advocates in the 1980s and 1990s to shift their focus to state courts in an attempt to develop state constitutional interpretations that would extend more rights to disadvantaged groups than the federal courts now recognize under the Federal Constitution. *See, e.g.*, Badih v. Myers, 43 Cal. Rptr.2d 229, 231 (Cal. Ct. App. 1995) (holding that pregnancy discrimination is sex discrimination under the California Constitution).

29. *See, e.g.*, People v. Kimery, 676 N.E.2d 656, 661-62 (Ill. 1997) (Illinois double jeopardy clause must be construed in same manner as federal clause); State v. Champoux, 555

State statutes explicitly discriminating against pregnant women may be relatively rare today compared to the time *Geduldig* was decided. But, as shown here, *Geduldig* continues to have practical consequences beyond the narrow issue of whether pregnant women are being discriminated against when denied state benefits. In addition, as the next section will show, *Geduldig*'s theoretical implications go even further.

B. Doctrinal Difficulties

1. Constitutional Analysis Under Rational Basis

The doctrinal implication of *Geduldig* with which this article is concerned is that laws which discriminate on the basis of pregnancy are subject to equal protection review under the lowest level of constitutional scrutiny, the rational basis test. Under this test, a state must merely show that a law is rationally related to any legitimate government interest.[30] In contrast, the Supreme Court has extended heightened equal protection scrutiny to

N.W.2d 69 (Neb. 1996) (adopting U.S. Supreme Court's interpretation of federal due process clause in interpreting state due process clause); University of Texas Medical School at Houston v. Than, 901 S.W.2d 926, 929 (Tex. 1995) ("Although not bound by federal due process jurisprudence. . .we consider federal interpretations of procedural due process to be persuasive authority in applying our due course of law guarantee."); Right to Choose v. Byrne, 450 A.2d 925, 932 (N.J. 1982) (although "state Constitutions may provide more expansive protection of individual liberties than the United States Constitution. . .we proceed cautiously before declaring rights under our state Constitution that differ significantly from those enumerated by the United States Supreme Court in its interpretation of the federal Constitution. . . .Our caution emanates, in part, from our recognition of the general advisability in a federal system of uniform interpretation of identical constitutional provision."). *See also* Stuart D. Rudoler, *Developments in State Constitutional Law: 1993*, 25 RUTGERS L.J. 1107 (1994).

Federal courts, when applying state law, are likely to be even more influenced by federal constitutional law in areas of state constitutional law that are relatively undeveloped. Although required to determine what the state courts would themselves decide, federal courts frequently assume that state courts would themselves look to federal law for guidance. *See, e.g.*, Jane L. v. Bangerter, 794 F. Supp. 1528, 1533-34 (D. Utah 1992) (rejecting state equal protection challenge to Utah's abortion restrictions, holding that Utah's equal protection clause requires the same interpretation as the federal constitutional provision).

30. *See, e.g.*, Heller v. Doe, 509 U.S. 312 (1993) (applying the rational basis test and upholding state distinctions between the mentally retarded and the mentally ill in the context of involuntary confinement). As the *Heller* court explained, "a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. . . .[Such a classification] 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Id.* at 319-20 (quoting FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993)).

laws affecting only certain classifications of people.[31] While sex, as a classification, has received heightened "intermediate" scrutiny,[32] pregnancy has not. Thus, as long as pregnancy is analyzed as a classification distinct from gender, laws which discriminate against pregnant women will not be held to a higher standard of review.[33] Because the rational basis test is so easy to satisfy, the test provides little constitutional protection against laws that discriminate on the basis of pregnancy.[34]

Subjecting classifications on the basis of pregnancy to heightened scrutiny would not mean that all such classifications would be invalidated. Thus, women's advocates need not worry that an overruling of *Geduldig* would preclude any and all special treatment for pregnancy.[35] The intermediate scrutiny standard, as it has been applied to evaluating classifications on the basis of sex, examines whether the challenged law "serve[s]

31. The most stringent equal protection test, strict scrutiny, first articulated in *Korematsu v. United States*, 323 U.S. 214 (1944), has been reserved for classifications on the basis of race. The Court has applied intermediate scrutiny, a lower level of scrutiny, to classifications on the basis of: sex, *see, e.g.*, Craig v. Boren, 429 U.S. 190 (1976); alienage, *see, e.g.*, Sugarman v. Dougall, 413 U.S. 634 (1973); parents' marital status, *see, e.g.*, Pickett v. Brown, 462 U.S. 1 (1983); and, though it soon retreated sharply from this position, wealth, *see, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970).

32. The intermediate scrutiny test, which evolved as a compromise between the strict scrutiny and rational basis tests for classifications on the basis of sex, was first used in *Craig v. Boren*, 429 U.S. 190 (1976), which struck down an Oklahoma statute which established different minimum ages at which females and males could purchase nonintoxicating beer. The intermediate scrutiny has become standard doctrine governing review for gender classifications.

However, last year the Supreme Court hinted at a shift toward a more "skeptical scrutiny" for gender. In United States v. Virginia, 116 S.Ct. 2264, 2274 (1996), the Court found that a state-supported all-male military academy violated the equal protection clause. Writing for the majority, Justice Ginsburg explained that, "Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." Although the Court has so far refused to elevate sex to the same standard of scrutiny reserved for race and national origin, some advocates continue to press for strict scrutiny. *See, e.g.*, John Galotto, *Strict Scrutiny for Gender, via* Croson, 93 COLUM. L. REV. 508, 508, 519-24 (1993).

33. *But see infra* text accompanying notes 130-135, regarding the possibility of convincing the Supreme Court to extend the intermediate scrutiny test to pregnancy independently of sex, thus avoiding the need to overturn *Geduldig* explicitly.

34. However, one former Supreme Court Justice would have invalidated pregnancy discrimination under the rational basis test. *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 653 (1974) (Powell, J., concurring). *See also infra* text accompanying notes 136-141.

35. In the area of employment law, the feminist legal community has been very divided on this issue. Although some believe that preferential treatment does more harm than good for women by giving employers strong incentive to discriminate against them, *see, e.g.*, Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 348 (1985), others argue that special allowances must be made for pregnancy in order to ensure women the opportunity to participate equally with men in the workplace, *see, e.g.*, Issacharoff and Rosenblum, *supra* note 12, at 2155. In *Cal.Fed.*, a number of women's organizations urged the Court to strike down a California state law mandating pregnancy leave. *See* Brief for the National Organization for Women; NOW Legal Defense and Education Fund; National Bar Association; Women's Lawyers' Division, Washington Area Chapter; National Women's Law Center; Women's Law Project; and Women's Legal Defense Fund, Amici Curiae, *Cal.Fed.*, 479 U.S. 272

important governmental objectives" and is "substantially related to achievement of those objectives."[36] Similarly, pregnancy classifications, if subjected to intermediate scrutiny, would be invalidated only if they could not be defended as relating substantially to the achievement of important governmental objectives. But in order for the courts even to perform this type of analysis with respect to pregnancy, it is first necessary for the Supreme Court to take the step of accepting that classifications on the basis of pregnancy are equivalent to classifications on the basis of sex.

In response to concerns regarding how the Court might apply intermediate scrutiny to the context of pregnancy, one author, Wendy Strimling, has advocated a refined intermediate scrutiny test.[37] Rather than focusing on the state's purported objectives, her analysis would more sensitively examine the impact that the law actually has on women's lives.[38] Under Strimling's proposal, a law would survive constitutional scrutiny if it has a positive "impact on the social and economic status of women."[39] Strimling

(1987) (No. 85-494). Others argued for it to be upheld. *See* Brief for Equal Rights Advocates; California Teachers Association; Northwest Women's Law Center; San Francisco Women' Lawyers Alliance, Brief Amici Curiae, *Cal.Fed.*, 479 U.S. 272 (1987) (No. 85-494). For further discussion of this controversy, see Strimling, *supra* note 8, at 194-96; Lisa A. Rodensky, California Federal Savings and Loan Association v. Guerra: *Preferential Treatment and the Pregnancy Discrimination Act*, 10 HARV. WOMEN'S L.J. 225 (1987); Tamar Lewin, *Maternity-Leave Suit Has Divided Feminists*, N.Y. TIMES, June 28, 1986, at 52. *See also* Martha Minow, *The Supreme Court, 1986 Term, Justice Engendered, Foreword*, 101 HARV. L. REV. 10, 17-19 (1987) (arguing that this controversy, which Minow refers to as the "difference dilemma," stems from the characterization of maleness as the norm; Minow advocates for use of an alternate perspective which incorporates the point of view of a pregnant worker).

36. *Craig*, 429 U.S. at 197.

37. *See* Strimling, *supra* note 8, at 174.

38. Strimling borrows this test from legal scholars Catharine MacKinnon and Sylvia Law. *See* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 117 (1979); Law, *supra* note 14, at 1008-09. However, while MacKinnon and Law seek to restructure entirely the three-tiered equal protection doctrine, Strimling proposes incorporating her test into the traditional equal protection framework.

39. Strimling argues that pregnancy discrimination should be seen sometimes, but not always, as unlawful sex discrimination. Strimling, *supra* note 8, at 203. Current intermediate scrutiny doctrine, Strimling and others argue, makes it too easy for a state to justify gender classifications merely on the basis of biological differences. For example, many women's advocates assail *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464 (1981), in which the Supreme Court upheld a statutory rape law that subjected males, but not females, to criminal prosecution. The Court reasoned that "real differences," specifically females' risk of pregnancy, justified the unequal treatment. *Id.* at 468-69. Although the Court purported to be helping females, many believe this opinion merely perpetuates harmful stereotypes of women as overly vulnerable. *See, e.g.*, Elizabeth A. Reilly, *The Rhetoric of Disrespect: Uncovering the Faulty Premises Infecting Reproductive Rights*, 5 AM. U. J. GENDER & L. 147, 176 (1996) ("By making the males the only moral agents with responsibility, the Court enshrined and perpetuated male control and female passivity in reproduction. . . .While the Court was beginning to recognize female 'equality' in the workplace and outside world, it was unable to treat females with equality in the intimate world of family, relationships and reproduction. By focusing upon women as gestators and reproducers, the Court justified differential treatment that is ultimately disrespectful of women."). One author has suggested that *Michael M.* contradicts *Geduldig* because the Court's observation in *Michael M.* that "[o]nly women may become pregnant" "treat[s] the class of women and the

argues that in *California Federal Savings & Loan Ass'n v. Guerra*,[40] the Supreme Court, without acknowledging it, effectively adopted this analysis for evaluating the validity of pregnancy distinctions under the PDA.[41]

In order for the Court to extend this sensitive analysis beyond the statutory context and to the realm of equal protection doctrine, it must elevate the evaluation of pregnancy classifications above the traditional rational basis standard. Short of declaring pregnancy a suspect class in itself,[42] the Court may only implement this improved test by overruling *Geduldig*.

2. *Reproductive Rights Based on Privacy, Not Equality*

Geduldig has even wider repercussions in the broader reproductive rights arena. By denying that laws or policies affecting pregnant women affect the opportunities of women in general, *Geduldig* restricts the possibility of shifting the legal foundation of abortion and reproductive rights from grounds of privacy to grounds of equality.[43]

Thus, *Geduldig* also stands as the central roadblock to the success of attempts to challenge abortion restrictions as discrimination against women.[44] For example, in *Maher v. Roe*[45] and *Harris v. McRae*,[46] the Court

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class of potentially pregnant persons as coextensive." *See* Tracy E. Higgins, *By Reason of Their Sex: Feminist Theory, Postmodernism, and Justice*, 80 CORNELL L. REV. 1536, 1553 (1995).

40. 479 U.S. 272 (1987) (plurality opinion, J. Marshall).

41. The plurality claimed to have decided *Cal.Fed.* on the narrow statutory issue of whether the PDA preempted the state law. *Cal.Fed.*, 479 U.S. at 284-92. Yet the plurality concluded that there was no preemption because it made the further-reaching substantive decision that the California statute promoted the PDA's goal of expanding women's opportunities in the workplace. *Id.* Importantly, Marshall noted approvingly in the opinion that the statute was "narrowly drawn to cover only the period of actual physical disability on account of pregnancy, childbirth, or related medical conditions" and warned that a similar statute would not survive if it goes so far in extending preferential treatment that it "reflect[s] archaic or stereotypical notions about pregnancy and the abilities of pregnant workers." *Id.* at 290. Since *Cal.Fed.* was decided on statutory grounds, the Court has never ruled on the constitutionality of mandatory pregnancy leave laws. *See infra* Part II.A. for further discussion of *Cal.Fed.*

42. *See infra* Part II.C.

43. *See* Law, *supra* note 14, at 985 (explaining that "[d]octrinally . . . *Geduldig* has made it . . . difficult to claim that reproductive freedom is an aspect of sex-based equality").

44. According to Professor Law, abortion rights advocates in the early 1970s intentionally avoided pressing equal protection arguments:

> [M]any who worked to develop constitutional doctrine to support reproductive freedom emphasized rights of privacy, physician discretion, and the vagueness and uncertainty of the criminal laws prohibiting abortions. The decision to de-emphasize sex discrimination in the reproductive freedom cases reflected a judgment that privacy was a more conservative and, hence, stronger constitutional tool than sex-based equality.

Id. at 981-82. Today, advocates are more eager to develop an equal protection doctrine supporting reproductive rights, largely because of concern about the Supreme Court's recent cutbacks on the broad privacy-based guarantee of abortion rights declared in *Roe v. Wade*, 410 U.S. 113 (1973). *See, e.g.*, Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) and Webster v. Reproductive Health Services, 492 U.S. 490 (1989). Until the Court reconsiders *Geduldig*, such attempts cannot succeed. *See, e.g.*, Jane

refused to subject abortion funding restrictions to heightened scrutiny.[47] Similarly, *Geduldig* has also been a barrier to challenging mandatory consent requirements for abortion and anti-abortion protests as sex discrimination.[48] Although these setbacks are an important reason why women's rights advocates would like to see *Geduldig* overruled, the intense political controversy surrounding abortion and reproductive rights would most likely make this a difficult area for beginning attempts to rollback the *Geduldig* doctrine.[49]

As difficult as this area might be, however, the argument that reproductive rights should be grounded in the equal protection clause rather than in the less solid, penumbral constitutional right to privacy has gained such popularity[50] that at least one federal court has acknowledged the possibility that the Supreme Court might reconsider the issue in the near future. In a decision denying attorneys' fees for the defendant in a case challenging Utah's abortion restrictions, the Tenth Circuit recently ruled

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L. v. Bangerter, 794 F. Supp. 1537 (D. Utah 1992) (citing *Geduldig*, rejecting an equal protection challenge to Utah abortion restrictions).

45. 432 U.S. 464 (1977).

46. 448 U.S. 297 (1980).

47. While the Court did not explicitly cite *Geduldig* in *Maher* and *Harris*, the *Geduldig* doctrine nevertheless prevented the Court from extending heightened scrutiny to state action related to abortion. *See also* Lehocky v. Curators of the Univ. of Mo., 422 F. Supp. 124 (E.D. Mo. 1976), *aff'd*, 558 F.2d 887 (8th Cir. 1977) (relying on *Geduldig* to find constitutional state university's payment for childbirth but not non-therapeutic abortions).

Courts have, however, avoided the *Geduldig* result in this context by distinguishing state from federal constitutional law. In *National Education Association of Rhode Island v. Garrahy*, a federal district court noted that "[t]he Court's decisions in Maher and Harris have been the subject of vigorous debate. . . .Indeed, every state court that has considered the Medicaid abortion funding issue under a state constitution since Harris has come to the opposite conclusion." 598 F.Supp. 1374, 1383 n. 10 (D. R.I. 1984), *aff'd*, 779 F.2d 790 (1st Cir. 1986), (citing Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1375 (1984)). *See also* Committee to Defend Reproductive Rights v. Meyers, 625 P.2d 779 (1981); Moe v. Secretary of Admin. and Fin., 417 N.E.2d 387 (1981); Right to Choose v. Byrne, 450 A.2d 925 (1982); Planned Parenthood Ass'n v. Dep't of Human Resources, 663 P.2d 1247 (1983); Fischer v. Dep't of Pub. Welfare, 482 A.2d 1137 (1984).

48. *See, e.g.*, Preterm Cleveland v. Voinovich, 627 N.E.2d 570, 580 (Ohio Ct. App. 1993) (rejecting the argument that "any measure regulating or restricting abortion falls on a class consisting exclusively of women"). In Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993), the Supreme Court refused to accept the argument that because only women have abortions, protests against abortion constitute invidious discrimination against women. The Court described its reasoning in part:

> Whatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of or condescension toward . . . women as a class—as is evident from the fact that men and women are on both sides of the issue.

Bray, 506 U.S. at 270.

49. *See* Law, *supra* note 14, at 987 (arguing that assertion of abortion rights and reproductive freedom in the context of expanding the breadth of the equal protection clause might be politically destructive).

50. Justice Ginsburg has spoken strongly in favor of this shift. *See, e.g.*, Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C.

that although the plaintiffs' attempt to base their objections in part on equal protection grounds was not successful, their argument was also not frivolous:

> The defendants argue that cases such as [*Geduldig* and *Bray*] foreclose an equal protection argument here. These cases are distinguishable from the instant case and do not preclude the future development of an abortion jurisprudence rooted in the equal protection clause.[51]

Courts in several states have already shifted abortion rights to equality grounds through interpretation of their states' constitutions.[52] Some might argue, therefore, that such a shift on the federal level would require the passage of a federal Equal Rights Amendment (ERA).[53] It is not clear, however, that an amendment would create such a change.[54] And even if a federal ERA would allow abortion rights to shift to an equality-based legal foundation, a revival of the movement to pass such legislation is clearly not the most feasible option today.[55] Instead, persuading the Supreme Court to overrule *Geduldig* and unite the sex-based equal protection and reproductive rights case law doctrines is currently a more realistic course of action.

3. *The Unavailability of Disparate Impact Analysis Under Equal Protection Doctrine*

The *Geduldig* doctrine became even more restrictive after the Court's later rulings barring the use of disparate impact theory in challenges

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L. REV. 375, 386 (1985) ("[T]he Court's Roe position is weakened, I believe, by the opinion's concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective."). *See also* Ruth Colker, *The Practice/Theory Dilemma: Personal Reflections on the Louisiana Abortion Case*, 43 HASTINGS L.J. 1195 (1992) (discussing the proposed application of equal protection doctrine to abortion cases).

51. Jane L. v. Bangerter, 61 F.3d 1505, 1516 n.11 (10th Cir. 1995).

52. *See, e.g.*, Women's Health Center of West Virginia, Inc. v. Panepinto, 446 S.E.2d 658, 666 (W.Va. 1994) (restriction on use of state Medicaid funds for abortions violated state equal protection clause); Doe v. Maher, 515 A.2d 134 (Conn. 1986) (restriction on public funding for abortion violated Connecticut ERA); Committee to Defend Reproductive Rights v. Myers, 625 P.2d 779, 793 n. 22 (Cal. 1981) (restriction on public funding for abortion violated various provisions of California Constitution, including equal protection clause). *See also*, Preterm Cleveland v. Voinovich, 627 N.E.2d 570, 589 (Ohio Ct. App. 1993) (Petree, J., concurring in part, dissenting in part) (urging that Ohio "reject *Geduldig*. . .and treat abortion as a sexual equality issue").

53. California and West Virginia, however, have made the shift without enacting state equal rights amendments.

54. When the unsuccessful federal ERA was proposed in 1971, legal commentators interpreted it as not prohibiting laws governing "physical characteristics, unique to one sex." Barbara A. Brown, Thomas I. Emerson, Gail Falk & Ann E. Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 893 (1971).

55. *See infra* text accompanying notes 75-76.

brought under the equal protection clause.[56] *Geduldig* itself left open the possibility that a law or policy which discriminates on the basis of pregnancy and has an invidious effect on women may constitute sex discrimination.[57] In fact, shortly after *Geduldig*, the Supreme Court relied on this loophole to hold that *Geduldig* merely bars a *presumption* that pregnancy discrimination is sex discrimination. In *Nashville Gas v. Satty*,[58] the Court ruled that under *Geduldig*,[59] plaintiffs may prove that such policies discriminate on the basis of sex by making case-by-case showings that a policy that discriminates against pregnancy has an invidious effect on women.[60] In *Satty*, the Court specifically determined that an employer's denial of seniority accumulation during employees' pregnancy leave did have an impermissible disparate effect on women.[61]

However, in *Personnel Administrator of Massachusetts v. Feeney*,[62] the Court announced that it would no longer recognize claims of non-intentional sex discrimination under the equal protection clause. Finding that an employment preference for veterans did not discriminate against women, the Court ruled that it was not enough for the plaintiffs to prove that the rule had a discriminatory effect. In order to prevail, the plaintiffs had to show that the legislature enacted the rule with the specific intent to discriminate. Although *Feeney* could arguably be distinguished from *Satty* on the ground that the veteran preference hurt some men as well as women,[63]

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56. Although employees can use Title VII to challenge facially neutral workplace policies that have a disproportionately adverse effect on protected classes of people, *see* Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Supreme Court has required a showing of intentional discrimination for claims brought under the equal protection clause. *See* Washington v. Davis, 426 U.S. 229 (1976) (race-based challenge); Personnel Administrator of Mass. v. Feeney, 442 U.S. 256 (1979) (sex-based challenge).

57. The Court in *Geduldig* stated that:

> Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

417 U.S. at 497 n.20 (1974).

58. 434 U.S. 136 (1977).

59. Although *Satty* was a Title VII case, it was decided before the passage of the PDA and thus relied on the then-unified equal protection/Title VII doctrine of *Geduldig* and *Gilbert*.

60. *Satty*, 434 U.S. at 145.

61. However, the employer's denial of pay during pregnancy leave did not. The Court in *Satty* drew a line between what it determined to be impermissible imposition of burdens and permissible denial of benefits. *Id.* at 142.

62. 442 U.S. 256 (1979).

63. Of course, one could argue that a pregnancy-discriminatory policy, such as the one in *Satty*, also hurts the male partners of affected women, who have an economic interest in their partners' career advancement and success. Conversely, the cases are similar in that in both cases not all women were harmed by the policies. The female veterans in *Feeney* and the women who never got pregnant in *Satty* (and so gained seniority over their pregnant colleagues) were helped by the challenged policies.

courts have interpreted *Feeney*, in conjunction with *Washington v. Davis*,[64] to create an absolute bar to disparate impact equal protection claims.[65]

Because proof of disparate impact may not be used to support challenges brought under the equal protection clause, *Geduldig* stands as a barrier to the simple argument that discriminating against pregnant women, or enforcing any rule that affects only women because of a biological difference between the sexes, is constitutionally equivalent to discriminating against women as a group.[66] Thus, in order to prove sex discrimination under the equal protection clause, if the rule does not explicitly require disparate treatment of all women, not just pregnant women, *Geduldig* places the burden on the plaintiffs to show that the rule is a pretext for invidious intentional discrimination.[67]

Of course, in any discrimination case, not every member of a protected class claims discrimination. Instead, only those class members who are directly affected by the discriminatory rule or policy may bring suit. For instance, in *Wengler v. Druggists Mutual Insurance Co.*,[68] a group of male plaintiffs successfully challenged a worker's compensation statute that required widowers, but not widows, to prove economic dependence on their deceased spouses in order to receive death benefits. In that case, not all men, but only those men who worked for the defendant employer and had applied for the benefits, were affected. The Court did not, as it did in *Geduldig*, bar their claim on the basis that the law differentiated between people who had applied for the benefits and were male (an all male group) and people who had not applied for the benefits and were female (a mixed female-male group).

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64. 426 U.S. 229 (1976).

65. Although *Geduldig* itself did not rule out disparate impact claims, *see* Yuhas v. Libbey-Owens-Ford Co., 411 F. Supp. 77, 78 (N.D. Ill. 1976) (rejecting argument that *Geduldig* overruled *Griggs*), *rev'd on other grounds*, 562 F.2d 496 (7th Cir. 1977), some courts cite *Geduldig*, rather than *Feeney*, along with *Washington v. Davis* for the proposition that disparate impact theory cannot be used in an equal protection challenge. *See, e.g.*, Greenberg v. Kimmelman, 494 A.2d 294 (N.J. 1985) (upholding restrictions on casino employment to immediate family members of state employees). One commentator has argued that the Court's fear of extending suspect status to classifications based on biological differences, such as pregnancy, makes *Feeney* a more fertile area for attack than *Geduldig*. *See* Ruth Colker, *An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age, and Class*, 1991 DUKE L.J. 324 (1991).

66. *See* Smith v. Troyan, 520 F.2d 492 (6th Cir. 1975) (relying on *Geduldig* to reject a constitutional challenge to a minimum height requirement for police officers, which eliminated 95% of women, but only 45% of men). Professor Law has aptly noted that "our present equality doctrine carefully scrutinizes explicit sex-based classifications while essentially ignoring laws governing sex-based biological differences." Law, *supra* note 14, at 962.

67. The *Geduldig* doctrine ignores the fact that although only a small subset of women are pregnant at any one time, a much greater proportion of women become pregnant at some point in their lives. Policies that discriminate against pregnant women actually discriminate against all women who might ever bear children, by making it less possible for them to remain free from such discrimination throughout their lives.

68. 446 U.S. 142 (1980).

Professor Herma Hill Kay has described the problem with *Geduldig* as its choice of categories. Rather than considering whether the California disability insurance program discriminated against all women, the Court should instead have examined only a group of similarly situated people, i.e., people who had engaged in reproductive behavior, and then determined whether the program distinguished between women and men. Kay asserts that by not focusing on this more limited category, *Geduldig* compared the "wrong universe of people."[69] In his dissent to *Gilbert*, Justice Stevens expressed this concern as well, arguing that the challenged classification "is between persons who face a risk of pregnancy and those who do not."[70]

4. Justification for Under-funding State Programs

In addition to its conclusion that classifications on the basis of pregnancy are not sex-based, the *Geduldig* opinion is also notorious for its declaration that state-run social welfare programs need not be comprehensive. In *Geduldig*, the Court approvingly noted the low cost of the California disability insurance program at issue and asserted that the state had an interest in keeping such a program self-sustaining.[71] *Geduldig* has become the case that many courts refer to for support for this assertion.[72] Although this reasoning arguably has provided state governments with a strong tool for disguising discrimination, the overruling of *Geduldig* alone would not affect this doctrine.[73] For this reason, this paper focuses instead on *Geduldig*'s pregnancy-related doctrinal holding.

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69. Herma Hill Kay, *Equality and Difference*, 1 BERKELEY WOMEN'S L.J. 1, 8 (1985).

70. General Elec. Co. v. Gilbert, 429 U.S. 125, 161-62 n.5 (1976) (Stevens, J., dissenting).

71. The program was financed by a 1% payroll deduction. *See Geduldig*, 417 U.S. at 487. The parties, naturally, differed in their estimates of how much it would cost the state to include benefits for disability arising out of normal pregnancy. The women challenging the program argued it would increase the expenditures by only 12%, while the state argued that the costs would rise by at least 33%. *Id.* at 494 n.18.

72. *See, e.g.*, Moore v. Ganim, 660 A.2d 742, 770 (Conn. 1995) (approving the state's nine month limit on general assistance benefits); Connors v. Sterling Milk Co., 649 N.E.2d 856 (Ohio Ct. App. 1993) (upholding the denial of workers' compensation benefits for mental disabilities resulting from sexual assault at work).

Geduldig itself relied on two often-quoted equal protection precedents: *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955) (a state can tackle social issues "one step at a time," as long as it does not, in the process, independently violate the Constitution), and *Dandridge v. Williams*, 397 U.S. 471, 486-87 (1970) ("[t]he equal protection clause does not require that a state must choose between attacking every aspect of a problem or not attacking the problem at all.").

73. Of course, if *Geduldig* were eliminated as governing precedent, state programs that treated pregnancy differently from other conditions in their attempt to keep costs down would be held to a higher level of equal protection review. *See supra* Part I.B.1.

5. *The Absurdity Problem*

Finally, the *Geduldig* opinion is problematic simply for its absurdity. When the average person, unschooled in the nuances of American constitutional law, hears that the Supreme Court has determined that pregnancy discrimination is not sex discrimination, the obvious reaction is disbelief. *Geduldig* is the kind of case which reduces respect for the Court and for the law. A final argument for overruling *Geduldig*, then, is to protect the Court's credibility with the American public.[74]

C. *Propriety of Appealing the* Geduldig *Issue to the Supreme Court*

Since the Supreme Court has already spoken clearly on the *Geduldig* issue, some might question whether urging the Court to reconsider its holding is appropriate or whether opponents of the decision should instead appeal to another institution. There are limitations, however, to the alternative avenues available.

One possible route would be an effort to amend the Constitution. However, this procedure, rarely invoked, seems a drastic remedy for such a relatively narrow issue of constitutional interpretation. It would certainly be possible for the Supreme Court to revisit this doctrine without requiring an amendment to the Constitution. The Court itself has recognized a need for flexibility in its constitutional interpretations based on an acknowledgment of the difficulty of invoking this procedure.[75] In fact, a body of doctrine has developed around the Court's greater willingness to reconsider its interpretations of the Constitution than its interpretations of statutes, which Congress could more easily overrule if the Supreme Court erred.[76]

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74. When a "former determination is most evidently contrary to reason" a judge overruling that decision would "not pretend to make a new law, but to vindicate the old one from misrepresentation. . . .[I]f it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law." 1 BLACKSTONE, COMMENTARIES 69, 69-70 (1765) (quoted in Harper v. Virginia Dept. of Taxation, 509 U.S. 86, 107 (1993) (Scalia, J., concurring in judgment)).

75. *See* Agostini v. Felton, 1997 WL 338583, at *21 (U.S. June 23, 1997) (stare decisis "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions"); Webster v. Reproductive Health Services, 492 U.S. 490, 518 (1989) ("Stare decisis is a cornerstone of our legal system, but it has less power in constitutional cases, where, save for constitutional amendments, this Court is the only body able to make needed changes. . . .We have not refrained from reconsideration of a prior construction of the Constitution that has proved 'unsound in principle and unworkable in practice'") (quoting Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 546 (1985)).

76. Professor William Eskridge calls this doctrine the "super-strong presumption against overruling statutory precedents." William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 374 n.129 (1991).

Some might argue that the doctrine would have been struck down by the passage of the Equal Rights Amendment (ERA), and that amendment's failure signals that the Court should leave *Geduldig* in place.[77] However, the proposed ERA was far broader than this issue and arguably would not have affected the holding of *Geduldig*.[78] The fact that the amendment did not pass should not be considered an indication that the country is not ready or willing for the Constitution to permit heightened scrutiny for pregnancy discrimination.

Barring a constitutional amendment or constitutional reinterpretation, another approach for eliminating the *Geduldig* doctrine might be an attempt to overrule the decision by statute. By enacting the PDA, Congress took one step toward this solution, but the PDA affected *Geduldig* only in the limited arena of employment law covered by Title VII. It seems unlikely, however, that it would be possible to craft a statute which would address all contexts to which *Geduldig* might apply. Congress could try to develop a laundry list of applications, but under the canon of statutory interpretation *expressio unius est esclusio alterius*, the Supreme Court could still apply the *Geduldig* reasoning to any areas which the Court might decide escaped the statute. Additionally, although Congress may extend broader protections through legislation than are available from the Constitution, such a statute that was not entirely comprehensive would still not resolve the doctrinal difficulties discussed in Part I.B., *supra*. In short, the *Geduldig* doctrine is too diffused to be addressed adequately through legislation.[79]

Recognizing the difficulties in overruling such a broad constitutional decision by statute, it might be argued that the Court should accept that Congress has already come as close as it could to achieving this goal by passing the PDA.[80] In other words, perhaps the Court could be persuaded

77. In Colorado, which has a state ERA, the state Supreme Court has rejected the *Geduldig* rationale for cases brought under the state constitution. *See* Colorado Civil Rights Comm'n v. Travelers Ins. Co., 759 P.2d 1385 (Colo. 1988) (striking down the exclusion of pregnancy coverage from employer health insurance policy). However, it is not clear how important the state ERA was to the court's result, since the opinion provided no analysis of and made only a passing reference to the constitutional provision.

78. *See supra* notes 53-54 and accompanying text. Furthermore, one can point to more plausible explanations for the ERA's failure. *See* JANE J. MANSBRIDGE, WHY WE LOST THE ERA (1986).

79. It is possible that Congress might not have the authority under Article I to legislate across all the areas affected by *Geduldig*. *See* United States v. Lopez, 115 S.Ct. 1624 (1995) (declaring limits on Congress' legislative authority under the Commerce Clause). In addition, a federal statutory override would not address the concern that Supreme Court constitutional interpretation influences state court interpretation of state law. *See supra* notes 27-29 and accompanying text.

80. This situation is therefore different from the issue of whether provisions of the Civil Rights Act of 1991 (CRA), Pub. L. No. 102-166, 105 Stat. 1071 (1991), that do not expressly mention the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634, nevertheless may be interpreted as having altered the ADEA. Some courts have concluded that since Congress could easily have made the CRA explicitly applicable to the

to see the PDA as an objection not only to *Gilbert*, but to *Geduldig* as well.[81] One commentator, Lorraine Hafer O'Hara, has briefly made the argument that the PDA implicitly overruled *Geduldig*.[82] In support of this contention, O'Hara cites a Court of Appeals opinion, which suggests that the statutory development of Title VII doctrine can influence the courts' analysis of constitutional law.[83]

There is no doubt that the PDA has significantly affected courts' view of pregnancy. Since the PDA was passed, courts have intermingled the classifications of sex and pregnancy. Because the statute prohibits discrimination on the basis of either classification, it is not necessary for the courts to distinguish between sex and pregnancy discrimination in Title VII cases. The lower courts' collapse of the two categories, however, could be seen as a rejection of *Geduldig*'s nonsensical distinction. For example, in a disparate impact challenge under Title VII, the D.C. Circuit mingled the two by finding that a ten-day limit on sick leave was not adequate to accommodate the needs of pregnant workers, explaining its rationale in terms of the

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ADEA but did not, the CRA should not be interpreted to modify the ADEA. *See, e.g.*, James v. Sears, Roebuck, and Co., Inc., 21 F.3d 989, 996 (10th Cir. 1994) (CRA's provision allowing recovery of expert witness fees for prevailing plaintiffs in Title VII actions does not apply to ADEA). For a discussion of this dilemma, see Howard C. Eglit, *The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog That Didn't Bark*, 39 WAYNE L. REV. 1093 (1993) (suggesting that the CRA does in part modify the ADEA).

81. *Cf.* Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970) (admiralty case which created federal common law by looking to statutes in related area). The *Moragne* Court observed:

> The statutes evidence a wide rejection by the legislatures of whatever justifications may once have existed for a general refusal to allow such recovery. This legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law.

Id. at 390-91 (citing Landis, *Statutes and the Sources of Law*, *in* HARVARD LEGAL ESSAYS 213, 226-27 (1934)).

82. *See* O'Hara, *supra* note 13, at 763, n.43. *See also* Strimling, *supra* note 8, at 187-89 (stating that "Congress repudiated the fundamental premise of *Gilbert* and, by implication, the logic of *Geduldig* when it passed the PDA," but nevertheless concluding that "[t]he Court is under no compulsion to defer to Congress when interpreting the equal protection clause.")

83. *See* Hanson v. Hoffman, 628 F.2d 42 (D.C. Cir. 1980). In considering a public employee's equal protection challenge of her employer's denial of sick pay benefits, the court here discussed the *Gilbert/Satty* benefit-burden distinction under Title VII and concluded that "an analogous distinction might be drawn in the scrutiny of maternity leave policies under the Constitution." *Id.* at 47. Interestingly, this case involved events predating the PDA. Thus, the court was influenced not by a major statutory amendment, but instead by a gradual court-made development in Title VII law.

In City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), the Court held that in order for a city to justify an affirmative action program under the equal protection clause, the city must demonstrate that the program is narrowly tailored to remedy the effects of prior discrimination. In dissent, Justice Marshall assailed "the majority's constitutional incorporation of state and local statutes" for determining whether the City succeeded in proving prior discrimination. *Id.* at 556.

"drastic effect" this limit would have on "women employees of childbearing age."[84]

The passage of time since the PDA was enacted is not fatal to the argument that the Court should now begin to read the statute in a broader light.[85] Although the Court has occasionally relied on the principle of *Geduldig* over the last two decades, it has declined to reaffirm the decision explicitly and at times has avoided confronting the issue altogether.[86] This fact suggests that the Justices are aware of the tension between the constitutional and statutory doctrine in this area.[87]

It would, of course, be more difficult to argue that the Court should look to statutory developments for guidance on its constitutional decisions if the statute in question were cutting back on rights already declared to be guaranteed by the Constitution. But the suggestion raised here presents the opposite situation. The *Geduldig* doctrine, in effect, limits rights of pregnant women in the name of the Constitution. Congress' extension of protection to pregnant women through the enactment of the PDA reflects evolving societal norms. It is thus highly appropriate for the Court to recognize this statutory development as a legal advance for the rights of women, a constitutionally protected disadvantaged group, and choose to reconcile constitutional and statutory doctrine by incorporating this statute into equal protection law.

Furthermore, the changed composition of the Court since *Geduldig* was decided may well have a significant impact on the reception this issue would receive today.[88] In 1974, all of the Justices were male, but two women sit on the Court today. Recent cases in related areas, such as *International Union, UAW v. Johnson Controls, Inc.*,[89] have demonstrated the Court's enhanced sensitivity to the difficulties pregnant women face and an understanding that equality requires that women should not have to bear

84. Abraham v. Graphic Arts Int'l Union, 660 F.2d 811, 819 (D.C. Cir. 1981).

85. For support of the argument that courts should read laws differently in light of changing times, see GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

86. *See infra* text accompanying notes 95-99.

87. *See infra* text accompanying notes 91-94 and 144-145.

88. *See infra* Part II.D. for an analysis of how the current members of the Supreme Court are likely to vote in a challenge to *Geduldig*. In its recent *Agostini* opinion, the Supreme Court allowed a party opposing a twelve year-old Supreme Court constitutional precedent, *Aguilar v. Felton*, 473 U.S. 402 (1985), to reopen and reargue that case, based on the party's contentions that intervening case law had undermined the *Aguilar* decision and that "a majority of Justices have expressed their views that *Aguilar* should be reconsidered or overruled." 1997 WL 338583, at *7. The Agostini majority was unpersuaded by respondents' argument that "[i]f the Court permits precedent to be reopened on the basis of prognostication and head-counting, it will feed the perception that the Court is no different from any political body." *Arguments Before the Court*, 65 U.S.L.W. 3707.

89. 499 U.S. 187 (1991) (holding that employers may not deny women access to jobs in hazardous work environments on the basis of the danger they may pose to women's reproductive health).

all the societal risks of pregnancy.[90] In addition, enough time has now passed since the enactment of the PDA for the Justices to assess the impact of the statute's revision on the Court's sexual equality doctrine.

The next section examines the doors the Court has left open for itself on the *Geduldig* issue and how, if the Justices are willing to revisit the decision, they might do so.

II.
AVENUES FOR RECONSIDERATION OF *GEDULDIG* BY THE SUPREME COURT

Although the Supreme Court has never overruled *Geduldig*, later opinions suggest that the *Geduldig* doctrine is not so firmly entrenched that the Court would adamantly resist retreating from the decision, if given an appropriate opportunity.[91] Some Justices have even directly questioned whether *Geduldig* is still binding precedent. For example, in *Los Angeles Department of Water & Power v. Manhart*,[92] the Court held that an employer could not use the fact that women on average live longer than men, and thus are likely to receive more total pension benefits after retirement, to justify a greater payroll pension deduction for female employees.[93] Although the Court could have analogized this situation to *Geduldig* and found that women are not constitutionally entitled to more costly benefits than men simply because they are more likely to need them, it instead struck down this provision on the basis that it created an impermissible distinction between women and men. In his concurrence, Justice Blackmun displayed skepticism that this result was consistent with prior case law and asserted that the reasoning of *Manhart* "cuts back . . . inferentially on *Geduldig* . . . and . . . makes the recognition of [*Geduldig*] as continuing precedent somewhat questionable."[94]

In several other related areas, the Court has used reasoning inconsistent with *Geduldig* but has stopped short of noting any direct contradiction

90. The Court's recent resounding opinion in *United States v. Virginia* further demonstrates the Court's current openness to new equal protection approaches against barriers to women's advancement.

91. *See* Preterm Cleveland v. Voinovich, 627 N.E.2d 570 (Ohio App. 1993) (Petree, J., concurring in part, dissenting in part) ("*Geduldig*. . .has not been accorded much favor in the larger picture of constitutional law. The case, though apparently still good law at the federal level, has been criticized and is rarely cited by the United States Supreme Court itself"); Scott v. American Bar Ass'n, 652 F. Supp. 1419, 1421 (E.D. Pa. 1987) (noting that "subsequent Supreme Court decisions have restricted *Geduldig*'s precedential value").

92. 435 U.S. 702 (1978).

93. Although *Manhart* was a Title VII case, its reasoning should arguably apply in the equal protection context because it did not involve the PDA, the amendment which separates the two lines of doctrine. The Court's reasoning in *Gilbert* indicates that, absent some statutory provision directing otherwise, Title VII and equal protection sex discrimination cases should follow the same reasoning. *See, e.g.*, Reilly v. Robertson, 360 N.E.2d 171 (Ind. 1977) (resting the same issue raised in *Manhart* on federal equal protection grounds).

94. *Manhart*, 435 U.S. at 725 (Blackmun, J., concurring).

of the precedent. This section examines several strands of case law which might be developed to enable the Court to revisit the *Geduldig* holding more directly.

A. Challenging Special Protections for Pregnancy

As noted earlier in Part I.B.1., in a 1987 case, *California Federal Savings & Loan Ass'n v. Guerra*,[95] the Supreme Court upheld a California state law mandating leave and reinstatement for pregnant employees. Because the Court decided the issue on statutory grounds,[96] it did not question whether such a requirement would violate the equal protection clause. However, in *Miller-Wohl Co. v. Commissioner of Labor & Industry*,[97] a case brought to the Supreme Court the same year as *Cal.Fed.*, an employer challenged an almost identical Montana state law under both the PDA and the equal protection clause. In *Miller-Wohl* the Court ignored the constitutional question entirely and peremptorily remanded the case in light of its decision in *Cal.Fed.*[98] Had the Court considered the constitutionality of the challenged state law, it would have been faced again with the question of whether distinctions on the basis of pregnancy are equivalent to distinctions on the basis of sex or whether they at least require a higher standard of scrutiny than traditional rational basis review. Because the Court declined to address the question altogether, it has never considered the constitutionality of a statute that mandates special benefits for pregnant women.[99]

Writing the opinion for the plurality, Justice Marshall indicated that a law which purported to provide needed benefits for pregnant women, but which actually went beyond what would be necessary to accommodate pregnancy and, instead, relied on stereotypes, would not be allowed to stand.[100] Marshall found this limitation dictated by both Title VII and, in a

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95. 479 U.S. 272 (1987).

96. *See supra* note 41 (discussing the *Cal. Fed.* decision).

97. 479 U.S. 1050 (1987).

98. The Court's refusal to consider the constitutional question most likely indicates its hesitation to address the *Geduldig* doctrine because the canon that courts should avoid constitutional questions when unnecessary to the outcome of a case was not implicated. The conclusion that the PDA did not invalidate the state statute should only have been the first step in the Court's analysis. Simply because the state law did not contradict federal law does not mean that it could necessarily withstand constitutional scrutiny. Only if the Court had, on the other hand, deemed the statute inconsistent with the PDA, and so invalidated it under the Supremacy Clause, would the equal protection analysis have been foreclosed as unnecessary.

99. The Court may have evaded the constitutional issue because of its uncertainty regarding which equal protection standard to apply.

100. The law would be invalid if it "reflect[s] archaic or stereotypical notions about pregnancy and the abilities of pregnant workers." California Fed. Sav. & Loan Ass'n v. Guerra, 472 U.S. 272, 290 (1987). The circuits have not applied this directive uniformly in considering whether the states may require child*rearing*, as opposed to child*bearing*, leave for pregnant workers alone. *Compare* Schafer v. Board of Pub. Educ., 903 F.2d 243, 248 (3d

footnote, the equal protection clause.[101] To support the equal protection basis for this proposition, he cited *Mississippi University for Women v. Hogan*,[102] a landmark case in the area of sex discrimination. Thus, *Cal.Fed.* arguably overruled *Geduldig* by suggesting that a law which went too far toward protecting pregnancy would constitute sex discrimination.[103] This reference to the Constitution, however, was buried in a footnote and was used to support only dicta in an opinion signed by only a plurality of the Justices. A good strategy for persuading the Court to reconsider *Geduldig* might therefore be to urge the Court to affirm this buried argument by pressing it to decide the constitutionality of a statute providing special treatment for pregnant women.

Given the Court's recent extension of the strict scrutiny standard to challenges to race-based affirmative action,[104] it may be quite willing to raise the standard of scrutiny for considering the constitutionality of such a statute. The rationale for such a heightening of the standard would be that pregnant women should not be entitled to any advantages over non-pregnant people, except in limited circumstances where special treatment is specifically shown to be necessary. Women's rights advocates may hesitate to bring a lawsuit challenging mandated advantages for pregnant women in order to ensure their equality,[105] but this is exactly the tactic advocates such as now-Justice Ginsburg used to develop a sex-based equal protection

Cir. 1990) (finding that *Cal.Fed.* does not allow leave only for female schoolteachers "beyond the period of actual physical disability on account of pregnancy, childbirth or related medical conditions"), *with* Harness v. Hartz Mountain Corp., 877 F.2d 1307 (6th Cir. 1989) (purporting to follow *Cal. Fed.*, upholding, under Kentucky's PDA equivalent, a policy that provided one year leave for pregnant workers but only ninety days for other employees), *cert. denied*, 493 U.S. 1024 (1990).

101. *See* Cal.Fed., 479 U.S. at 290 n.28

102. 458 U.S. 718 (1982) (exclusion of men from state-supported nursing school unconstitutionally discriminates on basis of sex).

103. The excerpt Marshall cites from *Hogan*, however, indicates that such a law would be invalid because it would demonstrate discriminatory intent against one sex. The *Cal.Fed.* footnote states that "[i]n the constitutional context, we have invalidated on equal protection grounds statutes *designed 'to exclude or "protect" members of one gender* because they are presumed to suffer from an inherent handicap or to be innately inferior'" (quoting Mississippi University for Women v. Hogan, 458 U.S. at 725) (emphasis added). Thus, it could be argued that such a statute is not mere "reverse" pregnancy discrimination but instead meets the *Feeney* standard of indicating intentional discrimination on the basis of sex. *See supra* text accompanying notes 62-65.

104. *See, e.g.*, Adarand v. Peña, 115 S. Ct. 2097 (1995) (subjecting affirmative action by federal government contractors to strict scrutiny). Two federal Courts of Appeals have recently held that affirmative action is no longer a constitutionally valid remedy for race-based discrimination. *See* Coalition for Economic Equity v. Wilson, 110 F.3d 1421 (9th Cir. 1997) (upholding state ballot initiative prohibiting state's use of affirmative action); Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) (finding law school's use of race-based affirmative action in admissions violates equal protection clause).

105. This issue might best be litigated, then, as a *defense* to a challenge to a statute providing special treatment for pregnant women, if such a lawsuit were to arise. Such a defense would concede that the statute must be subjected to heightened scrutiny but would argue that the statute meets its burden under this standard.

doctrine in the 1970s.[106] In the past, women's advocates have been split on the question of whether laws that provide special protections for pregnant women are even desirable. For example, women's rights groups filed briefs on both sides of the *Cal.Fed.* case.[107] Even those advocates who support the result in *Cal.Fed.*, however, might hesitate to support a law which, as Marshall described, went well beyond the needs of pregnant women.

A problem with this approach, however, is that a law which goes beyond what Marshall approved in *Cal.Fed.*—for instance a law which mandates that an employer provide more time for pregnancy leave than is presumed to be medically necessary for a normal childbirth[108]—might be constitutionally suspect because it is sex-discriminatory rather than pregnancy-discriminatory.[109] In order to keep the issue focused on pregnancy discrimination, it may be necessary to argue that the law discriminates on the basis of pregnancy by presuming that pregnant women have a much greater need for time away from work than they actually do. Thus, it would be argued, such a law creates an impermissible stereotypical notion

106. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (striking down a statute that allowed women to purchase beer at a younger age than men); Califano v. Goldfarb, 430 U.S. 199 (1977) (invalidating a requirement that widowers, but not widows, must prove economic dependence on their deceased spouses in order to receive death benefits). However, although these statutes treated women more favorably than men, they did not create as significant an advantage for women as pregnancy benefits provide.

107. *See supra* note 35.

108. According to evidence presented to the *Geduldig* Court from the American College of Obstetricians and Gynecologists, the usual period of actual disability from a normal pregnancy is six to eight weeks. *See* Geduldig, 417 U.S. at 500 n.4 (Brennan, J., dissenting). Thus, a requirement that an employer provide more leave time than this period implies that the leave includes time for child rearing or bonding, not only time medically necessary for childbirth. Since men are also capable of rearing and bonding with their children, such an allowance for only those parents who give birth to their children would clearly be sex discriminatory. When parental leave statutes are challenged, it is very important whether a benefit is called pregnancy disability leave or child care leave. For example, in *Chaleff v. Bd. of Trustees, Teachers' Pension Fund*, 457 A.2d 33 (N.J. Super. Ct. App. Div. 1983), male schoolteachers challenged a rule barring them from purchasing child care leaves, which were available to schoolteachers disabled by pregnancy. The court held that the provision did not violate the PDA because the leave could not be used for child care purposes. *See also* Nadine Taub, *From Parental Leaves to Nurturing Leaves*, 13 N.Y.U. REV. L. & SOC. CHANGE 381, 384-90 (1985).

109. *Cf.* Department of Civil Rights *ex rel.* Peterson v. Brighton, 431 N.W.2d 65 (Mich. Ct. App. 1988). In *Peterson* The court held that a school's policy designed to benefit pregnant women had a disparate impact on men under Title VII. Since no male had ever applied for the consecutive pregnancy disability leave/infant care leave, the court found that the policy constituted sex discrimination.

As Marshall noted in *Cal.Fed.*, it would be possible for an employer to comply with the California statute *and* avoid claims of pregnancy discrimination under the PDA by implementing a gender-neutral plan that extends comparable leave for both women and men. *See Cal.Fed.*, 479 U.S. at 291 ("[the statute] does not compel California employers to treat pregnant workers better than other disabled employees .... Employers are free to give comparable benefits to other disabled employees."). For an excellent discussion of the importance of men's involvement in child rearing to women's quest for economic equality, see RHONA F. MAHONY, KIDDING OURSELVES: BREADWINNING, BABIES, AND BARGAINING POWER (1995).

about pregnancy which may encourage irrational discrimination against pregnant women.[110] This approach could borrow from similar arguments developed under the due process clause in cases described in the next section.

B. Reviving the Ban on Irrebuttable Presumptions

In two major pregnancy discrimination cases, *Cleveland Board of Education v. LaFleur*[111] and *Turner v. Department of Employment Security of Utah*,[112] the Supreme Court relied on the due process clause to strike down statutes that discriminated against pregnant women. In both cases, however, the Court declined to base its ruling on the equal protection clause.

The statute in dispute in *LaFleur* required pregnant schoolteachers to leave their jobs five months before their expected delivery date and prohibited their return to work for at least three months after childbirth.[113] The Sixth Circuit struck down the statute as a violation of the equal protection clause.[114] In an almost identical case, *Cohen v. Chesterfield County School Board*,[115] the Fourth Circuit upheld a similar statute under the equal protection clause. Although the Supreme Court granted certiorari in both cases to resolve conflicting circuit rulings, the Court did not decide either case on an equal protection ground. Drawing in part from the *Roe*,[116] *Griswold*,[117] and *Eisenstadt*[118] line of cases, all of which relied on due process reasoning, the Court instead found that the statutes impermissibly created an irrebuttable presumption that women would not be able to teach school for fixed periods of time before and after giving birth.[119]

Interestingly, Justice Powell concurred in *LaFleur* on equal protection grounds. He criticized the Court's extension of the "irrebuttable presumption" doctrine and questioned the dependence of this analysis on due process.[120] Powell stated that he would have invalidated the statute under the

110. This argument is analogous to the "stigma" objection to affirmative action. For a discussion of this issue, see CHRISTOPHER F. EDLEY, JR., NOT ALL BLACK & WHITE: AFFIRMATIVE ACTION, RACE, AND AMERICAN VALUES 84-106 (1996).

111. 414 U.S. 632 (1974).

112. 423 U.S. 44 (1975).

113. *LaFleur*, 414 U.S. at 634.

114. LaFleur v. Cleveland Bd. of Educ., 465 F.2d 1184 (6th Cir. 1972).

115. 474 F.2d 395 (4th Cir. 1973).

116. Roe v. Wade, 410 U.S. 113 (1973) (striking down criminal abortion law for violating right to privacy).

117. Griswold v. Connecticut, 381 U.S. 479 (1965) (invalidating law forbidding the use of contraceptives by married couples).

118. Eisenstadt v. Baird, 405 U.S. 438 (1972) (extending *Griswold* to unmarried people).

119. *LaFleur*, 414 U.S. at 639-40.

120. Justice Powell noted that "not every government policy that burdens childbearing violates the Constitution." *Id.* at 651 (Powell, J., concurring). To support this point, Powell cited Dandridge v. Williams, 397 U.S. 471 (1970), in which the Court held that government limitations on welfare benefits do not violate the equal protection clause. *Id.* Powell further argued that the majority did not adequately explain the distinction between government

rational basis equal protection test, using similar arguments to the Court's due process reasoning.[121] Thus, Powell's opinion, like that of the majority, did not require that the restriction on pregnant schoolteachers be viewed as discrimination on the basis of sex.

LaFleur was decided in the same year as *Geduldig*.[122] Therefore, it is especially significant that the Court chose to avoid an equal protection analysis in *LaFleur*. It is likely that in *LaFleur* the Justices wanted to strike down the restriction on pregnant schoolteachers but, knowing that this conclusion would conflict with the forthcoming *Geduldig* decision, found a ground other than equal protection on which to base its invalidation of the statute.[123] The Court's hesitation to rely on the equal protection clause may also have been the result of negotiation among the Justices with respect to the evolving standard for sex-based equal protection challenges.[124] Because the intermediate scrutiny test was still in development, the Justices may have been reluctant to strike down this law on equal protection grounds because they feared that such a decision would have implied that pregnancy discrimination would subsequently be subject to strict scrutiny analysis.[125] Now that the intermediate scrutiny test has become firmly established as the appropriate analysis for evaluating sex-based equal protection claims, however, the Court might be more willing to allow pregnancy

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policies that burdened childbearing which were constitutional and those which were not. Powell seemed concerned about extending the "irrebuttable presumption" case law lineage of substantive due process too far. *Id.*

121. Justice Rehnquist also believed that the case should have been decided on equal protection, rather than due process, grounds. Rehnquist, however, would have *upheld* the mandatory maternity leave rule under rational basis analysis. *Id.* at 657-60 (Rehnquist, J., dissenting).

122. Justice Stewart wrote for the majority in both *LaFleur* and *Geduldig*.

123. The Court has been harshly criticized for the scarcity of logic underlying its distinction here. *See, e.g.*, Hewitt v. State Accident Ins. Fund Corp., 653 P.2d 970, 975 (Or. 1982) (citing a comparison of *Geduldig* and *LaFleur* as one example of the Court's "schizophrenic" reasoning in the area of sex discrimination):

> The apparent inconsistency of results under the court's "heightened" but not "strict" scrutiny has sparked criticism for failure to provide a consistent analysis offering guidelines to trial and appellate courts.... The kaleidoscope of standards and rationales underlying the United States Supreme Court decisions prompted one judge to write, " . . . the lower courts searching for guidance in the 1970's Supreme Court's sex discrimination precedents have 'an uncomfortable feeling, like players in a shell game who are not absolutely sure there is a pea.'" Vorchheimer v. School District of Philadelphia, 400 F. Supp. 326, 340-41 (E.D. Pa. 1975), *rev'd* 532 F.2d 880 (3rd Cir. 1976), *aff'd by an equally divided court*, 430 U.S. 703 (1977).

124. Before Craig v. Boren, 49 U.S. 190 (1976), the Court's equal protection sex discrimination doctrine was particularly confused. One court, for example, interpreted *Geduldig* as merely a retreat from *Frontiero*'s plurality declaration that sex-based classifications require strict scrutiny, rather than an issue of what constitutes a sex-based classification. Mercer v. Bd. of Trustees, North Forest Indep. Sch. Dist., 538 S.W.2d 201 (Tex. Civ. App. 1976).

125. As Strimling points out, the *Geduldig* majority "may have refused to categorize pregnancy-based laws as gender-based classifications . . . as a hedge against the possibility that a majority would hold gender classifications 'suspect' at some future time." Strimling,

discrimination claims to be united with sex discrimination constitutional claims.[126]

The year after *LaFleur* and *Geduldig* were decided, the Court again avoided an equal protection analysis and instead relied on the due process clause to strike down a statute which denied unemployment compensation to pregnant women. In *Turner v. Department of Employment Security of Utah*,[127] the Court suggestes, with reasoning which strained to remain faithful to precedent, that under *Geduldig* the state would have been constitutionally permitted to prohibit payment to pregnant women. However, the Court found that the challenged rule, which rendered women ineligible for benefits from twelve weeks before until six weeks after childbirth, adopted an unconstitutional presumption that no women would be capable of working during this eighteen-week period.[128]

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supra note 8, at 183. Indeed, Justice Brennan argued in his dissent to *Geduldig* that he would have held the state classification to a stricter standard of scrutiny, citing Reed v. Reed, 404 U.S. 71 (1971), and Frontiero v. Richardson, 411 U.S. 677 (1973). *See Geduldig*, 417 U.S. at 498 (Brennan, J., dissenting).

126. Intermediate scrutiny is not always fatal to a classification. *Compare* Michael M. v. Sonoma County Superior Court, 450 U.S. 464 (1981) (upholding law which subjected only males to punishment for statutory rape, decided presumably under intermediate scrutiny) *with* United States v. Virginia, 116 S.Ct. 2264 (finding all-male state military academy unconstitutional under intermediate "skeptical scrutiny").

127. 423 U.S. 44 (1975). One circuit has relied on *Turner* to avoid the *Geduldig* result, even in an equal protection case. *See* International Union v. Indiana Employment Sec. Bd., 600 F.2d 118 (7th Cir. 1979) (invalidating statute which denied unemployment insurance to women who were willing and able to work but were denied the opportunity to do so because of pregnancy).

128. Professor Law states in passing that *Turner* limited *Geduldig* to the insurance area. *See* Law, *supra* note 14, at 984. In a footnote to *Turner*, the Court rejected the employer's analogy to *Geduldig*, noting that the challenged Utah Supreme Court decision "makes no mention of coverage limitations or insurance principles central to [Geduldig v.] Aiello." *Turner*, 423 U.S. at 45 n.1. Although this point has not been emphasized in later discussions of *Geduldig* (indeed, Law later asserts that *Geduldig* is "not so easily confined through manipulation of doctrine" and so "[t]he Court should simply overrule it," Law, *supra* note 14, at 1037), it might be worth pressing as an argument in a pregnancy discrimination case unrelated to insurance. However, this strategy would merely marginalize *Geduldig*, not overrule it, and thus may not solve all the difficulties described in Part I, *supra*.

If, however, it were possible to isolate *Geduldig* to this narrow area and create contrary surrounding case law, the Court would be left with the issue it faced in *Flood v. Kuhn*, 407 U.S. 258 (1972), in which the Court declined to overrule a precedent that exempted baseball from federal antitrust laws, even though more recent case law had brought players of all other professional sports under federal antitrust protection. In *Kuhn*, the Court had to decide whether to overrule the narrow inconsistency or wait for Congress to correct the error if it saw fit. Although *Kuhn* involved statutory interpretation, the issue raised by the *Geduldig* scenario is similar in that Congress could overrule the Supreme Court by passing a statute which extends more protection than the Constitution. If the Court chose, as in *Kuhn*, to leave the resolution of the inconsistency to Congress, it would be a much easier task for Congress to pass a statute narrowly addressing insurance discrimination than it would be to pass a statute designed to overrule *Geduldig* in its entirety. *See supra* text accompanying note 79.

Whatever the fate of pregnancy under the Court's equal protection doctrine, these due process rulings remain valid.[129] Thus, an alternate strategy to overruling *Geduldig* directly might be to revive this line of cases and urge the Court to reject a statute that discriminates on the basis of pregnancy on due process grounds. The weakness of this approach is that it would be limited to those situations in which the discriminatory statute created an irrebuttable presumption similar to those found unconstitutional in *Turner* and *LaFleur*; it would not necessarily apply to all cases in which a statute denies pregnant women some benefit.

C. Raising the Level of Scrutiny for Pregnancy Classifications

Another alternative to arguing for the overruling of *Geduldig* might be to persuade the Court to elevate pregnancy to suspect status, and thus extend heightened equal protection review to pregnancy, independently of sex.[130] This strategy could entail asking the Court to review classifications on the basis of pregnancy under the intermediate scrutiny test,[131] to bring pregnancy in line with gender, or perhaps under a sharpened rational basis test.

The Court has extended intermediate scrutiny only to an extremely limited number of classifications.[132] In judging whether a group is eligible for heightened equal protection scrutiny, the Court has considered first whether membership in the group is based on immutable characteristics. Because membership in this class—the class of pregnant women—is temporary, pregnancy may not fulfill this requirement. However, this difficulty

129. *See also* Stanley v. Illinois, 405 U.S. 645 (1972) (avoiding an equal protection challenge by invoking due process to strike down an irrebuttable presumption of an unwed father's unfitness to parent, thus requiring a hearing prior to terminating the parent-child relationship).

130. By keeping the classifications of sex and pregnancy separate, this strategy would leave open the future possibility of convincing the Supreme Court to extend strict scrutiny to sex discrimination, as some advocates have continued to urge. *See, e.g.*, Galotto, *supra* note 32, at 508. Under this formulation, the Court would use strict scrutiny for sex-based, non-biological classifications and intermediate scrutiny when a classification is based on real biological differences. This structure, however, does not address the controversial question of what constitutes a real biological difference.

131. In the early years of the intermediate scrutiny test, when the Supreme Court's gender-based equal protection doctrine was especially confused, some lower courts already seemed to be subjecting pregnancy classifications to heightened scrutiny. For example, in *Rodgers v. Berger*, 438 F. Supp. 713 (D. Mass. 1977), a federal district court struck down, under both the Federal equal protection and due process clauses, a mandatory one year pregnancy leave for schoolteachers, which nullified service credit already accumulated toward tenure. The court distinguished the case from *Geduldig*, finding that this penalty against pregnant women had no "fair and substantial relation to the object of the school committee's rule." *Id.* at 725. Although the court was not explicit about what standard of review it was using to judge the challenged rule, it appears that the court was applying the newly created intermediate scrutiny test.

132. These include sex, alienage, non-marital children, and, to some degree for a brief period, wealth.

should not be fatal.[133] Because pregnancy is, by nature, a temporary state, the Court could consider the immutable characteristic that members of this class share is the potential capacity for pregnancy.[134]

In addition, in evaluating candidates for heightened scrutiny, the Court considers whether the group constitutes a "discrete" and "insular" minority lacking political power.[135] Although pregnant women comprise a diverse class of people, certainly they are a more "discrete" and "insular" minority than the category of women as a whole, which has been raised to suspect status. Furthermore, the very fact that pregnancy discrimination persists demonstrates pregnant women's relative lack of political power.

Alternatively, if the Court refuses to subject classifications on the basis of pregnancy explicitly to intermediate scrutiny, it might nonetheless be willing to impose a more critical version of the rational basis test. Although this test has traditionally upheld almost any legislative classification,[136] the Court has more recently imposed a sharpened rational basis test to strike down discrimination against groups for which it was not prepared to extend suspect status explicitly. In 1985, it used such heightened rational basis review to strike down a measure that discriminated against the mentally retarded.[137] More recently, in *Romer v. Evans*,[138] the Court demonstrated its continued affinity for this approach by using the rational basis test to invalidate a Colorado constitutional amendment that prohibited legislative protections for lesbians and gay men. These cases indicate that, although the Court might be hesitant to expand the uses of the intermediate scrutiny test, it is nevertheless willing to take a critical look at statutes that discriminate against traditionally disadvantaged groups of people.

A distinction between *Romer* and the pregnancy issue, however, is that in *Romer* the Court found actual animus directed against people on the

133. The Court's application of equal protection doctrine has not been as overly rigid as this analysis suggests. In cases in which the Court has extended heightened scrutiny to a class, it has not followed a strictly formulaic procedure to arrive at its conclusion. Often the Court is not explicit about what level of review it has used. In the early gender cases, including Craig v. Boren, 429 U.S. 190 (1976), the Court did not even acknowledge that it had created a new test. Only later in retrospect was the new three-tier system recognized. *See, e.g.*, Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) (state university nursing program that denied enrollment for men violated equal protection clause).

134. Of course, this argument seems to collapse pregnancy back into the general classification of women, which would require an outright overruling of *Geduldig*. If the Court were attempting to follow this general alternate strategy of independently elevating pregnancy to suspect status, it could avoid this difficulty only by not focusing on or somehow modifying this requirement.

135. *See* U.S. v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

136. *See supra* note 30.

137. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442-50 (1985) (invalidating a zoning ordinance that excluded a group home for the mentally retarded from a residential neighborhood).

138. 116 S. Ct. 1620 (1996).

basis of sexual orientation. Defenders of pregnancy classifications may argue that these policies do not stem from any animus against pregnant women *per se*, but are instead merely cost-saving devices.[139] Thus, advocates seeking to overrule *Geduldig* may need to persuade the Court that these policies are in fact motivated by a discriminatory animus.[140]

Even without explicitly raising the level of scrutiny for pregnancy classifications, it is possible that the Court could be convinced to relax the standard used in proving that discrimination on the basis of pregnancy indicates intentional discrimination against women. The Court stated in *Geduldig* that plaintiffs could prove that in a particular setting that discrimination on the basis of pregnancy is impermissible sex discrimination.[141] The Court in *Geduldig* simply refused to make the presumption that pregnancy discrimination always constitutes sex discrimination. However, if a case were brought to the Court's attention in which there was some evidence that a provision affecting pregnant women was motivated in part by a discriminatory animus against women in general, the Court might be willing to find that pregnancy discrimination was, in that case, sex discrimination.[142]

D. A Brief Analysis of Today's Supreme Court

The current composition of the Supreme Court is almost entirely different from when *Geduldig* was decided in 1974.[143] The only remaining

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139. The defenders of the Colorado amendment in *Romer* also presented rationales for the provision that were not based on animus, but the Court summarily rejected them:

> The primary rationale the State offers for Amendment 2 is respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality. Colorado also cites its interest in conserving resources to fight discrimination against other groups. The breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them.

116 S.Ct. at 1629.

140. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 2105 (which revamped the federal welfare system), and the states' efforts to comply with that act, may undoubtedly provide advocates with examples of animus against pregnant women. *See infra* Part IV.G.

141. Although *Geduldig* itself may have allowed this showing to be based on disparate impact, *Geduldig*, 417 U.S. at 497 n.20, *Feeney* rejected the use of disparate impact theory in equal protection cases. *See supra* text accompanying notes 62-65. Thus, it would be necessary to show an actual discriminatory purpose behind the policy.

142. A striking example of a case in which a court found such animus is *De La Cruz v. Tormey*, 582 F.2d 45 (9th Cir. 1978). In that case, the Ninth Circuit held that a public college violated the equal protection clause when it refused to allow the establishment of a campus child care facility. The district court, relying on *Geduldig*, dismissed the claim, but the Ninth Circuit reinstated it, concluding that the college's refusal had both a disproportionate impact on and demonstrated intentional discrimination against women students. Although in today's political climate it may be difficult to find a court willing to adopt such a generous interpretation of intentional discrimination, this holding was never developed further and may be a fertile ground for future expansion.

143. Chief Justice Burger and Justices Powell, White, Blackmun, and Rehnquist joined Justice Stewart's majority opinion in *Geduldig*. Justice Brennan's dissenting opinion was joined by Justices Marshall and Douglas.

member of the Court from that year is Chief Justice Rehnquist. In the interim, the Court has seen the addition of two female Justices, both of whom appear to oppose *Geduldig*. Justice Ginsburg herself wrote an amicus brief opposing the outcome of *Geduldig*,[144] and Justice O'Connor has noted the peculiarity of the Court's conflicting Title VII and equal protection doctrines in the area of pregnancy discrimination.[145] In addition, Justices Stevens and Breyer, who both frequently cast "liberal" votes on social issues before the Court, are likely to join an opinion overruling or cutting back on this outdated precedent.

Justices Kennedy and Souter may have the swing votes. Although these two Justices set forth a strong allegiance to *stare decisis* in their joint opinion with Justice O'Connor in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[146] they may not feel such a strong compunction to abide by *Geduldig*. In *Casey*, the Justices voted to uphold *Roe v. Wade* which, as the Justices explained, was a landmark ruling that has induced great reliance in the two decades since it was decided.[147] The decision in *Geduldig*, on the other hand, as demonstrated in the previous and following sections of this paper, has been eroded by the Supreme Court, and evaded by lower federal courts and state courts. Although *Roe v. Wade* has also suffered in the hands of judges who would like to see it overruled, the opinion's establishment of a right to abortion before viability has remained a clear constitutional principle. As stated in the *Casey* opinion:

> [F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.[148]

The principle of *Geduldig*, that pregnancy discrimination is not sex discrimination, does not ring as clear and understandable a pronouncement and has not been relied upon by the nation's population in the same way that two generations have relied on *Roe*.

In addition, the fact that Justices Kennedy and Souter recently agreed in *Romer* to strike down the Colorado constitutional amendment that discriminated on the basis of sexual orientation indicates an open-mindedness toward evolving social issues, particularly with regard to discrimination

144. *See also* Ginsburg, *supra* note 50, at 386 (describing Justice Ginsburg's support for shifting reproductive rights from a privacy to an equal protection basis).

145. *See* Ronald Smothers, *Conferees Seek "Founding Mothers,"* N.Y. TIMES, Feb. 12, 1988, at B6; Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. REV. 1546, 1554-56 (1991).

146. 505 U.S. 833 (1992).

147. *Id.* at 856.

148. *Id.*

against groups with traditionally limited political power. In fact, Justice Kennedy wrote the majority opinion in *Romer*.

Thus, it appears that a majority of the current Supreme Court might be receptive to a new attack on *Geduldig*. As described in this section, the Court has left itself several opportunities to repudiate the decision, either outright or implicitly. The next part of this article considers arguments articulated by state courts which might help convince the Supreme Court to reconsider *Geduldig*.

III.
STATE COURT DECISIONS THAT CHALLENGE THE *GEDULDIG* RATIONALE

In the wake of *Geduldig* and *Gilbert*, many state courts rejected the Supreme Court's reasoning that pregnancy discrimination is not sex discrimination by finding ways of distinguishing state law from federal law.[149] This section surveys a range of arguments accepted by state courts in a variety of contexts which rejected the logic of *Geduldig*. These cases provide useful arguments for future challenges to *Geduldig* and demonstrate the near universal rejection of *Geduldig* by practically all courts that have independently reviewed the issue.

In *Hanson v. Hutt*,[150] an early case presenting the same issue as *Geduldig*, the Washington Supreme Court essentially adopted Professor Kay's criticism of *Geduldig*[151] when she argued that *Geduldig* compared the wrong universe of people. The Washington Supreme Court ruled that a state statute disqualifying pregnant women from unemployment benefits violated the Federal equal protection clause and based its reasoning on the observation that "[o]nly women must remain barren to be eligible for and to receive unemployment compensation."[152]

More recently, in *Badih v. Myers*,[153] a California court ruled that under the state constitution, pregnancy discrimination is sex discrimination. The court supported this conclusion with "the rationale that only women

149. *See, e.g.*, Quaker Oats Co. v. Cedar Rapids Human Rights Comm'n, 268 N.W.2d 862 (Iowa 1978); Massachusetts Elec. Co. v. Massachusetts Comm'n Against Discrimination, 375 N.E.2d 1192 (Mass. 1978); Bully v. General Motors, 328 N.W.2d 24 (Mich. Ct. App. 1982); Minnesota Mining & Mfg. Co. v. State, 289 N.W.2d 396 (Minn. 1979), *appeal dismissed*, 444 U.S. 1041 (1980); Castellano v. Linden Bd. of Educ., 386 A.2d 396 (N.J. Super. Ct. App. Div. 1978); Brooklyn Union Gas Co. v. New York State Human Rights Appeal Bd., 359 N.E.2d 393 (N.Y. 1976); Kimberly-Clark Corp. v. Labor & Indus. Review Comm'n, 291 N.W.2d 584 (Wis. Ct. App. 1980). Before the passage of the PDA, only Rhode Island chose to follow *Gilbert*. *See* Narragansett Electric Co. v. Rhode Island Comm'n for Human Rights, 374 A.2d 1022 (R.I. 1977) (holding federal statutory and constitutional interpretation of *Geduldig* in *Gilbert* persuasive, but not binding on state statutory and constitutional interpretation).

150. 517 P.2d 599 (Wash. 1973).

151. *See* Kay, *supra* note 69, at 8.

152. *Hanson*, 517 P.2d at 601.

153. 43 Cal. Rptr. 2d 229 (Ct. App. 1995).

can become pregnant."[154] The court acknowledged that this holding contradicted the Supreme Court's "roundly disapproved decision" in *Gilbert*.[155]

One might argue that the reason a California court was willing to depart from the Supreme Court's interpretation of the Federal Constitution on this issue was because the California Constitution has been interpreted to require strict, not merely intermediate, scrutiny of gender classifications.[156] However, while the California constitutional doctrine indicates a greater receptiveness by California courts to claims of gender discrimination, the choice of which standard of scrutiny applies to sex-based equal protection claims is analytically distinct from the question of whether discrimination on the basis of pregnancy also implicate a sex classification. Thus, this decision may still carry weight with other courts despite California's unusually strong constitutional protection for women.

Some state courts have simply seemed to ignore *Geduldig*, even when purporting to apply federal equal protection doctrine. For example, in *Chaleff v. Board of Trustees, Teachers' Pension Fund*,[157] a New Jersey court used intermediate scrutiny to review a rule limiting child care leave to schoolteachers disabled by pregnancy. While stating that the rule did not violate federal or state equal protection law, the court upheld the statute under the heightened standard of scrutiny used in *Michael M.* and *Craig v. Boren*.[158]

It is interesting that the *Chaleff* court avoided the *Geduldig* classification issue only to reach the result that *Geduldig* would likely have dictated. It is possible that the New Jersey court was confused about the interaction between *Geduldig* and sex discrimination cases. Although the court seemed to indicate that the rule did not make a sex-based classification—because the statute "embraces all illnesses regardless of whether they are contracted by men or women"—the court nevertheless applied the intermediate scrutiny test, concluding that, "There is no gender-based classification in the statute which could be considered violative of the equal protection clauses."[159] Given the persistently confusing nature of the

154. *Id.* at 233. The court cited a federal district court opinion, *Merrell v. All Seasons Resorts*, 720 F. Supp. 815 (C.D. Cal. 1989), which previously interpreted the California Constitution differently from the Federal Constitution on this issue.

155. *Badih*, 43 Cal. Rptr. 2d at 233.

156. *See* Cotton v. Municipal Court for the San Diego Judicial Dist., 130 Cal. Rptr. 876 (1976).

157. 457 A.2d 33 (N.J. Super. Ct. App. Div. 1983).

158. The Chaleff court cited *Geduldig* only for the proposition that the state had a legitimate interest in controlling its costs. This opinion thus suggests it may be possible to persuade courts to read this statement as *Geduldig*'s main holding, thereby de-emphasizing *Geduldig*'s controversial footnote 20, which severs pregnancy from sex discrimination analysis.

159. *Chaleff*, 457 A.2d at 37.

Supreme Court's sex discrimination cases,[160] it might be possible to persuade lower federal courts to challenge directly the Supreme Court through similar reasoning, thus forcing a clarification, and perhaps rethinking, of the *Geduldig* doctrine.

The Court's reasoning in *Geduldig* rested largely on the argument that the state had a legitimate interest in keeping down the cost of its disability insurance program so that it could remain self-sustaining.[161] Therefore, another way courts may avoid reliance on *Geduldig* is by accepting proof that the economic cost of adopting a non-discriminatory alternative is not significant. For example, in *Vineyard v. Hollister Elementary School District*,[162] a district court concluded that *Geduldig* did not control the case's outcome because there was "no showing of a strong economic justification for singling out pregnant women for exclusion from disability benefits."[163] This strategy is limited in effectiveness, however, to only those cases in which the cost of including benefits for pregnancy truly are comparable.[164] Furthermore, this strategy may be largely precluded in abortion funding cases because of the Supreme Court's recently increased pronouncements that states have a legitimate interest in preserving the lives of fetuses.[165]

Just as women's rights advocates in the 1970s relied on cases in which men were discriminated against in order to develop sex discrimination equal protection doctrine benefiting women, it might be possible to convince the Supreme Court to rethink *Geduldig* by shifting its frame of reference to situations in which pregnancy classifications clearly put men at a disadvantage. For example, in *Thompson v. Merritt*,[166] a Michigan state appellate court considered an equal protection challenge to a law requiring fathers to share in the cost of pregnancy. The court, citing *Gilbert*, found that the differentiation in the paternity law was based on a factor other than sex and upheld it under the rational basis test. If the Supreme Court were confronted with a similar statute, one that placed an even greater burden on fathers, perhaps it would be willing to impose a higher level of scrutiny. In this type of case, it is unusually clear that classifications on the basis of pregnancy are classifications on the basis of sex. Because paternity laws do not force women to pay child support, it cannot be argued, as in *Geduldig*, that one category of people consists of women, while the other consists of both women and men. This example pointedly shifts the universe of people from which the categories are drawn, as Professor Kay has

160. *See supra* text accompanying notes 123-124.

161. *See supra* Part I.B.4.

162. 64 F.R.D. 580 (N.D. Cal. 1974).

163. *Id.* at 584-85.

164. In *Geduldig* itself, the parties had different opinions about the likely costs of the inclusive alternative. The majority seemed to give great weight to the state's estimate. *See supra* note 71.

165. *See* Webster v. Reproductive Health Services, 492 U.S. 490 (1989); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).

166. 481 N.W.2d 735, 741 (Mich. Ct. App. 1992).

advocated, from all people to only those engaged in reproductive behavior.[167]

Women's rights advocates might hesitate to push for their goal by supporting a position that might, in the individual case, be detrimental to women. However, the ultimate goal is not to prohibit all distinctions on the basis of pregnancy, but is instead for pregnancy classifications to be equated with gender classifications and thus, under current equal protection doctrine, be held to intermediate scrutiny. Thus, the paternity statute described above could still meet this level of review if it were shown to "serve important governmental objectives" and be "substantially related to achievement of those objectives."[168] If it did not survive this test, its failure would likely be an indication that it went so far toward "protecting" pregnant women that it created an invidiously stigmatic stereotype portraying single mothers as presumptively unable to support their children.[169]

State v. Toomey[170] presented a similar issue to the paternity law discussed above by extending a special benefit for pregnant women. In this case, a juvenile convicted of murder was given a lighter sentence because she was pregnant. The Washington state court ruled that this treatment did not violate the equal protection clause because the defendant was not similarly situated to a non-pregnant defendant. The court stressed the special needs of the defendant who, it reasoned, needed the chance to acquire child-rearing skills. It is unlikely that a male who is expecting a child would be successful with such an argument. This example thus clearly demonstrates a distinction explicitly based on pregnancy which is indisputably a classification based on sex.

In *In Re Baby M.*,[171] a New Jersey state court used Professor Kay's proper "universe" of people in refusing to allow the enforcement of a surrogacy contract. The court reasoned that since men can donate sperm and still be legally recognized as fathers, equal protection requires that women who bear children for other people likewise have the right to be recognized as mothers. In this case the Court understood that women's capacity to become pregnant renders pregnancy and gender inextricably intertwined. No one argued that, because non-procreating women would not be hurt by the enforcement of the contract, the contract did not discriminate against women in general but instead only those women who entered such contracts and became pregnant. In fact, the court did not even question that, in this situation, a distinction on the basis of pregnancy was a sex-based distinction. The Supreme Court has not ruled on the validity of surrogacy

167. *See* Kay, *supra* note 69, at 8.

168. *Craig*, 429 U.S. at 197.

169. Of course, women's advocates might be more trusting of the courts' judgment if the traditional intermediate scrutiny test were replaced by a more sensitive test, like Strimling's proposed analysis. *See supra* text accompanying notes 37-41.

170. 690 P.2d 1175 (Wash. Ct. App. 1984), *cert. denied*, 471 U.S. 1067 (1985).

171. 525 A.2d 1128, 1165 (N.J. Super. Ct. Ch. Div. 1987).

contracts. If it chose to hear this kind of case, the New Jersey court's reasoning might help persuade it to take the opportunity to repudiate *Geduldig*.

IV.
LEGAL CONTEXTS FOR CHALLENGING *GEDULDIG*

This final section briefly considers a number of legal contexts which raise issues analogous to those presented in *Geduldig* and explores in somewhat greater detail the rapidly changing welfare context. In determining which of these areas would provide the best opportunity for overruling *Geduldig*, advocates would be wise to confront first the easier political issues before tackling the more controversial ones.[172] Once lower federal courts begin to dismantle the *Geduldig* reasoning in less politically charged contexts, the Supreme Court might be willing to revisit the decision outright and extend the repudiation to more volatile areas such as reproductive rights.

A. State Disability Programs

The most direct way to force an explicit overruling of *Geduldig* would be to challenge a state program similar to the California disability program upheld in *Geduldig* itself. Essentially, this strategy would be to relitigate *Geduldig* in light of current understandings, using some of the arguments described in this paper. One example of a potential litigation target is the Michigan Workers' Disability Compensation Act, which a state court recently held is not required to extend workers' compensation benefits to pregnant women.[173]

One advantage to a state court litigation strategy is that state courts might be more willing to contravene the federal precedent of *Geduldig* than federal courts.[174] If a number of state courts were now to reject *Geduldig* outright with well-articulated reasoning, the Supreme Court would have further proof that the decision is outdated and stronger support for repudiating it.

If, however, a challenge reaches the Supreme Court through an appeal from a high state court's invalidation of the program, there is the risk that the Supreme Court might find an adequate and independent state ground supporting the state court decision which would preclude the Supreme Court's jurisdiction.[175] Under the doctrine of *Michigan v. Long*,[176] the

172. *See* Law, *supra* note 14, at 987.

173. Lee v. Kogel Meats, 502 N.W.2d 711 (Mich. Ct. App. 1993).

174. *Geduldig* was a consolidation of two class actions, one initially filed in a federal district court and the other removed from a state court to the federal court. The Supreme Court granted review of a direct appeal from the district court decision, so the case was never reviewed by the Ninth Circuit. *See* Geduldig, 417 U.S. at 487.

175. *See* Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935) (describing the power of state courts to rest judgments on independent state grounds).

Supreme Court will presume there is no adequate and independent state ground unless the state court explicitly declares one to be the basis for its opinion. Thus, litigation of this issue would need to reach a high state court that would be willing both to force the Supreme Court to reconsider *Geduldig* and forgo basing its decision on state constitutional law.

Challenging the doctrine through litigation with a fact scenario nearly identical to the one in *Geduldig* would force the Court to confront *Geduldig*'s continuing validity directly should it agree to review the case.[177] However, it would probably be most difficult to seek a direct overruling of a case precisely on point.

A safer strategy might therefore be to develop the arguments discussed in this paper using an analogous, but not identical, context. The Court would thus be free to move away from *Geduldig* while saving face by not explicitly overruling a twenty-three year old precedent. The Court could use one or more other contexts to cut back on the *Geduldig* doctrine and eventually isolate the decision.[178] Once *Geduldig* is narrowed enough, it might be easier to urge the Court to overrule it outright or to convince Congress to reverse it legislatively.[179]

The most obvious drawback to concentrating on other areas, however, is that, even if the Court appeared to be moving away from the *Geduldig* rationale in other contexts, it might justify its decisions by drawing too bright a distinction from the facts of *Geduldig*, thus allowing the precedent and its accompanying difficulties to remain. A litigation strategy must balance these considerations and find a legal context that is distinct enough to encourage Supreme Court review while similar enough to force a direct reconsideration of the precedent.

B. Military Benefits

The military is one possible alternative context which has the advantage of being similar to the general employment arena—and thus, the logic of the PDA should apply—but sufficiently different enough to encourage Supreme Court review. Because military employees are not covered by Title VII,[180] challenges to CHAMPUS, the health insurance program for

176. 463 U.S. 1032 (1983).

177. In *Romer v. Evans*, 116 S. Ct. 1620 (1996), which invalidated a state constitutional amendment that prohibited special protections for lesbians and gay men, the majority did not even mention *Bowers v. Hardwick*, 478 U.S. 186 (1986) which upheld a criminal prosecution under a state anti-sodomy law. Thus, the Court has shown a willingness to avoid arguably contrary precedent, based on a similar legal context but distinct fact situation, without explicitly overruling the precedent.

178. Preferably, the Court would do this more explicitly than it may have done in *Turner*, when the Court enigmatically noted that *Geduldig* may be limited to the insurance arena. *See supra* note 128.

179. *See supra* text accompanying note 79-83.

180. *See* Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority, 464 U.S. 89, 92 n.4 (1983).

military employees and their families, must be brought under the equal protection clause. In a case decided shortly after *Geduldig*, the Second Circuit ruled that treatment of pregnant Marines that differed from treatment of Marines with other temporary disabilities was an equal protection violation.[181] This ruling may be useful as a starting point for other military cases involving disparate treatment of pregnancy.

A drawback to this strategy, however, is that the courts have traditionally held that military personnel have fewer rights than civilians and have hesitated to interfere with military policy.[182] However, since the treatment of pregnancy should not directly affect the nation's military readiness and, therefore, should not interfere with military policy, courts might be willing to consider an equal protection challenge in this context.

C. *Drug Treatment Programs and Prosecution of Drug-Dependent Pregnant Women*

Concerned about liability issues, a number of drug treatment programs have tried to exclude pregnant women.[183] A related issue is the recent practice by some states of testing pregnant women for drug use and prosecuting those who test positive under laws prohibiting the dispensing of drugs to minors.[184] Both of these situations clearly discriminate on the basis of pregnancy and could serve as vehicles for a challenge to *Geduldig*.

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181. Crawford v. Cushman, 531 F.2d 1114, 1121 (2d Cir. 1976).

182. *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503 (1986) (upholding air force regulation that prevented Orthodox Jew from wearing yarmulke while on duty). The Court wrote:

> "[T]he military is, by necessity, a specialized society separate from civilian society." Parker v. Levy, 417 U.S. 733, 743 (1974). . . . Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. . . . The essence of military service "is the subordination of the desires and interests of the individual to the needs of the service." Orloff v. Willoughby, supra, 345 U.S. 83, 92 (1953).

475 U.S. at 506-507.

183. *See* Megan R. Golden, *When Pregnancy Discrimination is Gender Discrimination: The Constitutionality of Excluding Pregnant Women from Drug Treatment Programs*, 66 N.Y.U. L. REV. 1832, 1844-47 (1991).

184. However, the courts have not been receptive to these attempted applications of drug delivery statutes. *See, e.g., State v. Kruzicki*, 561 N.W.2d 729 (Wis. 1997) (mother cannot be taken into protective custody for delivering drug to her fetus because, under the statute, fetus is not a "child"); *Sheriff, Washoe County, Nevada*, 885 P.2d 596 (Nev. 1994) (statute criminalizing child endangerment does not apply to pregnant woman's ingestion of illegal substances and resulting transmission of substances to child through umbilical cord); *Johnson v. State*, 602 So.2d 1288 (Fla. 1992) (mother who passed cocaine to her baby through umbilical cord after birth did not violate statutory prohibition against adult delivery of controlled substance to minor); *State v. Luster*, 419 S.E.2d 32 (1992) (legislature did not intend to prosecute pregnant women who ingest a controlled substance for delivery of the substance to another person). *See also* Michelle D. Wilkins, *Solving the Problem of Prenatal Substance Abuse: An Analysis of Punitive and Rehabilitative Approaches*, 39 EMORY L.J. 401 (1990) (evaluating the constitutionality of criminal prosecutions under existing child protection and drug statutes, including statutes criminalizing the delivery of drugs to minors when infants are born with drugs in their systems).

As with abortion and welfare, however, drug use has been a very strong political target in recent years and the Court may choose not to reconsider a major Supreme Court precedent in a case seeking to assist drug-dependent pregnant women.

D. Fetal Protection Policies

In *International Union, UAW v. Johnson Controls, Inc.*,[185] the Supreme Court issued a landmark ruling prohibiting employers from discriminating against women by denying them the opportunity to work in environments potentially hazardous to their reproductive health. The Court ruled that under the PDA, an employer's policy of discriminating against workers who were "capable of bearing children" constituted pregnancy, and thus sex, discrimination.[186]

Because this was an employment case, the Court rested its decision on Title VII. However, the opinion is a strong statement in which the Court showed great sensitivity to the reality of pregnancy in working women's lives. Furthermore, the Court seemed to recognize in this case the importance to all women's equality of invalidating statutes which discriminate on the basis of pregnancy or the capacity for pregnancy. If presented with a similar factual situation not covered by Title VII, the Court might be persuaded to extend its logic to the equal protection clause. Because of the forcefulness of the Court's argument in this case, this context would be an excellent one for challenging *Geduldig*. However, because this issue is so tied to employment, it may be difficult to find a similar fact pattern in a case not covered by Title VII.

E. Health Issues Specific to Men

Justice Brennan's dissent in *Geduldig* pointed out that the California disability program at issue covered several uniquely male health problems, including prostatectomies, circumcision, hemophilia, and gout.[187] The majority of the Court, however, denied that the program provided any benefit for one sex that was not available to the other. If the Court were faced with a challenge to a denial of a benefit applicable to men only, perhaps it would reconsider its reasoning. As discussed earlier, this strategy of shifting the sex-equality framework to a male perspective was quite successful in the development of the Court's sex-based equal protection doctrine.

F. Health Issues Specific to Particular Racial Groups

Because the Supreme Court has extended more stringent equal protection review to racial than to gender classifications, another possible

185. 499 U.S. 187 (1991).
186. *Id.* at 199.
187. *Geduldig*, 417 U.S. at 501 (Brennan, J., dissenting).

strategy for overruling *Geduldig* might be to challenge a non-employer-based insurance program, subject to the equal protection clause, which denies benefits for health issues primarily affecting particular racial groups. Because of the unavailability of the disparate impact theory in the equal protection context,[188] such a program would have to exclude a benefit needed almost exclusively by one racial group, such as testing and treatment for sickle cell anemia. As with health issues specific to men, this type of challenge would be hard for the Court to distinguish from *Geduldig* and, at the same time, extremely difficult for the Court to reject. The main difficulty, however, would be identifying such a program.

G. Challenges to the Welfare Bill

Litigation involving the 1996 welfare bill[189] may provide a number of opportunities for attacking *Geduldig*. Although overturning a precedent such as *Geduldig* will be secondary to attempts to block harsh implementations of the new law, much of the litigation around this law will affect pregnant women. Thus, welfare may be a good area for confronting the outdated *Geduldig* precedent. In turn, advocates for pregnant women who risk losing benefits under the new law will need to deploy a variety of legal strategies. Some of the arguments explored in this article may assist in developing several of these strategies. If pregnancy discrimination were to be equated with sex discrimination, courts could review a number of the states' new welfare-related measures under heightened equal protection scrutiny.

Welfare reform provides a strong basis for challenging *Geduldig* since the federal law explicitly demonstrates Congress' intent to affect some women's right to bear children.[190] In order to implement its provisions and be eligible for federal block grant funding, states are now compelled to enact programs adversely affecting pregnant women. A sympathetic court might well agree that some of these programs stem from actual animus against pregnant women receiving public support.[191]

One state, California, has already taken measures to attempt to reduce benefits for pregnant women since the passage of the new federal welfare law. Shortly after the law passed, Governor Pete Wilson announced his

188. *See supra* Part II.B.3.

189. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 [hereinafter Welfare Act], Pub. L. 104-193, 110 Stat. 2105.

190. *See* Welfare Act, § 101(10):

> Therefore, in light of this demonstration of the crisis in our Nation, it is the sense of the Congress that prevention of out-of-wedlock pregnancy and reduction in out-of-wedlock birth are very important Government interests and the policy contained in . . . the Social Security Act (as amended by . . . this Act) is intended to address the crisis.

191. *See supra* text accompanying notes 66-67.

intention to interpret the law as a directive for eliminating California's program which provides free prenatal care for undocumented immigrants.[192] Even before the welfare law was enacted, Wilson stated that he hoped to eliminate this program, as well as many others serving undocumented immigrants in California, after the state's voters passed Proposition 187 in 1994.[193] That proposition, which would deny almost all public services for undocumented immigrants, was enjoined in 1995 by U.S. District Judge Mariana Pfaelzer.[194] In her injunction, Judge Pfaelzer ruled that many provisions of the state proposition impermissibly usurped federal authority over immigration policy.[195] However, in the fall of 1996, when the legal team that had succeeded in persuading Judge Pfaelzer to enjoin Proposition 187 returned to court to block Wilson's plan to cut prenatal services for undocumented pregnant immigrants, they were not successful. Judge Pfaelzer ruled that although the State may not enact immigration-related measures that conflict with federal law, the federal welfare law itself justified and even required the State to halt benefits for undocumented immigrants.[196]

192. Since 1988, California has subsidized these prenatal services, which are not covered by Medicaid, through its Medi-Cal program. State officials claim that this program now costs $69 million and provides care for 70,000 undocumented pregnant immigrants a year. *See* Patrick J. McDonnell & Virginia Ellis, *Welfare Law Will Allow Wilson to Cut Immigrant Aid*, L.A. TIMES, Nov. 2, 1996, at A1.

193. *See* Laura Mecoy, *Restrictions on Immigrants Sought*, SACRAMENTO BEE, Feb. 1, 1996, at A1 ("[California] claimed . . . that it eventually could exclude undocumented immigrants from 23 programs.").

194. League of United Latin American Citizens v. Wilson, 908 F. Supp. 755 (C.D. Cal. 1995).

195. *Id.* Her decision left open the possibility, however, that the State might be able to halt programs for undocumented immigrants that are completely supported by State funds. *Id.* In her decision, Judge Pfaelzer stated "[t]hat the state's denial of such benefits may be unconstitutional on other grounds is not a question before the Court at this time." *Id.* at 781. Early in 1996, Wilson announced that he would seek to eliminate the program providing prenatal care for undocumented immigrant women by demonstrating that the program received no federal funds. *See* Mecoy, *supra* note 193, at A1. However, opponents have questioned Wilson's assertion that the program is supported exclusively by state funds. *See also League of United Latin American Citizens*, 908 F. Supp. at 781 ("the Court is unable to conclude that such wholly state-funded programs in fact exist.").

196. *See* Patrick J. McDonnell & Virginia Ellis, *Welfare Law Will Allow Wilson to Cut Immigrant Aid*, L.A. TIMES, Nov. 2, 1996, at A1 ("'Congress has decided that the states should deny health benefits to illegal aliens'"). Under the law, states may provide state and local benefits for undocumented immigrants only by passing new state legislation which affirmatively allows such benefits. Section 411(d) of the Welfare Act states:

> A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under . . . only through the enactment of a State law after the date of the enactment of this Act which affirmatively provides for such eligibility.

California has not passed such legislation. Although Wilson received permission from the federal court to eliminate the prenatal care program on this basis, a state superior court judge later blocked his attempt to end the program immediately. *See* Aurelio Rojas & John Wildermuth, *Judge Asks for Proof of 'Emergency' for Prenatal Cuts*, S.F. CHRON., Nov. 23, 1996, at A15. In the state court action, Wilson argued that the passage of the federal welfare bill constituted an "emergency" that required prompt action by the State and left no

The legal team opposing the elimination of services for immigrants in California has stated that it intends to wage a further challenge to Wilson's plan. The ACLU of Southern California has announced that the team is considering an equal protection challenge, at least in part, on the ground that many of the children who will be affected—children whose mothers will be denied prenatal services—are U.S. citizens.[197]

In addition to raising the equal protection issue of alienage, this situation could also serve as a basis on which to challenge the State's discrimination against pregnant women. The State would be very likely to argue that it intends eventually to eliminate benefits for all undocumented immigrants and, therefore, its current plan should not be seen as an attack against pregnant women in particular.[198] However, in light of arguments discussed throughout this article, advocates could argue that California's near-isolated attempt to end a program which provides services to pregnant women constitutes discrimination on the basis of sex.

In addition to undocumented immigrants, another category of pregnant women specifically targeted by the new welfare law is teenagers.[199] Section 905 of the law requires the Secretary of Health and Human Services to establish a national strategy for preventing out-of-wedlock teenage pregnancies. In implementing the law, states will be required to take a variety of measures against pregnant teenagers, including denying benefits

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time for the 60-day rule-making and public discussion review process usually accorded new State regulations. The court rejected Wilson's argument and ruled that no "emergency" existed necessitating such swift action. Although this defeat for Wilson created a temporary setback for his plan to eliminate the prenatal care program, the state court's decision has only delayed implementation of the plan.

197. *See* McDonnell & Ellis, *supra* note 196, at A1 ("[Mark Rosenbaum, legal director of the ACLU of Southern California, predicted] legal assaults, including a possible challenge of the ban on pregnancy aid under constitutional guarantees of equal protection, [arguing that] '[d]enying prenatal care to citizen children is an open question that could be litigated.'").

198. According to state officials, Wilson ordered his staff last year to determine which state programs officially serve undocumented immigrants, and the prenatal care, as well as nursing home assistance, programs were simply the first programs for which his staff completed their reviews. *See* Faye Fiore, *Welfare Reform Bolsters Prop. 187, Governor Says*, L.A. TIMES, Sept. 11, 1996, at A3.

199. In its findings section of the Welfare Act, Congress expressed its belief that teenage pregnancy costs taxpayers large amounts of public resources each year. *See* Welfare Act, § 101(9)(f) ("[y]oung women who have children before finishing high school are more likely to receive welfare assistance for a longer period of time") and Sec. 101(9)(g) ("[b]etween 1985 and 1990, the public cost of births to teenage mothers under the aid to families with dependent children program, the food stamp program, and the Medicaid program has been estimated at $120,000,000,000"). However, some studies have reached a different conclusion. For example, according to a recent study conducted at the University of Chicago, "[t]een mothers who have children before they are 18 become successful wage-earners by their 30s, earning more than teens who had infants in later years and relying less on the welfare system." Della De Lafuente, *Study Refutes Belief About Teen Mothers*, CHI. SUN-TIMES, Dec. 6, 1996, at 22. The researchers found that "by the time women are 34, those who had been teen mothers earn about $25,000 a year, nearly $5,000 a year more than if these women had delayed childbearing until they were young adults." *Id.*

to teenage mothers who do not live with their parents or guardians and reducing benefits for those who do not assist welfare officials in establishing their children's paternity. In Georgia, it has even been proposed that teenagers who become pregnant within ten months of receiving welfare be punished.

Although the welfare law purports to strengthen mechanisms for the collection of child support[200] and for the prevention of statutory rape leading to pregnancy,[201] the measures that states must enact to limit and withhold benefits to indigent pregnant teenagers will likely be more punitive than the measures they will take against the fathers of their children. Thus, these measures may provide another basis for an equal protection challenge against pregnancy discrimination.

Another way in which the new federal welfare law denies benefits to pregnant women is through the "child exclusion" or "family cap" strategy.[202] Under this plan, states may limit the total amount of benefits they will provide to a family without regard to the number of children in the family. Generally, the benefit rate is fixed upon the family's entry into the program and, thus, when a woman has a child while receiving welfare, she and each member of her family receive proportionately lower benefits.

Republicans in Congress tried to mandate child exclusion policies nationwide as part of the federal law. Although they were not successful, the states are still free to impose this rule. As of the fall of 1996, at least nineteen states have made plans to create such a system or already have one in place.[203]

Before the new welfare law was passed, a coalition of welfare advocacy groups brought a class action challenge against New Jersey's child exclusion rule. In the summer of 1996, the Third Circuit rejected their arguments and allowed the rule to stand.[204] The court based its decision

200. *See* Title III of the Welfare Act (entitled "Child Support").

201. Welfare Act Section 906(b) states:

> Not later than January 1, 1997, the Attorney General shall establish and implement a program that—(1) studies the linkage between statutory rape and teenage pregnancy, particularly by predatory older men committing repeat offenses; and (2) educates State and local criminal law enforcement officials on the prevention and prosecution of statutory rape, focusing in particular on the commission of statutory rape by predatory older men committing repeat offenses, and any links to pregnancy.

202. Before the current law requiring states to devise their own programs and rules for distributing benefits was passed, states could implement their own experimental welfare plans, including child exclusions, only by obtaining a waiver from the federal Department of Health and Human Services.

203. *See* Sue Ellen Christian, *Welfare Reform Puts Mom in Middle*, CHI. TRIB., Oct. 31, 1996, at 1.

204. *See* C.K. v. New Jersey Department of Health and Human Services, 92 F.3d 171 (3rd Cir. 1996).

primarily on administrative law grounds, however, concluding that the Secretary of Health and Human Services did not act "arbitrarily or capriciously" in approving an AFDC waiver for New Jersey's "experimental" program. The lengthy opinion addressed the plaintiffs' constitutional arguments in only three paragraphs. Applying rational basis review, the court ruled that the program did not irrationally penalize children for their parents' behavior or unduly burden the plaintiffs' procreative choices in violation of their right to due process, but instead was rationally related to the state's legitimate interests in controlling welfare expenditures.[205] Thus, the court did not seem to consider whether the program discriminated against pregnant welfare recipients in particular.[206]

With the increasing number of states now implementing child exclusion policies, further challenges to these rules are certain to arise soon.[207] Although the Third Circuit ruling created a difficult precedent, other courts may view the situation differently. The states no longer need to apply to the Department of Health and Human Services for waivers to implement their various welfare programs; therefore, new challenges may focus more on the constitutional issues underlying these policies instead of on federal administrative regulations. By demonstrating that child exclusion policies are directed toward women who become pregnant while receiving welfare and are explicitly intended to punish these women for their behavior, advocates could argue that these rules discriminate against pregnancy and thus against women on the basis of their gender.

The principal drawback to raising the strategies discussed throughout this article in the context of the new welfare law is the highly politically charged state of the issue today, particularly in light of the law's dramatic change in this country's treatment of the poor. A constitutional rule mandating that pregnancy discrimination be reviewed with the same level of scrutiny as sex discrimination would certainly help in the legal effort to contain some of the damage produced by the new federal welfare law. Although this area might be a tricky one in which to force a reversal of a Supreme Court precedent, the advantages to using this context to update equal protection law are the pressing urgency of the welfare issue today and the fact that new challenges to the welfare law are certainly imminent.

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205. *Id.* at 194-95.

206. In another section of the opinion in which the court considered whether the program violated regulations regarding research on human subjects, the court affirmed the district court's holding that the policy was not "directed toward" or did not "involve[ ]" pregnant women. *Id.* at 190-91. However, rather than making its own independent decision regarding this question, here the court stressed its deference to the Secretary of Health and Human Services. *Id.*

207. In May 1997, the Indiana Civil Liberties Union filed a lawsuit challenging Indiana's "family cap" provision. *See ICLU Challenges State Welfare Cap*, Louisville Courier-Journal, May 24, 1997, at 1B.

CONCLUSION

Ideally, women's advocates could pursue a variety of avenues to weaken the *Geduldig* precedent. However, limited resources require that advocates concentrate their efforts on the most promising tactics. Since *Geduldig* has been so heavily criticized and arguably already limited by the Court, and because a majority of sitting Justices appear willing to acknowledge explicitly that the opinion is outdated, a primary strategy should be a direct challenge of a state program that excludes coverage for pregnancy—the first option described in Part IV.

It would also be helpful if lawsuits opposing recent welfare rollbacks included arguments specifically targeting *Geduldig*. Even if challenges to *Geduldig* in the welfare context are not successful, they might at least generate widespread discussion of the absurdity of the Court's equal protection doctrine as it is currently applied to sex and pregnancy. Public awareness of the issue may prove useful to later cases brought in other contexts.

Furthermore, it would be useful for advocates considering a long-term strategy for challenging *Geduldig* to agree on common goals. For example, in light of the continuing controversy in the women's rights community regarding the appropriateness of special benefits for pregnant women, such as mandatory availability of work leave, it would be best not to concentrate on challenging special benefits for pregnancy unless it is feasible to ensure the extension of these benefits to men and non-pregnant women also. The strategy of reviving the ban on irrebuttable presumptions would be less controversial but, as described in Part II.B., probably limited as a practical matter.

In light of the Court's strong equal protection pronouncements in the recent cases of *Romer* and *Virginia*, the most promising strategy probably would be to convince the Supreme Court to impose heightened scrutiny on pregnancy discrimination as discussed in Part II.C.—either by uniting it with sex discrimination through a direct overruling of *Geduldig* or by independently endowing it with some degree of suspect status. In making this argument, advocates can point to two decades of overwhelming support by Congress, state and federal courts, and legal commentators, who have recognized the importance to women's equality of lessening the burdens of pregnancy.