SEXUAL EQUALITY IN FRINGE-BENEFIT PLANS

George Rutherglen*

Both the Supreme Court and Congress recently have examined the legality of sexual classifications in employee fringe-benefit plans, focusing principally on employer-sponsored insurance and pension plans.¹ The decisions and legislation begin from the premise that the constitutional and statutory rules against sexual discrimination apply to employee fringe-benefit plans.² They concern the fundamental question of exactly what these rules prohibit. Benefits for pregnancy have been a persistent focus of dispute.

Three decisions of the Supreme Court present its view of the legality of excluding disability due to pregnancy from fringe-benefit plans. The first is Geduldig v. Aiello,³ which rejected a constitutional challenge to the exclusion of disability due to pregnancy from a general program of compensation for disability applicable to all employees within the state. The Court held that the exclusion of

* Assistant Professor, University of Virginia School of Law; B.A., 1971, J.D., 1974, University of California at Berkeley.

I would like to thank my colleagues at the University of Virginia for their assistance and encouragement, which were essential to the completion of this article. I take responsibility, of course, for all mistakes.

¹ The purpose of such plans is to provide employees with nonmonetary compensation, typically at lower rates than those available to individual customers of insurance companies. See M. Greene, Risk and Insurance 517, 571-72 (3d ed. 1973); S. Huebner & K. Black, Life Insurance 398-99 (9th ed. 1976); Note, Sex Discrimination and Sex-Based Mortality Tables, 53 B.U.L. Rev. 624, 632-33 & n.59 (1973). For a summary of the tax advantages of employer-financed retirement plans, see M. Canan, Qualified Retirement Plans § 3.1 (1977); S. Huebner & K. Black, supra, at 422.


pregnancy did not violate the equal protection clause of the fourteenth amendment, relying on the illogical argument that classifications on the basis of pregnancy are not classifications on the basis of sex. The next case, *General Electric Co. v. Gilbert*, extended the reasoning of *Geduldig* from its constitutional context to title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963, which together generally prohibit sexual discrimination in public and private employment. The Court interpreted these statutes to permit the exclusion of pregnancy from a disability plan that covered non-occupational accident or sickness. The Court reaffirmed this conclusion in *Nashville Gas Co. v. Satty*, but refused to extend it to all classifications based on pregnancy. Specifically, the Court distinguished between the exclusion of preganacy from a paid sick-leave plan, a permissible denial of a benefit, and the withholding of accrued seniority from women who returned from pregnancy leaves, an impermissible imposition of a burden. Together, these three cases established two implausible propositions: first, classifications on the basis of pregnancy are not classifications on the basis of sex; second, discrimination in denial of benefits is permissible, but discrimination in the imposition of burdens is not.

Confronted with these decisions, Congress amended title VII to prohibit explicitly discrimination on the basis of pregnancy. In a new section 701(k), Congress redefined the prohibition against discrimination "because of" or "on the basis of" sex to include discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions," thereby specifically overruling

---

4 *Id.* at 496 n.20.
5 429 U.S. 125 (1976).
6 42 U.S.C. §§ 2000e to -17 (1976). For the text of relevant sections, see note 114 *infra.*
8 See 429 U.S. at 133-46.
10 *Id.* at 142-46.
11 *Id.* at 141-42.
12 Title VII §§ 703(a)-(d), 704(b), 42 U.S.C. § 2000e-2(a) to (d), -3(b) (1976).
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 703(h) of this title shall be inter-
Gilbert and Nashville Gas. The object of congressional displeasure was the proposition that classifications on the basis of pregnancy are not classifications on the basis of sex.\textsuperscript{14} This enactment of a general prohibition against classifications based on pregnancy also rendered obsolete the unpersuasive distinction between denial of benefits and imposition of burdens.\textsuperscript{15}

While the Supreme Court and Congress debated the sex-neutrality of pregnancy classifications, the Court unilaterally settled a related question: whether explicit sexual classifications are justifiable if they are necessary to ensure equal treatment of men and women. City of Los Angeles, Department of Water & Power v. Manhart\textsuperscript{16} held that title VII prohibits employers from relying on sex-based actuarial tables in setting the level of benefits and contributions in pension plans despite the undisputed fact that women have a greater life expectancy than men and so have an expectation of receiving greater pension benefits.\textsuperscript{17} The Court reasoned that title VII prohibits all sexual classifications not specifically exempted in the statute, whether or not they have a basis in fact.\textsuperscript{18} This line of argument is consistent with the congressional reasoning underlying section 701(k): classifications on the basis of pregnancy are classifications on the basis of sex and therefore are prohibited by title VII unless specifically exempted by the statute.

\textsuperscript{14} 435 U.S. 702 (1978).
\textsuperscript{15} Congress qualified its rejection of Gilbert and Nashville Gas only by relieving employers of the obligation to provide benefits for some abortions. See note 13 supra. Some classifications on the basis of pregnancy, however, still may fall within the general exceptions in title VII for sexual classifications. See note 165 infra.
\textsuperscript{16} Id. Sections 2 and 3 of the amending statute contain provisions for its effective date and its effect upon existing fringe-benefit programs. Id. §§ 2, 3.
\textsuperscript{17} This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.
The recently achieved harmony between the statutory and case law in this area, however, leaves two questions unanswered. First, what is to become of the constitutional holding in Geduldig, which depends on the same argument that section 701(k) rejected? Second, if classifications on the basis of pregnancy, or more generally, classifications on the basis of sex, are necessary for equal treatment of men and women in some cases, why should they be prohibited by title VII? Indeed, should they not be required?

The short answer to such doubts about the continued survival of Geduldig is that its constitutional holding may be immune from congressional modification and that, in any event, Congress has not attempted any such modification in section 701(k). A longer answer is that the constitutional law of sexual discrimination should not be modeled on the law of racial discrimination, principally because of the justifiable significance attached to sexual differences in our society. The Constitution should leave the states and the federal government free to choose between alternative conceptions of sexual equality: an anticlassification conception that prohibits distinctions on the basis of sex, and an equal-treatment conception that requires equal treatment in each case in light of genuinely relevant differences between the sexes.

This analysis of the constitutional question, however, leaves unexplained the strict statutory prohibition against sexual classifications. If the legitimate relevance of sex in some social practices requires flexibility in the constitutional law of sexual discrimination, should it not also require flexibility in the statutory law? Although title VII, unlike the Constitution, contains a general prohibition against sexual discrimination, the statute could be interpreted according to the equal-treatment conception of equality to allow reliance on acceptable sexual differences. Nevertheless, neither the courts nor Congress ultimately has chosen this course. Whereas Gilbert and Nashville Gas can be rationalized according to the conception of equality as equal treatment, the overruling of these decisions by section 701(k) suggests that Congress has rejected an equal-treatment interpretation of title VII, and Manhart indicates more clearly that the Supreme Court has done so as well.

Although the arguments against an equal-treatment interpretation of title VII may be unpersuasive on the facts of Manhart, they

---

19 See note 113 infra.

20 For further discussion of these two conceptions of equality, see notes 75-82 infra and accompanying text.

21 Title VII §§ 703(a)-(d), 704(b), 42 U.S.C. §§ 2000e-2(a) to (d), -3(b) (1976).
illustrate the difficulties created by the uncertainty of a rule requiring equal treatment in each case. These difficulties constitute decisive objections to an equal-treatment interpretation of title VII and the Equal Pay Act.

I. CONSTITUTIONAL LAW

A. Constitutional Treatment of Sexual Discrimination

The Supreme Court decided Geduldig v. Aiello against a background of constitutional prohibitions against sexual discrimination founded largely on the equal protection clause of the fourteenth amendment and the due process clause of the fifth amendment. The extent of these constitutional prohibitions is uncertain because the Supreme Court has not held that sexual classifications are generally invalid or even generally suspect. Reliance on the stereotype that a woman's place is in the home—by presuming that men are the providers in a family or that men have greater competence in business and public affairs—has been held unconstitutional. Likewise, stereotypes of maturity and drinking habits have been condemned. Sexual classifications have been held unconstitutional in Frontiero v. Richardson, 411 U.S. 677 (1973), a four-justice plurality took the position that sexual classifications are "inherently suspect, and must therefore be subjected to strict judicial scrutiny." Id. at 688. Justice Stewart concurred in the judgment, on the ground that the challenged statutes "work[ed] an invidious discrimination in violation of the Constitution." Id. at 691. The challenged statutes in Frontiero granted men in the armed forces dependency benefits for spouses without a showing of dependency, but granted women such benefits only upon a showing of dependency.

The constitutional prohibitions apply only against the states, the federal government, and private persons acting in some manner constituting governmental action. See G. Gunther, Cases and Materials on Constitutional Law 906-61 (9th ed. 1975). By contrast, title VII and the Equal Pay Act apply to both public and private employers. See note 113 infra and accompanying text.

24 In Frontiero v. Richardson, 411 U.S. 677 (1973), a four-justice plurality took the position that sexual classifications are "inherently suspect, and must therefore be subjected to strict judicial scrutiny." Id. at 688. Justice Stewart concurred in the judgment, on the ground that the challenged statutes "work[ed] an invidious discrimination in violation of the Constitution." Id. at 691. The challenged statutes in Frontiero granted men in the armed forces dependency benefits for spouses without a showing of dependency, but granted women such benefits only upon a showing of dependency.


even when men appear to have been the victimized sex.\textsuperscript{29} However, statutes that rest on the presumption of past discrimination against women in the job market\textsuperscript{30}—presumably distinguishable from the stereotype that women are less capable in the job market—have been held constitutional.\textsuperscript{31}

A revealing, if inconclusive, case is \textit{Schlesinger v. Ballard},\textsuperscript{32} which upheld different promotion schedules for male and female naval officers. Women had to secure a promotion within thirteen years of service or face mandatory discharge, but men had to secure a promotion or face mandatory discharge within a significantly shorter period of time. The Court reasoned that the longer period of guaranteed service for women was justified because their opportunities in the Navy were severely restricted, a sex-based limitation that the plaintiff, a male officer facing mandatory discharge after nine years of service, had not challenged.\textsuperscript{33}

The Court’s reasoning exemplifies the different constitutional status of sex and race. The assumption in \textit{Ballard} that the sexual classification was permissible is an important one, but few litigants would count on challenging it successfully. The claim that all sexual classifications in the armed forces are constitutionally prohibited, particularly those that restrict combat roles to men, is at least open to fair debate.\textsuperscript{34} By contrast, classifications on the basis of race are


\textsuperscript{32} 419 U.S. 498 (1976).

\textsuperscript{33} \textit{id.} at 508.

\textsuperscript{34} A survey of the cases reveals only one unreversed decision holding that sexual classifications in the assignment of military positions are unconstitutional: Owens v. Brown, 455 F. Supp. 291 (D.D.C. 1978), which invalidated a federal statute, 10 U.S.C. § 6015 (1976), prohibiting women from shipboard duty on naval vessels other than hospital ships and transports. The court, however, reserved the question of restricting women from combat roles. \textit{See id.} at 306-08 & n.65, 310. A number of earlier cases had found the exclusion of women from the draft
subject to the suspect-classification/compelling-government-interest test of constitutionality, and it is a commonplace that, apart from emergencies and attempts to remedy past discrimination, the test is virtually never satisfied. Sex and race do not receive the same constitutional treatment, either as a matter of results in particular cases or as a matter of reasoning supporting those results.

B. Justifications for Differing Constitutional Treatment of Sexual and Racial Discrimination

Two justifications can be offered for the difference between the constitutional law of racial and sexual discrimination. The first is a difference in constitutional history. The Constitution as yet contains no explicit, general prohibition against sexual discrimination. Unlike the constitutional law of racial discrimination, the constitutional law of sexual discrimination finds no support in the intent of the framers of the Reconstruction amendments, which generally were addressed to the evils of racial discrimination. By contrast, the nineteenth amendment is confined to granting women the right to vote, and the equal rights amendment has yet to be ratified.


See note 59 infra and accompanying text.

The equal rights amendment was submitted to the states on March 23, 1972, after passage by two-thirds majorities of the House and Senate, H.R.J. Res. 208, 92d Cong., 1st Sess., 86 Stat. 1523 (1972). As of this writing, 35 states have ratified the amendment, but four have voted to rescind their ratification. N.Y. Times, Mar. 1, 1979, at A16, col. 6. The amendment originally had a ratification period of seven years, but a joint resolution passed by simple majorities in the House and Senate has extended the ratification period until June 30, 1982. H.R.J. Res. 638, 95th Cong., 2d Sess. (1978); 124 CONG. REC. H8,665 (daily ed. Aug. 15, 1978); 124 CONG. REC. S17,318-19 (daily ed. Oct. 6, 1978).


See note 36 supra.
apply with only diminished force to sexual classifications. The reasons advanced for a strict rule against governmental classifications on the basis of race are several: the historical connection between racial classifications and racial discrimination; the stigma of racial segregation, together with its cumulative, unavoidable, and pervasive effects; the fact that racial minorities are "discrete and insular" and therefore subject to the "racially selective sympathy and indifference" of predominantly white lawmakers; and the irrational character of many racial classifications and the correspondingly small cost of prohibiting even well-founded reliance on race.

By contrast, any prohibition against sexual classifications must be flexible enough to accommodate two legitimate sources of distinctions on the basis of sex: biological differences between the sexes and the prevailing heterosexual ethic of American society. Although there are genuine biological differences among the races that have some medical significance, their importance appears to be overshadowed, even in medicine, by diseases and conditions in which

---

42 "The assertion of human equality is closely associated with the proposition that differences in color or creed, birth or status, are neither significant nor relevant to the way in which persons should be treated." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 355 (1978) (Brennan, White, Marshall, Blackmun, JJ., concurring in the judgment in part and dissenting).

This argument, however, has been criticized on two grounds: first, race may be an efficient proxy for other characteristics that legitimately may be taken into account, and second, if the defect of racial classifications were irrationality, then they could be held unconstitutional under a less stringent standard of review. See Brest, supra note 39, at 6-7; Posner, The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities, 1974 Sup. Ct. Rev. 1, 9-11.
43 Familiar examples of genetic conditions confined to a particular racial or ethnic group are sickle cell anemia in blacks and Tay-Sachs disease in Jews. See Myrianthopoulos & Aronson, Population Dynamics of Tay-Sachs Disease, in I Ethnic Groups of America: Their Morbidity, Mortality and Behavior Disorders 81, 81-84 (A. Shiloh & I. Selavon eds. 1973) [hereinafter cited as I Ethnic Groups of America]; Scott, Health Care Priority and Sickle Cell Anemia, in II Ethnic Groups of America: Their Morbidity, Mortality and Behavior Disorders 121, 121-22 (A. Shiloh & I. Selavon eds. 1974) [hereinafter cited as II Ethnic Groups of America].
environmental influences play a large, if uncertain, role. 44 Given the present state of medical knowledge, biological differences among the races would justify at most a narrow exception to the strict prohibition against governmental classifications by race. 45 The biological differences between the sexes are of greater significance 46 and cause greater social controversy, as the pregnancy cases illustrate. 47

Sexual differences founded on heterosexual practices, however, generate most of the controversy in the constitutional law of sexual discrimination. Familiar and established values in American social life presuppose the existence of a predominantly heterosexual culture. These values occasionally are articulated in constitutional decisions, 48 but they also remain implicit in large areas of substantive law. Family law, 49 and to a lesser extent the law of decedents’ estates, 50 rest on the premise that the heterosexual family is the basic unit of social life. Areas as varied as income and estate taxation, 51


45 When Congress has created special programs for genetic disorders, it has done so without resort to racial classifications. See 42 U.S.C. §§ 300b to -5 (1976).

46 For example, the difference in reproductive organs alone gives rise to specializations in obstetrics and gynecology. The medical significance of sexual differences is also illustrated by the difference in death rates of men and women from cancer of the breast and urinary tract and by the death rates from diseases of the prostate and complications of pregnancy and childbirth. See U.S. Nat’l Cent. for Health Statistics, U.S. Dep’t of Health, Education, and Welfare, Vital Statistics of the United States 1973, table 1-8, at 1-12 to -22 (1977).

47 See notes 3-18 supra and accompanying text.

48 E.g., Moore v. City of East Cleveland, 431 U.S. 494, 498-500 (1977) (plurality opinion) (ordinance prohibiting traditional family group from occupying single dwelling unit held unconstitutional, citing cases protecting marriage and family life); Village of Belle Terre v. Boraas, 416 U.S. 1, 8-9 (1974) (similar prohibition against groups other than traditional families or unmarried couples held constitutional because, inter alia, the state can legislate to foster “family values”).

49 Although arguments for homosexual marriage have been advanced, they have been rejected, see, e.g., Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (1974), and even if accepted, they would not displace the heterosexual family as the model upon which family law is based.


social security and welfare legislation, evidence, and torts also recognize the fundamental social role of the family.

Despite recent advances in the constitutional law of privacy, regulation of sexual practices by such commonplace means as the laws of marriage and divorce is an accepted function of government. Somewhat more questionable are prohibitions against practices that do not fit the heterosexual norm, although the Supreme Court has summarily, if not unanimously, rejected a constitutional attack on such prohibitions. But such cases lie at the margin where values of heterosexuality and privacy conflict, and the decisions of the Court leave unaffected the broad and undisputed power of government to encourage sex-based roles in sexual conduct.

A variety of sexual classifications in related social practices also are within the government's power to preserve and support, especially when the government acts as an employer. For example, sex-based standards of appearance for government employees are clearly constitutional. Although this example is atypical of challenged sexual classifications, it is significant because it illustrates the power of government to define and maintain sexual classifications that are beyond challenge. The same, of course, is not true of governmental power with respect to racial classifications. Whatever the cultural significance of race, constitutional law after Brown v. Board of Education has restricted governmental reliance on race to emergencies and to attempts to remedy past discrimination, and


54 See W. Prosser, Law of Torts 859-97 (4th ed. 1971) (intrafamily immunities, vicarious liability of family members, interference with family relations, and injuries to members of family).


even in those areas, classifications on the basis of race have been quite controversial.  

The more lenient constitutional treatment of sexual classifications draws support from contemporary morality, both in the descriptive sense of the moral consensus prevalent today and in the normative sense of the justifiability of that consensus. At the descriptive level, sexual classifications are valued for their own sake within an important area of human life, namely sexual conduct, whereas racial classifications are neither so widely nor so openly valued in everyday life. Dress again provides a clear example. The accepted practice of emphasizing differences in sex by differences in dress reveals the importance of sexuality in social life and its pervasive influence on other social practices. Disputes over sexual discrimination do not concern the merits of a unisex society as disputes over racial discrimination concern the merits of a color-blind society. Instead, they concern the extent to which the roles of men and women in sexual conduct should affect other social roles. 

At the normative level, however, it might be argued that contemporary morality is wrong and that distinctions on the basis of sex should be condemned as forcefully as distinctions on the basis of race. For instance, it has been argued that oppression of women is inextricably tied to the existence of sexual roles and that the value of individual self-realization must take precedence over the limitations on choice entailed by such roles. These arguments, however, fail as moral arguments because they do not explain how abolition

---


60 For a similar account of the greater moral acceptability of sexual classifications, see Dummett, Racism and Sexism: A False Analogy, 56 New Black Friers 404 (1975). For a critical account, see Wasserstrom, supra note 39, at 584-94, 603-15. For a debate over these issues, see Bhattacharya, Because He is a Man, 49 Philosophy 96 (1974); Harck, On the Moral Relevance of Sex, 49 Philosophy 90 (1974); Lucas, "Because You Are A Woman," 48 Philosophy 161 (1973); Lucas, Vive la Difference, 53 Philosophy 363 (1978).

61 See, e.g., Jaggar, On Sexual Equality, 84 Ethics 275, 276 (1974); Wasserstrom, supra note 39, at 613-14.

of sexual roles can be accomplished and why abolition is superior to reform of sexual roles to eliminate sexist practices. The well-known differences in sexual roles across cultures do not establish the practical possibility of a society without sexual roles; they suggest instead the practical possibility of reform to eliminate the oppressive aspects of existing sexual roles.\footnote{Cf. Wasserstrom, \textit{supra} note 39, at 609-10 & n.53, 613 (apparently acknowledging this point).}

The asserted inadequacy of reform rests on two claims, which are both problematical: an empirical claim that sexist practices inevitably accompany sexual roles and a normative claim that social roles not chosen by an individual necessarily are unjust. The empirical claim can be substantiated by evidence that only attempts at reform are likely to provide. If sexual roles inevitably cause oppression, then attempts at reform will confirm the existence of this causal connection. In the absence of attempts at reform, the connection is only a matter of surmise. The normative claim must explain why sexual roles, even purged of their oppressive aspects, restrict individual choice to such a degree that they deserve to be abolished. The continued existence of society as we know it, as well as the choices that such a society makes possible, requires the existence of social roles that inevitably restrict individual choice.

Many social roles, like sexual roles, are closed to those who do not possess acquired or inherited characteristics beyond their individual control. Without some degree of musical talent, a person is foreclosed from a career in music, but this limitation on individual choice is not a persuasive argument for abolishing careers in music. The fact that those lacking in musical talent cannot become professional musicians does not justify denying that choice to those who are talented.\footnote{See J. Rawls, \textit{A Theory of Justice} 100-02 (1971).} Likewise, the fact that women cannot assume the role of father and men the role of mother does not justify abolishing the heterosexual family and replacing it with an institution in which “one’s sex is no more significant than eye color in our society today.”\footnote{Wasserstrom, \textit{supra} note 39, at 606, 614-15.} Abolition of the heterosexual family entails abolition of sexual roles, and with them the ability to choose those roles. Arguments based on the value of individual choice are inevitably arguments about degrees of choice. They do not support abolition to the exclusion of reform.

The arguments for abolition have another, obvious failing as
Sexual Equality

constitutional arguments: the abolitionist position is hopelessly inconsistent with existing law. Even in the debate over the equal rights amendment, claims that the amendment would abolish sexual roles are made by its opponents, not by its supporters, and understandably so, because such claims entail abolishing the special legal status of the family and replacing the norm of heterosexuality with one of bisexuality. The abolitionist goal is thus far more radical than the goal of toleration of homosexuality, which recently has been the subject of legal and political controversy.

As the foregoing discussion demonstrates, any close analogy between the constitutional treatment of racial and sexual classifications must be abandoned. The acceptability and rationality of some sexual classifications diminish the applicability of most of the reasons for a strict prohibition against racial classifications. The argument based on the stigmatizing effect of sexual classifications is most diminished in force. If sexual classifications are permissible in the area of sexual conduct and therefore do not stigmatize, then such classifications in other areas are also less likely to stigmatize. Likewise, an absolute prohibition against sexual classifications is difficult to justify because the instances of legitimate reliance on sex are more numerous than the instances of legitimate reliance on race. The practice of defining social roles by sex has not been condemned completely; sex still makes a justifiable difference in sexual conduct and related social practices.

Of course, the dissimilarity of racial and sexual classifications does not prove that no constitutional prohibition against sexual discrimination should exist. The arguments for a strict prohibition against racial classifications are impaired only partially when applied to sexual classifications. To the extent that sexual classifications stigmatize or otherwise harm women, the adverse effects are

---


65 Although the proponents of abolition recognize the radical nature of their claims, see Wasserstrom, supra note 39, at 605-06, they do not advocate the accomplishment of their goals through constitutional adjudication.


67 See Wasserstrom, supra note 39, at 606.

68 See notes 55-56 supra.

69 For a list of those reasons, see notes 39-42 supra and accompanying text.
cumulative and unavoidable. Many such classifications, particularly in economic life, have irrationally denied women the opportunity to develop and use their talents and skills.\textsuperscript{71} Despite the value of sexual roles, they historically have been the principal means of discrimination against women; and despite the fact that women are not a minority, they still suffer from the selective sympathy and indifference of predominantly male lawmakers. Men are more likely than women to err in judging the permissibility of sexual classifications because they rarely have felt their adverse effects.\textsuperscript{72}

Although one might doubt whether these reasons are strong enough to support the judicial creation of a constitutional prohibition against sexual discrimination,\textsuperscript{73} the settled course of adjudication appears to have resolved the issue, at least for the near future.\textsuperscript{74} Given the existence of a constitutional prohibition against sexual discrimination, but one weaker than the prohibition against racial discrimination, the question remains what to make of it: what kind of sexual equality does the Constitution require and what conceptual framework should the courts bring to issues of sexual discrimination?

C. Two Conceptions of Sexual Equality

As Ronald Dworkin has argued, disputes about what constitutes equality can take two forms: disputes about the concept of equality

\textsuperscript{71} E.g., Oaxaca, Sex Discrimination in Wages, in DISCRIMINATION IN LABOR MARKETS 124, 147-51 (O. Ashenfelter & A. Rees eds. 1973). "Rational" refers to economically efficient employment practices, determined without giving value to satisfaction of tastes for discrimination. "Tastes for discrimination" means preference not to associate with members of a particular group. For a more elaborate definition, see G. BECKER, THE ECONOMICS OF DISCRIMINATION 13-17 (2d ed. 1971). The calculation of efficiency must exclude tastes for discrimination because the aim of laws against discrimination in employment is to eliminate employment decisions based upon tastes for discrimination. Economic efficiency is relevant only in determining the costs of achieving this goal apart from frustration of tastes for discrimination. For a similar view, see Fiss, supra note 40, at 253-63.

\textsuperscript{72} See note 41 supra and accompanying text.

\textsuperscript{73} For arguments that sex should be a suspect classification, see D. RICHARDS, THE MORAL CRITICISM OF LAW 173-76 (1977).

\textsuperscript{74} Paradoxically, neither ratification nor failure of the equal rights amendment is likely to work a major change in the law. The failure of the amendment would not directly undermine precedents that in no way depend on its success. Conversely, the success of the amendment would not eliminate the need to accommodate the prohibition against sexual discrimination to the preferred status of heterosexuality in our society. Although ratification of the amendment might well result in a stricter prohibition against sexual classifications by government, it would not make the prohibition absolute. As previously noted, only the opponents of the amendment foresee such drastic consequences from its adoption. See note 67 supra and accompanying text.
Sexual Equality and disputes about conceptions of equality. The former concern the meaning of "equality" and related terms and must be settled by reference to the proper use of such terms in ordinary language and professional discourse. The latter are disputes over legal, political, and moral theories of equality and cannot be resolved solely by reference to linguistic usage. Instead, they stand or fall according to the arguments that can be made for or against any normative theory. Thus the question of what kind of sexual equality is protected by the Constitution is a question about the appropriate conception of sexual equality in constitutional law.

One conception of sexual equality is an anticlassification conception, which holds that any decision on the basis of a person's sex denies equality. It is modeled on the widely accepted conception of racial equality as blindness to color. The existence of broad and uncertain areas in which sexual classifications are constitutionally permissible suggests, however, that the appropriate conception of sexual equality is not a version of the color-blind conception of racial equality. An alternative conception of equality is an equal-treatment conception, which permits distinctions on the basis of sex if they are necessary to achieve equal treatment of men and women. An equal-treatment conception of sexual equality condemns some sexual classifications but allows others. Which conception is superior?

The answer depends on the level of analysis at which the question is asked. At the abstract level of defining the aim of the law, disregarding considerations of administering the law, the equal-treatment conception of equality is superior. Although the anticlassification conception is more definite, what it gains in specificity it loses in power and flexibility. In particular, it fails to account for any allowable sexual classifications based on biological differences and heterosexual practices. Because the anticlassification conception itself does not allow any sexual classifications, it must leave permissible sexual classifications to be justified by independent, overriding values. This may be possible with respect to classifications reflecting biological differences, but only at a significant cost in clarity.

---

75 R. Dworkin, supra note 66, at 134-36.
76 This analysis parallels Dworkin's distinction between abstract and concrete rights. See id. at 93-94. Dworkin has advanced a similar claim with respect to racial discrimination, although in different terminology. See id. at 225-29.
77 The government may deny hysterectomies to men because it would be irrational to
The dilemma is more acute with respect to sexual classifications founded on heterosexual practices. An illustration is the frequently repeated argument that an interest in personal privacy justifies sexual segregation of restrooms. The argument does not appeal to an independent, overriding value of personal privacy but to heterosexual values fundamentally inconsistent with the anticlassification conception of equality. The kind of privacy at issue is the qualified privacy of members of one sex from members of the other. Such privacy requires sexual classifications, because it is part of a network of values supporting heterosexuality in our society, and heterosexuality requires sexual classifications, not because they are a necessary evil, but because they define the practice itself. Moreover, other permissible sexual classifications are not even remotely justifiable by appeal to overriding values of personal privacy or self-expression. For instance, sex-based standards of dress are at best indifferent to such values and at worst opposed to them. The existence of such broad and uncertain areas in which sexual classifications are permissible suggests that the appropriate conception of

provide them, but can it prohibit women from playing football with men simply because sexually integrated football is irrational? If it can, sexual equality is in danger of being overridden by any argument of rationality, and if it cannot, rationality is in danger of losing its independence from sexual equality. It is simpler to admit that the governing abstract conception of equality allows consideration of relevant differences between the sexes and then to consider whether the biological differences between men and women are relevant to sexually integrated football.

Sexual equality is not a version of the color-blind conception of racial equality.

By contrast, the equal-treatment conception of equality can easily accommodate permissible classifications based on biological differences and heterosexual practices because sex in those instances is relevant to achieving equal treatment of men and women. Of course, the equal-treatment conception of equality leaves the question of relevance to a more concrete level of analysis, but that is where it belongs. Whether a particular distinction on the basis of sex is necessary to achieve equal treatment because it reflects relevant differences between men and women is a question that can be answered only by a detailed consideration of the distinction itself. A draconian insistence that sexual classifications are always irrelevant is not true to the complexities of social life in a heterosexual society. The governing conception of sexual equality must be more flexible.

At the concrete level of administering the law, however, complications arise. Not only does the question of relevance become more pressing, but the need to secure obedience to the law imposes constraints of its own. Requiring state and federal officials to treat men and women equally in light of all relevant sexual differences is futile if these officials lack the resources to determine which differences are relevant and which are not. Expecting judges to resolve such questions if the parties lack the resources to litigate them fully is no less unreasonable.

These difficulties are not avoided easily. The conception of equality as equal treatment does not just permit sexual classifications necessary to achieve equal treatment; it requires them. If the abstract conception of equality as equal treatment is implemented directly, by a rule that requires equal treatment in light of all the relevant differences between the sexes, then the entire risk of determining which differences are relevant falls on those subject to the rule. If a classification on the basis of sex is made, then the members of the sex disadvantaged by the classification can sue, claiming that it results in unequal treatment. On the other hand, if no classification is made, then the members of the opposite sex can sue, claiming that the classification is necessary for equal treatment.79

To avoid these difficulties, the abstract conception of equality as

---

79 Allocating the burden of proof will not solve this problem. See text accompanying notes 238-41 infra.
equal treatment might be implemented, at least in part, by an anticlassification conception of equality, for example, by a rule prohibiting all sexual classifications except those specifically permitted. The obvious advantage of such a rule is that it clearly states exactly what is prohibited, allowing those subject to the rule to conform their conduct to it and those who administer the rule to determine efficiently whether it has been violated. Its obvious defect is that it does not achieve, but instead denies, equal treatment in cases in which sexual distinctions are genuinely relevant, but in which no specific exception applies. Like quotas or goals, such a rule forces some individuals to bear a disproportionate share of the burden of eliminating sexist practices from society. Similar short-term departures from equal treatment may be among the dislocations accompanying any important reform, but the anticlassification conception of equality imposes more such inequalities than necessary. By hypothesis, it prohibits reliance on genuine differences between the sexes, even those that the law cannot affect or does not purport to change.

Thus at the concrete level of administering the law, the choice between the equal-treatment and the anticlassification conceptions of equality is a choice between two imperfect devices for achieving the goal defined by the abstract conception of equality as equal treatment. As a matter of constitutional law, the nature of this choice requires judicial deference to the judgment of the states and the political branches of the federal government. Given the difficulties in distinguishing permitted sexual roles from prohibited sexual stereotypes and the related difficulties of distinguishing relevant and irrelevant differences between the sexes, the federal courts have no special competence to choose between the two concrete conceptions of equality. If other branches of government attempt to implement the abstract right to equal treatment with one or the other conception of equality, or with some combination of the two, the federal courts should defer to that decision.

---

80 Cf. Fiss, supra note 40, at 258-63 (making similar arguments in favor of a general prohibition against employment discrimination).


82 When the government has acted without regard to considerations of sexual equality, its actions should be judged according to a somewhat stricter standard. In particular, sex-based classifications that result in equal treatment, even though unintentionally, should be held
D. Geduldig v. Aiello

Most of the Court's confusion in the pregnancy cases emanates from the argument in *Geduldig v. Aiello* that classifications on the basis of pregnancy are not classifications on the basis of sex. The plaintiff's claim in *Geduldig* was that California's disability compensation plan denied equal protection because it excluded coverage of disability resulting from pregnancy. The Court's principal reason for rejecting this claim was not premised on the employment relationship or even on the question of sexual discrimination. Instead, it relied on the familiar argument that the states have broad authority to enact and administer social welfare legislation. The Court confined its discussion of sexual discrimination to three sentences and two footnotes. The Court argued that the exclusion of disability due to pregnancy was not based on sex because it did not distinguish all female employees from all male employees but only pregnant employees from nonpregnant employees.

Ironically, the Court may have been driven to this antifeminist conclusion by the feminist argument that distinctions on the basis of sex are to be judged as severely as those on the basis of race. If all, or nearly all, sexual classifications are prohibited, then one may be justly reluctant to characterize a classification as sexual.

Whatever the Court's motivation, its conclusion is obviously defective, for a reason put most succinctly by Justice Stevens: "it is the capacity to become pregnant which primarily differentiates the female from the male." Classifications based on pregnancy are sex-based in nearly literal terms: "pregnancy of women" can be substituted for "pregnancy" with no change in meaning. To insist that pregnancy classifications are sex-neutral is simply to misuse constitutional, but the burden of proving equal treatment should be placed on the government to ensure that it has not acted out of an implicit motive to deny equal treatment. Cf. *Ely, supra* note 31, at 731-32 (discussing the heavier burden of justifying racial classifications).

---


The Court stated: "Particularly with respect to social welfare programs, so long as the line drawn by the state is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point." *Id.* at 495.

Id. at 496-97 & nn.20-21.

Id. at 496 n.21.

The Court has succumbed to similar pressure in Indian cases, where it has characterized federally recognized Indian tribes as sovereign entities but not as racial groups, despite the explicit racial requirements for membership in a federally recognized Indian tribe. *See Morton v. Mancari*, 417 U.S. 535, 553-54 & n.24 (1974).

words. The Court conceivably used these words in some special sense, but if so, it is one that includes many discriminatory practices. For example, a disability plan that denied benefits to female employees over thirty, granted benefits to female employees under thirty, and granted benefits to all male employees regardless of age, would distinguish only some female employees from all other employees, but it would nevertheless be discriminatory. Indeed, most sexually discriminatory practices result in discrimination against fewer than all male or female employees or applicants; those who discriminate may feel that the increased risks of detection and prosecution outweigh the benefits of additional discrimination, they may not discriminate consistently, or they may limit the scope of discrimination for independent reasons.

The opinion in Geduldig itself suggests that the Court need not have taken the dubious step of characterizing pregnancy classifications as sex-neutral. The Court should have relied entirely on a second argument that it advanced: that women were not denied equal treatment because they already received benefits in excess of their contributions. Instead of resorting to an erroneous characterization, the Court should have upheld the California statute on the ground that it conformed to an equal-treatment conception of equality. Instead of comparing the subclass of burdened female employees with all other male and female employees, the Court should have compared it with an analogous subclass of male employees to determine whether similarly situated men and women received equal treatment. The Court obscured the need for such a comparison by defining the burdened female subclass as employees with disabilities resulting from pregnancy. The fact that only women become pregnant, however, does not pose an insuperable obstacle to defining an analogous male subclass.

First, the relevant subclasses should not be defined in terms of actual disability but in terms of potential disability. The benefit provided to employees is coverage of the risk of disability, not the varying amounts of money that each employee ultimately receives for actual disabilities suffered. Participation in a disability plan is

---

10 "There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program." 417 U.S. at 496 (footnote omitted).
91 See id. at 496 n.20.
a form of insurance that protects employees against the risk of losing income from disability. In effect, each employee obtains coverage of this risk in exchange for contributions of money; the value of participation in the plan depends on both of these factors. Under the California plan in Geduldig, contributions were the same for men and women who earned the same income. Thus the only relevant variable was the extent of covered risks. These also were identical for men and women, with the exception of the exclusion of pregnancy. The relevant subclass in Geduldig is therefore the subclass of female employees who run a significant risk of pregnancy, approximated by the subclass of fertile female employees, which is roughly equivalent to the class of all female employees.

The second step is finding an analogous subclass of male employees, despite the fact that men cannot become pregnant. One way of doing so is by assimilating the risk of disability from pregnancy to the risk of disability from reproduction. There is no semantic obstacle to speaking of the risk of reproduction for men, even though men are exposed to a smaller risk of disability from reproduction than women. The change in terminology from “risk of pregnancy” to “risk of reproduction” is necessary because the equal-treatment conception of equality requires comparison of similarly situated subclasses of female and male employees. Thus the most analogous subclass of male employees is that of all male employees who run a significant risk of paternity, approximated by the subclass of all nonsterile male employees, which is roughly equivalent to the class of all male employees.

After identifying the appropriate subclasses, the relevant inquiry is whether the burdened subclass of female employees obtains less

---

[2] Each employee was required to contribute one percent of wages or salary up to an annual maximum of $85. Id. at 487.
[4] There may be other ways as well, such as comparing the covered risks of men and women of the same age. The relevant risks can be approximated by examining the risks to all male and female employees. See text accompanying notes 99-100 infra.
[5] The typical period of disability from pregnancy and childbirth is estimated to be six to eight weeks. American College of Obstetricians and Gynecologists, Policy Statement on Pregnancy-related Disabilities (Mar. 2, 1974), quoted in Geduldig v. Aiello, 417 U.S. at 500 n.4 (Brennan, J., dissenting). Men suffer no corresponding disability, and generally male disabilities from reproduction are less severe than female disabilities. Cf. A. Ferris, TRENDS IN THE STATUS OF AMERICAN WOMEN 193, table 12.3 (1971) (days of restricted activity for genitourinary disorders is 5.7 per 100 persons per year for men and 29.1 for women; for pregnancy and related disorders, 41.8).
benefit from participation in the plan than the corresponding subclass of male employees. This question cannot be answered by comparing only the reproductive risks of men and women, as the Court seemed to suggest. Instead, it requires an examination of all risks covered by the plan and all contributions made to the plan because these determine the value of participation. The district court in *Geduldig* found that even excluding disability from pregnancy, women made 28% of the contributions to the disability compensation fund but received 38% of the benefits. Other statistics in the briefs before the Supreme Court support the conclusion that coverage of pregnancy would have aggravated the existing inequality.

Although these comparisons are only approximate, they satisfy the constitutional standard of justification for sexual classifications. According to the Court's most recent pronouncement on the subject, "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." In *Geduldig*, the state's objective was to achieve rough proportionality between contributions and benefits for employees of each sex. The fact that the proportionality was only approximate is excusable because the errors were made in favor of those alleging discrimination. Coverage of disability from pregnancy only would have enhanced the disproportionality in favor of women.

Moreover, it is doubtful that any better approximation was possible. The administrators of the plan were required to approximate the extent of the covered risks as of the time that contributions were paid in, not as of the time that benefits would be paid out. The extent of individual risks could not be determined with certainty because uncertainty over the extent of individual risks is the very...

---

86 "There is no risk from which men are protected and women are not. Likewise there is no risk from which women are protected and men are not." 417 U.S. at 496-97.
87 Id. at 497 n.21 (citing Aiello v. Hanson, 359 F. Supp. 792, 800 (N.D. Cal. 1973)).
88 The plaintiffs argued that the disproportion in existing levels of benefits was attributable solely to the fact that women made lower contributions than men because they earned less. Brief for Appellees at 82-83. See Comment, Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination, 75 COLUM. L. REV. 441, 478-79 (1975). They did not answer, however, defendants' argument that coverage of pregnancy would have increased the disproportion dramatically. Brief for Appellants at 26-27. Both parties assumed that coverage of pregnancy would have increased benefits 12%, see Brief for Appellees at 88-89, so that women would have made 28% of the contributions but received about 45% of the benefits.
90 See 417 U.S. at 496-97 & n.21.
reason for having insurance plans. The demands of efficient administration further compound this uncertainty. Some characteristics that have a plausible correlation with risks of disability may be too difficult to measure in setting class-wide contribution rates and benefit levels; for example, setting contribution rates on the basis of obesity, medical history, and occupational hazards requires individual investigation and voluminous recordkeeping that probably are impractical on a scale large enough for actuarial validity. The California statute limited the extent of the covered risks in other ways: the plan covered only employees who had contributed to the fund for one year preceding disability, it limited the amount of benefits, it excluded disabilities of less than eight days that did not require hospitalization, and it covered disabilities for no more than twenty-six weeks. As the Court concluded: “It is clear that California intended to establish this benefit system as an insurance program that was to function essentially in accordance with insurance concepts.” A constitutional justification based on actuarial principles should not fail because the state might, in theory, have adopted a more precise classification of risks.

Even if a more precise classification of risks were possible, some sex-based comparison of the covered risks was necessary because the equal-treatment conception itself introduces sexual classifications into the analysis of claims of discrimination. In Geduldig, it required a comparison of the covered risks of male and female employees and recognition of the fact that only women run the risk of disability from pregnancy. Of course, drawing sexual distinctions reinforces awareness of sexual differences, but the underlying aim of the law is not abolition of sexual classifications. The states and the federal government should have as much power to implement the abstract conception of equality as equal treatment directly, by taking relevant differences between the sexes into account, as they have to implement it indirectly, by refusing to rely on sexual classifications. When a state attempts to achieve equal treatment by classifying persons on the basis of sex, a general suspicion of sexual classifications should not stand in its way.

---

101 Id. at 487-88.
102 Id. at 492.
103 Other sexual classifications by government would be constitutional if they met this requirement. See, e.g., Treas. Reg. § 20.2031-10(e) (1970) (sexual classifications in actuarial tables to determine the value of future interests for tax purposes).
There was little evidence in Geduldig that the state had some other, improper purpose in mind. Although the exclusion of disability from pregnancy was the only risk excluded on sex-based grounds, the singularity of the exclusion does not give special force to the arguments underlying the constitutional prohibitions against sexual discrimination. Exclusion of benefits for pregnancy is not irrational because it serves the legitimate purpose of preserving the rough equality between male and female participants in the plan. Nor does it deter women from employment, except insofar as it fails to provide special compensation for the burdens of pregnancy. As the Court has pointed out, however, abandoning all disability programs is not discriminatory, even though it would leave women without any added compensation for the burdens of pregnancy; the denial of disability benefits for pregnancy does not deter women from employment to any greater extent than any form of equal pay for equal work. The argument that women are victimized by the selective sympathy or indifference of male lawmakers also carries no special force because the California program erred in favor of women as a class. Finally, the claim that the exclusion of pregnancy stigmatizes women, although it may find support in traditional attitudes toward pregnancy and childbirth and in a comparison with other disabilities excluded from the plan, does not detract from the universal awareness that women become pregnant and the indisputable value of motherhood, despite its sexist associations. It is also doubtful that treating disability from pregnancy like disabilities resulting from sickness or injury would leave pregnancy free of stigma.

104 The other excluded disabilities were those resulting from commitment by a court as a dipsomaniac, drug addict, or sexual psychopath. 417 U.S. at 488. These were conceded to be insignificant at oral argument. Id. at 499 n.3 (Brennan, J., dissenting).
106 See, e.g., Genesis 3:16 (King James) (“in sorrow shalt thou bring forth children”).
107 See note 104 supra.
108 Geduldig sometimes has been rationalized on the ground that disability from pregnancy often is a voluntarily undertaken condition or that it is not a sickness in the ordinary sense. See General Elec. Co. v. Gilbert, 429 U.S. 125, 136 (1976); Larson, Sex Discrimination as to Maternity Benefits, 1975 DUKE L.J. 805, 813-18. The first argument fails because California's program did not exclude all disabilities resulting from voluntary conditions, 417 U.S. at 499 (Brennan, J., dissenting), and in any event, many pregnancies are undesired, if the statistics on undesired births and abortions are any indication. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1977, at 62-63 (1977) (in a 1973 survey of mothers, 13.1% of births in that year and earlier were reported to be unwanted; in an estimate for 1972-1974, there were 213 and 329 legal abortions per 1,000 births for whites and nonwhites respectively; computations from the latter statistics indicate that about 19% of pregnancies in 1972-1974 ended in abortion). If pregnancy is characterized as a voluntary
The result in *Geduldig* therefore can be justified without resort to the claim that classifications on the basis of pregnancy are sex-neutral. The exclusion of pregnancy from the California disability plan was constitutional because it resulted in roughly equal treatment of men and women. Conversely, if a state or the federal government decided to forego sex-based classifications, on the ground that the abstract conception of equality was best implemented in that way, that too would be constitutional. The question of how best to attain the abstract goal of equal treatment is not within the special competence of the federal judiciary. With the extension of title VII and the Equal Pay Act to the states and the federal government, however, the constitutional question has diminished in significance, and the validity of sexual classifications in employment has become in the first instance a question of statutory law.

condition on the ground that pregnancy is a possible outcome of consensual sexual intercourse, then disability from pregnancy cannot be distinguished from disabilities resulting from such varied causes as skiing and smoking. See Comment, *supra* note 98, at 444 & n.18. In any case, given the absence of fit between pregnancy and voluntariness, an independent justification is necessary for the use of sex-based pregnancy classifications.

The same is true of the argument premised on the meaning of "disability" or "sickness." Disability from pregnancy is obviously a disability in the ordinary sense, although it is not a "sickness" in the ordinary sense. Both the use of "disability" in a special sense and the use of "sickness" in the ordinary sense require justification if they are to support the exclusion of pregnancy. See *id*. No such justification is apparent here. The characterization of a plan as one confined to disability from sickness does not justify the exclusion of disability from pregnancy.

Another version of the voluntariness argument is more successful. It asserts that employers are justified in excluding pregnancy from disability plans because otherwise women will take jobs to obtain eligibility for pregnancy benefits and then quit after they have become pregnant and received the benefits. See Comment, *Gender Classifications in the Insurance Industry*, 75 COLUM. L. REV. 1381, 1386-87 (1975). To the extent that this argument is valid, it depends on the actuarial argument for excluding pregnancy from disability plans. Such an argument would have to show that women who intend to become pregnant are attracted to jobs that provide pregnancy benefits, thus increasing the proportion of benefits paid to women without any corresponding increase in benefits paid to men.


Although a theory of governmental interference with sexual privacy might support an independent constitutional attack on pregnancy classifications, it is doubtful that such an attack would succeed against most employee fringe-benefit plans. The leading decision in this area is *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974), which held that a school board could not impose mandatory pregnancy leaves of fixed duration. *Accord*, Turner v. Department of Employment Security, 423 U.S. 44 (1975) (per curiam). To the extent that *LaFleur* rested on governmental interference with sexual privacy, it is irrelevant to most
II. STATUTORY LAW

A. The Statutory Framework

The statutory prohibitions against sexual discrimination in employment are both broader and more explicit than the constitutional prohibitions. The Equal Pay Act of 1963\textsuperscript{111} and title VII of the Civil Rights Act of 1964\textsuperscript{112} apply to private, as well as public, employers.\textsuperscript{113}

---

\textsuperscript{112} 42 U.S.C. §§ 2000e to -17 (1976).

There is some question whether the statutes constitutionally can apply to states and municipalities after National League of Cities v. Usery, 426 U.S. 833 (1976). That decision restricted the power of Congress under the commerce clause to regulate the employment practices of state and local government. As a result, the extension of title VII to states and municipalities in the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103 (codified at 42 U.S.C. § 2000e(a), (b), (f), (h) (1976)), and a similar extension of the Equal Pay Act, Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6(a), 88 Stat. 55 (codified at 29 U.S.C. § 203(d), (e), (x) (1976)); Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 102, 80 Stat. 830 (codified at 29 U.S.C. § 203(d), (r), (s), (u) (1976)), may be justifiable only as an exercise of congressional power under § 5 of the fourteenth amendment, see Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). But cf. Marshall v. City of Sheboygan, 577 F.2d 1, 5-6 (7th Cir. 1978) (Congress has power under the commerce clause to extend Equal Pay Act to state employers). If so, application of the doctrine of disproportionate adverse impact to the employment practices of state and local government is constitutional only if Congress has the power under § 5 of the amendment to expand the prohibitions contained in § 1. See Fitzpatrick v. Bitzer, 427 U.S. at 456 n.11; id. at 458 (Stevens, J., concurring). All the circuit courts that have considered the question have held that the Equal Pay Act is constitutional as applied to state and local governments. See Marshall v. Owensboro-Daviess Hospital, 581 F.2d 116 (6th Cir. 1978); Marshall v. City of Sheboygan, 577 F.2d 1 (7th Cir. 1978); Usery v. Charleston County School Dist., 558 F.2d 1189 (4th Cir. 1977); Usery v. Allegheny County Inst. Dist., 544 F.2d 148, 154-56 (3d Cir. 1976), cert. denied, 430 U.S. 946 (1977). Contra, Howard v. Ward County, 418 F. Supp. 494 (D.N.D. 1976) (granting full relief under title VII). For arguments supporting congressional power under § 5, see Choper, The Scope of National Power Vis-à-Vis the States: The Dispensability of
and they expressly prohibit sexual discrimination in employment. Title VII is the broader of the two statutes: section 703(a) prohibits sexual discrimination in all aspects of employment,\(^{114}\) while the Equal Pay Act requires only equal pay to members of each sex for equal work.\(^{115}\) Although there are other federal prohibitions against discrimination on the basis of sex, they are not used as frequently to attack sexual discrimination in employment, and they typically incorporate the principles developed under the Equal Pay Act and title VII with few variations.\(^{116}\)

Section 703(a) of title VII, 42 U.S.C. § 2000e-2(a) (1976), provides:

It shall be an unlawful employment practice for an employer—

1. to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or

2. to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id. Sections 703(b), (c), and (d), 42 U.S.C. § 2000e-2(b) to (d) (1976), contain similar prohibitions applicable to employment agencies, labor organizations, and joint labor-management committees, and section 704(b), 42 U.S.C. § 2000e-3(b) (1976), prohibits discrimination in advertising. For definitions of "employment agency" and "labor organization," see title VII § 701(c)-(e), 42 U.S.C. § 2000e(c)-(e) (1976).

Subsection (1) of the Equal Pay Act, 29 U.S.C. § 206(d)(1) (1976), provides:

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

Id. Subsection (2), 29 U.S.C. § 206(d)(2) (1976), prohibits labor organizations from causing a violation of subsection (1).


HeinOnline -- 65 Va. L. Rev. 225 1979
Despite the breadth and explicitness of these statutes, they pose the same problem of interpretation as the constitutional prohibitions. The statutory law reflects the same uneasiness over the distinction between permissible sexual roles and prohibited sexual stereotypes as the constitutional law. The Equal Pay Act manifests these doubts through the narrow scope of its prohibition: sexual classifications that deny equal pay for equal work are prohibited, but sexual classifications that deny women the opportunity to perform equal work are not.\footnote{Although title VII largely remedied the limited scope of the Equal Pay Act, it retains two exceptions addressed specifically to sexual discrimination. The first, in section 2000e (1976), which prohibits sexual discrimination by federal contractors; and the State and Local Fiscal Assistance Act of 1972, § 122(a), 31 U.S.C. § 1242(a) (1976), which prohibits sexual discrimination by state and local governments in programs funded wholly or partially with revenue-sharing monies. In addition, the Civil Rights Act of 1871, §§ 1, 2, 42 U.S.C. §§ 1983, 1985(3) (1976), authorizes private causes of action for sexual discrimination under color of state law in violation of the Constitution and for conspiracy to deny equal protection of the laws by sexual discrimination. See Calhoun, The Thirteenth and Fourteenth Amendments: Constitutional Authority for Federal Legislation Against Private Sex Discrimination, 61 Minn. L. Rev. 313 (1977).} The application of title IX of the Education Amendments of 1971 to employment practices in most federally assisted education programs recently has been called into question, as have the extent and availability of private remedies for violations of that statute. Both issues involve the relationship of title IX to title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to -6 (1976), which contains a general prohibition on racial discrimination by all recipients of federal funds. For cases refusing to apply title IX to employment practices, see Isleboro School Comm. v. Califano, 593 F.2d 424 (1st Cir. 1979); University of Toledo v. HEW, 464 F. Supp. 693 (N.D. Ohio 1979); Junior College Dist. v. Califano, 455 F. Supp. 1212 (E.D. Mo. 1978); Brunswick School Bd. v. Califano, 449 F. Supp. 866 (D. Me. 1978); McCarthy v. Burkholder, 448 F. Supp. 41 (D. Kan. 1978); Seattle Univ. v. HEW, 16 Fair Empl. Prac. Cas. 719 (W.D. Wash. 1978); Romeo Community Schools v. HEW, 438 F. Supp. 1021 (E.D. Mich. 1977). For further arguments favoring this conclusion, see Kuhn, Title IX: Employment and Athletics Are Outside HEW's Jurisdiction, 65 Geo. L.J. 49 (1976). See also Comment, Administrative Cutoff of Federal Funding Under Title VI: A Proposed Interpretation of "Program," 52 Ind. L.J. 651 (1977). The availability of a private cause of action under title VI of the Civil Rights Act of 1964 was discussed, but not decided, in Rogents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 281-84 (1978) (opinion of Powell, J.); id. at 328 & n.8 (Brennan, White, Marshall, Blackmun, JJ., concurring in the judgment in part and dissenting); id. at 379-87 (opinion of White, J.); id. at 418-21 (Stevens, J., concurring in the judgment in part and dissenting). The Court, however, recently has held that title IX gives rise to a private cause of action. Cannon v. University of Chicago, 99 S. Ct. 1946 (1979). See K. Davidson, R. Ginsburg & H. Kay, supra note 67, at 569-70. Thus an employer that segregated its work force so that only women performed clerical work and only men performed supervisory work would not violate the Act. Title VII also contains several general exceptions that apply to any form of discrimination: for various persons who do not fit the statutory definitions of "employer," "employment agency," "labor organization," or "employee," title VII §§ 701(b)-(f), 717(a), 42 U.S.C. §§
Sexual Equality

703(h),\(^{118}\) exempts any differential in pay "authorized" by the Equal Pay Act. Differentials "authorized" by the Equal Pay Act presumably are those permitted by the Act because they conform to the requirement of equal pay for equal work,\(^{120}\) not because they deny members of one sex the opportunity to do the same work as members of the other. The equal pay clause of section 703(h) exempts only differentials in pay; it does not allow discrimination in hiring or promotions.\(^{121}\) The second, and more important, exception is

---


\(^{121}\) See Gitt & Gelb, Beyond the Equal Pay Act: Expanding Wage Differential Protections Under Title VII, 8 Loy.Chr. L.J. 723, 749-51 (1977). Litigation over the equal pay clause in § 703(h) has centered on whether a claim of denial of equal pay under title VII requires the same showing of substantial equality of work as a claim under the Equal Pay Act. Id. at 751-57. However this question is resolved, sexual discrimination in the assignment of jobs is not immune from title VII on the ground that it is permitted by the Equal Pay Act. The equal pay clause in § 703(h) exempts only differentials in pay.

A further limitation on the Equal Pay Act is that it requires equal pay for equal work only "within any establishment." Equal Pay Act of 1963 § 3, 29 U.S.C. § 206(d)(1) (1976). For definitions of "establishment," see K. DAVISON, R. Ginsburg & H. Kay, supra note 67, at 571; Sullivan, supra note 120, at 548-52. Whether title VII allows such inequalities by way of the equal pay clause in § 703(h) is unclear because another clause in § 703(h) allows locational differentials only if "such differences are not the result of an intention to discriminate because
contained in section 703(e), which permits sexual classifications when sex is "a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of that particular business or enterprise." 122

The proper scope of the BFOQ exception has given the courts and the commentators some trouble. 123 The courts have had difficulty, not with the results in particular cases because they usually have held that the exception does not apply, 124 but in formulating a general test that both leaves some room for application of the exception and explains the difference between the cases in which it applies and cases in which it does not. 125 To take one popular test, "discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively." 126 Does this test permit a topless bar owner to hire only female dancers? If it does not, then the test does not mean what it appears to say. If it does, then it permits employers to exploit the worst of sexual stereotypes, that women should be treated solely as objects of sexual desire. It is surely safer to say, with the Supreme Court, that "it is impermissible under Title VII to hire an individual woman or man on the basis of stereotyped characterizations of the sexes." 127 Of course, this only restates the original problem: some sexual classifications, or "stereotypes," are prohibited and some are not. The point deserves emphasis, however,
because it marks off the difference between racial and sexual classifications. All racial classifications in employment are prohibited by title VII. There is no BFOQ for race.\(^{128}\)

The moral value attached to distinctions on the basis of sex also tempers the statutory prohibitions in ways not dictated by the statutory language. For example, different standards of appearance for male and female employees do not amount to sexual discrimination prohibited by title VII, even though they do not fall within the BFOQ exception.\(^{129}\) Sex-based standards of dress are neither discrimination in terms or conditions of employment prohibited by section 703(a)(1) nor a classification with adverse effect prohibited by section 703(a)(2).\(^{130}\) By contrast, standards of dress for employees of different races fall within the statutory prohibitions against racial discrimination because the stigma attached to racial classifications justifies a finding either of discrimination or of classification with adverse effect.\(^{131}\) In the case of both race and sex, the analysis of the statutory issues parallels the analysis of the constitutional issues.\(^{132}\)

---


There is, however, a BFOQ for national origin discrimination, title VII § 703(e), 42 U.S.C. § 2003-2(e) (1976), despite the significant overlap between national origin discrimination and racial discrimination. For instance, Congress contemplated that the BFOQ for national origin would permit employers to hire only Italians as Italian chefs. See 110 Cong. Rec. 7213 (1964) (Clark-Case Memorandum); id. at 2548-49, 13,169-70 (Sen. Byrd). But how many black Italians are there? By contrast, the Supreme Court has recognized the similarity between the two forms of discrimination by assimilating national origin discrimination to racial discrimination in constitutional law. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 287-99 (opinion of Powell, J.); id. at 355-62 & n.34 (Brennan, Marshall, White, Blackmun, JJ., concurring in the judgment in part and dissenting); Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

129 See, e.g., Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084 (5th Cir. 1975) (en banc). Willingham reflects the weight of judicial authority but not the view of the EEOC. See Annot., 27 A.L.R. Fed. 274, 278-93 (1976). These cases refute the argument that only sexual classifications in hiring practices are exempt from title VII because only hiring practices are within the BFOQ exception to the statute. See, e.g., Gold, Equality of Opportunity in Retirement Funds, 9 Loy. L.A.L. Rev. 596, 629 (1976); Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, supra note 125, at 1176 n.46.


131 The litigation over racial discrimination in standards of appearance has not concerned the legality of racial classifications, which have been assumed to be illegal, but the legality of seemingly neutral standards that may be a covert form of discrimination or may have a disproportionate adverse impact on members of one race. See B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 235-36 (1976); Annot., 27 A.L.R. Fed. 274, 293-94 (1976).

132 A statement in the legislative history of the Equal Employment Opportunity Act of 1972...
The similarity between the constitutional and the statutory law of sexual discrimination, however, does not make the statutory law any clearer. Some sexual classifications by government clearly are unconstitutional, such as those denying women a role in public or economic life, while some clearly are permitted, such as those needed to maintain a heterosexual society, but many fall in between. Similarly, in the statutory law, a general prohibition against sexual discrimination must allow for sexual classifications required by biological differences and heterosexual practices. Once these are allowed, however, the line between permitted sexual roles and prohibited sexual stereotypes becomes problematical. If female employees can be required to wear different clothes than male employees, can they be required to shave their legs?\footnote{133}


A similar dispute over sexually segregated housing has arisen under the Housing and Community Development Act of 1974, § 808(b)(1), 42 U.S.C. § 3604 (1976), which prohibits discrimination on the basis of sex in the sale or rental of housing. Brigham Young University requires landlords who rent to students to agree to segregate men and women by building or wing. In 1976, one such landlord refused to rent an apartment to a woman, who was not a student at the university, on the ground that the building in which the apartment was located was reserved for men. The Justice Department took the position that the university and the signatory landlords were in violation of § 3604. When Separate Is Equal, N.Y. Times, Mar. 29, 1978, § A, at 26, col. 1.
of equality\textsuperscript{134} as the constitutional law. The extent and character of permissible sexual classifications preclude an abstract conception of equality that absolutely prohibits reliance on sexual classifications, but the uncertainties of a conception of equality that simply requires equal treatment leave a difficult choice between the two conceptions at the concrete level of administering the law. The main differences between the statutory law and the constitutional law are that the dominant role of Congress is more obvious and that the role of the states is wholly excluded. If Congress has chosen between the two concrete conceptions of equality, that is the end of the matter. In the absence of congressional choice, however, the decision must be left with the federal courts because the need for a uniform federal rule precludes the use of state law.\textsuperscript{135} The crucial question is whether Congress has decided the issue, and if not, how the federal courts should do so.

\textsuperscript{134} See notes 75-82 supra and accompanying text.

\textsuperscript{135} Title VII explicitly preempts any state law "which purports to require or permit the doing of any act which would be an unlawful employment practice under this [subchapter]." Title VII § 708, 42 U.S.C. § 2000e-7 (1976). Although the enforcement provisions of the statute require the EEOC to defer to state and local administrative agencies, id. § 706(b)-(d), 42 U.S.C. § 2000e-5(b) to (d) (prior resort to such agencies and "substantial weight to [their] final findings and orders"); id. § 709(b), (d), 42 U.S.C. § 2000e-8(b), (d) (cooperation with such agencies), the statute grants adjudicative authority to the federal courts, id. §§ 706(f), 707(a)-(b), 717(c)-(d), 42 U.S.C. §§ 2000e-5(f), -6(a) to (b), -16(e) to (d), which are not bound by the determinations of any administrative agency, federal, state, or local, see Chandler v. Roudebush, 425 U.S. 840 (1976); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798-99 (1973). See also title VII § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) (1976) (courts have discretion to stay judicial proceedings for 60 days pending outcome of administrative proceedings). Similar arguments can be made from the provisions for enforcement of the Equal Pay Act, but with greater strength, because these provisions do not require deferral to state agencies. See 29 U.S.C. §§ 215-218 (1976). The extension of both statutes to the employment practices of state and local governments, see note 113 supra, also argues against adoption of state law to define their central prohibitions.

Apart from legislative intent, another compelling argument against a discretionary application of state law is the need for a rule that can be administered with a fair degree of consistency. See Mishkin, The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision, 106 U. Pa. L. Rev. 797, 813-14 (1957); text accompanying notes 237-42 infra.

B. General Electric Co. v. Gilbert, Nashville Gas Co. v. Satty, and Section 701(k)

General Electric Co. v. Gilbert and Nashville Gas Co. v. Satty extended the reasoning and result of Geduldig v. Aiello to the Equal Pay Act and title VII, but with added complications peculiar to the law of title VII. Although these decisions were overruled by section 701(k), they still must be understood to determine what section 701(k) accomplished. In particular, they shed light on whether Congress adopted an anticlassification conception of equality in enacting section 701(k).

In Gilbert, the Court held that exclusion of pregnancy from a disability plan did not violate title VII. The Court relied entirely on the reasoning of Geduldig that classifications on the basis of pregnancy are sex-neutral, quoting the analysis of Geduldig in its entirety and rejecting the contrary interpretation given to title VII by the EEOC and the lower federal

---

132 429 U.S. at 133-35. The Court left out only the footnote reporting that women received a disproportionate share of the benefits under the plan in Geduldig, 417 U.S. at 484 n.21.

The restricted deference accorded the guidelines in Gilbert is the better approach. Congress expressly granted the EEOC authority only to make procedural rules, title VII § 713(a), 42 U.S.C. § 2000e-2(a) (1976), and both the original enactment of title VII and its amendment by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified at 42 U.S.C. §§ 2000e to -6, -8 to -9, -13 to -14, -16 to -17 (1976)), depended on compromises limiting the power of the EEOC and expanding the power of the federal courts. See Sape & Hart, Title VII Reconsidered: The Equal Employment Opportunity Act of 1972,
The Court also held that the plaintiffs had not shown that the exclusion of pregnancy had a disproportionate adverse impact on women, referring to a doctrine the Court first endorsed in *Griggs v. Duke Power Co.* The doctrine of disproportionate adverse impact places the burden of showing that a neutral employment practice has a disproportionate adverse impact on the plaintiff. If the plaintiff carries this burden, then the burden shifts to the employer to show that the practice is justified by "business necessity" or because it is "related to job performance." Finally, if the employer carries this burden, the burden shifts once more to the plaintiff to show that the neutral practice is a pretense for discrimination.


The Court appears to use these phrases interchangeably: "The touchstone is *business necessity*. If an employment practice which operates to exclude Negroes cannot be shown to be *related to job performance*, the practice is prohibited."
Unfortunately, the Court did not conclude its discussion of the doctrine of disproportionate impact with its holding that the plaintiffs had failed to carry their initial burden. In an apparent attempt to restrict the doctrine, the Court suggested that because the plaintiffs had alleged only discrimination in violation of section 703(a)(1), the doctrine was unavailable to them. The Court reasoned that when Congress made it unlawful to “discriminate” in section 703(a)(1), it used the word with reference to the case law defining “racial discrimination” in constitutional law. Although this interpretation of title VII finds support in the legislative history of the entire Civil Rights Act of 1964, it does not take into account the crucial element in the doctrine is the burden of justification on the employer. If the burden is light—for example, if the employer need only advance a plausible justification for employment practices that have a disproportionate adverse impact—then the doctrine represents only a moderate addition to theories of intentional discrimination. See Fiss, supra note 40, at 270-73, 296-304. On the other hand, if the burden is heavy, then employers are forced to adopt quotas or goals to eliminate any disproportionate impact on a protected group and to avoid the concomitant burden of validation. See B. Schleif & P. Grossman, supra note 131, at 103 n.60 (cost of $400,000 for validation study applicable to 200 bus drivers); Lerner, Washington v. Davis: Quantity, Quality and Equality in Employment Testing, 1976 Sup. Ct. Rev. 263, 279-304; Shoben, Probing the Discriminatory Effects of Employee Selection Procedures with Disparate Impact Analysis Under Title VII, 56 Tex. L. Rev. 1, 5-6 & n.14 (1977). A lenient burden of justification is sufficient to support the result in Griggs, because the employer there had imposed the disputed job qualifications in suspicious circumstances and had advanced no justification for them at all. See 401 U.S. at 427-32. Moreover, a heavy burden of justification is contrary to explicit language in title VII disclaiming any intent to require quotas or goals, title VII § 703(j), 42 U.S.C. § 2000e-2(j) (1976), and to legislative history condemning such practices as discriminatory, H.R. REP. No. 914 (pt. 2), 88th Cong., 1st Sess. 29 (1963) (additional views of Rep. McCulloch), reprinted in [1964] U.S. CODE CONG. & AD. NEWS 2487, 2516; 110 CONG. REC. 7209 (1964) (Dep’t of Justice memorandum); id. at 7212 (Clark-Case Memorandum). A heavy burden of justification is also inconsistent with the legislative history of the testing clause of title VII § 703(h), 42 U.S.C. § 2000e-2(h) (1976). Wilson, A Second Look at Griggs v. Duke Power Company: Ruminations on Job Testing, Discrimination and the Role of the Federal Courts, 58 VA. L. REV. 844, 852-58 (1972).

---

See 429 U.S. at 146 (Stewart, J., concurring); id. at 146 (Blackmun, J., concurring in part); id. at 153-55 & nn.6-7 (Brennan, J., dissenting). See generally note 144 supra.


429 U.S. at 133, 145.

The Court adopted such an interpretation of title VI, 42 U.S.C. §§ 2000d to -6 (1976), in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 284-87 (1978) (opinion of Powell, J.); id. at 328-41 (Brennan, White, Marshall, Blackmun, JJ., concurring in the judgment in part and dissenting). Unlike title VII, however, title VI can be interpreted according to the model of the constitutional prohibitions against racial discrimination because it prohibits discrimination only on the basis of race and national origin and only by those receiving federal financial assistance. In effect, it extends the constitutional prohibitions against racial discrimination to cases in which the only state action is federal funding. See id. Title VI neither prohibits sexual discrimination nor contains detailed and numerous exceptions similar to those in Title VII.
either the distinctive character of sexual discrimination or the elusive nature of the distinction between discrimination in violation of subsection 703(a)(1) and classification with adverse effect in violation of section 703(a)(2).151

This cryptic suggestion in *Gilbert* bore fruit in *Nashville Gas Co. v. Satty.*152 In that case, the plaintiff alleged that denial of sick pay for mandatory pregnancy leaves and deprivation of accrued seniority after return from leave violated both section 703(a)(1) and section 703(a)(2).153 As in *Gilbert,* the Court held that the exclusion of pregnancy from the sick-leave plan did not constitute intentional discrimination and that the plaintiff had failed to show any disproportionate adverse impact.154 The Court again suggested that the doctrine of disproportionate adverse impact did not apply to claims under section 703(a)(1), adding that claims of discrimination in sick-leave or disability plans could be brought only under that section.155 The Court also found that the deprivation of accrued seniority after pregnancy leave, when seniority was retained after all other disability leaves, did not constitute intentional discrimination.156 Nevertheless, it held that the deprivation of accrued seniority did have a disproportionate adverse impact on women in violation of section 703(a)(2).157 The Court distinguished the deprivation of accrued seniority from the denial of sick leave on the ground that the employer "has not merely refused to extend to women a benefit that
men cannot and do not receive, but has imposed on women a burden that men need not suffer.\textsuperscript{5}

Neither this distinction, nor the Court's assertion that challenges to discriminatory fringe-benefit programs could be brought only under section 703(a)(1), is tenable. As Justice Stevens pointed out, the Court's distinction between imposing a burden and denying a benefit is entirely one of characterization.\textsuperscript{159} Discrimination in the provision of fringe benefits can be characterized equally well either as discrimination in violation of section 703(a)(1) or as classification with adverse effect in violation of section 703(a)(2).

With the enactment of section 701(k),\textsuperscript{160} Congress swept these tenuous distinctions away. The first clause of section 701(k) defines "because of sex" or "on the basis of sex"\textsuperscript{161} to include "because of or on the basis of pregnancy, childbirth, or related medical conditions."\textsuperscript{162} The second clause then generally requires that pregnant women be "treated the same for all employment-related purposes" as others "similar in their ability or inability to work," specifically applies this requirement to "receipt of benefits under fringe benefit programs," and further provides that "nothing in section 703(h) of this title shall be interpreted to permit otherwise."\textsuperscript{163} The first clause rejects the reasoning of Gilbert and Nashville Gas that classifications based on pregnancy are sex-neutral, and the second clause rejects the results in these cases. Although Congress did not reject explicitly the Court's application of the doctrine of disproportionate impact and its distinction between receipt of benefits and imposition of burdens,\textsuperscript{164} its discussion of these issues makes sense only on the premise that classifications based on pregnancy are sex-neutral. Because Congress has found such classifications to be sex-based, and has generally prohibited them regardless of their effects,\textsuperscript{165} there

\textsuperscript{5} \textit{Id.} at 142.

\textsuperscript{159} The Court equally well might have characterized the seniority and the sick-leave programs in the opposite way: "The grant of seniority is a benefit which is not shared by the burdened class; conversely, the denial of sick pay is a burden which the benefitted class need not bear." \textit{Id.} at 154 n.4 (Stevens, J., concurring).


\textsuperscript{161} Id.

\textsuperscript{162} Id.

\textsuperscript{163} Id.

\textsuperscript{164} See note 14 supra.

\textsuperscript{165} Some pregnancy classifications, however, may fall within the BFOQ exception to the statute, see notes 122-28 supra and accompanying text. See, e.g., Condit v. United Air Lines, Inc., 558 F.2d 1176 (4th Cir. 1977) (pregnancy disqualifies stewardesses from flying for reasons
is no room left for the doctrine of disproportionate adverse impact. The Court's discussion of disproportionate adverse impact in Gilbert and Nashville Gas nevertheless raises two disturbing questions. First, should classifications on the basis of pregnancy be prohibited when they are necessary to achieve equal treatment? Second, did Congress intend to establish an anticlassification conception of equality by enacting section 701(k)? If Gilbert and Nashville Gas can be rationalized on an equal-treatment interpretation of title VII, then the exclusion of pregnancy from the disability and sick-leave plans was not just permissible, but mandatory, because it was necessary to achieve equal treatment of the sexes. Section 701(k), however, by rejecting the result in Gilbert, also rejects any interpretation of title VII that requires that result.

As in Geduldig, the theory of equal treatment applicable in Gilbert and Nashville Gas depends on an actuarial valuation of the benefits of participation in a fringe-benefit program. The Equal Pay Act requires equal pay to members of each sex for equal work. Although title VII more generally prohibits sexual discrimination in employment, by virtue of section 703(h), it incorporates the Equal Pay Act on questions of equal pay for equal work. A rule of equal pay for equal work is satisfied, as the Court has pointed out, simply by paying the same wages or salary to men and women who do the same work. It also is satisfied by equal compensation in the mixed form of fringe benefits and cash. The only constraint on a program of fringe benefits is that men and women must receive equal total compensation for equal work. Because the statutes...
express no preference for one form of compensation over another, employers, workers, and unions should be left free to choose among the many possible combinations of fringe benefits and cash payments. Application of the rule of equal pay for equal work therefore requires the value of fringe benefits to be reduced to the common denominator of present value in cash. For some fringe benefits, such as seniority, determination of a cash equivalent may be impossible in practice, but for most disability and sick-leave plans, the value of participation in the plan can be determined on the model of participation in an insurance plan. Under an equal-treatment interpretation of the rule of equal pay for equal work, sexual classifications are necessary whenever sex is relevant to the actuarial value of participation in the plan.

The disability and sick-leave plans in Gilbert and Nashville Gas, like the disability plan in Geduldig, insured against the covered risk by spreading it over all participating employees, who either paid premiums themselves or were the beneficiaries of premiums paid by their employer. In employer-financed plans, the type involved in

---

Writings on Politics and Philosophy 112, 119 (L. Feuer ed. 1959) ("'From each according to his ability, to each according to his needs!'").

172 In debate over section 703(h) of title VII, 42 U.S.C. § 2000e-2(h) (1976), Senator Humphrey stated that unequal treatment of men and women was permitted in fringe-benefit plans because such differences were authorized by the Equal Pay Act. 110 Cong. Rec. 13663, 13663-64 (1964) (statement of Sen. Humphrey). The Supreme Court correctly has rejected this statement because it represents a clear misinterpretation of the Equal Pay Act. See City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702, 713-14 & n.25 (1978). In Gilbert, the Court correctly cited Senator Humphrey's remarks for the distinct proposition that section 703(h) made interpretations of the Equal Pay Act applicable to title VII. See 429 U.S. at 144.

173 The monetary value of competitive seniority cannot be determined feasibly because it depends on too many factors that vary from employee to employee, for instance, the line of progression in which the employee's job is located, compensation for jobs higher or lower in the line, the competitive seniority of others in the line, and the likelihood of openings in other jobs in the line. Because an employer cannot feasibly take these factors into account in granting seniority, an employer complies with title VII by granting employees competitive seniority at an equal rate for equal work.

174 Excluding, of course, tastes for discrimination. See note 71 supra.

175 The analysis does not differ for employee-financed plans sponsored by the employer, because it is irrelevant whether the employer pays the premium as an expense of employment or whether the employee does so out of wages. In either case, the total compensation to the employee is the same. Whether participation is at the employee's option is also irrelevant, because a program that favors employees of one sex grants them an opportunity to participate in a program that is more valuable than the opportunity granted to employees of the other sex. But cf. EEOC v. Colby College, 589 F.2d 1138, 1146 (1st Cir. 1978) (Coffin, J., concurring) (suggesting that these changes might make a difference).
Sexual Equality

Gilbert and Nashville Gas, an employer equally compensates two employees who have unequal risks, not by entirely covering the risks of both, but by partially covering the employee with the greater risk. To cover entirely the risks of both would be to compensate favorably the employee with the greater risk.

As in Geduldig, determining whether coverage of pregnancy would result in equal compensation requires a comparison of the value of the plan to men and women. The evidence in Gilbert was that women received substantially greater benefits than men under the existing disability plan. As in Geduldig, inclusion of benefits for pregnancy would have aggravated the existing inequality in favor of women. In Nashville Gas, although no evidence was presented of the value of participation in the sick-leave plan, the exclusion of pregnancy could be justified by the general experience of employers that women receive disproportionate benefits from such plans despite the exclusion of pregnancy.

The Court, however, properly condemned the deprivation of accrued seniority after pregnancy in Nashville Gas. The kind of

---

178 See text accompanying notes 96-98 supra. In both Gilbert, 429 U.S. at 149 n.1 (Brennan, J., dissenting), and Nashville Gas, 434 U.S. at 145-46, the exclusion of pregnancy was tainted by the employer's past or concurrent discriminatory practices. There is no reason, however, to remedy other discriminatory practices by departing from the goal of equal treatment in disability and sick-leave plans.
179 See note 143 supra.
180 434 U.S. at 144-45.

An argument often made against the greater cost of covering women is that, for the work force as a whole, men have slightly higher rates of absenteeism due to disability and sickness. See N.C. Dep't of Insurance, supra, at 21 (citing study of one company); Bartlett, Pregnancy and the Constitution: The Uniqueness Trap, 62 Calif. L. Rev. 1532, 1559 & nn.141, 143 (1974). These statistics fail to take account of the distribution of men in more hazardous occupations, which, while increasing the aggregate rate of disability and sickness of men relative to women, does not affect the higher rate of women within equally hazardous occupations. See A. Ferriss, Indicators of Trends in the Status of American Women 194-95, 414 (1971); State of N.Y. Insurance Dep't, supra, at 20-26.
seniority at issue was competitive seniority, apparently used solely to bid for open positions.\footnote{See Nashville Gas Co. v. Satty, 434 U.S. at 138-39.} Like other fringe benefits, competitive seniority is a form of nonmonetary compensation. Although its precise dollar value is difficult to compute,\footnote{See note 173 supra and accompanying text.} an employer presumably complies with title VII by granting men and women equal seniority credit for the same amount of time at the same job. The seniority arrangement in \textit{Nashville Gas} systematically disadvantaged women because, although they accumulated seniority at the same rate as men, their seniority was subject to a risk of defeasance—mandatory pregnancy leave—that the men's seniority was not. Employees returning from any other kind of leave\footnote{434 U.S. at 140. Although the employer also denied accrued seniority to employees who returned from educational leaves, only two employees had taken such leaves and neither had returned to work. \textit{Id.} at 140 n.2. Employees on leave for pregnancy or education were also disadvantaged because they did not accrue seniority during the period of leave, while employees on other leaves did. The plaintiff, however, did not challenge this practice. \textit{Id.} at 138 & n.1, 140.} were allowed to keep their accrued seniority. Consequently, female employees received seniority credit discounted by the risk of pregnancy, whereas the corresponding subclass of male employees obtained seniority credit at full value. Although women were not entitled to special compensation for the risk of pregnancy, they were entitled to seniority credit at the same value as that received by men. Unlike the sick-leave plan, the employer's seniority policy granted women no offsetting benefit that would justify the denial of accrued seniority. Accordingly, denial of seniority credit because of pregnancy violated title VII.

Thus an equal-treatment interpretation of the statutory rule of equal pay for equal work provides a rationale for the holdings in \textit{Gilbert} and \textit{Nashville Gas}. It also has the consequence, however, that exclusion of disability and sick-leave benefits for pregnancy was not only permitted, but required, because the equal-treatment conception of equality requires sexual classifications necessary to achieve equal treatment. This consequence places the equal-treatment interpretation of title VII and the Equal Pay Act in irreconcilable conflict with section 701(k). Therefore, to the extent that section 701(k) rejects the results in \textit{Gilbert} and \textit{Nashville Gas}, it also rejects an equal-treatment interpretation of title VII.

Whether it completely rejects an equal-treatment interpretation is less certain. The equal-treatment rationale of \textit{Gilbert} and
Nashville Gas does not rest on the sex-neutrality of pregnancy classifications, the step in the Court's reasoning that inspired Congress to enact section 701(k). In originally enacting the Equal Pay Act and title VII, Congress also failed to consider an equal-treatment interpretation of the statutes, probably because the most obvious forms of discrimination offend both conceptions of equality. The impact of section 701(k) therefore might be confined to the special case of classifications based on pregnancy; other sex-based classifications might be judged according to an equal-treatment interpretation of the statutes. The Supreme Court's decision in City of Los Angeles, Department of Water & Power v. Manhart, however, forecloses this alternative.

C. City of Los Angeles, Department of Water & Power v. Manhart

In City of Los Angeles, Department of Water & Power v. Manhart, the Court held that title VII prohibits employers from using sex-based actuarial tables. The employer in Manhart had required female employees to make larger contributions than male employees to a pension plan that granted equal monthly benefits to employees of each sex upon retirement. Although the parties agreed that women on the average live longer than men, the Court refused to accept this fact as a justification for the use of sex-based actuarial tables. Instead, the Court reasoned that title VII prohibits all sexual classifications not specifically exempted in the statute.

---

185 See note 14 supra.
186 See note 151 supra.
188 Id.
189 Id. at 707-18. The Court took the unusual step, however, of depriving its holding of retroactive effect. Id. at 718-23. As the Court noted, giving its holding retroactive effect could have resulted in unfairness: "As commentators have noted, pension administrators could reasonably have thought it unfair—or even illegal—to make male employees shoulder more than their 'actuarial share' of the pension burden." Id. at 720 (footnote omitted). For similar reasons, the Court presumably will not require employers to equalize pension benefits by raising benefits to the level granted to the favored sex, as required by section 3 of the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (1976). Cf. Act of Oct. 31, 1978, Pub. L. No. 95-555, § 3, 82 Stat. 2076 (1978) (employer must increase benefits to cover pregnancy for a period of one year or until expiration of collective bargaining agreement).
190 Id. at 707-08.
191 The Court stated: "Congress has decided that classifications based on sex, like those based on national origin or race, are unlawful." Id. at 709. The commentators have agreed with the Court. See, e.g., Bernstein & Williams, supra note 151, at 1220; Gold, supra note 129, at 609-36; Lines, supra note 132, at 490; Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, supra note 125, at 1173-76; Note,
doing so, the Court implicitly rejected an equal-treatment interpretation of title VII.\textsuperscript{192}

The conception of equality as equal treatment could have been applied in \textit{Manhart} in the same way that it could have been applied in \textit{Geduldig v. Aiello},\textsuperscript{193} \textit{General Electric Co. v. Gilbert},\textsuperscript{194} and \textit{Nashville Gas Co. v. Satty}.\textsuperscript{195} The relevant statutory provision is the requirement of equal pay for equal work,\textsuperscript{196} and the relevant method of valuation is based on the model of participation in an insurance plan. In return for contributions, a pension plan protects participants against the risk that they will outlive their resources. As in the pregnancy cases,\textsuperscript{197} the value of participation depends on the extent of the covered risk and the amount of individual contributions. Assuming that men and women who perform equal work receive equal pay in other respects, they must receive coverage of equal value. As in the pregnancy cases, the value of coverage must be determined as of the time that contributions are paid in, not as of the time that benefits are paid out. Because women as a class have a greater life expectancy, sex is relevant to determining the extent of the covered risk. If women on the average live longer than men, they receive the greater benefit of coverage of a greater risk. According to the conception of equality as equal treatment, they

\begin{footnotesize}
\begin{enumerate}
\item Chief Justice Burger took this position in his partial dissent. \textit{See} 435 U.S. at 725-28 (Burger, C.J., concurring in part and dissenting in part).
\item 417 U.S. 484 (1974).
\item 429 U.S. 125 (1976).
\item 434 U.S. 136 (1977).
\item \textit{See} notes 91-98, 167-81 \textit{supra} and accompanying text.
\end{enumerate}
\end{footnotesize}
also must make greater contributions.

The Court advanced several objections to this argument, most of them obscuring the merits of an equal-treatment interpretation of title VII. The Court first analogized the use of sex in actuarial tables to the use of sex as an indicator of height. The Court argued that the greater life expectancy of women does not justify attributing to each individual woman the characteristics of the entire sex; some women have shorter life expectancies than some men, just as some women are taller than some men. The fallacy in this argument, however, is that determination of life expectancy differs from determination of height: height can be measured individually, precisely, and cheaply, whereas life expectancy cannot. Furthermore, predictions of life expectancy must take sex into account to achieve the greatest possible accuracy. Scientific studies of life expectancy routinely classify individuals on the basis of sex and routinely reveal sex-based differences. Nor does the scientific literature contain any suggestion that sex can be supplanted in the near future by some more accurate predictor of longevity. Although unisex actuarial tables can be constructed simply by merging sex-based tables, a loss of accuracy inevitably results, causing men to make excess contributions and women to receive excess benefits. Ignoring the difference in life expectancies will not cause it to go away, as the Court itself recognized by permitting employers to adjust actuarial tables to take account of the sexual composition of the work force they employ.

---

198 435 U.S. at 708.
200 See Palmore, Summary and the Future, in Prediction of Life Span, supra note 199, at 283; Palmore, The Promise and Problems of Longevity Studies, in Prediction of Life Span, supra note 199, at 3; Rose, Critique of Longevity Studies, in Prediction of Life Span, supra note 199, at 13. A study cited by the Court in Manhart, 435 U.S. at 709-10 & nn.17, 18 (citing R. Retherford, supra note 199, at 71-72, 82), does not attempt to explain the difference in mortality of men and women by attributing it to factors other than sex, but only to explain the increase in the difference from 1910 to 1965, nor does it purport to explain the entire increase. See R. Retherford, supra note 199, at 3-24, 101-06.
201 Even though employers may not set contributions and benefits at different levels for male and female employees working in the same establishment, they may take account of
The Court also objected that insurance plans inevitably cause some groups to subsidize others:

For when insurance risks are grouped, the better risks always subsidize the poorer risks. Healthy persons subsidize medical benefits for the less healthy; unmarried workers subsidize the pensions of married workers; persons who eat, drink, or smoke to excess may subsidize pension benefits for persons whose habits are more temperate.\textsuperscript{202}

The Court's observation is only partially true. Pension and insurance plans do not rely on individualized determinations of risks for each participant because it would be too costly to do so. The healthy can become sick, the married can become divorced, and those who eat, drink, and smoke to excess can become wiser. An employer or an insurance company would have a difficult time ascertaining such characteristics in the first place and keeping up with changes over the years or decades that the plan continued in effect. If the plan

the sexual composition of the entire work force in setting unisex rates. 435 U.S. at 718 & n.34. Indeed, they must do so for the plan to remain actuarially sound. See EEOC v. Colby College, 589 F.2d 1139, 1144-45 (1st Cir. 1978). This adjustment reflects the fact that the average life expectancy of the relevant group of employees increases with the proportion of women in the group. See C. Trowbridge & C. Farr, The Theory and Practice of Pension Funding 76-77 (1976). Sexual classifications that take account of this fact must be permitted to assure the solvency of pension plans.

Some writers have tried to explain away the difference in life expectancy between men and women by arguing that small employers have too few employees to use actuarial tables at all and large employers have large amounts of money to absorb the cost of inaccuracies, see Williams & Bernstein, Sex Discrimination in Pensions: Manhart's Holding v. Manhart's Dictum, 78 Colum. L. Rev. 1241, 1245-46 & n.22 (1978), or by emphasizing that 84% of the members of one sex can be paired with a member of the opposite sex who will die at the same age. See, e.g., Bernstein & Williams, supra note 151, at 1221-23 (68.1% of each of two equal samples of men and women aged 65 exhibit the same mortality patterns); Gold, supra note 129, at 626.

The first argument assumes, without explanation, that large employers have sufficient reserves to bear the risk of unfunded pension liability or sufficient economic power to shift it to someone else. It also neglects the fact that unfunded pension liability poses a greater threat to larger employers simply because their pension plans cover more employees. The use of inaccurate actuarial tables that do not take account of the sexual composition of the work force creates a risk of greater unfunded pension liability because the total pension liability is greater. The second argument obscures the fact that the pairing cannot be accomplished until the participants are dead and that the 16% of each sex who cannot be paired off have a significant effect on the life expectancy of all men and all women. Moreover, the argument fails on its own terms because it assumes that the difference in life expectancy is de minimis. If that is so, however, then the difference in contributions or benefits also must be de minimis because the one is derived from the other by methods that are actuarially sound. See generally Martin, Gender Discrimination in Pension Plans, supra note 191, at 203-14; Myers, supra note 191, at 144-45.

\textsuperscript{202} 435 U.S. at 710 (footnote omitted).
covered a large number of employees, these difficulties would be insurmountable. There are no such practical barriers to taking sex into account in determining life expectancy. An individual’s sex is neither easily concealed nor easily changed.

Moreover, insurance companies do not rely on sex alone to predict life expectancy. They also take other factors into account, for instance, by denying or restricting coverage, or charging higher premiums, for the very old or the very young, for those in hazardous occupations, or for those who are currently in poor health or who have a history of poor health. Greater reliance on changeable characteristics instead of reliance on sex would increase the opportunities for misstatement by covered employees.

Finally, the cost of developing and administering an accurate, sex-neutral predictor of longevity need not be bankrupting before it becomes prohibitive. If the cost to the employer outweighs the benefits in improved employee morale and reduction of other employee demands, then the employer probably will choose the cheaper alternative of complying with the law by paying its workers entirely in cash. The reaction of employers to the Employee Retirement Income Security Act of 1974 is instructive. Rather than incur the expense of complying with the statute’s detailed regulation of pension plans, a significant number of employers chose to terminate existing plans or to avoid establishing new plans. The prospects are not hopeful for finding a workable, sex-neutral actuarial table

---

203 See Halperin & Gross, supra note 191, at 246-47.
204 S. Huebner & K. Black, supra note 1, at 364-68; R. Mehr, Life Insurance: Theory and Practice 548-50, 551-57 (rev. ed. 1977); Bailey, Hutchinson & Narber, supra note 181, at 781-93. Insurers also adjust their actuarial tables to compensate for the phenomenon of “adverse selection”: the tendency for persons with high mortality rates to purchase insurance and for persons with low mortality rates to purchase annuities. See M. Greene, supra note 1, at 10; S. Huebner & K. Black, supra note 1, at 6, 361; R. Mehr, supra, at 547.
205 Insurers have experienced problems with misstatements of age and sex. M. Greene, supra note 1, at 508-09, 569; S. Huebner & K. Black, supra note 1, at 364; R. Mehr, supra note 204, at 197, 255-56, 308. Demographers have encountered similar problems in investigating the relationship between changeable characteristics and lifespan. See E. Kitigawa & P. Hauser, supra note 199, at 5-8.
that is more accurate than the sex-based alternative. The prospects are nil for finding one that employers actually would use.\footnote{208}

A further argument raised by the Court also is defective: that sex-based actuarial tables cannot be permitted because they are indistinguishable from race-based actuarial tables, which are clearly prohibited.\footnote{209} Although sex-based and race-based actuarial tables are equally well-founded in empirical evidence,\footnote{210} they are distinguishable on legal grounds. As shown earlier,\footnote{211} an anticlassification conception of equality better fits the law of racial discrimination than it does the law of sexual discrimination. Thus the Court's argument begs the question whether the anticlassification conception of equality should also apply to sexual discrimination.

The Court's rejection of an equal-treatment interpretation creates other difficulties. The first is the drastically different treatment of situations that are almost economically equivalent. As the Court pointed out, its holding does not apply to pension and life insurance

\footnote{208 This point rebuts the Court's argument that the pension plan in Manhart could be faulted "because its contribution schedule distinguished only imperfectly between long-lived and short-lived employees, while distinguishing precisely between male and female employees." 435 U.S. at 713 n.24.}

\footnote{209 Id. at 709.}

\footnote{210 The difference in the life expectancy of men and women may be attributable to sources as diverse as the different smoking habits of men and women, see Palmore, The Promise and Problems of Longevity Studies, in Prediction of Life Span, supra note 199, at 3, 5; note 200 supra, the evolutionary adaptation of women to the risk of childbearing followed by medical advances that have reduced that risk, see B. Neugarten & R. Havighurst, Extending the Human Life Span: Social Policy and Social Ethics 56 (1977); Rose, Critique of Longevity Studies, in Prediction of Life Span, supra note 199, at 13, 18-19, and to the greater likelihood that men work "in the more stressful, physically demanding, and dangerous occupations," Bureau of the Census, U.S. Dept of Commerce, Current Population Reports, Special Studies P-23, No. 59, Demographic Aspects of Aging and the Older Population 29 (1976); see Palmore, supra, at 3, 5. The scientific evidence provides no firm foundation for attributing the greater longevity of women to a biological source. Indeed, some scientists have turned the legal problem on its head by claiming that the biological or social bases of greater female life expectancy will become clear only as the social roles of men and women converge. See Palmore, Summary and the Future, in Prediction of Life Span, supra note 199, at 283, 285. There is greater scientific agreement that the racial differences in life expectancy are attributable to socioeconomic factors, such as education, occupation, income, and availability of medical care, see Corneby, The Health Status of the American Negro Today and in the Future, in II Ethnic Groups of America, supra note 43, at 5; Fauman & Mazer, Jewish Mortality in the United States, in I Ethnic Groups of America, supra note 43, at 33; Pettigrew & Pettigrew, Race, Disease and Desegregation: A New Look, in II Ethnic Groups of America, supra note 43, at 36; Sutton, Assessing Mortality and Morbidity Disadvantages of the Black Population of the United States, in II Ethnic Groups of America, supra note 43, at 18, but the evidence is not conclusive, see E. Kitigawa & P. Hauser, supra note 199, at 102-03, 156-57; Rose, Critique of Longevity Studies, supra, at 13, 18.}

\footnote{211 See notes 24-78 supra and accompanying text.
plans unrelated to employment.\textsuperscript{212} Employers remain free to abandon pension plans that provide guaranteed monthly payments, like the plan in \textit{Manhart}, for plans that provide a lump sum upon retirement.\textsuperscript{213} The latter need not depend on any actuarial assumptions at all, and so long as the lump sum is the same for similarly situated men and women, the plan would comply with title VII and the Equal Pay Act. From an employee’s perspective, payment in cash followed by purchase of an annuity from an independent source is little different from an annuity offered by an employer in exchange for decreased compensation in cash. Yet \textit{Manhart} treats the two differently because one involves the employment relationship and the other does not.\textsuperscript{214} The decision induces employers to pay cash, despite the absence of any statutory policy favoring payment in cash, and to forego the economic and tax advantages of group insurance and pension plans.\textsuperscript{215}

A related difficulty with the Court’s decision is that it revives the confusion surrounding the doctrine of disproportionate adverse impact.\textsuperscript{216} After \textit{Manhart}, pension plans that guarantee equal monthly benefits to men and women provide men with a fringe benefit worth less in present value than the benefit provided to women, causing men to suffer a disproportionate adverse impact. The Court tried to avoid this conclusion by arguing that the value of participation in a pension plan must be determined only after the participant has died and has received a definite amount of benefits.\textsuperscript{217} But the very point of a pension plan is to protect against risk; it makes no sense to determine the value of participation when the future risk has become a past event. The Court also argued that the adverse impact of unisex actuarial tables is insignificant,\textsuperscript{218} but the Court was

\textsuperscript{212} See 435 U.S. at 717-18 & n.33. The Court failed to add that about three-fourths of those covered by pension plans, see \textit{American Council of Life Insurance, Life Insurance Fact Book ’77}, at 36 (about 15,200 individual plans out of about 62,600 total plans, apart from Social Security), and about one-third of those covered by life insurance plans, see \textit{id.} at 28-29 (about 90% of group life policies are administered by employers and unions, accounting for about 39% in value of all life insurance in force), participate in employment-related plans.

\textsuperscript{213} See 435 U.S. at 717-18. For a succinct account of the different kinds of pension plans, see Halperin & Gross, supra note 191, at 236-38.

\textsuperscript{214} See note 1 supra.

\textsuperscript{215} See \textit{EEOC v. Colby College}, 589 F.2d 1139, 1145-46 (1st Cir. 1978). For discussion of the problem, see text accompanying notes 147-65 supra.

\textsuperscript{216} 435 U.S. at 710-11 n.10.

\textsuperscript{217} “Even a completely neutral practice will inevitably have \textit{some} disproportionate impact on one group or another.” \textit{Id.} (emphasis in original).
plainly wrong. Before *Manhart*, the employer required women to make contributions 15% higher than those made by men to participate in a pension plan worth 15% more; after the decision, women made the same contributions as men to participate in a plan that still was worth 15% more.\textsuperscript{219} If the difference in contributions was significant—and the Court certainly assumed it was—the difference in benefits also must be significant. This point is of general importance. To the extent that an anticlassification interpretation of title VII prohibits sexual classifications necessary for equal treatment, it is inconsistent with the doctrine of disproportionate adverse impact; to the extent that a prohibition against sexual classifications results in unequal treatment, it also results in a disproportionate adverse impact.

### D. An Alternative Rationale for Manhart

An alternative rationale for the decision in *City of Los Angeles, Department of Water & Power v. Manhart*\textsuperscript{220} can be developed from an argument made by the Court itself. Although the Court acknowledged that sex-based actuarial tables reflect the genuine difference in the cost of covering men and women,\textsuperscript{221} it held that a cost-justification defense for sex-based classifications was rejected in the legislative history of both the Equal Pay Act and title VII.\textsuperscript{222} If an equal-treatment interpretation of these statutes allows cost-justified sexual classifications, how can it be reconciled with congressional rejection of a cost-justification defense? Although this question can be answered, the answer reveals complexities inherent in an equal-treatment interpretation that would increase the difficulty of administering the statutes to the point of impracticality.

A cost-justification defense to the Equal Pay Act was considered during the debate in the House, when Representative Paul Findley offered an amendment that would have allowed "a differential [in pay] which does not exceed ascertainable and specific added cost resulting from employment of the opposite sex."\textsuperscript{223} He argued that

---

\textsuperscript{219} The pension plan in *Manhart* contained survivorship provisions, allowing the surviving spouse of a deceased employee to continue to receive benefits. As the Court pointed out, *id.* at 708-09 n.14, these provisions reduced the unequal effect of unisex actuarial tables, although they did not eliminate it entirely, since some employees presumably were unmarried.

\textsuperscript{220} 435 U.S. 702 (1978).

\textsuperscript{221} See *id.* at 707.

\textsuperscript{222} See *id.* at 716-17 & n.32.

\textsuperscript{223} 109 CONG. REC. 9217 (1963).
if employers were forced to grant women the same pay as men, even if the costs of employing women were generally higher, employers would prefer the cheaper alternative of hiring men. The House rejected the amendment after sponsors of the bill argued that employers could use sex-neutral criteria to take account of any genuine differences in cost. The Senate considered the same issue but disposed of it by stating that the Secretary of Labor would have authority to permit cost-justified exceptions to the statute. No similar statement was made in the House, and the Secretary of Labor never has claimed such authority.

In the debates over title VII, an amendment introduced by Senator John McClellan raised the issue of a cost-justification defense. That amendment would have permitted employers to hire or to refuse to hire persons on the basis of race, religion, sex, or national origin if they believed “on the basis of substantial evidence” that consideration of these factors would be beneficial for the business. The Senate rejected the amendment after Senator Clifford Case, a floor manager of title VII, made the pointed argument that the amendment “would destroy the bill.”

Senator Case, of course, was right. In a society with prevalent racial and sexual discrimination, employers should bear the cost in the first instance of eliminating discriminatory employment practices. They should have to contend with the tastes for discrimination of customers and employees and with the higher costs of obtaining information about members of disfavored groups. A generalized cost-justification defense, on the other hand, would permit generalized discrimination. It would allow employers to defend discriminatory practices because they reflected the prejudices of customers and other employees, because the cost of determining the qualifications of individual members of disfavored groups was too high, or because past discrimination had deterred members of such groups from developing necessary qualifications. Indeed, the only impermissible motive for discriminatory practices would be an employer's

22 Id.
22a Id. For instance, if women had a higher rate of turnover than men, employers could take individual turnover rates into account in determining individual pay, even though they could not use sex as an indicator of turnover rates.
22c Indeed, the Wage and Hour Division has rejected any cost-justification defense. See 29 C.F.R. § 800.151 (1978).
22d 110 CONG. REC. 13825 (1964).
22e Id.
own tastes for discrimination. Thus any cost-justification defense must be limited severely if it is not to undo the statutory purpose of eliminating discrimination in employment.

The same is true of an equal-treatment interpretation of the statutes. Men cannot be considered better qualified and therefore entitled to preferential consideration as a matter of equal treatment simply because it costs more to employ women. To do so would be inconsistent with the statutory purpose of eliminating discrimination because it would allow continued discrimination in favor of men because of past discrimination in favor of men. To take the example of higher rates of job turnover among women, these plausibly can be regarded as a vestige of past employment discrimination against women; because of reduced employment opportunities, women have been less likely than men to obtain the education necessary for a career, to sacrifice family responsibilities for a job, or to insist that their careers are more important than their husbands. Thus, even if the higher turnover rates among women impose costs on employers, men are not entitled to the benefit of a sexual classification that perpetuates past sexual discrimination. The conception of equality as equal treatment, therefore, must exclude from the determination of equal treatment sex-based classifications that, although economically relevant, are tainted by past discrimination. Specifically, sex-based classifications must be excluded if they would perpetuate past discriminatory practices.

The particular sexual classification in Manhart can be justified within this restrictive definition of relevance, but only by a legal and factual analysis that would be prohibitively expensive in most cases.

---

220 For a fuller statement of this argument, see Fiss, supra note 40, at 257-68. The costs initially borne by the employer may not be genuine social costs either because they are too closely connected with satisfaction of tastes for discrimination, see note 71 supra, or because the costs to the employer are offset by benefits elsewhere in the economy.

221 For a summary and analysis of the statistics, see Women's Bureau, U.S. Dep't of Labor, 1975 Handbook on Women Workers 60-64 (Bulletin No. 297, 1975).


Even assuming that the greater life expectancy of women is the result of past discriminatory practices, for instance, because women have been excluded from hazardous occupations, the use of sex-based actuarial tables does nothing to perpetuate such practices. Although sex-based actuarial tables in pension plans require greater contributions from women, decreasing their immediate compensation, sex-based actuarial tables in life insurance plans decrease the contributions from women, increasing their immediate compensation. The use of sex-based actuarial tables may require either higher or lower contributions from women, depending on their use in pension or life insurance plans. Moreover, as the Court pointed out in *Manhart*, the availability of survivorship options between spouses further reduces the effect of sex-based actuarial tables on the employment opportunities of women. Compared to practices like exclusion of women from hazardous occupations, the net effect of sex-based actuarial tables in maintaining the increased life expectancy of women and in perpetuating past discrimination is negligible.

The reasons for engaging in a complicated analysis of the relevance of sexual classifications, instead of abandoning any inquiry into relevance at all, are the same reasons that generally support the conception of equality as equal treatment. If sex is a relevant characteristic and consideration of sex does not perpetuate past discrimination, then fairness requires that it be taken into account. Failure to do so imposes present costs on those who are denied equal treatment without any prospect of remedying past discrimination or avoiding future discrimination. The effect of *Manhart* is to deny men equal treatment in pension plans—and women equal treatment in life insurance plans—without providing any remedy for unequal treatment in the past or any progress toward equal treatment in the future. This denial of equal treatment is even worse because it is arbitrary. The victims and the beneficiaries are determined by the kind of fringe benefits provided by the employer. In this respect, the denial of equal treatment resembles the imposition of a quota or goal: the costs are borne by those who need not have gained from discrimination and the benefits flow to those who need not have been its victims.

As with quotas or goals, however, denial of equal treatment in

---

21 See note 181 supra.
22 See note 219 supra.
23 See Ely, supra note 31, at 723.
particular instances might be better than the alternative, which in this case is haphazard enforcement of the law and haphazard compliance with its requirements. The conception of equality as equal treatment requires equal treatment in light of all the relevant facts. Developing all the relevant facts and properly filling the gaps when the facts are unknown is difficult enough. Identifying relevant facts untainted by the perpetuation of past discrimination is wholly impractical.

Employers trying to comply with the law face a particularly acute dilemma. A rule of equal treatment does not just permit equal treatment, it requires equal treatment; if sexual classifications are relevant, they must be taken into account. Except in the rare case in which consideration of sex makes no difference, this rule leaves employers with no leeway in which they may, but need not, rely on sexual classifications. Although the burden of complying with the law could be eased by requiring employers to achieve only approximately equal treatment, they still would be left with the same difficult factual and legal investigations into the nondiscriminatory relevance of sex. Similar difficulties led the Court in Manhart to temper its holding by denying retroactive relief.237 A strict adherence to the conception of equality as equal treatment, however, would create such difficulties in all cases in which sex was arguably relevant.

Furthermore, these problems are not likely to be resolved by allocating the burden of proof because the burden of proving nondiscriminatory relevance is likely to be heavy. According to one of the two widely accepted empirical theories of discrimination, employment discrimination is caused by tastes for discrimination among those who deal with employees—employers, fellow employees, customers, and suppliers.238 This theory raises a presumption that most sexual classifications result from tastes for discrimination because such classifications are the most effective means of implementing such preferences. This theory also casts doubt on most forms of evidence submitted to overcome that presumption. For example, any evidence of relevant sexual differences could be challenged either because it resulted from the investigators' own tastes for discrimination or because the differences, although genuine,

---

237 See note 189 supra.
resulted from the tastes for discrimination of those in the marketplace. The rejoinder that the market penalizes those who take account of tastes for discrimination also fails because the failure of the market to deter discrimination is the reason for laws against employment discrimination in the first place.

The second theory is that discrimination results from the greater cost of obtaining information about and selecting members of disfavored groups.\(^{29}\) According to this theory, the difficulty in carrying the burden of proof lies in distinguishing discriminatory and nondiscriminatory relevance. If most discrimination results from the higher costs of obtaining information about disfavored groups, then it is necessary to distinguish those costs that perpetuate past discrimination from those that do not. It is doubtful, however, that any general test for doing so can be formulated. The higher cost of information results as much from the inability of employers accurately to assess the qualifications of women as from the inability of women to communicate their qualifications.\(^{20}\) Both are intertwined inextricably with past discrimination, and both may be perpetuated by present reliance on sexual classifications. Drawing the distinction between sexual classifications that perpetuate past discrimination and sexual classifications that do not requires a knowledge of past effects and future consequences that typically will be unavailable.

According to either of these empirical theories of discrimination, any rule allocating the burden of proving nondiscriminatory relevance inevitably would cause deviations from equal treatment. It either would establish a presumption against sexual classifications, which in effect would prohibit even those sexual classifications necessary for equal treatment, or it would establish a presumption in favor of sexual classifications, which would allow sexual classifications that deny equal treatment. The burden of proof would be placed, most plausibly, on the party supporting a sexual classification, either an employer defending an existing classification or a plaintiff trying to establish one.\(^{21}\) Given the difficulty of proving nondiscriminatory relevance, this allocation would transmute the

---


\(^{20}\) See Arrow, *supra* note 239, at 26-27.

\(^{21}\) Under existing law, employers have the burden of proving that a sexual classification is permitted by the BFOQ exception in title VII. Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969). See notes 122-28 *supra* and accompanying text; Dothard v. Rawlinson, 433 U.S. 321, 332-34 (1977) (BFOQ exception to be construed narrowly).
equal-treatment conception of equality into the practical equivalent of an anticlassification conception, except for those rare cases in which the burden would be met. Alternatively, the burden could be allocated to those attacking a sexual classification, but this allocation would allow—and indeed would require—sexual classifications in the absence of any evidence on the issue of perpetuation of past discrimination. Distinctions on the basis of sex would be permissible simply on a showing of relevance, precisely the showing Congress found insufficient when it rejected cost-justification defenses to the Equal Pay Act and title VII. The remaining alternative is to allocate the burden of proof according to the position of a party as plaintiff or defendant. This allocation, however, would cause the question of liability to turn upon whether the plaintiff or the defendant is supporting the sexual classification, with the intolerable consequence that the result would turn almost wholly on party alignment rather than on the merits.

These difficulties in administering the conception of equality as equal treatment are not just a matter of efficiency. Inefficiency in determining what constitutes equal treatment leads to inaccuracy, and inaccuracy results in unequal treatment, not only in the procedural sense that similar cases yield dissimilar results, but also in the substantive sense that practices that deny equal treatment are permitted or required and practices necessary for equal treatment are prohibited. The distinctive defect of the equal-treatment conception of equality is the difficulty of showing that sex is, or is not, nondiscriminatorily relevant to employment decisions.

Efficiency is also crucial to the choice between the two conceptions of equality. As argued earlier,242 the appropriate abstract conception of equality is the equal-treatment conception. The inflexibility of the anticlassification conception, although a defect at the abstract level of determining the ultimate goal of laws against sexual discrimination, is a virtue at the concrete level of implementing that goal. The anticlassification conception provides clear guidance to both judges and employers about what the law prohibits and what it does not.

Of course, an anticlassification interpretation of title VII and the Equal Pay Act still must admit significant, and in some respects ill-defined, exceptions for biological differences and heterosexual practices.243 Although these exceptions raise problems, they do not

---

242 See text accompanying notes 76-78 supra.
243 See notes 39-74 supra and accompanying text.
Sexual Equality

pervade the rule and frustrate its enforcement, as would case-by-case litigation over what constitutes equal-treatment and nondiscriminatory relevance. An anticlassification interpretation of the statute is also inconsistent with the doctrine of disproportionate impact, which extends the equal-treatment conception of equality to neutral employment practices with unequal effects. But recent developments suggest that the significance of this doctrine is diminishing and that it is ancillary to the central prohibitions in title VII against intentional discrimination. An anticlassification interpretation of the statutes by definition prohibits some sexual classifications that are necessary for equal treatment, but this consequence is at least tolerable after a history of misuse of sexual classifications. By contrast, an equal-treatment rule is so cumbersome to administer that its effectiveness is dubious.

Given that the aim of the statutory law of sexual discrimination is not to achieve the sexual equivalent of a color-blind society, but to achieve equal treatment of men and women, either a rule requiring equal treatment or a rule prohibiting sexual classifications with limited exceptions may be appropriate. In the statutory law of sexual discrimination, however, the inaction of Congress has left the question to the federal courts. In City of Los Angeles, Department of Water & Power v. Manhart, the Supreme Court correctly decided it in favor of an anticlassification interpretation of title VII and the Equal Pay Act.

III. Conclusion

Although fringe benefits are not a likely source of fundamental issues, litigation over fringe benefits has raised fundamental questions about sexual equality: Do laws against sexual discrimination prohibit all sexual classifications, or do they allow sexual classifications that reflect genuine differences between the sexes? Do sexual classifications necessarily deny sexual equality, as racial classifications are thought to deny racial equality, or do they deny sexual equality only when they result in unequal treatment?

The record of litigation of these questions has been uneven. In the pregnancy cases, the Supreme Court avoided the question whether pregnancy classifications deny equal treatment by insisting that

2 See notes 144-46 supra.
pregnancy classifications are sex-neutral. In Geduldig v. Aiello, the Court accepted this proposition as a matter of constitutional law, and in General Electric Co. v. Gilbert and Nashville Gas Co. v. Satty, the Court extended it to title VII and the Equal Pay Act. These decisions can be rationalized on an independent ground: pregnancy classifications are sex-based, but they are prohibited only if they result in unequal treatment. Geduldig remains standing, but it stands for the proposition that the Constitution prohibits sexual classifications only if they deny equal treatment, not because they are necessarily unequal. This proposition ultimately rests on the fact that American society is predominantly heterosexual and on the moral claim that sexual roles in heterosexual practices are not unjust. If sexual distinctions are made routinely and properly in heterosexual conduct, it hardly makes sense to prohibit them in constitutional law.

The statutory law is more complicated. Gilbert and Nashville Gas have been overruled by Congress, which has enacted a general prohibition against pregnancy classifications in section 701(k). Moreover, in City of Los Angeles, Department of Water & Power v. Manhart, the Supreme Court has held that title VII and the Equal Pay Act prohibit sex-based actuarial tables in employment. How can section 701(k) and Manhart be reconciled with the proposition that sexual classifications are prohibited only if they deny equal treatment? The argument advanced here is that the ultimate aim of the statutory law is the same as the ultimate aim of the constitutional law. Both embody an abstract conception of sexual equality that requires equal treatment in light of genuine differences between the sexes, not abolition of sexual classifications. The crucial difference between the constitutional law and the statutory law is in the implementation of the abstract conception of equality as equal treatment. The Constitution leaves that decision to branches of government other than the federal judiciary. In title VII and the Equal Pay Act, however, Congress has left it to the federal courts, and the Supreme Court correctly resolved it in Manhart in favor of a rule against sexual classifications. Despite the attractions of a rule of equal treatment, both in general and in Manhart itself, the impracticality of the rule threatens to undermine the very equality it seeks to attain.