

CASENOTE

Expanding the Boundaries of Equality: Taking Pregnancy Into Account in *California Federal Savings & Loan Association v. Guerra*¹ — More than ever before in our nation's history, women in America are working outside the home. Women also continue to enter the work force in record numbers. Currently, nearly 54% of all women work² and female workers constitute over 42% of the nation's total work force.³ It is estimated that two-thirds of the new workers to enter the job market through 1995 will be women.⁴ Inevitably, many working women will become pregnant and bear children while participating in the paid work force.⁵

The rights of pregnant workers is not a new question, but the sheer number of working women and the importance of their role both in the nation's economy and in the economic well-being of their families gives the question an urgency and universality today that is new.⁶ Recent developments in the area of pregnancy discrimination may provide some solutions for the problems faced by so many pregnant workers. Under Title VII of the Civil Rights Act of 1964, Congress has outlawed discrimination on the basis of pregnancy.⁷ In addition, more and more private employers are providing pregnancy disability leave and parental leave for their employees.⁸ Furthermore, several state legislatures have enacted laws that provide job protection for pregnant workers.⁹ Most

¹ *California Fed. Sav. and Loan Ass'n v. Guerra*, 107 S. Ct. 683 (1987).

² WOMEN'S BUREAU, U.S. DEP'T OF LABOR, THE UNITED NATIONS' DECADE FOR WOMEN, 1976-1985: EMPLOYMENT IN THE UNITED STATES 13 (July 1985) [hereinafter DECADE FOR WOMEN], cited in Brief of Amici Curiae — California Women Lawyers, at 5, *California Fed. Sav. and Loan Ass'n v. Guerra*, 107 S. Ct. 683 (1987), *aff'g* 758 F.2d 390 (9th Cir. 1985).

³ Larwood & Gutek, *Women at Work in the USA*, in WOMEN: AN INTERNATIONAL SURVEY 237 (M. Davidson & C. Cooper eds. 1984). Larwood and Gutek note that this figure represents an increase from 29.6% in 1950. *Id.*

⁴ Dwyer, *Business Starts Tailoring Itself to Suit Working Women*, BUS. WK., Oct. 6, 1986, at 50. Dwyer notes that "[t]wo-thirds of the 15 million new entrants into the job market through 1995 will be women, according to the Bureau of Labor Statistics . . . and in terms of sheer numbers, they will have more influence than ever before." *Id.* at 50-51.

⁵ Studies estimate that 85% of the women currently working will have a child while in the labor force. W. Chavkin, *Walking A Tightrope: Pregnancy, Parenting and Work* 206, in DOUBLE EXPOSURE: WOMEN'S HEALTH HAZARDS ON THE JOB AND AT HOME (1984), cited in Brief of Amici Curiae — California Women Lawyers, *supra* note 2, at 7.

⁶ The working woman's income is essential to the maintenance of her family. Recent studies have shown that 60% of working women report that they must work to support themselves or their families, that women head 16% of all families and 61% of these women are in the work force, and that the income of married women who work full time accounts for approximately 40% of their family income. Brief of Amici Curiae — California Women Lawyers, *supra* note 2, at 7-8 (citing AMERICAN COUNCIL OF LIFE INSURANCE, WOMEN AND MONEY 30 (1984) and DECADE FOR WOMEN, *supra* note 2, at 25).

⁷ 42 U.S.C. § 2000e(k) (Supp. III 1985). The Pregnancy Discrimination Act (PDA) amended Title VII in 1978 to prohibit discrimination based on pregnancy. See *infra* note 15 for the text of the PDA.

⁸ See Dwyer, *Business Starts*, *supra* note 4, at 50.

⁹ Four states, California, Connecticut, Montana, and Massachusetts, currently have statutes which require that employers provide reasonable pregnancy disability leave with limited job protection for pregnant workers. See CAL. GOV'T CODE § 12945(b)(2) (West 1986); CONN. GEN. STAT. ANN. § 46a-60(a)(7) (West Supp. 1985); MASS. ANN. LAWS ch. 149, § 105D (Michie/Law. Co-op. 1986); MONT. CODE ANN. §§ 49-2-310 and 49-2-311 (1985).

recently, the United States Supreme Court ruled that in order to further Title VII's goal of equal employment opportunity for women, pregnant workers can receive special treatment in the form of limited job protection not available to other temporarily disabled workers.¹⁰

In *California Federal Savings & Loan Association v. Guerra*,¹¹ Lillian D. Garland wished to return to her job after a four-month pregnancy disability leave.¹² When her employer, California Federal Savings and Loan (Cal Fed), refused to rehire her, Garland sought the protection of California's "right to return" law.¹³ This statute requires employers to grant a pregnant employee up to four months of unpaid disability leave and to rehire her in the same or a similar position at the end of the leave.¹⁴ Cal Fed challenged the validity of the statute in federal district court, asserting that Title VII, as amended by the Pregnancy Discrimination Act (PDA),¹⁵ pre-empted the California law because the PDA prohibits any special treatment on the basis of pregnancy.¹⁶ The Supreme Court rejected this interpretation of the PDA, however, and upheld California's "right to return" law. The Court ruled that because both Title VII, as amended by the PDA, and California's right to return law share the common goal of ensuring equal employment opportunity for women, and because the California law limits special treatment to just the period of actual physical disability resulting from pregnancy and childbirth, Title VII does not pre-empt the California statute.¹⁷

In ruling that California's right to return law is not inconsistent with the PDA, the Supreme Court has resolved the confusion among the lower courts concerning the

¹⁰ *California Fed. Sav. and Loan Ass'n v. Guerra*, 107 S. Ct. 683 (1987), *aff'g* 758 F.2d 392 (9th Cir. 1985).

¹¹ *Id.*

¹² *Id.* at 688.

¹³ *Id.*

¹⁴ CAL. GOV'T CODE § 12945(b)(2) (West 1986). Initially codified as § 1420.35 of the California Labor Code, the law now appears as part of the California Government Code and reads, in pertinent part:

It shall be an unlawful employment practice unless based upon a bona fide occupational qualification: . . . (b) For any employer to refuse to allow a female employee affected by pregnancy, childbirth, or related medical conditions . . . (2) To take a leave on account of pregnancy for a reasonable period of time; provided, such period shall not exceed four months . . . Reasonable period of time means that period during which the female employee is disabled on account of pregnancy, childbirth, or related medical conditions.

Id.

¹⁵ The Pregnancy Discrimination Act of 1978 amended Title VII so that the definition of sex discrimination would include pregnancy discrimination:

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, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.

¹⁶ 42 U.S.C. § 2000e(k) (Supp. III 1985).

¹⁷ *California Federal*, 107 S. Ct. at 688.

¹⁸ *Id.* at 693-94.

proper interpretation of the PDA¹⁸ and established a test for states to follow in determining the validity of some kinds of pregnancy discrimination legislation.¹⁹ By permitting states, in the Court's words, to "tak[e] pregnancy into account"²⁰ in order to protect women workers, the Court has indicated that state legislation requiring the special treatment of pregnancy will be permitted when it meets a two-pronged test. Under this test, the state must first limit the special treatment to just the period of actual physical disability resulting from pregnancy and childbirth and, second, the special treatment must enhance the woman worker's employment opportunity.²¹ The Court's test expressly rests on a simple and fundamental concept: women, as well as men, should be able to have families without facing the risk of losing their jobs.²²

The Court formulated this two-pronged test after determining that the pre-emptive reach of Title VII, as amended by the PDA, is severely limited.²³ When it enacted Title VII, Congress explicitly stated that the federal law would not disturb existing state fair employment laws.²⁴ When the Court resolved the pre-emption issue by finding California's right to return law in harmony with the PDA, it provided both a sound, workable test by which to judge the legality of existing pregnancy discrimination statutes, and a model for states that might wish to follow California's lead. By articulating the case's underlying issue as one of equality between working women and working men with families, the Court provided not only a sensible framework with which to analyze the problem of pregnancy discrimination, but also demonstrated that the idea of equality in American law has continuing vitality and can respond to the needs of a changing world.

The *California Federal* case arose from a labor dispute between Lillian D. Garland and the California Federal Savings and Loan Association (Cal Fed). In January 1982, Garland, a Cal Fed receptionist/PBX operator, began a pregnancy disability leave.²⁵ Three months later Garland notified Cal Fed that she was ready to return to work.²⁶ Cal Fed advised Garland that no receptionist or similar positions were available at that time and that a permanent employee had filled her previous position.²⁷ Garland did not return to work until November 1982, when she accepted a position as a receptionist in Cal Fed's Accounting Department.²⁸

¹⁸ The lower courts have been far from consistent in their interpretation of the PDA. Some courts have adopted an equal treatment approach to pregnancy, others have required different treatment, and still others have found that the PDA permits, but does not require special treatment. See Note, *Sexual Equality Under the Pregnancy Discrimination Act*, 83 COLUM. L. REV. 690, 699-703 (1983) for a summary of these cases. These different interpretations of the PDA mirror the debate among various commentators concerning the treatment of pregnancy in the workplace. See *infra* notes 120-41 and accompanying text for a discussion of what is described as the equal treatment/special treatment debate.

¹⁹ See *California Federal*, 107 S. Ct. at 694.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 690.

²⁴ *Id.* (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 n.24 (1983)).

²⁵ *California Federal*, 107 S. Ct. at 688.

²⁶ *Id.*

²⁷ *California Fed. Sav. & Loan Ass'n v. Guerra*, 34 Fair Empl. Prac. Cas. (BNA) 562, 565 (D.C. Cal. 1984) (*California Federal I*), *rev'd*, 758 F.2d 390 (9th Cir. 1985) (*California Federal II*), *aff'd*, 107 S. Ct. 683 (1987) (*California Federal*).

²⁸ *Id.*

In May 1983, the California Department of Fair Employment and Housing²⁹ served a complaint against Cal Fed on Garland's behalf.³⁰ The complaint alleged that Cal Fed's disability leave policy violated California's pregnancy discrimination law because it failed to provide Garland with four months of pregnancy disability leave and reinstatement to the same or a similar job, as the statute required.³¹ Cal Fed then filed suit in federal district court seeking declaratory and injunctive relief against the enforcement of the California statute on the grounds that Title VII, as amended by the Pregnancy Discrimination Act (PDA), pre-empted the statute.³² The district court held that federal law pre-empted the California law because the statute required "preferential" treatment of pregnancy-related disabilities, while the PDA required that employers treat pregnancy disability the same as other temporary disabilities.³³ The court concluded that because female employees received a benefit that male employees did not receive, the special treatment of pregnancy made employers vulnerable to "reverse discrimination" suits by male employees under Title VII.³⁴

The Court of Appeals for the Ninth Circuit reversed the district court's ruling and stated that the district court's conclusion that the California statute discriminates against males "defies common sense, misinterprets case law, and flouts Title VII and the PDA."³⁵ The Ninth Circuit reasoned that Title VII, as amended by the PDA, and California's right to return law share a common goal: to achieve equal employment opportunity for women.³⁶ The PDA establishes a minimum level of protection for pregnant workers, the Ninth Circuit found, when it requires that employers treat pregnant workers the same as other workers similar in their ability or inability to work.³⁷ The Ninth Circuit stated, however, that this minimum level of protection does not prevent states from doing more for pregnant workers if they wish.³⁸ Cal Fed appealed and the

²⁹ The California Department of Fair Employment and Housing is the administrative agency charged with the enforcement of the Fair Employment and Housing Act, of which § 12945(b)(2) is a part. *California Federal I*, 34 Fair Empl. Prac. Cas. (BNA) at 565.

³⁰ *California Federal*, 107 S. Ct. at 688.

³¹ *California Federal II*, 758 F.2d at 392. Cal Fed's disability leave policy is reproduced in the district court's opinion, as follows:

(a) An employee must have completed the third month of employment in order to be eligible.

(b) To ensure continuous workflow, the position the employee is vacating may have to be filled. If this happens, the Personnel Division will make every effort to provide another, similar or suitable position. Under no circumstances may an employee return before contacting the Employment Department to find out whether a position is available.

(c) Cal Fed reserves the right to terminate an employee on leave of absence if a similar and suitable position is not available.

California Federal I, 34 Fair Empl. Prac. Cas. (BNA) at 565.

³² *California Federal*, 107 S. Ct. at 688.

³³ *Id.*

³⁴ *California Federal I*, 34 Fair Empl. Prac. Cas. (BNA) at 568.

³⁵ *California Federal II*, 758 F.2d at 393.

³⁶ *Id.* at 396.

³⁷ *Id.*

³⁸ *Id.* The Ninth Circuit stated that "the reasons for the PDA's enactment . . . [make] clear that Congress intended . . . to construct a floor beneath which pregnancy disability benefits may not drop — not a ceiling above which they may not rise." *Id.*

United States Supreme Court, in a six to three opinion, affirmed the Ninth Circuit's holding.³⁹

The Supreme Court sustained California's right to return law against Cal Fed's Title VII pre-emption challenge because the Court found no direct conflict between the state and federal statutes.⁴⁰ The Court reasoned that the goal of both the PDA, as evidenced by its legislative history, and the California statute is to achieve equal employment opportunity for women.⁴¹ Title VII permits the special treatment of pregnancy to achieve this goal, the Court ruled, when it meets a two-pronged test. First, the state law must be narrowly tailored to cover just the period of actual physical disability resulting from pregnancy and childbirth. Second, it must enhance employment opportunity for the pregnant worker.⁴² Thus, according to the Court, Title VII will not pre-empt state law providing for special treatment of pregnant workers when it conforms to this test.

In *California Federal*, the Supreme Court demonstrated great sensitivity to the needs of pregnant women in the workplace. The Court properly upheld a California law giving limited job protection to pregnant workers. It based its decision not on a paternalistic concern for the "weaker sex" but, rather, on an awareness that without this protection many women must choose between having families and keeping their jobs.⁴³ The decision is not only a victory for California and three other states with similar legislation,⁴⁴ but also a victory for all the nation's working women. The job protection now found permissible under federal law opens a door for all states to follow California's lead.

Section I of this casenote will trace the foundations of pregnancy discrimination law and examine the early Supreme Court cases that upheld protective legislation for women,⁴⁵ the modern pregnancy discrimination cases,⁴⁶ and the enactment of the Pregnancy Discrimination Act and California's right to return law.⁴⁷ Section I then will examine the current public policy debate concerning pregnancy discrimination in the workplace by surveying the viewpoints of both the "equal treatment"⁴⁸ and the "special treatment" advocates,⁴⁹ who propose very different solutions to the problems faced by pregnant workers. Section II will present the Supreme Court's opinion in *California Federal Savings & Loan Association v. Guerra*,⁵⁰ including both the concurring⁵¹ and dissenting opinions.⁵² Section III will analyze the soundness of the Court's reasoning and

³⁹ *California Federal*, 107 S. Ct. 683 (1987). Justices Brennan, Blackmun, and O'Connor joined Justice Marshall's majority opinion. Justices Scalia and Stevens contributed concurring opinions. Chief Justice Rehnquist and Justice Powell joined Justice White's dissenting opinion.

⁴⁰ *Id.* at 692.

⁴¹ *Id.* at 693.

⁴² *Id.* at 694.

⁴³ One court has observed that these statutes assist women's "participation in the job market by insuring that they will not be fired solely because they become pregnant." *Miller-Wohl Co. v. Commissioner of Labor & Indus., State of Mont.*, 515 F. Supp. 1264, 1268 (D. Mont. 1981).

⁴⁴ See *supra* note 9 for a listing of the state legislation of Connecticut, Montana, and Massachusetts.

⁴⁵ See *infra* notes 55-65 and accompanying text.

⁴⁶ See *infra* notes 66-95 and accompanying text.

⁴⁷ See *infra* notes 96-119 and accompanying text.

⁴⁸ See *infra* notes 122-33 and accompanying text.

⁴⁹ See *infra* notes 134-41 and accompanying text.

⁵⁰ See *infra* notes 142-80 and accompanying text.

⁵¹ See *infra* notes 181-95 and accompanying text.

⁵² See *infra* notes 196-209 and accompanying text.

examine both the legal and public policy implications of the Court's opinion.⁵³ Finally, Section III will conclude that the Court properly decided *California Federal* and, in the process, established a sensible model for the protection of pregnant employees in the workplace that enlarges traditional notions of equality.⁵⁴

I. THE FOUNDATIONS OF PREGNANCY DISCRIMINATION LAW

Pregnancy discrimination law has its roots in the early sex discrimination cases.⁵⁵ Courts upheld "protective" and paternalistic legislation for women based primarily on the view that women's childbearing ability made them vulnerable to potential dangers in the workplace. The protective legislation, however constitutional, limited women's access to the workplace. As a result of this history, modern plaintiffs sought equal treatment as the remedy for pregnancy discrimination. Only when this approach failed to protect pregnant women in the workplace did the law come full circle to a new protective approach.

Historically, society viewed a woman's capacity to bear children as something that made her different from the typical worker, usually a man.⁵⁶ Women's "difference" was seen as a frailty or a weakness that made them less able to handle the rigors of the working world. This view prompted restrictive legislation that many considered necessary for the protection of women in the workplace. In the 1873 case of *Bradwell v. Illinois*,⁵⁷ for example, the United States Supreme Court affirmed a state court ruling that prohibited Myra Bradwell's admission to the state bar. Justice Bradley reflected the judicial attitude of the time when he observed, in his concurring opinion, that the legal profession was particularly ill-suited for the sex whose "paramount destiny and mission . . . are to fulfill the noble and benign offices of wife and mother."⁵⁸ Justice Bradley explained that "the natural and proper timidity and delicacy which belongs to the female sex"⁵⁹ necessitated upholding the state court's ruling. Thus, in an effort to "protect"⁶⁰ a woman who evidently had sufficient courage and strength to pursue a career then considered inappropriate for her sex, the Court in effect prohibited her from earning a livelihood in the manner she chose.

This concern for the protection of the weaker sex influenced the court for almost a century. The Supreme Court's 1905 decision of *Lochner v. New York*⁶¹ struck down protective labor legislation for bakers — who were primarily male — on the theory that a law limiting work hours interfered with a worker's right to contract and sell his labor in any manner he wished. Just three years later, however, the Court upheld similar

⁵³ See *infra* notes 210–75 and accompanying text.

⁵⁴ *Id.*

⁵⁵ This casenote uses the term "pregnancy discrimination law" to describe the entire body of law that has developed concerning pregnancy discrimination, including both case law and statutory enactments.

⁵⁶ See B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, *SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES* 19–53 (1975) for a discussion of this period in history.

⁵⁷ 83 U.S. (16 Wall.) 130 (1873).

⁵⁸ *Id.* at 141 (Bradley, J., concurring).

⁵⁹ *Id.* (Bradley, J., concurring).

⁶⁰ *Id.* (Bradley, J., concurring).

⁶¹ 198 U.S. 45 (1905).

legislation in *Muller v. Oregon*⁶² that applied to female workers in factories and laundries. The Court did not view the *Muller* issue as touching the right to contract; rather, the Court found that the "burdens of motherhood" placed women at a competitive disadvantage in the workplace.⁶³ Once again, the Court found that women's natural weakness, the ability to bear children, justified a statute limiting the work hours, and consequently the pay, of female workers.⁶⁴ The Court in *Muller* perceived women workers as so different from men that it determined that *Lochner's* reasoning did not apply; nor did the Court recognize that the women workers had any contractual rights which the statute may have infringed.⁶⁵

These early cases indicate that when the Court took into account women's capacity to become pregnant, this consideration often resulted in setbacks for women both economically and in the choice of occupations.⁶⁶ Historically, therefore, the "special treatment" of pregnancy constricted the employment opportunities available to women. Not surprisingly, modern plaintiffs sought equal treatment as a remedy for discrimination on the basis of pregnancy.⁶⁷ Because employers treated pregnancy differently than other temporary disabilities by excluding it from disability benefit plans, these plaintiffs urged that pregnancy should receive equal treatment in the workplace so that pregnant workers could receive the same benefits as other temporarily disabled workers.⁶⁸

The first pregnancy discrimination case to reach the Supreme Court involved a Cleveland Board of Education policy that required pregnant teachers to begin maternity leave five months before the expected date of birth.⁶⁹ In addition, the policy permitted teachers to return to the classroom only after the infant reached three months of age and the teacher submitted a letter from her physician attesting to her "physical condition."⁷⁰ The plaintiffs in the 1974 case of *Cleveland Board of Education v. LaFleur* challenged this policy on due process grounds.⁷¹ The Court found that the policy violated the pregnant teachers' due process rights because no rational basis existed for the school board's conclusion that the teachers were physically incapable of teaching after the fourth

⁶² 208 U.S. 412 (1908).

⁶³ *Id.* at 421.

⁶⁴ *Id.*

⁶⁵ *Id.* at 422.

⁶⁶ Other influential cases involving restrictive protective legislation include *Hoyt v. Florida*, 368 U.S. 57 (1961) (upholding state statute excluding women from jury selection lists) and *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding state statute prohibiting women from tending bar).

⁶⁷ See *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977) (plaintiffs claimed loss of seniority and exclusion of pregnancy coverage from disability benefits plan violated Title VII); *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (plaintiffs claimed exclusion of pregnancy coverage from disability benefits plan violated Title VII); *Geduldig v. Aiello*, 417 U.S. 484 (1974) (plaintiffs claimed exclusion of pregnancy coverage from disability benefits plan violated equal protection clause); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (plaintiffs claimed mandatory pregnancy leave violated due process clause).

⁶⁸ See *infra* notes 69-95 and accompanying text for a discussion of these cases.

⁶⁹ *LaFleur*, 414 U.S. at 635 n.1.

⁷⁰ *Id.*

⁷¹ A second consolidated case challenged a similar policy on equal protection clause grounds. See *Cohen v. Chesterfield County School Bd.*, 414 U.S. 632 (1974). The Court decided *LaFleur* on due process clause grounds and therefore did not reach the equal protection clause issue in either *LaFleur* or *Cohen*. *LaFleur*, 414 U.S. at 652 (Powell, J., concurring).

month of pregnancy,⁷² or that they would be unable to return to the classroom until three months after childbirth.⁷³ The Court also found that the mandatory leave policy unconstitutionally interfered with a woman's right to decide to bear children.⁷⁴

Later that same year, in *Geduldig v. Aiello*, the Court determined the status of pregnancy discrimination under the equal protection clause.⁷⁵ The *Geduldig* plaintiffs challenged the constitutionality of California's disability insurance program, which compensated workers for virtually every temporary disability except pregnancy and pregnancy-related conditions.⁷⁶ The state argued that providing coverage for pregnancy-related disabilities was simply too costly for the program.⁷⁷ The Court held that the disability plan was not discriminatory.⁷⁸ The Court reasoned that because both women and men received identical coverage under the plan,⁷⁹ and because those employees who would not seek pregnancy coverage included both women and men,⁸⁰ the state's decision to exclude pregnancy coverage from the plan was not sex-based.⁸¹ Thus, the Court ruled that pregnancy coverage exclusion did not constitute "invidious" discrimination as required to invalidate the disability plan on equal protection grounds.⁸²

After the mixed results in *LaFleur* and *Geduldig*, Title VII became the vehicle for plaintiffs challenging discrimination on the basis of pregnancy.⁸³ The first case to reach the Supreme Court with a pregnancy discrimination claim based on Title VII was the 1976 case of *General Electric Co. v. Gilbert*.⁸⁴ The *Gilbert* plaintiffs charged that General Electric's sickness and accident leave policy violated Title VII because it excluded any

⁷² *Id.* at 646.

⁷³ *Id.* at 648.

⁷⁴ *Id.* at 650.

⁷⁵ 417 U.S. 484 (1974).

⁷⁶ *Id.* at 490.

⁷⁷ *Id.* at 493. The state asserted that "coverage of these disabilities is so extraordinarily expensive that it would be impossible to maintain a program supported by employee contributions if [pregnancy-related] disabilities are included." *Id.* In reality, however, the cost of pregnancy disability coverage was far lower than predicted. The PDA's legislative history reported the following in 1978:

Generally, it is not anticipated that disability benefit costs will rise substantially [once pregnancy coverage is required]. For instance, California's disability insurance program for pregnant women, enacted in 1976, and providing for benefits for 3 weeks prior to delivery and 3 weeks after, has given the State a \$52 million surplus. California's experience shows that only \$13.2 million in benefits were claimed in 1977 although payroll taxes to pay for the program raised \$65.3 million. Only 40,708 claims were filed for benefits instead of 115,000 expected and the average benefit paid to women was less than predicted.

H. R. REP. NO. 948, 95th Cong., 2d Sess. 10, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 4749, 4758.

⁷⁸ *Geduldig*, 417 U.S. at 494.

⁷⁹ *Id.* at 496-97. The *Geduldig* Court stated, "[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." *Id.* The Court failed to realize that the plan fully covered male sex-specific illnesses and disabilities. Williams, *Equality's Riddle*, *infra* note 122, at 343.

⁸⁰ Justice Stewart described the group of employees who would not seek pregnancy coverage as "nonpregnant persons," because it included both men and women. *Id.* at 496 n.20.

⁸¹ *Id.*

⁸² *Id.* at 494.

⁸³ Thomas, *Different Treatment of Pregnancy in Employee Disability Benefit Programs: Title VII and Equal Protection Clause Analysis*, 60 OR. L. REV. 249, 253 (1981).

⁸⁴ 429 U.S. 125 (1976).

coverage for "absences due to pregnancy or resulting childbirth or to complications in connection therewith."⁸⁵ The Court sustained General Electric's disability policy for the same reason that it upheld the disability plan in *Geduldig*:⁸⁶ the plan's pregnancy exclusion did not constitute invidious discrimination because it divided recipients into the permissible categories of pregnant women and nonpregnant persons.⁸⁷

The Court adopted this interpretation of Title VII because it concluded that Congress had, at least to some extent, incorporated the Court's equal protection clause analysis into the statute when it was enacted.⁸⁸ Because Title VII, in the Court's view, included this equal protection analysis, the *Geduldig* decision disposed of the *Gilbert* claims.⁸⁹ The *Gilbert* ruling, therefore, limited Title VII's effectiveness against pregnancy discrimination just as the *Geduldig* ruling previously limited the equal protection clause.

The Supreme Court's second Title VII-based pregnancy discrimination case was the 1977 case of *Nashville Gas Co. v. Satty*,⁹⁰ and it seemed to evince a more sympathetic handling of pregnancy discrimination claims. The *Satty* plaintiffs challenged two aspects of the Nashville Gas Company (Nashville) policy concerning pregnancy: mandatory unpaid leave for all pregnant employees and loss of all job seniority by anyone who took pregnancy leave.⁹¹ The Court found the company's policy of not granting disability pay to pregnant employees on leave "legally indistinguishable" from the disability program upheld in *Gilbert* and thus permissible under Title VII.⁹² The Court broke with its *Geduldig/Gilbert* analysis, however, and found sex discrimination in Nashville's policy of revoking the job seniority of those employees on pregnancy leave.⁹³ This policy clearly violated Title VII, the Court found, because it denied pregnant employees future employment opportunities at Nashville.⁹⁴ The loss of seniority policy was also distinguishable from *Gilbert*, according to the Court, because it did more than simply fail to provide a benefit for pregnant employees; it "burdened" female employees in a way that similarly situated male employees were not burdened.⁹⁵

When the Supreme Court ruled in *Gilbert* that excluding pregnancy coverage from a disability benefits plan did not constitute sex discrimination under Title VII, California responded by enacting legislation to protect pregnant workers within the state and make clear that workers discriminated against on the basis of pregnancy could find a remedy

⁸⁵ *General Elec. Co. v. Gilbert*, 375 F. Supp. 367, 370 (E.D. Va. 1974), *aff'd*, 519 F.2d 661 (4th Cir. 1975), *rev'd*, 429 U.S. 125 (1976).

⁸⁶ *Gilbert*, 429 U.S. at 133. The *Gilbert* Court stated, "[w]e think, therefore, that our decision in *Geduldig v. Aiello*, . . . dealing with a strikingly similar disability plan, is quite relevant in determining whether or not the pregnancy exclusion did discriminate on the basis of sex." *Id.*

⁸⁷ *Id.* at 135.

⁸⁸ *Id.* at 136.

⁸⁹ *Id.*

⁹⁰ 434 U.S. 136 (1977).

⁹¹ *Id.* at 138-39.

⁹² *Id.* at 143.

⁹³ *Id.* at 142.

⁹⁴ *Id.* at 141.

⁹⁵ *Id.* at 142. Commentators have criticized the Court's benefits/burdens analysis. "[B]enefits/burden analyses are notorious for their conceptual difficulties," according to one commentator. Note, *Sexual Equality Under the PDA*, *supra* note 18, at 723; Sheryl McCloud asks, "[w]hy burdens? Why benefits? The Court offers no substantive notion of equality, of sameness in relevant features, that justifies economic categorization when the explicit issue is sexual equality." McCloud, *Feminism's Idealist Error*, 14 N.Y.U. REV. L. & SOC. CHANGE, 277, 304 (1986).

in state law.⁹⁶ The law provides unpaid disability leave of up to four months for any pregnant worker and guarantees that she can return to the same or a similar job at the end of her disability.⁹⁷ Under the statute, no pregnant worker is forced to take pregnancy leave, and the total leave time an employee does take can be less than the maximum four months if the employee's period of actual physical disability is less.⁹⁸ The statute only applies to businesses with fifteen or more employees.⁹⁹

While California responded to *Gilbert* with a statute that expressly provides job protection for pregnant workers,¹⁰⁰ Congress responded by amending Title VII of the Civil Rights Act of 1964 with the Pregnancy Discrimination Act (PDA).¹⁰¹ Congress specifically intended the PDA to overrule the holding and disapprove the reasoning of *Gilbert*.¹⁰² Where the *Gilbert* Court had interpreted Title VII's prohibition against sex discrimination as not prohibiting pregnancy discrimination,¹⁰³ the first clause of the PDA enlarged the definition of sex discrimination: "[t]he 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"¹⁰⁴ And where the *Gilbert* Court had found that Title VII permitted employers to exclude pregnancy coverage from their disability benefit plans,¹⁰⁵ the second clause of the PDA clarified that such an exclusion is no longer permitted: "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"¹⁰⁶ It is clear, therefore, from both the language and the legislative history of the PDA,¹⁰⁷ that Congress intended to overturn *Gilbert* and prohibit the different treatment of pregnancy the *Gilbert* holding had sanctioned: the exclusion of pregnancy from an otherwise comprehensive disability benefits plan.¹⁰⁸

In the 1983 case of *Newport News Shipbuilding & Dry Dock v. EEOC*,¹⁰⁹ the Supreme Court's first pregnancy discrimination case based on the PDA, the plaintiffs challenged an employer's health plan that covered all temporary disabilities for male and female employees, including pregnancy-related disabilities.¹¹⁰ The plan also covered any tem-

⁹⁶ See *Review of Selected 1978 California Legislation*, 10 PAC. L.J. 247, 463 (1979).

⁹⁷ CAL. GOV'T CODE § 12945 (West 1986). See *supra* note 14 for the text of the California statute.

⁹⁸ Note, *California Federal Savings & Loan Association v. Guerra: The State of California has Determined that Pregnancy may be Hazardous to Your Job*, 16 GOLDEN GATE U.L. REV. 515, 519-20 (1986). It is important to note that the California statute is not a parental leave law. The statute permits up to four months leave only if the time is needed to recover from the temporary disabilities associated with pregnancy and childbirth.

⁹⁹ CAL. GOV'T CODE § 12945(e) (West 1986).

¹⁰⁰ CAL. GOV'T CODE § 12945(b)(2) (West 1986). See *supra* note 14 for the text of California's right to return law.

¹⁰¹ See *supra* note 15 for the text of the PDA.

¹⁰² H. R. REP. NO. 948, 95th Cong., 2d Sess. 2-3, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4749, 4750-51.

¹⁰³ *Gilbert*, 429 U.S. at 136.

¹⁰⁴ 42 U.S.C. § 2000e(k) (Supp. III 1985).

¹⁰⁵ *Gilbert*, 429 U.S. at 138-39.

¹⁰⁶ 42 U.S.C. § 2000e(k) (Supp. III 1985).

¹⁰⁷ H. R. REP. NO. 948, 95th Cong., 2d Sess. 2-3, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4749, 4750-51.

¹⁰⁸ *Id.*

¹⁰⁹ 462 U.S. 669 (1983).

¹¹⁰ *Id.* at 671-72.

porary disabilities suffered by employees' spouses, with the single exception of pregnancy.¹¹¹ As a result, the spouses of female employees received complete health coverage, while the health coverage for the spouses of male employees was less than complete.¹¹²

Justice Stevens, writing for the majority, found that the policy violated the PDA.¹¹³ He noted that Congress enacted the PDA specifically to overturn *Gilbert* and make pregnancy discrimination actionable under Title VII.¹¹⁴ The Court noted that Title VII prohibits all sex discrimination,¹¹⁵ while the PDA prohibits all pregnancy discrimination.¹¹⁶ The Newport News policy of providing a less than complete health care plan to male employees, therefore, constituted sex discrimination under Title VII,¹¹⁷ according to the Court, and the policy excluding pregnancy coverage from the coverage provided for spouses constituted pregnancy discrimination under the PDA.¹¹⁸ The Supreme Court's interpretation of the PDA in *Newport News* has been the sole guide for Title VII pregnancy discrimination claims until the Court's ruling in *California Federal Savings & Loan Association v. Guerra*.¹¹⁹

In conclusion, the plaintiffs seeking equal treatment for pregnant workers had mixed success before the Supreme Court. The Court struck down mandatory leave policies and the loss of seniority for workers on pregnancy disability leave. For too long, however, the Court clung to the meaningless distinction, established in *Geduldig*, that disability benefits plans which excluded pregnancy coverage did not discriminate on the basis of sex under the Constitution or Title VII because they divided employees into the permissible categories of pregnant women and nonpregnant persons. After the Court handed down the *Gilbert* decision, Congress acted to clarify the parameters of pregnancy discrimination. When it enacted the PDA, Congress resolved the problem of disability benefit plans that excluded pregnancy coverage. The PDA, however, raised new questions.

A. *Special Treatment v. Equal Treatment: The Public Policy Debate Concerning Pregnancy in the Workplace*

When Congress enacted the PDA in 1978 in order to give workers recourse against pregnancy discrimination in the workplace, the legislation it passed resolved the *Gilbert* problem of the outright exclusion of pregnancy coverage from disability benefits plans.¹²⁰ But the PDA sparked a new controversy. Both courts and commentators struggled to interpret and reconcile the two clauses of the Act.¹²¹ The PDA's second clause proved

¹¹¹ *Id.* at 672-73.

¹¹² *Id.* at 676.

¹¹³ *Id.* at 678.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 681.

¹¹⁶ *Id.* at 684.

¹¹⁷ *Id.* at 682.

¹¹⁸ *Id.* at 684.

¹¹⁹ *California Federal*, 107 S. Ct. 683 (1987).

¹²⁰ The reaction to *Gilbert* was swift and sharp. Professor Kay reports that "more than three hundred groups, including labor unions, feminist groups and some church groups, lobbied for Congressional repeal of *Gilbert*." Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1, 8 (1985).

¹²¹ See *supra* note 15 for the text of the PDA. See Note, *Sexual Equality Under the PDA*, *supra* note 18, for a discussion of the different approaches the courts have taken to the PDA. This

particularly difficult. It provides that pregnant workers shall be treated "the same" as other workers "similar in their ability or inability to work." Some have interpreted this language as mandating equal treatment of pregnant workers; they are entitled to no more and no less than other temporarily disabled workers. Others have focused on the PDA's first clause, with its broad definition of discrimination, and interpreted it to permit the special treatment of pregnancy in the workplace.

These different approaches to pregnancy discrimination can be loosely grouped into two schools of thought. The "equal treatment" advocates interpret the PDA to require laws which treat pregnant workers identically as other temporarily disabled workers.¹²² The "special treatment" advocates support statutes such as California's right to return law and urge a reading of the PDA which permits favorable treatment of pregnant workers.¹²³ Both the special treatment and the equal treatment advocates are firmly committed to the goal of equality for women.¹²⁴ Yet the differences between the two approaches reflect fundamental differences in the very idea of women's equality and the concept of equality itself. These differences are at the heart of the public policy debate sparked by the *California Federal* decisions.¹²⁵

The equal treatment advocates frame the issue of equality for pregnant workers as part of the larger problem of providing sufficient health benefits and work leave for all temporarily disabled employees.¹²⁶ According to the equal treatment advocates, the

commentator describes the equal treatment/special treatment debate as the "assimilationist/pluralist" debate. *Id.* at 691.

¹²² Professor Williams has written most frequently and eloquently in support of the equal treatment approach. See, e.g., Taub & Williams, *Will Equality Require More than Assimilation, Accommodation or Separation from the Existing Social Structure?*, 37 RUTGERS L. REV. 825 (1985) [hereinafter Taub & Williams, *Will Equality Require More?*]; Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984-85) [hereinafter Williams, *Equality's Riddle*]; Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism*, 7 WOMEN'S RIGHTS L. REP. 175 (1982) [hereinafter Williams, *Equality Crisis*].

¹²³ See, e.g., Kay, *Equality and Difference*, *supra* note 120; McCloud, *Feminism's Idealist Error*, *supra* note 95; Krieger & Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action, and the Meaning of Women's Equality*, 13 GOLDEN GATE U.L. REV. 513 (1983) [hereinafter Krieger & Cooney]; Note, *Equality in the Workplace: Is that Enough for Pregnant Workers?*, 23 J. FAM. L. 401 (1984-85).

¹²⁴ Professor Williams has suggested that the core difference between the special treatment and the equal treatment advocates is one of tactics rather than goals. Williams, *Equality's Riddle*, *supra* note 122, at 378. She explains,

If I am right about this, the equal treatment critics part company with the equal treatment advocates as a matter of tactics rather than ultimate goals. Tactically, the special treatment advocates may perceive of themselves as defending what they have (in this case the California and Montana statutes), rather than seeking more at the risk of ending up with nothing.

Id. (footnote omitted).

¹²⁵ An examination of the various amicus curiae briefs filed in the *California Federal* case reveals the split in the feminist community on this issue. Both sides argued for equality, yet several groups (including California Women Lawyers, Coalition for Reproductive Equality in the Workplace, Betty Friedan, Planned Parenthood Federation of America, and Los Angeles Feminist Legal Scholars) urged the Supreme Court to uphold the California statute, while others (including the National Organization for Women, American Civil Liberties Union, and League of Women Voters) argued that the statute should only be upheld if it were extended to cover all temporary disabilities for all employees.

¹²⁶ Williams, *Equality's Riddle*, *supra* note 122, at 327. Professor Williams states, [T]he objective is to readjust the general rules for dealing with illness and disability to ensure that the rules can fairly account for the whole range of workplace disabilities

effects of pregnancy discrimination would disappear once all workers receive the health benefits they need.¹²⁷ Central to their approach is a belief that pregnancy and childbirth are analogous to other temporarily disabling conditions, such as a heart attack or appendicitis.¹²⁸ Indeed, under traditional Title VII analysis, courts identify discrimination by comparing the treatment of an individual in the protected group with the treatment of a similarly situated individual who is not a member of the protected group.¹²⁹

According to Professor Williams, one of the most important reasons for advocating the equal treatment approach is to avoid the paternalistic treatment women have received when the courts have taken their childbearing capacity into account. Professor Williams observes that when the law has viewed women as different from men because of their ability to become pregnant, the results have often limited women's employment opportunities and their freedom of choice in a variety of matters.¹³⁰ Because taking pregnancy into account has harmed women in the past, Professor Williams concludes that there are tremendous risks associated with the special treatment approach.¹³¹ Most importantly,

that confront employed people. Pregnancy creates not "special" needs, but rather exemplifies typical basic needs. If these particular typical needs are not met, then pregnant workers simply become part of a larger class of male and female workers, for whom the basic fringe benefit structure is inadequate. The solution, in that view, is to solve the underlying problem of inadequate fringe benefits rather than to respond with measures designed especially for pregnant workers.

Id.

¹²⁷ *Id.*

¹²⁸ *Id.* at 357. Professor Williams asserts,

[W]hen a woman goes into labor, the measures appropriate for someone having a heart attack won't help; but if both childbirth and a heart attack cause an inability to work and income loss, it makes sense to encompass both within a disability program designed to cushion the economic effects of temporary inability to work.

Id. Professor Williams also asks, "[o]n what basis can we fairly assert, for example, that the pregnant woman fired by [her employer] deserved to keep her job when any other worker who got sick for any other reason did not?" Williams, *Equality Crisis*, *supra* note 122, at 196. Professor Kay responds, "[t]he short answer to this question is that no male worker who had exercised his reproductive capacity lost his job as a result." Kay, *Equality and Difference*, *supra* note 120, at 35.

¹²⁹ Krieger & Cooney, *supra* note 123, at 520-21. As Krieger and Cooney explain, Title VII disparate treatment analysis relies upon a comparison of "similarly situated" individuals in order to establish discrimination. *Id.* "[T]his means that in order to prove discrimination in denial of sick leave under the PDA [before *California Federal*], a female employee must show that she was denied a pregnancy-related leave while a 'similarly situated' person was granted a non-pregnancy related leave." *Id.* at 521. As the authors point out, finding this similarly situated individual is extremely difficult. *Id.* Even more difficult is what Krieger and Cooney describe as the "problem of the strained analogy." *Id.* at 539. Because pregnancy and childbirth are exclusively female traits, finding a similarly situated male for comparison depends upon analogy. *Id.* Thus both courts and commentators have attempted to analogize pregnancy to such primarily male medical problems as heart attack and prostatectomy. *Id.* at 540. The analogies are simply unpersuasive and ignore both women's personal experience of pregnancy and childbirth and their social dimension.

¹³⁰ Williams, *Equality Crisis*, *supra* note 122, at 177-79. Cases such as *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873), and *Muller v. Oregon*, 208 U.S. 412 (1908), see *supra* notes 57-66 and accompanying text, illustrate what has been described as the "separate spheres" doctrine. Williams, *Equality Crisis*, *supra* note 122, at 178. As Professor Williams explains, according to this doctrine, women belonged to the private sphere and men to the public sphere: "[t]he public world of men was governed by law while the private world of women was outside the law, and man was free to exercise his prerogative as he chose." *Id.* at 177-78. Clearly women did not have the same freedom during this period in history.

¹³¹ Taub & Williams, *Will Equality Require More?*, *supra* note 122, at 830-32. The authors note

she believes the modern special treatment advocates approach pregnancy in the same manner as the Supreme Court did in cases such as *Geduldig v. Aiello* and *General Electric Co. v. Gilbert*.¹³² In those cases, according to Professor Williams, viewing pregnancy as different and, therefore, requiring special treatment, proved disastrous for women.¹³³ The equal treatment advocates, in sum, regard pregnancy as similar to other temporary disabilities. In their view, the solution to pregnancy discrimination is not to establish unique advantages and protection for pregnant workers but, rather, to ensure that the law treats all temporarily disabled workers fairly.

The special treatment approach differs from the equal treatment approach in several fundamental ways.¹³⁴ The special treatment advocates believe that pregnancy should not be analogized to other temporary disabilities.¹³⁵ In their view, pregnancy is not simply an illness for which the employee needs time off from work; nor do they regard pregnancy leave as a "voluntary" separation from work.¹³⁶ Instead, the special treatment

that "[j]udges and legislators would be the decisionmakers; their record on discerning what benefits and what hurts women is uneven, to say the least." *Id.* at 831 n.25. But where else can women turn for assistance? After *California Federal* it is clear that the California legislature and the Supreme Court have done rather well in discerning what benefits women.

¹³² See *supra* notes 75-82 and accompanying text for a discussion of *Geduldig*. See *supra* notes 84-89 and accompanying text for a discussion of *Gilbert*.

¹³³ Williams, *Equality's Riddle*, *supra* note 122, at 366. The similarity between the special treatment approach and the *Geduldig* and *Gilbert* reasoning, according to Professor Williams, is that both define women as "men plus pregnancy." *Id.* Thus pregnancy is a special "burden" that women suffer and men do not. *Id.* at 366-67. While the special treatment approach thus requires special laws for women to achieve equality, Professor Williams reminds us that the *Geduldig* and *Gilbert* decisions "squarely rejected the notion that equality means making up for 'women's more burdensome role in the scheme of human existence.'" *Id.* at 367 (quoting *Gilbert*, 429 U.S. 125, 139 n.17 (1976)).

¹³⁴ See, e.g., Kay, *Equality and Difference*, *supra* note 120; McCloud, *Feminism's Idealist Error*, *supra* note 95; Note, *Equality in the Workplace: Is that Enough for Pregnant Workers?*, *supra* note 123; Krieger & Cooney, *supra* note 123. It is important to note that Professor Kay advocates an "episodic" analysis of pregnancy that provides, in her view, a middle ground in the equal treatment/special treatment debate. Because her analysis still calls for treating pregnancy differently from other temporary disabilities, even for a short period of time, she is grouped with the special treatment advocates.

¹³⁵ See, e.g., Kay, *Equality and Difference*, *supra* note 120, at 32-37; Krieger & Cooney, *supra* note 123, at 539-44; Note, *Sexual Equality Under the PDA*, *supra* note 18, at 721-22. As Krieger and Cooney explain, "[t]he capacity to become pregnant is unique to women; it is an inherent, not a normative sex difference." Krieger & Cooney, *supra* note 123, at 541. They warn that "the assumption of homogeneity and interchangeability" between women and men in a "society of equals" establishes a model of equality analytically unequipped "to provide guidance as to the meaning of equality between two functionally distinct groups." *Id.* at 540. Phyllis Segal also notes that "[w]hen so-called neutrality is constructed from the perspective of male dominance, insisting merely on facially neutral standards is inevitably insufficient to eliminate sex inequality. There is nothing 'equal' in the opportunity of males and females to satisfy such standards." Segal, *Sexual Equality, the Equal Protection Clause, and the ERA*, 33 BUFFALO L. REV. 85, 113 (1984) [hereinafter Segal, *Sexual Equality*].

¹³⁶ Even Professor Williams has recognized a dimension to pregnancy and childbirth that makes it different than other temporary disabilities:

Some will object that pregnancy is voluntary and its consequences therefore appropriately visited exclusively upon the employee. Individual pregnancies may be and often are voluntary in the sense that the individual woman made a conscious choice to become pregnant. But, as a social matter, pregnancy is not meaningfully voluntary any more than eating or sleeping is voluntary. All are basic functions of the human animal necessary to survival.

Williams, *Equality's Riddle*, *supra* note 122, at 354 n.114.

advocates argue that society needs both the woman worker and the mother,¹³⁷ and that special treatment is necessary to combat the economic consequences of pregnancy and childbirth for the pregnant worker and her family.

Special treatment advocates Krieger and Cooney cite statistics that indicate four out of five female workers may become pregnant while participating in the paid labor force.¹³⁸ Most of these women will need six weeks or less to recover from the temporary disabilities associated with pregnancy and childbirth.¹³⁹ When an employer does not offer pregnancy disability leave, this omission can be "tantamount to a policy of dismissal for pregnancy" for most working women.¹⁴⁰ The lack of job protection for pregnant workers is at least partly to blame for women's precarious economic position, the special treatment advocates argue, because a woman must find new employment after the birth of each child, "thereby losing her seniority rights, wage increases, and promotional and training opportunities."¹⁴¹ In the face of these disturbing facts, the special treatment advocates believe the law must take pregnancy into account in order to protect the woman worker.

II. CALIFORNIA FEDERAL SAVINGS & LOAN ASSOCIATION V. GUERRA: THE COURT'S ANALYSIS AND HOLDING

In *California Federal Savings & Loan Association v. Guerra*,¹⁴² the Supreme Court upheld a California statute that provides a female employee up to four months of pregnancy disability leave and reinstatement to the same or a similar job at the end of the leave.¹⁴³ California Federal Savings and Loan Association (Cal Fed), an employer, claimed that under the supremacy clause of the Constitution,¹⁴⁴ Title VII, as amended by the Pregnancy Discrimination Act (PDA), pre-empted the California statute.¹⁴⁵ Cal Fed claimed that Title VII and the PDA require that employers treat pregnant employees exactly the same as other employees.¹⁴⁶ In contrast, Cal Fed argued, California's "right to return" law requires that employers give special benefits to pregnant employees that other employees do not receive.¹⁴⁷ Given this apparent conflict between the state and federal law, Cal Fed urged the Supreme Court to invalidate the state law as inconsistent with and, therefore, pre-empted by the PDA.¹⁴⁸ Instead, the Court found California's

¹³⁷ Note, *Sexual Equality in the Workplace*, *supra* note 18, at 417. The author notes that "[a]s a matter of social policy, however, it seems unwise to treat pregnancy like any other disability. Society expects and demands, and it's a necessity, that women become pregnant. Society both needs the woman worker and needs the mother." *Id.* (quoting Gorney, *Have a Baby, Lose Your Job*, Wash. Post National Weekly Edition, Apr. 23, 1984 at 7, col. 2-3).

¹³⁸ Krieger & Cooney, *supra* note 123, at 519 (citing KAMERMAN, MATERNITY AND PARENTAL LEAVES: AN INTERNATIONAL REVIEW 8 (1980)).

¹³⁹ *Id.* (citing H.R. REP. NO. 948, 95th Cong., 2d Sess. 5, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 4749, 4753).

¹⁴⁰ *Id.*

¹⁴¹ Brief of Amici Curiae — California Women Lawyers, *supra* note 2, at 6.

¹⁴² *California Fed. Sav. and Loan Ass'n v. Guerra*, 107 S. Ct. 683 (1987).

¹⁴³ *Id.* at 686-87.

¹⁴⁴ U.S. CONST. art. VI § 2. The Constitution states, "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." *Id.*

¹⁴⁵ *California Federal*, 107 S. Ct. at 688.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

approach to pregnancy discrimination permissible under Title VII and the PDA's broad mandate to achieve equal employment opportunity for women.¹⁴⁹ The Court found nothing in the language of the California statute that would require or permit any unlawful employment practice prohibited by Title VII and allowed the law providing special protection for pregnant workers to stand.¹⁵⁰

A. *The Majority Opinion*

The majority opinion, written by Justice Marshall,¹⁵¹ addressed the question of whether California's right to return law¹⁵² requires employers to treat pregnant workers in a manner that violates the PDA.¹⁵³ In order to answer this question, the opinion focused on general pre-emption principles, the specific pre-emption provisions of the Civil Rights Act of 1964,¹⁵⁴ and the legislative history of the PDA.¹⁵⁵ Justice Marshall began his analysis by stating that when presented with a pre-emption question, the Court's "sole task" is to ascertain the intent of Congress when it enacted the federal statute at issue.¹⁵⁶

Justice Marshall described the three ways in which courts identify congressional intent to pre-empt state law. First, the Court may find congressional intent to pre-empt state law when a federal statute's express terms invalidate state law. Second, the creation of a comprehensive statutory and regulatory scheme may establish congressional intent to pre-empt state law. Finally, if the Court finds a "direct conflict" between the federal and state statute, even when the federal law does not purport to occupy the field in question, the Court may permissibly infer congressional intent to pre-empt state law.¹⁵⁷ Justice Marshall concluded that the first two types of pre-emption do not apply in *California Federal*. He further stated that Congress, when it enacted Title VII, "explicitly disclaimed"¹⁵⁸ any intent to either pre-empt state law or to occupy the field of employment discrimination law to the exclusion of state law.¹⁵⁹

¹⁴⁹ *Id.* at 694.

¹⁵⁰ *Id.* at 694-95.

¹⁵¹ Justices Brennan, Blackmun, Stevens and O'Connor joined in the majority opinion.

¹⁵² CAL. GOV'T CODE § 12945(b)(2) (West 1986). See *supra* note 14 for the text of the California statute.

¹⁵³ See *supra* note 15 for the text of the PDA.

¹⁵⁴ Section 708 of Title VII provides:

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

42 U.S.C. § 2000e-7 (Supp. III 1985).

¹⁵⁵ 1978 U.S. CODE CONG. & ADMIN. NEWS 4749.

¹⁵⁶ *California Federal*, 107 S. Ct. at 689.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 689.

¹⁵⁹ *Id.* Section 1104 of Title XI, which the Court described as "applicable to all titles of the Civil Rights Act," *id.*, reads:

Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed

According to the Court, the pre-emption question in *California Federal* concerns the third type: pre-emption through conflict with state law.¹⁶⁰ Pre-emption of this kind occurs, Justice Marshall stated, when "compliance with both federal and state regulation is a physical impossibility"¹⁶¹ or when a state law creates an obstacle preventing the "accomplishment and execution of the full purposes and objectives of Congress."¹⁶² Justice Marshall examined Sections 708 and 1104 of the Civil Rights Act of 1964¹⁶³ and concluded that Congress intended Title VII to pre-empt state law only in the most narrow circumstances, when an outright conflict with federal law exists.¹⁶⁴ The Court cited the legislative history of Title VII and the PDA to support its view that Congress believed state law, as well as federal law, were essential to achieve Title VII's goal of equal employment opportunity for women.¹⁶⁵

After finding that Title VII's general pre-emptive power is limited to only those circumstances where actual conflict with state law exists, the Court turned to the question of whether the PDA and California's right to return statute presented such a conflict.¹⁶⁶ The Court relied on its earlier ruling in *Newport News Shipbuilding & Dry Dock Co. v. EEOC* to restate its conclusion that Congress enacted the PDA in order to overturn *General Electric Co. v. Gilbert*.¹⁶⁷ Justice Marshall stated that *Newport News* established that the first clause of the PDA¹⁶⁸ embodies Congress's intent to overrule *Gilbert's* reasoning, while the second clause¹⁶⁹ embodies Congress's disapproval of *Gilbert's* holding.¹⁷⁰ Rather than viewing the PDA's second clause as a limitation on the scope of the first, Justice Marshall stated that the clause simply illustrates the type of pregnancy discrimination the PDA prohibits.¹⁷¹

The Court also noted with approval the Ninth Circuit's reliance on *Newport News* in its conclusion that the PDA establishes a "floor beneath which pregnancy disability benefits may not drop — not a ceiling above which they may not rise."¹⁷² The legislative history and historical context of the PDA supports this reading of the Act, the Court found.¹⁷³ Justice Marshall stated that Congress considered extensive evidence of discrim-

as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

42 U.S.C. § 2000h-4 (Supp. III 1985).

¹⁶⁰ *California Federal*, 107 S. Ct. at 689-90.

¹⁶¹ *Id.* (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)).

¹⁶² *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

¹⁶³ Codified at 42 U.S.C. § 2000e-7 and § 2000h-4 (Supp. III 1985) respectively.

¹⁶⁴ *California Federal*, 107 S. Ct. at 689.

¹⁶⁵ *Id.* at 690.

¹⁶⁶ *Id.* at 691.

¹⁶⁷ *Id.* (citing *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983)). For a discussion of *Gilbert*, see *supra* notes 84-89 and accompanying text.

¹⁶⁸ The first clause of the Pregnancy Discrimination Act reads: "[t]he 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" 42 U.S.C. § 2000e(k) (Supp. III 1985).

¹⁶⁹ The second clause of the Pregnancy Discrimination Act reads: "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" 42 U.S.C. § 2000e(k) (Supp. III 1985).

¹⁷⁰ *California Federal*, 107 S. Ct. at 691.

¹⁷¹ *Id.*

¹⁷² *Id.* at 691-92 (quoting *California Federal II*, 758 F.2d at 396).

¹⁷³ *Id.* at 692.

ination against pregnant workers when it debated the PDA, and the legislative record contains numerous statements by members of Congress that the PDA would not require employers to treat pregnant workers differently from other workers.¹⁷⁴ But, Justice Marshall noted, not requiring special treatment is different from prohibiting special treatment.¹⁷⁵ Because Congress knew that statutes such as California's existed at the time it enacted the PDA and the PDA's legislative record contains no evidence of congressional disapproval of these statutes, Justice Marshall concluded that the "clear and manifest purpose" to pre-empt California's right to return law, and statutes like it, is lacking from Title VII.¹⁷⁶

The Court found further support for this determination in its observation that Title VII, as amended by the PDA, and California's right to return law share the same goal: to provide equality in employment opportunity for pregnant workers.¹⁷⁷ Justice Marshall noted that this common goal protects both the jobs and the families of pregnant workers. He stated that "[b]y 'taking pregnancy into account,' California's pregnancy disability leave statute allows women, as well as men, to have families without losing their jobs."¹⁷⁸ The Court distinguished the California statute from the "protective" labor legislation for women characteristic of an earlier era. Justice Marshall noted that the California statute is narrowly drawn to cover just the period of "actual physical disability" resulting from childbirth and, therefore, is not based on "archaic or stereotypical notions about pregnancy and the abilities of pregnant workers."¹⁷⁹ In answer to Cal Fed's complaint that it could not comply with both the PDA and the California law, the Court reiterated that the California statute does not require better treatment of pregnant workers; rather, it sets a minimum level of protection which employers are free to extend to other workers or not, as they see fit.¹⁸⁰

B. *The Concurring Opinions*

Justice Stevens grounded his concurring opinion in traditional Title VII analysis. He disagreed with the majority's reasoning that upheld the California statute based on general pre-emption principles.¹⁸¹ Instead, Justice Stevens argued that the Court's 1979 decision in *United Steelworkers v. Weber*¹⁸² disposed of the pre-emption question presented in *California Federal*.¹⁸³

Weber involved a white employee's Title VII challenge to his employer's voluntary affirmative action plan which admitted several black employees into a training program over some white employees with more seniority.¹⁸⁴ The white employee argued that the language of Title VII prohibits all "race-conscious" employment decisions.¹⁸⁵ The Court

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 692-93.

¹⁷⁶ *Id.* at 693 (quoting *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 206 (1983)).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 694 (quoting *Gilbert*, 429 U.S. 125, 159 (1976)).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 694-95.

¹⁸¹ *Id.* at 695 (Stevens, J., concurring).

¹⁸² 443 U.S. 193 (1979).

¹⁸³ *Id.* at 695-96 (Stevens, J., concurring).

¹⁸⁴ *Weber*, 443 U.S. at 199.

¹⁸⁵ *Id.* at 201.

in *Weber* found the affirmative action plan's special treatment of a disadvantaged minority group permissible under Title VII because it furthered the goal of equal employment opportunity.¹⁸⁶ Justice Stevens argued that because *Weber* permits special treatment under Title VII, the PDA cannot pre-empt the California statute.¹⁸⁷ When Congress enacted the PDA, it incorporated then-existing Title VII principles and interpretation, Justice Stevens stated.¹⁸⁸ Therefore, Justice Stevens found that the *Weber* analysis applied to and resolved the pre-emption issue in *California Federal*.¹⁸⁹

Whereas Justice Stevens relied upon *Weber* to uphold California's right to return law, Justice Scalia in his concurrence found ample support for the California law in one short provision of Title VII.¹⁹⁰ According to Justice Scalia, the Court must look only as far as Section 708 of the Civil Rights Act, which sets out the pre-emptive scope of the PDA, to resolve *California Federal*.¹⁹¹ Section 708 provides that the PDA pre-empts only state laws which "purpor[] to require or permit the doing of any act which would be an unlawful employment practice" under Title VII.¹⁹² Justice Scalia found nothing in the California statute's language which requires or permits "any refusal to accord federally mandated equal treatment to others similarly situated."¹⁹³ Because the California statute does not require any unlawful employment practice under "any conceivable interpretation of the PDA,"¹⁹⁴ Justice Scalia concluded that the California law does not fall within the pre-emptive reach of section 708.¹⁹⁵

C. The Dissenting Opinion

Justice White, in a dissenting opinion joined by Chief Justice Rehnquist and Justice Powell, disagreed with the majority's interpretation of the PDA.¹⁹⁶ In Justice White's view, the clear language of the PDA's second clause, which states that women with pregnancy-related disabilities "shall be treated the same for all employment-related purposes," absolutely prohibits the special treatment of pregnant workers.¹⁹⁷ Justice White disagreed with the majority's interpretation that the holding in *Newport News* appropriately applied to this case.¹⁹⁸ According to Justice White, *Newport News* involved the issue of pregnancy benefits for the wives of male employees and did not directly implicate the PDA's second clause.¹⁹⁹ Justice White stated that in a case such as *California Federal*, involving female employees, which directly touches the PDA's second clause, the court should interpret the clause to mean "exactly what it says."²⁰⁰

¹⁸⁶ *Id.* at 208.

¹⁸⁷ *California Federal*, 107 S. Ct. at 696 (Stevens, J., concurring).

¹⁸⁸ *Id.* (Stevens, J., concurring).

¹⁸⁹ *Id.* at 696-97 (Stevens, J., concurring).

¹⁹⁰ *Id.* at 697 (Scalia, J., dissenting).

¹⁹¹ *Id.* (Scalia, J., dissenting) (citing 42 U.S.C. § 2000e-7 (Supp. III 1985)).

¹⁹² *Id.* (Scalia, J., dissenting).

¹⁹³ *Id.* (Scalia, J., dissenting).

¹⁹⁴ *Id.* at 698 (Scalia, J., dissenting).

¹⁹⁵ *Id.* (Scalia, J., dissenting).

¹⁹⁶ *Id.* (White, J., dissenting).

¹⁹⁷ *Id.* (White, J., dissenting).

¹⁹⁸ *Id.* (White, J., dissenting).

¹⁹⁹ *Id.* (White, J., dissenting).

²⁰⁰ *Id.* (White, J., dissenting).

Justice White also found evidence in the PDA's legislative history to dispute the majority's holding that the PDA permits preferential treatment of pregnancy.²⁰¹ Justice White found statements in the legislative record which indicate, in his view, that Congress did not intend to require employers to provide special benefits for pregnant workers.²⁰² This legislative history, according to Justice White, prohibits states from enacting special treatment statutes such as California's right to return law.²⁰³

Justice White viewed the problem of special treatment for pregnant workers as a "policy dispute" which the Court had no role in resolving.²⁰⁴ It is the Court's role to interpret the PDA, the Justice asserted, and because the PDA's guiding principle is equal treatment, in Justice White's view, California's statute is not permissible.²⁰⁵ That Congress knew that statutes such as California's existed when it enacted the PDA did not, in Justice White's view, rise to the level of an endorsement of those statutes, nor an incorporation of their approaches into the meaning of the PDA.²⁰⁶

Justice White also disagreed with Justice Marshall's conclusion that employers can comply with both California's law and the PDA.²⁰⁷ Compliance with the PDA's equal treatment mandate would require the Court to extend the right to return law to cover all temporarily disabled employees, Justice White stated. Because the California legislature clearly did not intend that result when it enacted the statute, according to Justice White, the statute must fail.²⁰⁸ Justice White concluded by stating that Section 708 of the Civil Rights Act does not save the California law. He stated that the California statute, by requiring special treatment of pregnancy, authorizes an unfair employment practice forbidden by Title VII.²⁰⁹

III. TAKING PREGNANCY INTO ACCOUNT TO EXPAND THE BOUNDARIES OF EQUALITY

In *California Federal Savings & Loan Association v. Guerra*, the Supreme Court ruled that Title VII, as amended by the Pregnancy Discrimination Act, does not prohibit the special treatment of pregnancy.²¹⁰ The Court sustained California's right to return law²¹¹ against a pre-emption attack on the grounds that both the California statute and the PDA share the common goal of furthering women's employment opportunities.²¹² The Court found no conflict between the two statutes which required pre-emption of the state statute.²¹³ Once the Court determined that the PDA did not pre-empt the California statute, it established a two-pronged test for judging the validity of other state laws that provide special treatment in the form of job protection for pregnant workers.²¹⁴ In order

²⁰¹ *Id.* at 699 (White, J., dissenting).

²⁰² *Id.* (White, J., dissenting).

²⁰³ *Id.* (White, J., dissenting).

²⁰⁴ *Id.* at 700 (White, J., dissenting).

²⁰⁵ *Id.* at 701 (White, J., dissenting).

²⁰⁶ *Id.* at 700 (White, J., dissenting).

²⁰⁷ *Id.* at 701 (White, J., dissenting).

²⁰⁸ *Id.* (White, J., dissenting).

²⁰⁹ *Id.* at 702 (White, J., dissenting).

²¹⁰ *California Federal*, 107 S. Ct. at 695 (1987).

²¹¹ CAL. GOV'T CODE § 12945(b)(2) (West 1986). See *supra* note 14 for the text of the California statute.

²¹² *California Federal*, 107 S. Ct. at 693.

²¹³ *Id.* at 694-95.

²¹⁴ *Id.* at 694.

to be in harmony with federal law, such statutes must limit job protection to just the period of actual physical disability resulting from pregnancy and childbirth. Furthermore, the statute must have the effect of enhancing the employment opportunities available to women employees.²¹⁵ The Court reasoned that such laws will enable women, as well as men, to have families without the risk of losing their jobs.²¹⁶

California Federal marks an important milestone in pregnancy discrimination law. In permitting the special treatment of pregnancy under the PDA, the Court has removed the equal treatment obstacle from the path of equal employment opportunity for pregnant workers. Although the decision directly affects only four states,²¹⁷ state legislatures can now safely provide additional protection within their jurisdictions for pregnant workers. The *California Federal* Court properly refrained from mandating special treatment for pregnant workers, but its decision injects new life into an old debate. By describing the underlying issue in pregnancy discrimination as a matter of equality between working women and working men with families, the Court has shaken off a decade of unfortunate pregnancy discrimination analysis and established a new analytical framework in its place. The decision represents primarily a symbolic victory for pregnant workers, but it also lays the groundwork for the continuing development of sexual equality in the law.

A. *The Supreme Court Correctly Determined that Taking Pregnancy Into Account does not Violate the PDA*

When the Supreme Court ruled in *California Federal* that the PDA did not pre-empt California's right to return law under the supremacy clause of the Constitution, the Court stated that in order to resolve the pre-emption question, "our sole task is to ascertain the intent of Congress" when it enacted Title VII.²¹⁸ The Court found two sources for Congressional intent concerning the pre-emptive reach of the PDA: the pre-emption provisions of the Civil Rights Act of 1964, of which Title VII is a part, and the legislative history of the PDA.²¹⁹

The Civil Rights Act contains two references to pre-emption. The first reference, in Title VII, makes it clear that the federal law will pre-empt state law only when state law requires or permits an "unlawful employment practice" as defined by Title VII.²²⁰ The second reference, in Title XI, states that Congress did not intend the Civil Rights Act to "occupy the field" of civil rights legislation, and that Congress intended to invalidate state law only when it is "inconsistent" with federal civil rights law.²²¹ In general, the Court has held that Title VII was intended to supplement, rather than to supplant, state law prohibiting employment discrimination.²²² Once the Court established that the PDA

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ Connecticut, Massachusetts, and Montana currently have statutes similar to California's right to return law. See *supra* note 9.

²¹⁸ *California Federal*, 107 S. Ct. at 689.

²¹⁹ *Id.* at 690.

²²⁰ 42 U.S.C. § 2000e-7 (Supp. III 1985). See *supra* note 154 for the text of this provision.

²²¹ 42 U.S.C. § 2000h-4 (Supp. III 1985). See *supra* note 159 for the text of this provision.

²²² *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-49 (1974). The *Alexander* Court stated, [T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his [or her] rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed

will pre-empt only state law that requires or permits an unlawful employment practice or is inconsistent with the Act, its next task was to determine whether the preferential treatment of pregnancy, as required by the California statute, fit either of these two categories.²²³ To answer this question the Court turned to the legislative history of the PDA.²²⁴

The PDA's legislative history leaves no doubt that Congress enacted the statute against the backdrop of the Supreme Court's ruling in *General Electric Co. v. Gilbert*.²²⁵ Because that case held that an employer's disability benefits plan which excluded pregnancy and childbirth coverage did not violate Title VII's prohibition against sex discrimination,²²⁶ the PDA's legislative record contains numerous statements that employers would no longer be permitted to offer disability plans with this exclusion.²²⁷ The record also clearly states that the PDA would not require employers to institute pregnancy disability coverage if the employer has no disability plan for its employees.²²⁸ The PDA would simply require all existing plans to provide reasonable pregnancy disability coverage.²²⁹

Although the PDA's immediate goal was to overturn *Gilbert* and prohibit the overt discrimination involved in that case, clearly the statute's long-term goals are to prohibit all forms of pregnancy discrimination in the workplace and to ensure equal employment opportunity for women.²³⁰ The PDA's first clause, which broadly states that Title VII's

to supplement, rather than supplant, existing laws and institutions relating to employment discrimination.

Id. at 48-49.

²²³ *California Federal*, 107 S. Ct. at 691.

²²⁴ *Id.* at 691-93.

²²⁵ 1978 U.S. CODE CONG. & ADMIN. NEWS 4749 [hereinafter Legislative History]. The House Report noted that the Equal Employment Opportunity Commission had issued guidelines under Title VII that prohibited pregnancy discrimination and that eighteen federal district courts and "all seven Federal courts of appeals which have considered the issue have rendered decisions prohibiting discrimination in employment based on pregnancy . . ." Contrary to these rulings and guidelines, however, the Report stated, the *Gilbert* Court ruled that Title VII did not prohibit the exclusion of pregnancy from the company's disability benefits plan. *Id.* at 4750.

²²⁶ *General Electric Co. v. Gilbert*, 429 U.S. 125, 145 (1976). See *supra* notes 84-89 and accompanying text for a discussion of *Gilbert*.

²²⁷ Legislative History, *supra* note 225, at 4752-54. For example, the House Report stated that, "This bill would prevent employers from treating pregnancy, childbirth and related medical conditions in a manner different from their treatment of other disabilities. In other words, this bill would require that women disabled due to pregnancy, childbirth and related medical conditions be provided the same benefits as those provided other disabled workers. This would include temporary and long-term disability insurance, sick leave, and other forms of employee benefit programs."

Id.

²²⁸ *Id.* at 4752. The legislative history provides that "HR 6075 in no way requires the institution of any new programs where none currently exist. The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work."

Id.

²²⁹ *Id.*

²³⁰ The legislative history reflects the PDA's overriding goal of employment opportunity in its emphasis on the PDA's place as part of Title VII: "[i]n enacting Title VII, Congress mandated that equal access to employment and its concomitant benefits for female and male workers. However, the Supreme Court's narrow interpretation of Title VII [in *Gilbert* and *Satty*] tend[s] to erode our national policy of nondiscrimination in employment." *Id.* at 4751.

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," would have been unnecessary if Congress had intended to limit the PDA to the *Gilbert* facts. The general language Congress chose to use in the PDA's first clause indicates, rather, a desire to incorporate some flexibility into the statute in order to address future forms of discrimination and future barriers to employment opportunity that women may face in the workplace.

Once it is clear that the PDA should be read to reach more than simply the exclusion of pregnancy from disability benefits plans, however, a problem arises in determining just how far the PDA reaches. As Justice White wisely observed, "most Congresspersons did not seriously consider the possibility that someone would want to afford preferential treatment to pregnant workers" when they enacted the PDA.²⁵¹ Congress's failure to explicitly endorse the special treatment of pregnancy in the PDA or its legislative history simply cannot be interpreted to require that the statute which Congress enacted to protect pregnant workers may be used by employers to deny them this very protection. Shackling the PDA to an interpretation based solely on *Gilbert*, as proposed by the *California Federal* dissent, ignores both its long-term goals and its place as part of Title VII. If equal employment opportunity requires the special treatment of pregnancy in the workplace, and the California legislature determined that it does, the Court correctly found that the PDA permits special treatment.

Support for the *California Federal* majority's interpretation of the PDA comes from the legislative record.²⁵² Congress expressly stated that the PDA would not require special treatment, but never said that it absolutely prohibited special treatment. Congress also knew that statutes such as California's existed at the time it enacted the PDA and, in the Court's words, "apparently did not consider them inconsistent with the PDA."²⁵³ The Court, therefore, read the legislative record as permitting the states to do more in the area of pregnancy discrimination, if they wish.²⁵⁴ This interpretation is sound in view of the PDA's overriding purpose. Once the Court reached this conclusion concerning the PDA's long-term goals, its finding that the special treatment of pregnancy does not constitute an unlawful employment practice, nor in any way contravenes the purposes of the PDA, naturally followed.²⁵⁵

The dissent focused on the second clause of the PDA and the Act's legislative history to support its conclusion that the PDA absolutely prohibits special treatment.²⁵⁶ Because the PDA's second clause states that pregnant workers "shall be treated the same" as other temporarily disabled workers and the legislative history emphasizes equal treatment, Justice White concluded that the PDA prohibits statutes such as California's right to return law.²⁵⁷ This conclusion reflects Justice White's view that the special treatment of pregnancy is an unlawful employment practice under Title VII.²⁵⁸ But this belief survives only by ignoring the PDA's long-term goal of equal employment opportunity by inter-

²⁵¹ *California Federal*, 107 S. Ct. 683, 699 (1987) (White, J., dissenting).

²⁵² Legislative History, *supra* note 225, at 4759.

²⁵³ *California Federal*, 107 S. Ct. at 693 (citing the forerunners of the Connecticut and Montana statutes which can be found at note 9, *supra*).

²⁵⁴ 107 S. Ct. at 692-93.

²⁵⁵ *Id.* at 693-94.

²⁵⁶ *Id.* at 698 (White, J., dissenting).

²⁵⁷ *Id.* (White, J., dissenting).

²⁵⁸ *Id.* (White, J., dissenting).

preting the PDA's second clause as requiring identical treatment, rather than treatment that will ensure equality in the workplace.

Justice White further argued that employers cannot possibly comply with both the PDA and California's right to return law.²³⁹ In his view, the PDA requires equal treatment of pregnant workers and other similarly disabled workers and the job protection provided by the California statute must either be made available to all workers, or to none.²⁴⁰ The fact that only women become pregnant and need the protection of the California statute does not enter into his analysis. This omission renders Justice White's dissent a hollow, formalistic argument. He argues for an essentially meaningless equality standard, since male employees do not need pregnancy disability benefits.

Justice Stevens added an important ingredient to the issue of interpreting the PDA. He noted that the PDA is part of Title VII and that traditionally, the Court has interpreted Title VII to permit preferential treatment of a disadvantaged class.²⁴¹ In *United Steelworkers v. Weber*, the Court permitted an affirmative action plan to stand even though it meant a minority employee was admitted into a training program over a white employee with more seniority.²⁴² Because Title VII permits this special treatment, Justice Stevens concluded, Title VII certainly permits the special treatment provided by the California statute.²⁴³ Justice Stevens' comparison to *Weber* is important because it links the *California Federal* decision with traditional Title VII analysis. When *Weber's* interpretation of Title VII is considered, the *California Federal* Court's ruling on the PDA is a logical and necessary extension of Title VII principles in the area of sexual equality.

The final element in the majority opinion, *Newport News Shipbuilding & Dry Dock v. EEOC*,²⁴⁴ is the only case prior to *California Federal* to interpret the PDA. The Court relies on it for its reading of the PDA's two clauses.²⁴⁵ The *Newport News* Court interpreted the two clauses of the PDA as manifesting congressional intent to overrule *General Electric Co. v. Gilbert*.²⁴⁶ According to *Newport News*, the PDA's first clause, which provides that Title VII's prohibition against sex discrimination also prohibits discrimination on the basis of pregnancy, disapproved the *Gilbert* reasoning.²⁴⁷ The second clause, which provides that employers treat pregnancy disability the same as other temporary disabilities, overruled the *Gilbert* holding.²⁴⁸ In *California Federal*, the Court reiterated this interpretation of the PDA. *Newport News* serves as the final leg of support in the *California Federal* analysis, and the Court properly used the precedent.

Although the language of the PDA appears to require equal treatment of pregnancy and related disabilities, as Justice Stevens noted, "[t]he Pregnancy Discrimination Act . . .

²³⁹ *Id.* at 701 (White, J., dissenting).

²⁴⁰ *Id.* at 701-02 (White, J., dissenting).

²⁴¹ *Id.* at 696 (Stevens, J., concurring) (citing *United Steelworkers v. Weber*, 443 U.S. 193 (1979)). See *supra* notes 183-89 and accompanying text for a discussion of the *Weber* decision.

²⁴² *Weber*, 442 U.S. at 199.

²⁴³ *California Federal*, 107 S. Ct. at 696-97.

²⁴⁴ *Id.* at 691-92 (citing *Newport News Shipbuilding & Dry Dock v. EEOC*, 462 U.S. 669, 678 (1983)).

²⁴⁵ *Id.* at 691.

²⁴⁶ *Id.* The Court stated, "[w]hen Congress amended Title VII in 1978, it unambiguously expressed its disapproval both of the holding and the reasoning of the Court in the *Gilbert* decision." *Id.* (quoting *Newport News*, 462 U.S. at 678).

²⁴⁷ *Id.* See *supra* notes 109-19 and accompanying text for a discussion of *Newport News*.

²⁴⁸ 107 S. Ct. at 691.

does not exist in a vacuum."²⁴⁹ The legislative record reveals a Congress committed to overruling *Gilbert* and ensuring that pregnancy would be covered in disability benefit plans. Congress did not anticipate a day when pregnancy would receive preferential treatment, and so the PDA's response to such legislation must be divined from other sources. The *California Federal* Court relied on basic pre-emption doctrine, general Title VII principles, and the *Newport News* analysis of the PDA in order to uphold California's right to return law. Justice Stevens added the *Weber* analysis as further support for permitting special treatment under Title VII. The *California Federal* ruling is a logical extension of existing Title VII principles and reflects the Court's commitment to the PDA's long term goal of achieving equality in women's employment opportunities.

B. *The Implications of the California Federal Decision*

The most immediate impact of the *California Federal* decision is its clarification of the proper interpretation of the PDA. The Act does not mandate special treatment of pregnancy, but permits states to enact legislation such as California's right to return law in order to provide limited job protection for pregnant workers. Because only four states, including California, currently have such statutes, the Court's decision has a limited effect on the lives of most working women and men. While the decision opens the door for more job protection for pregnant workers, it forces no state or employer to walk through. The ruling has significant symbolic importance, however, because of the way in which it discusses pregnancy discrimination. The *California Federal* ruling has transformed this debate.

Throughout the early sex discrimination cases²⁵⁰ and the first pregnancy discrimination cases,²⁵¹ the Court struggled to define the parameters of pregnancy discrimination. Initially, the Court viewed a woman's childbearing ability as something that made her different from her male counterpart at work and necessitated special protection.²⁵² When the era of protective legislation ended and as women entered the workforce in greater and greater numbers, plaintiffs tried to obtain disability coverage for pregnancy on the same basis as employer plans covered other temporary disabilities. The Supreme Court determined that pregnancy was different from other disabilities, however, and it permitted employers to exclude pregnancy coverage from their otherwise comprehensive plans.²⁵³

²⁴⁹ *Id.* at 695 (Stevens, J., concurring).

²⁵⁰ See *supra* notes 55-65 and accompanying text for a discussion of the early sex discrimination cases.

²⁵¹ See *supra* notes 66-95 and accompanying text for a discussion of the pre-PDA pregnancy discrimination cases.

²⁵² See *supra* notes 55-65 and accompanying text for a discussion of the early sex discrimination cases.

²⁵³ In *General Electric Co. v. Gilbert*, Justice Rehnquist described pregnancy in this way:

Pregnancy is, of course, confined to women, but it is in other ways significantly different from the typical disease or disability. The District Court found that it is not a "disease" at all, and is often a voluntarily undertaken and desired condition.

429 U.S. 125, 136 (1976) (citation omitted). The *Geduldig* Court's insistence that distinctions based on pregnancy divided employees into groups of "pregnant women" and "nonpregnant persons" also illustrates the Court's inability to see pregnancy and childbirth as part of regular human experience, and as touching the lives of men, as well. As Christine Curtis, one of the drafters of California's right to return law, observed, "it is difficult to see how men are harmed by a woman's

Once Congress enacted the PDA, federal law mandated that at the very least employers must treat pregnancy the same as other temporary disabilities. The *California Federal* ruling has taken this analysis one step further by introducing a new standard for comparison: both working mothers and working fathers should have the same opportunities in the workplace. The Court no longer defines pregnancy discrimination through the often meaningless process of comparing the sex-specific disabilities of men and women and their respective coverage in health plans. Instead, the Court has shifted the focus to firmer ground and compares the employment opportunities available to both male and female employees. If a state legislature determines, as California did, that pregnant workers require job protection in order to achieve equal employment opportunity, federal law will not stand in its way.

C. *Other States Should Follow California's Lead and "Take Pregnancy Into Account"*

As recent statistics demonstrate, the economic situation of most working women and their families is precarious. Over two-thirds of working women serve as the sole or primary breadwinners for their families,²⁵⁴ and in over half of married couples both spouses work.²⁵⁵ On the average, women earn about 60% of what men earn in comparable positions,²⁵⁶ and 80% of working women earn less than \$19,000 annually.²⁵⁷ Most shocking, the National Council on Economic Opportunity estimates that by the year 2000 *all* of those people living in poverty in our nation will be women and children in woman-headed households.²⁵⁸

When an employer offers no job protection for pregnant workers, having a child can be tantamount to losing one's job.²⁵⁹ When a woman attempts to re-enter the workforce after having a child, she often has lost seniority and commands a lower salary.²⁶⁰ Lillian D. Garland's story breathes life into these statistics. She planned a short unpaid pregnancy leave.²⁶¹ Garland developed complications and delivered by Cesarean section, however, and her doctor prescribed a three-month leave.²⁶² When Cal Fed refused to let her return to work, Garland lost both her apartment and custody of her daughter to the child's father.²⁶³ The realities of the lives of working women like Lillian Garland and their children should be a matter of great concern.²⁶⁴

right to return to her job. Indeed, men who have pregnant women in their immediate families should benefit from the law." Curtis, *For Equality of the Sexes*, CALIFORNIA LAWYER 15, 16 (June 1985).

²⁵⁴ Segal, *Sexual Equality*, *supra* note 135, at 99 n.82 (citing WOMEN'S BUREAU, U.S. DEP'T OF LABOR, TWENTY FACTS ON WOMEN WORKERS (1982)).

²⁵⁵ *Id.* at 99 n.81 (citing Waldman, *Labor Force Statistics from a Family Perspective*, 106 MONTHLY LAB. REV. 16, 19 (Dec. 1983)).

²⁵⁶ BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, WOMEN AT WORK 28 (1983), *cited in* Brief of Amici Curiae — California Women Lawyers, *supra* note 2, at 6.

²⁵⁷ Dwyer, *Business Starts*, *supra* note 4, at 50.

²⁵⁸ Segal, *Sexual Equality*, *supra* note 135, at 86 n.6 (citing NAT'L ADVISORY COUNCIL ON ECONOMIC OPPORTUNITY, CRITICAL CHOICES FOR THE 80'S 19 (1980)).

²⁵⁹ Brief of Amici Curiae — California Women Lawyers, *supra* note 2, at 6.

²⁶⁰ *Id.*

²⁶¹ *Garland's Bouquet*, TIME, Jan. 26, 1987, at 14.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ Krieger and Cooney observe,

The United States stands alone among modern industrialized nations in its failure to provide pregnancy and childcare benefits to working parents.²⁶⁵ Recent congressional efforts to provide limited pregnancy disability coverage and parental leave for federal employees have died in committee,²⁶⁶ and there is certainly no sign that a federal law applying to private employers would meet with congressional approval. Meanwhile, women and children comprise the fastest growing poverty group in the nation.²⁶⁷

California's right to return law, like the statutes in Connecticut, Massachusetts, and Montana, attempts to take some of the economic sting out of the decision to bear a child. The Supreme Court has determined that Title VII permits this limited job protection. Until Congress articulates a national policy, however, states must shoulder the burden of protecting pregnant workers. No state should shirk this responsibility.

The *California Federal* decision also represents an important victory for the special treatment advocates.²⁶⁸ Whereas the equal treatment advocates were concerned that the special treatment of pregnancy would harm women in the workplace, the Court established a test that requires any special protection to enhance the woman worker's employment opportunities. And whereas the equal treatment advocates feared a slippery slope, the Court established a precise and rational test which expressly prohibits any statute based on archaic stereotypes of women. Most importantly, the *California Federal* decision makes it possible for pregnant workers to have a choice when working and having a family overlap.

The Court's willingness to uphold California's right to return law demonstrates a commitment to the idea of equality in American law. Ronald Dworkin's analysis of equality sheds light on the significance of the *California Federal* decision. He distinguishes between every individual's right to equal treatment and an individual's right to be treated as an equal:

There are two different rights [individuals] may be said to have. The first is the right to *equal treatment*, which is the right to an equal distribution of some opportunity or resource or burden The second is the right to *treatment as an equal*; . . . to be treated with the same respect and concern as anyone else In some circumstances the right to treatment as an equal will entail a right to equal treatment, but not, by any means, in all circumstances.²⁶⁹

Dworkin's analysis presents two ideas about equality. First, in our nation of equals, all citizens are entitled to a minimum level of equal treatment. And second, this equality

Available statistics probably underestimate the impact of no-leave policies on working women. A woman may quit to save herself the indignity of being fired once her employer discovers she is pregnant. Or, prior to becoming pregnant, a woman may voluntarily remove herself from the workplace in anticipation of pregnancy. Neither of these factors would suffice in a statistical analysis of working women.

Krieger & Cooney, *supra* note 123, at 526 n.42.

²⁶⁵ Brief for Human Rights Advocates, at 6-18, *California Fed. Sav. and Loan Ass'n v. Guerra*, 107 S. Ct. at 683 (1987).

²⁶⁶ See, e.g., H.R. 925, 100th Cong., 1st Sess. (1987). The Family and Medical Leave Act was previously introduced as H.R. 4300, 99th Cong., 2d Sess. (1986) and H.R. 2020, 99th Cong., 1st Sess. (1985).

²⁶⁷ See *supra* note 258.

²⁶⁸ See *supra* notes 134-41 for a discussion of the special treatment approach to pregnancy discrimination.

²⁶⁹ DWORKIN, *TAKING RIGHTS SERIOUSLY* 227 (1977) (emphasis in original).

entitles all citizens to an opportunity to participate, to contribute, and to be taken seriously.

When the Court of Appeals for the Ninth Circuit determined that the PDA did not pre-empt California's right to return law, it described the federal statute as establishing "a floor beneath which pregnancy disability benefits may not drop — not a ceiling above which they may not rise."²⁷⁰ The Ninth Circuit viewed the PDA as a minimum standard for pregnant workers, or Dworkin's right to equal treatment. But the right to equal treatment is only half the story. Full equality also requires treatment as an equal. When the Supreme Court ruled that women, as well as men, should have the right to have families without the risk of losing their jobs, it completed the story for pregnant workers.

In order for pregnant workers to be treated as equals in the workplace, the Court said that states may "tak[e] pregnancy into account."²⁷¹ Yet historically, that has backfired for women. The special treatment of pregnant employees may create some of the same suspicions that accompany affirmative action plans; that women or minorities cannot "make it on their own," or that they need special help in order to survive in the workplace. First *Weber* and now *California Federal* indicate that those suspicions may be true. Minorities and women may need special treatment, but not for the reasons critics suppose. Just as entrenched and pervasive racism may only disappear with purposeful affirmative action, a labor market geared toward the male employee may become a place where women, too, can succeed only with purposeful protection for pregnancy disability.

Clearly *California Federal* represents an important step forward in the area of pregnancy discrimination. The case is not, however, an all-out endorsement of special treatment as the only way to achieve equal employment opportunity. At the time of this writing, only three states in addition to California have enacted legislation providing minimal job protection for pregnant workers.²⁷² Although Congress continues to debate a parental leave bill that would provide job-protected pregnancy disability leave and gender-neutral parental leave,²⁷³ the bill has not made significant progress. Just a week after the Court decided *California Federal*, it handed down another pregnancy discrimination case that determined that a pregnant employee had left her job "voluntarily" to have her child, and therefore did not qualify for unemployment benefits under state law.²⁷⁴

In this context, *California Federal's* greatest immediate impact is probably mostly symbolic. But symbolic victories are victories nonetheless. Professor Karst identified the symbolic importance of the landmark desegregation case, *Brown v. Board of Education*. That decision, he suggests, represents a "redefinition of community that would embrace a previously excluded group."²⁷⁵ *California Federal* represents such a redefinition in the area of sexual equality. For the first time, the Supreme Court has recognized that equality in the workplace must be defined by comparing the opportunities available to working

²⁷⁰ *California Fed. Sav. & Loan Ass'n v. Guerra*, 758 F.2d 390 (9th Cir. 1985), *aff'd*, 107 S. Ct. 683 (1987).

²⁷¹ *California Federal*, 107 S. Ct. at 694 (quoting *Gilbert*, 429 U.S. at 159).

²⁷² Connecticut, Massachusetts, and Montana also have statutes similar to California's right to return law. See *supra* note 9.

²⁷³ See *supra* note 266.

²⁷⁴ *Wimberly v. Labor and Indus. Relations Comm'n*, 107 S. Ct. 821 (1987), *aff'g* 688 S.W.2d 344 (Mo. 1985).

²⁷⁵ Karst, *Woman's Constitution*, 1984 DUKE L.J. 447, 497-98 (1984).

mothers and working fathers. All states are now free to follow California's example and provide reasonable job protection for pregnant workers.

CONCLUSION

California Federal established the principle that employers may treat pregnancy differently from other temporary disabilities in order to achieve equal employment opportunity for women. In finding that the Pregnancy Discrimination Act permits the special treatment of pregnancy, the Court brought the PDA into harmony with general Title VII principles. The careful reasoning of the Court and the statement that women, as well as men, should not have to risk losing their jobs when they have families, indicates that *California Federal* is not a step down the slippery slope of the protectionism of the past but, rather, an enlightened, humane response to the very real needs of women in the workplace. There is much to celebrate and little to fear in this important decision.

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