Nebraska Law Review

Volume 55 | Issue 1 Article 8

1975

The Supreme Court Avoids Considering Sex-Based Classifications: *Geduldig v. Aiello*, 417 U.S. 484 (1974)

Rebecca L. Ross
University of Nebraska College of Law, becky.ross@troutmansanders.com

Note

The Supreme Court Avoids Considering Sex-based Classifications

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

I. INTRODUCTION

In *Geduldig v. Aiello*,[1] the United States Supreme Court held that California's refusal to insure normal pregnancies in the state disability insurance program was not a violation of the equal protection clause of the fourteenth amendment. Over strong dissent,[2] the Court held that California could take one step at a time in selecting the disabilities its insurance program would cover. Therefore, the statutory scheme did not involve a denial of equal protection and the district court was reversed. In this holding, the Court offered dicta[3] which have sewn the seeds of confusion in the lower courts and left murkier than ever the question of the constitutionality of sex-based classifications.

II. THE FACTS

In the original action brought before a three judge district court,[4] four women challenged section 2626 of the California Unemployment Compensation Disability Fund Act[5] which refused pay-

1. 417 U.S. 484 (1974).
2. The dissent, written by Justice Brennan, joined by Justices Douglas and Marshall, is discussed in note 20 and accompanying text *infra*.
3. 417 U.S. at 496-97 n.20.
4. Aiello v. Hansen, 359 F. Supp. 792 (N.D. Cal. 1973).
5. CAL. UNEMPL. INS. CODE §§ 2601 *et seq.* (West 1972). The fund, established in 1946, is a comprehensive legislative scheme designed to provide protection against wage loss caused by involuntary unemployment. The program is completely supported by employee contributions. Presently employees must contribute one percent of their salary up to a maximum of $85 per year.

   To be eligible for the program, an employee must have contributed, prior to the time of his disability, one percent of a minimum income of $300 during a one year base period. If the employee satisfies this requirement, he is eligible for basic weekly benefits beginning on the

ment of benefits for pregnancy-related disabilities. Section 2626 provides:

> "Disability" or "disabled" includes both mental and physical injury. An individual shall be deemed to be disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular or customary work. *In no case shall the term "disability" or "disabled" include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter.*[6]

Three of the women suffered unemployment disabilities attributable to abnormal pregnancies.[7] The fourth, Jacqueline Jaramillo, claimed that a normal pregnancy caused her disability. The district court held that the statute's "exclusion of pregnancy-related disabilities was not based on a classification having a rational and substantial relationship to a legitimate state purpose,"[8] and, therefore, violated the equal protection clause of the fourteenth amendment.

Ten days before the district court's decision in *Geduldig*, the California Court of Appeals decided a case brought for disability benefits for an ectopic pregnancy,[9] *Rentzer v. Unemployment Insurance Appeals Board.*[10] The state court had held that section 2626 did not bar payment of benefits for disabilities arising from medical complications during pregnancy, but precluded only the payment of benefits for disabilities accompanying normal pregnancy. The Unemployment Insurance Appeals Board acquiesced in this construction of section 2626 and issued administrative guidelines excluding only the payment of hospitalization and disability benefits for normal delivery and recuperation.[11]

There was apparently no opportunity to call the district court's attention to *Rentzer*, and the court later denied a motion for recon-

---

eighth day of disability or the first day of hospitalization. Claims are required to be accompanied by affidavits of a licensed physician and the employee must submit to reasonable examinations required by the State Department of Human Resources Development.

The program provides benefits for almost any incapacity including cosmetic surgery. In addition to the pregnancy exclusion, the program also does not cover one confined in an institution as a dipsomaniac, drug addict, or sexual psychopath.

6. *Id.* § 2626 (emphasis added).
7. 417 U.S. at 489. The three women were Carolyn Aiello (ectopic pregnancy); Augustine Armendariz (miscarriage); and Elizabeth Johnson (tubal pregnancy).
8. 359 F. Supp. at 801.
9. An ectopic pregnancy is caused by gestation outside the uterus, often in a Fallopian tube.
10. 32 Cal. App. 3d 604, 108 Cal. Rptr. 336 (Ct. App. 1973).
11. 417 U.S. at 491.

sideration.[12] On appeal, the Supreme Court held that *Rentzer* had mooted the issue as to the three women with abnormal pregnancies and that only Jaramillo had a live controversy concerning the validity of section 2626. The Court reversed the district court and found no denial of equal protection as to Jaramillo.

III. THE COURT'S REASONING

The district court viewed the questions to be decided in terms of traditional equal protection analyses. It first determined what classification was involved, and then applied the appropriate standard of review. The court determined that because only women suffer pregnancy-related disabilities, the classification was one based on sex. It then proceeded to apply the intermediate "fair and substantial relationship" test for equal protection scrutiny of legislative classifications.[13] The court concluded that the state could not demonstrate that the classification had a "fair and substantial relation to the object of the legislation."[14]

The Supreme Court viewed the issue differently. Instead of focusing on the classification and the standard of review to be applied, the Court analyzed the equal protection issue in terms of the underinclusiveness of the set of risks the state had selected to insure. It then reiterated the position that the state could take one step at a time in selecting the disabilities it wished to cover and held that California need not include pregnancy disabilities simply because it chose to insure other risks.

Utilizing the reasoning behind *Dandridge v. Williams*,[15] the

12. *Id.*
13. Traditionally, the Court has adopted a two-pronged test for equal protection. If the statute concerns a suspect class (*e.g.*, race, aliens, or nationality) or if it concerns a fundamental right (*e.g.*, right to vote, travel, or procreate), the Court will apply a standard of strict judicial scrutiny and the state must show a compelling state interest in the classification. This is an extremely difficult standard to meet and has only been met in rare instances.

    If there is no suspect class or fundamental right involved, the Court has traditionally presumed that the classification is valid. If any possible reason can be imagined for the state's classification, it will be upheld under a rational basis test.

    Recently, however, the Court has introduced an intermediate test. This test removes the presumption of validity and requires that the classification have a fair and substantial relation to the object of the legislation. This new test, hereinafter called the fair and substantial relationship test, is set out in Reed v. Reed, 404 U.S. 71 (1971), and is discussed in detail in *Developments in the Law: Equal Protection*, 82 HARV. L. REV. 1065 (1969).
14. Reed v. Reed, 404 U.S. 71, 76 (1971).
15. 397 U.S. 471 (1970).

Geduldig Court once again rejected the idea that a state must choose between attacking every aspect of a problem and not attacking the problem at all. Therefore, under the least stringent rational basis test, any legitimate state interest would satisfy the constitutional requirements of equal protection. It found such interest in the state's desire to maintain the self-supporting nature of the insurance program,[16] and in a strong state commitment to keeping the contribution rate at its present level. Because the additional benefits for pregnancy-related disabilities would increase the cost of the program,[17] the Court held that the state had met the burden of showing a legitimate state interest. Thus, with this holding, the Court simply reiterated the rule established in *Dandridge v. Williams*,[18] *Williamson v. Lee Optical Co.*,[19] and *Jefferson v. Hackney*[20] that the asserted underinclusiveness of a state administered social program may be balanced against a legitimate state interest to negate an allegation of unconstitutionality under the equal protection clause of the fourteenth amendment.

The dissenting opinion in *Geduldig*, on the other hand, followed the reasoning of the district court. Justice Brennan, in dissent, agreed that the classification was one based on sex.

> In my view, by singling out for less favorable treatment a gender-linked disability peculiar to women, the State has created a double standard for disability compensation: a limitation is imposed upon the disabilities for which women workers may recover, while men receive full compensation for all disabilities suffered, including those that affect only or primarily their sex, such as prostatectomies, circumcision, hemophilia, and gout. In effect, one set of rules is applied to females and another to males. Such dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination.[21]

Thus having decided the threshold question that the classifica-

16. *See* note 5 *supra*.
17. There was considerable discussion about how much more it would cost to include pregnancy-related disabilities. The state argued that it would cost between $120.2 million and $131 million annually, an increase of 33 to 36 percent. California stated that this increase would have to come from either an increased contribution rate or a flat dollar amount, either of which would impose a greater burden on those with the lowest incomes.

    The appellee argued that the added cost would only be $48.9 million annually or a 12 percent increase. She said that the increase could be absorbed in a less drastic manner by changing the maximum benefits allowed or increasing the maximum contribution rate to $119.
18. 397 U.S. 471 (1970).
19. 348 U.S. 483 (1955).
20. 406 U.S. 535 (1972).
21. 417 U.S. at 501.

tion was one of disabilities suffered only by women as opposed to disabilities suffered only by men, the dissent would have held that the true issue was the proper standard of review to be applied to classifications based on sex. Using the strict judicial scrutiny test because there was a suspect class based on sex, Justice Brennan argued that the state had not demonstrated a compelling state interest in the classification and that section 2626 was unconstitutional as a denial of equal protection.

Had the dissenting opinion been adopted, it would have clarified the obscure area of what constitutional standard to apply to sex-based classifications. In 1971, the Court applied the intermediate "fair and substantial relationship" test to a sex-based classification in *Reed v. Reed*.[22] Two years later, four Justices made the progression and held that sex was a suspect class and the strict judicial scrutiny test should be applied.[23] The next logical step was the acceptance of sex as a suspect class by a full five-man majority of the Court.

However, since 1973, the Court has repeatedly failed to take advantage of the opportunity to finalize this area of the law.[24] In each case, the Court has chosen to sidestep the issue. *Geduldig* is one more example of the Supreme Court's reluctance to establish a standard for equal protection analysis of sex-based classifications.

IV. FOOTNOTE 20

In *Geduldig*, the majority addressed the dissent's objections in footnote 20. In what appeared to be almost an afterthought, the Court dealt with the classification and the applicable standard of review.

> The dissenting opinion to the contrary, this case is thus a far cry from cases like *Reed v. Reed*, 404 U.S. 71 (1971), and *Frontiero v. Richardson*, 411 U.S. 677 (1973), involving discrimination based on gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed* . . . . and *Frontiero* . . . . Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy

22. 404 U.S. 71 (1971).
23. Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality holding).
24. *See* Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Schlesinger v. Ballard, 419 U.S. 498 (1975), and Kahn v. Shevin, 416 U.S. 351 (1974).

> are mere pretexts designed to effect an invidious discrimination against members of one sex or other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.
>
> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.[25]

This footnote presents several statements deserving of closer examination: the classification involved is one of pregnant women versus non-pregnant persons; distinctions involving pregnancy are constitutionally sound unless they are "mere pretexts designed to effect invidious discrimination;" and pregnancy-related classifications are not classifications based on sex.

A. The Classification

At the core of any equal protection analysis is the classification the Court chooses to examine. Much of the outcome of any given case depends upon the parameters of the distinctions reviewed. Determining the classification depends on individual conceptions of a legislative scheme and its goals, and wide discretion is given to the Court in making its selection.

However, the Court strained the concept behind classifications in *Geduldig* when it separated the groups into pregnant women and non-pregnant persons. In so doing, it was clearly attempting to establish a classification whereby women were in both the groups receiving and not receiving insurance benefits; therefore, the conclusion would be that pregnancy is not a sex-based class. This grouping overlooks the fact that the distinction drawn by the California legislature was not based on types of persons but rather on types of disabilities to be covered. California did not exclude pregnant women from all coverage while extending benefits to non-pregnant persons. What it did was exclude the disability of pregnancy while including almost every other disability.[26] In attempting to obviate the necessity for looking at sex-based classifications, the Court failed to examine the classifications as established by the California legislature.

Ironically, the Court could have avoided the question of sex-

25. 417 U.S. at 496-97.
26. *See* note 5 *supra*.

based classifications and the confusion resulting from footnote 20 by adopting the limitations imposed by *Rentzer*[27] and subjecting them to present equal protection analysis. This would not have solved the Court's dilemma concerning sex-based distinctions, but it would have permitted the majority to deal with the classification presented. After the *Rentzer* court's determination that abnormal pregnancies were covered under section 2626, the classification left for Supreme Court review was one of disabilities suffered by women with abnormal pregnancies versus disabilities suffered by women with normal pregnancies.

That classification turns on types of disabilities, not on sex, and the less stringent "fair and substantial relationship" test would apply. Under that test any legitimate state interest, such as California's desire to provide a continuing and inexpensive, self-supporting program, would uphold the classification.

Using such an analysis would not have solved the ever-remaining problem of what standard of review should be applied to sex-based classifications. However, it would have permitted the Court to continue to reflect upon this issue and it would have obviated the need for the confusing dicta in footnote 20.

B. Pretexts Designed to Effect Invidious Discrimination

The Court severely limited the application of the fourteenth amendment in sex discrimination cases by declaring that distinctions involving pregnancy are constitutionally acceptable unless they are mere pretexts designed to effect discrimination. It is difficult to imagine many instances in which the distinction involved would merely be a pretext for discrimination, except for the extreme case in which pregnancy is an excuse to fire a woman employee. Apparently, a state or an employer[28] can make distinctions based on pregnancy in restricting types of work, hours, or benefits to be received so long as there is no intention to discriminate invidiously against women.

Where a classification excludes pregnant women in an attempt to discriminate maliciously and intentionally against women, the protection of the fourteenth amendment will be invoked. Few such situations can be imagined.

C. Pregnancy-based Classifications as Sex-based Classifications

Footnote 20 stated that pregnancy-based classifications are not sex-based classifications. This was necessary to justify the Court's

27. *See* notes 10-11 and accompanying text *supra*.
28. *See* Section IV discussing sex-based classifications under Title VII of the Civil Rights Act of 1964.

failure to determine what standard of review to apply to sex-based classifications.

Certain criteria have been established by the Court to determine when a suspect class exists. The class is suspect if it bears no relation to ability; if the persons within it are locked in (if it is an immutable trait); and if a stigma of inferiority is attached to it.[29] As the four Justices in *Frontiero* agreed, sex falls within these requirements.[30] Sex has nothing to do with ability; a person is locked into the sex she is born with; and a clear stigma of inferiority historically has been attached to the female sex. Furthermore, to hold that pregnancy-based distinctions are not sex-based distinctions is to ignore one aspect of what makes sex an immutable trait: only women are capable of bearing children. A woman is not locked into pregnancy. There are ways to avoid it. However, biology locks only women into the possibility of becoming pregnant. Furthermore, a woman will be locked into a class which will be discriminated against if she decides to become pregnant.

Just as sex-based classifications largely depend on outdated historical attitudes, so too does discrimination against pregnant women. It has been believed that women would quit working after becoming pregnant—or at least that they should. It was thought that pregnant women ought to be kept home and out of sight. It was felt that pregnancy was something women let happen to them (alone)[31] and it could have been prevented if they were respon-

29. *Developments in the Law: Equal Protection*, note 13, *supra* at 1173-74.

30. The four Justices, Brennan, Douglas, White and Marshall, determined that sex was a suspect class under the due process clause of the fifth amendment. The United States Air Force argued that administrative convenience required the ruling that spouses of uniformed males were dependents for the purpose of benefits, but that spouses of uniformed females were not dependents unless they were in fact dependent for over one-half of their support. The Court held that administrative convenience did not pass constitutional muster under the strict judicial scrutiny test.

31. The court in *Turner v. Department of Employment Sec.*, — Utah —, 531 P.2d 870 (1975), provides an excellent example of the historical societal attitudes:

> The question she poses is this: Is the statute set out above void in that it denies to her rights which are given to males? We do not think so. Should a man be unable to work because he was pregnant, the statute would apply to him equally as it does to her. What she should do is to work for the repeal of the biological law of nature. She should get it amended so that men share equally with women in bearing children. If she could prevail upon the Great Creator to so order things, she would be guilty of violating the equal protection of the law unless she saw to it that man could also share in the thrill and glory of Motherhood.
>
> It is just as bad to treat unequal things as equals as it is

sible members of the work force. And there was reluctance to accept the fact that women, with their unique biological functions, were a major force in the working community.

These kinds of societal attitudes are similar to the misconceptions that forced the Court in *Frontiero* to declare that sex was a suspect class. They are the underlying presumptions ingrained in legislative declarations and private opinion which led that Court to determine that sex-based classifications should receive strict scrutiny to determine if there was a compelling state interest for such a distinction. Those same presumptions mandate that pregnancy-based classifications receive similar treatment. Therefore, it is unfortunate that a classification which is so clearly sex-based was allowed to remain and that the Court has again avoided deciding what is the appropriate standard of review to be applied to sex-based classifications.

V. SEX-BASED CLASSIFICATIONS UNDER TITLE VII

Although the dicta in *Geduldig* suggest that pregnancy-based classifications are not sex-based classifications, lower courts have ignored this in cases arising under Title VII of the Civil Rights Act of 1964.[32] Lower courts heretofore faced with pregnancy-related classifications under Title VII have held that *Geduldig* has no application since it arose under the fourteenth amendment.

In each case, federal courts of appeal have determined that the Equal Employment Opportunity Commission ("EEOC") guidelines preclude any discrimination against pregnant women. The guidelines state:

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

---

to treat equal things unequally. In the matter of pregnancy there is no way to find equality between men and women. The Great Creator so ordained the difference and there are few women who would wish to change the situation.

Id. at ___, 531 P.2d at 871.

32. 42 U.S.C. § 2000e2(a)(1) (1970).

> (c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity.[33]

Thus, in *Communications Workers of America, AFL-CIO v. AT&T Longlines Department*,[34] *Wetzel v. Liberty Mutual Casualty Insurance Co.*,[35] and *Gilbert v. General Electric Co.*,[36] the Second, Third and Fourth Circuits, respectively, have held that disability plans offering fewer benefits for pregnancy-related disabilities than for other temporary disabilities violate Title VII.

The courts distinguished *Geduldig* because it arose under the fourteenth amendment and avoided considering the implications of *Geduldig* by reasoning that the Supreme Court would not have intended its holding to apply to Title VII cases without stating this explicitly. The *Communications Workers* court said:

> If . . . [*Geduldig*] was a definitive holding that, absent mere pretext, disparity of treatment of pregnancy-related disabilities could not constitute a violation of Title VII, [*Geduldig*] would substantially circumscribe the reach of that Act of Congress and would invalidate the guidelines as to treatment of pregnancy disabilities issued by the EEOC. It is inconceivable that the majority opinion intended so to hold without even a mention of Title VII or the guidelines.[37]

The apparent lesson to be learned from the lower courts' interpretation of *Geduldig* is that cases involving pregnancy-based distinctions ought to be brought under Title VII.[38] The validity of this proposition will soon come under judicial review, however, with the granting of certiorari by the Supreme Court in the case of *Wetzel v. Liberty Mutual Casualty Insurance Co.*[39]

VI. CONCLUSION

By refusing to make a determination on pregnancy-based dis-

33. 29 C.F.R. § 1604.10 (1973). *See also* 29 C.F.R. § 1604.9(b) (1973), which prohibits discrimination with regard to fringe benefits.
34. 513 F.2d 1024 (2d Cir. 1975).
35. 511 F.2d 199 (3d Cir. 1975).
36. 44 U.S.L.W. 2013 (U.S. June 27, 1975).
37. 513 F.2d at 1030.
38. The Nebraska Supreme Court recently failed to follow this procedure in Richards v. Omaha Pub. Schools, 194 Neb. 463, 232 N.W.2d 29 (1975), a case involving mandatory maternity leave. The court was familiar with the *Wetzel* decision and aware of the trend holding cases arising under Title VII to a different standard. However, the court held that *Geduldig*'s declaration that pregnancy-based classifications are not sex-based classifications mandated a decision upholding the leave policy.
39. 43 U.S.L.W. 3587 (U.S. April 29, 1975).

tinctions, the Supreme Court has avoided deciding what standard of review to apply to sex-based classifications. This has led to inequitable results and the Court is now caught in a mire of contradictions. A pregnant woman whose employer is regulated by EEOC guidelines may successfully challenge benefits extended under disability plans which are not made available to pregnant women. Similarly situated pregnant women whose only recourse is under the fourteenth amendment must accept such discrimination because of the Court's ruling in *Geduldig*. This contradiction will have to be handled when the Court reviews the *Wetzel* decision.

Even more basic is the dichotomy the Court has created by establishing a fundamental right of procreation, while sanctioning discrimination under the fourteenth amendment should a woman decide to exercise that right. Although adhering to the theory that only legislation serving a compelling governmental interest should be allowed to interfere with the right of procreation, the Court has tolerated pregnancy-based classifications having a mere rational relationship to the object of the legislation. The Court cannot continue to condone pregnancy-based classifications while defending the fundamental right of procreation. The Court should no longer avoid the issues by retreating to an obscure footnote. It is time to deal with them directly.

Rebecca L. Ross '76

40. Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).