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PREGNANCY BENEFITS, BENIGN SEX DISCRIMINATION, AND JUSTICE: WHY DOES IT MATTER HOW WE ASK THE QUESTIONS?

by Patricia Ann Boling*

"He who calls the game, names the winner." The old expression is perhaps even truer in courts of law than in poker: Surely we need to acknowledge and consider the power involved in framing issues for judicial resolution. The way in which a problem is formulated will influence the approach, relevant data, and appropriate remedy applied to the issues in question. Nowhere is this more evident than in the controversy over the use of pregnancy classifications in cases involving disability and sickness benefits and seniority determinations.

The Supreme Court held in divided decisions, Geduldig v. Aiello¹ and General Electric Co. v. Gilbert,² that denial of disability benefits for normal pregnancies does not discriminate on the basis of sex, either under an equal protection analysis (Geduldig) or under Title VII of the Civil Rights Act of 1964³ (Gilbert). Nevertheless, in a later decision, Nashville Gas Co. v. Satty,⁴ the entire Court decided that workers cannot be deprived of accumulated seniority simply because they have taken leaves of absence for normal childbirths.

In some regards, the question of resolving the tension between Satty and the pregnancy benefit cases has been rendered moot by the 1978 amendment to the Civil Rights Act,⁵ which

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2. 429 U.S. 125 (1976).
explicitly prohibits discrimination on the basis of pregnancy. Nevertheless, the debate about whether denying women workers disability benefits for pregnancies constitutes sex discrimination remains a lively one. A recent article in the *Texas Law Review*\(^6\) attempted to explain why it was plausible that pregnancy disability benefits were treated differently than seniority. The authors, Kirp and Robyn, argue that seniority is more closely connected to the personal dignity of the individual worker than payments for temporary disabilities such as pregnancy,\(^7\) which can be anticipated (unlike most illnesses),\(^8\) funded by the family unit,\(^9\) and which are often excluded from disability and health insurance programs as part of a mutual agreement negotiated between unions and employers.\(^10\) Kirp and Robyn consider the Court's decisions in *Geduldig*, *Gilbert*, and *Satty*, as well as the 1978 legislative action which overruled *Gilbert*, sensible in light of their primary policy criterion, distributive justice.\(^11\) But what is disturbing about their public policy approach to the pregnancy benefits issue is that, despite the attention to the equities of paying for pregnancies as opposed to other disabilities, and of shifting the cost from childbearing families to worker-employer-consumer funded insurance programs, Kirp and Robyn overlook the impact a refusal to fund pregnancy leaves on the family and career possibilities and personal dignity of women workers.

One purpose of this essay will be to respond to this argument by showing what sorts of considerations are pertinent and what conclusions are warranted if one considers the underlying issue in pregnancy benefits cases to be distributive justice, and then contrasting this with the considerations and judgments indicated by a more comprehensive view of sex discrimination.

There are other reasons as well for maintaining the debate about the proper perspective on pregnancy disability issues. The Court's difficulties in convincingly justifying the refusal to equate pregnancy with sex-based discrimination in *Geduldig* and *Gilbert*, and in distinguishing the seniority and pregnancy

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7. *Id.* at 957-58.
8. *Id.* at 956.
9. *Id.* at 955.
10. *Id.* at 954-55.
11. *Id.* at 949, 954, 960.

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benefit situations, have been paralleled by untenable distinctions and unconvincing justifications in more recent cases involving "benign" sex discrimination.12 Perhaps a clearly articulated debate about how to frame the pregnancy benefit issue can help resolve the analytical confusion apparent in these later cases.

Finally, the debate about issue-framing in the context of pregnancy disability and benign discrimination cases will be used to illustrate some more general problems which arise when one is forced to choose between competing conceptualizations of a problem. This is, of course, the task in which judges are constantly engaged. Why is it that the choice seems so wrong at times? Why do courts seem to be so partial in their views, to have overlooked so much of what seems to be relevant to a given problem? Are there areas of law, like sex discrimination, where the issues appear so indefinite and unsettled that courts have genuine difficulties justifying their decisions in light of the multiple arguments to which they need respond, or at least to consider? This process is a function of the competing formulations of an issue, none of which seem to be clearly accurate, correct, or comprehensive, and each with uncertain criteria or guides for choosing among them. Is it necessary to make such choices, or can we blend different appreciations of a situation in order to resolve the issue with some sensitivity to the concerns of each?

I. PREGNANCY BENEFITS

A. AS A QUESTION OF DISTRIBUTIVE JUSTICE

Competing formulations of gender policy questions are incommensurable because they affect the factors to which one will be sensitive in making decisions regarding pregnancy benefits and benign sex discrimination.

12. One line of benign sex discrimination cases, Kahn v. Shevin, 416 U.S. 351 (1974); Schlesinger v. Ballard, 419 U.S. 498 (1975); and Califano v. Webster, 430 U.S. 313 (1977); upholds the use of sex-based classifications in order to remedy a long history of discrimination against women. The other line, Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 (1973); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Craig v. Boren, 429 U.S. 190 (1976); and Califano v. Goldfarb, 430 U.S. 199 (1977); strikes down the use of such classifications as vestiges of "romantic paternalism" and outmoded, demeaning ways of thinking about women as the "weaker sex." For a discussion of the inconsistency between these two lines of cases, see notes 40-60 infra and accompanying text.
Kirp and Robyn argue that the differing results reached in *Geduldig* and *Gilbert*, in which the Court upheld programs denying disability benefits for pregnancy, and *Satty*, in which the Court reversed a denial of seniority for taking a pregnancy leave, are best understood when disability payments are viewed as “transfer payments to childbearing families, and not as another skirmish in the war between the sexes.” They claim to offer a better rationale for the seemingly inconsistent results reached by the Court by framing the issue in the disability payment cases in terms of distributive justice rather than sex discrimination.

Distributive justice offers a sound basis for denying disability payments for pregnancy; it argues that it may be fairer for childbearing families to bear the cost of pregnancies than it is to distribute that cost to workers and consumers in the form of reduced benefits and increased prices. But several assumptions about pregnancy become relevant when one adopts this perspective. First, the authors suggest that the relevant class in analyzing pregnancy is not pregnant women or women in general, but the childbearing family. If one assumes that pregnancy is a decision which will be planned for and financed by a couple, then it is easier to view pregnancy costs in this manner. After all, the couple will bear these costs together, basing the decision to have children on a calculation based on their joint earning power and job security.

Secondly, viewing pregnancy benefits as primarily a distributive question rather than an issue involving sex discrimination invites a comparison between pregnancy and other kinds of disabilities which health and disability insurance might cover. Pregnancy is not particularly expensive for the individual family, but it is quite expensive in the aggregate because it is so common. Unlike illness, Kirp and Robyn argue that pregnancy is generally a voluntary and joyous occurrence. Thus, distributive justice

14. *Id.* at 964-67.
15. *Id.* at 955.
16. The costs of pregnancy include medical expenses and the general financial burden of a child, as well as the interruption of the woman's career and the general relegation of women to low-paying, low-status, interchangeable jobs.
18. *Id.* at 956.
would dictate that we balance pregnancy against other ills which might also be insurable, considering the relative ability of the childbearing family to plan and pay for pregnancies and the inability of older people to avoid or afford illness.

Kirp and Robyn offer distributive justice as an alternate analytic framework to the Court's strained attempt to distinguish pregnancy classifications from sex discrimination, which was at the core of *Geduldig* and *Gilbert*. Note 20 of the Court's opinion in *Geduldig*, quoted with approval in *Gilbert*, reads in part:

> The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities... . . .
>
> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and non-pregnant persons.

As Kirp and Robyn note, the statement that pregnancy classifications do not discriminate on the basis of sex because, at any given moment not all women are pregnant, is analogous to the statement that segregated schools do not discriminate on the basis of race because not all blacks are in school. The results reached in *Geduldig* and *Gilbert* are more convincing when the issues involved are viewed as attempts to implicitly embrace distributive arguments rather than as attempts to argue that the exclusion of pregnancy is not a sex-based classification. Viewing the issue as a compromise between assuring women that they will not be penalized for deciding to take a leave from work to have children, and assuring workers that their contributions to insurance programs will not be exorbitant, or as a compromise between paying pregnancy benefits and paying for black lung, or kidney dialysis, or injuries suffered in auto accidents, clearly shapes the perspective taken on the issue of a woman's autonomy of choice as a worker and mother.

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19. Id. at 953-54.
20. 417 U.S. at 496-97 n.20.
Viewing the pregnancy benefit decisions in terms of distribu­tional issues indicates that it is permissible to compare preg­nancy with other kinds of illness covered by health insurance, and to compare childbearing families with workers and consum­ers at large. Certainly the Geduldig and Gilbert results are more sensible when viewed as a deliberate redistributive policy than they are as refutations of alleged sex discrimination. But if one were to reverse the question—consider seriously the claim that payment of unemployment benefits for pregnant workers implic­ates the right of women workers to equal protection under the law, and treat the distributive arguments as a secondary issue—one might well conclude that Geduldig and Gilbert were wrongly decided. Such an approach to questions of sex discrimination would probably lead to the conclusion that insurance programs should fund pregnancy leaves. Different considerations arise if we treat pregnancy policy primarily as a question involving sex discrimination.

B. AS A QUESTION OF SEX DISCRIMINATION

If a distributive justice analysis requires consideration of competing demands on health insurance, the relative seriousness or accidental character of other kinds of illnesses, and the relative ability of the childbearing family to pay and plan for preg­nancy, then shaping the issue in terms of sex discrimination reveals an entirely different set of concerns. One becomes concerned with the relative position of women in the job market, and especially with the ramifications unpaid pregnancy leaves have on women’s career and marriage choices.22 If assuring wo­men choice, equality, and respect in both the workplace and the home is the goal of a serious perspective on sex discrimination, then it becomes especially important to compensate women for pregnancy and childbirth leaves because pregnancy is a predict­able and recurrent event in many women’s lives. Without a con­scious effort to meet the demands of the dual roles women play as workers and mothers, there is little chance to change traditional patterns of dependence and differing opportunities for workplace respect and advancement for either sex. Professor

22. Women are funneled into low-status, low-paying interchangeable jobs that are easily interrupted. This perpetuates the concept of the man’s salary as the economic basis of a marriage, and the woman’s salary as secondary and more expendable.

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Tribe views the unequal treatment and status of women as the crux of discrimination. In a critical discussion of the Court's refusal to grant pregnancy benefits, he stated:

Both [Geduldig and Gilbert] evidence a degree of judicial blindness to the extreme importance for women of being able to combine the roles of employees and child-bearers if they choose: Women will not enjoy truly equal rights in the labor market until it is recognized that their health care needs are indeed different from men's and that insurance coverage for absences incurred during pregnancy and childbirth may be needed if women are in fact to be placed in positions of equal opportunity.23

If one views the pregnancy benefits as fundamentally an issue of sex discrimination, one questions whether it is appropriate or accurate to assume that most pregnancies occur within the context of a childbearing family, or to assume that pregnancy is usually a voluntary, joyous event. The protection of nontraditional households becomes more important, as for example, in single parent households, or families in which the woman is the chief wage earner. These are situations in which a salary interruption of several months would work a real hardship. One might also consider the ways in which pregnancy is like other illnesses as, for instance, when it is unplanned, unwanted, and physically and emotionally stressful. Even within the context of a planned pregnancy by a married couple, it may be important for the woman's feelings of independence and self worth vis-à-vis her colleagues that she receive benefits for a pregnancy leave. We should be careful not to stigmatize pregnancy as an option for a conscientious, motivated, career-minded woman.24

C. DISTRIBUTIVE JUSTICE VS. SEX DISCRIMINATION

Having discussed the different kinds of considerations and conclusions to which the "redistribution" and "discrimination" perspectives lead in characterizing pregnancy benefits, the ques-

24. For an example of how women have been so stigmatized, see Justice Stevens' reference in his concurring opinion in Satty to the employer's "initial decision to treat pregnancy as an unexcused absence." 434 U.S. at 158.
tion arises how one chooses between these two perspectives—or whether the choice is even necessary. In important ways, “distributive justice” and “sex discrimination” appear to be mutually exclusive ways of framing the issue of whether women should receive pregnancy benefits. Posing the issue as one of finding the fairest way to distribute benefits among workers without unduly increasing the cost of health insurance premiums is likely to emphasize the equities of a labor-management bargain which excludes pregnancy from the medical benefit package, or the desirability of reducing employee contributions to state programs. Nevertheless, treating pregnancy as just another disability to fund or not depending on its costliness and avoidability, artificially preempts considerations about the sex-specific nature of pregnancy and its impact on the lifestyle and careers of women workers. Assuming that pregnancy decisions are not solely a woman’s affair, and are usually made jointly by a couple, again ignores the impact uncompensated leaves of absence for pregnancy can have on women’s self-image as well as on employment possibilities. Yet, if focusing on distributional fairness overlooks considerations of sexual equality, a different focus on “gender justice” may be just as likely to eclipse critical questions of cost, efficiency, and relative ability to afford the plan for medical needs.

Both ways of framing the issue reach relevant—and different—aspects of public policy regarding pregnancy. One can certainly imagine weighing the value of sexual equality against the value of otherwise economical medical protection for workers. On the other hand, weighing sexual equality against fairness, economy, and efficiency in allocating medical benefits is like comparing apples and oranges; the balance is uncertain because the two values at stake are so different in character. This difficulty of comparison suggests part of the way in which these two views are incommensurable. Once phrased in terms of distributive justice, the problem becomes difficult to appreciate in terms of the competing values of autonomy and equality for women, or the perpetuation of traditional sex roles and discrimination in the workplace. This is, however, precisely what happens when Kirp and Robyn translate discrimination into a distributive question: The discussion precludes consideration of sex discrimination.

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How one chooses a paradigm, or analytical framework, may simply depend on one's notion of justice. Which is more objectionable: higher insurance premiums or pervasive sex discrimination in the workplace? Perhaps we can construct a fuller answer—one which explains how the persuasiveness of the analytical framework changes with the particular fact situation and substantive policy issues at stake—by studying how Satty,25 which upheld the right to accumulated seniority throughout pregnancy leaves, was distinguished from Geduldig and Gilbert. Constructing a pattern to those decisions in which sex discrimination was the controlling form of analysis may help pinpoint some of the Court's implicit criteria for choosing one analysis over another. The pregnancy benefit cases, marked by vigorous dissents finding unjustifiable sex discrimination under Reed v. Reed26 and Frontiero v. Richardson,27 contrast well with Satty. In Satty, the Court held that denying an employee her accumulated seniority for taking a ten-week pregnancy leave violated Title VII of the Civil Rights Act of 1964.28 Because the case questioned both the employer's practice of refusing sick pay to pregnant employees and the policy of denying seniority to women returning from pregnancy leave, Justice Rehnquist's opinion for the majority shows how the Court distinguished the two issues. Loss of seniority was viewed as a more serious deprivation than denial of sick pay for pregnancy, because "the direct effect of the [pregnancy benefit] exclusion is merely a loss of income for the period the employee is not at work; such an exclusion has no direct effect upon either employment opportunities or job status."29 The Court recognized, however, just how devastating loss of seniority could be for an employee's opportunities and status within the company, as an earlier portion of the opinion makes clear:

[i]t is beyond dispute that petitioner's policy of depriving employees returning from pregnancy leave of their accumulated seniority acts both to deprive them 'of employment opportunities' and to 'adversely affect [their] status as an employee'

29. 434 U.S. at 145.
Even if she [plaintiff] had ultimately been able to regain a permanent position with petitioner, she would have felt the effects of a lower seniority level, with its attendant relegation to less desirable and lower-paying jobs, for the remainder of her career with petitioner.\textsuperscript{30}

Justice Stevens made the same point slightly differently in his concurrence. He argued that the difference between the disability benefit and seniority issues is like the difference between discriminating against a temporary physical condition, by refusing to pay workers while they are absent from work for pregnancy, and discriminating against a formerly pregnant person who will be permanently disadvantaged by the loss of accumulated seniority.\textsuperscript{31} Kirp and Robyn add that loss of seniority has especially serious consequences because the system "represents the way in which an employer respects an employee’s service," and therefore, the worker’s "personal status created by the reward system of the institution—is very much at issue . . . ."\textsuperscript{32}

Loss of seniority may be an easier issue for the Court to deal with than denial of pregnancy benefits. The impact of the seniority policy is considered graver and more personalized even though an unpaid vacation for childbirth may have an equally serious impact on the employee. The critical difference between \textit{Satty}, and \textit{Geduldig} and \textit{Gilbert} is that the latter two cases involve competing interests regarding health insurance costs and inviolability of the bargaining process, whereas the former does not. Clearly, seniority differs from pregnancy disability payments in that seniority is simply recognition that accrues with employment longevity, rather than as one of many competing demands on the limited resources of the health insurance fund. Benefiting one employee by allowing her to retain accumulated seniority after returning from pregnancy leave does not affect the seniority or benefits enjoyed by others. In the context of sick leave or disability payments for pregnancy, however, the trade-offs involved concerning higher costs and smaller medical coverage are quite apparent.

\textsuperscript{30} Id. at 141.
\textsuperscript{31} Id. at 156.
\textsuperscript{32} Kirp & Robyn, \textit{supra} note 6, at 957-58.

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Justice Stewart discusses these trade-offs in Geduldig, which is largely a defense of state discretion in matters of fiscal policy. California’s disability insurance program, funded by a contribution rate of one percent from employee wages, was attacked as discriminating against women for failure to fund normal pregnancies and childbirths. The reasons adduced for maintaining the current contribution rate, which precluded financing pregnancies, ranged from California’s strong commitment to maintenance of a low contribution rate; to the fact that one percent is “easily computable”; the fact that the one percent rate has generally met the costs of the currently covered disabilities; \(^{33}\) and the desire to keep contributions low in order not to burden low income workers. \(^{34}\) The Court readily affirmed the state’s actions, declaring that:

> 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. ‘The Equal Protection Clause does not require that a state must choose between attacking every aspect of a problem or not attacking the problem at all.'\(^ {35}\)

Contrasting the Court’s deference to legislative judgment about distributive concerns with its willingness to protect seniority rights not only reiterates the argument that the distributive and discrimination perspectives lead to different emphases and results, but also suggests that attention to discrimination is particularly likely to give way to distributive concerns when policies deal with state insurance or welfare programs and public fiscal policy.

II. BENIGN SEX DISCRIMINATION

Benign sex discrimination decisions reveal a similar analytical pattern. Often a determination of constitutionality depends on whether the statute is viewed as perpetuating traditional, stereotypical generalizations about women, or as a measure intentionally and reasonably aimed atremedying past discrimination. The distinctions between gender classifications which

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34. Id. at 493.
35. Id. at 495 (quoting Dandridge v. Williams, 397 U.S. 471, 486-87 (1970)).
are remedial and permissible, and those which are paternalistic and discriminatory are uncertain. Thus, in *Weinberger v. Weisenfeld*, the Court rejected a Social Security provision awarding survivor’s benefits only to widows, while *Kahn v. Shevin* upheld a $500 property tax rebate for widows but not for widowers. Chief Justice Burger’s comment in his concurrence in *Califano v. Webster*, a case which upheld a shorter baseline period for women in determining Social Security benefits, reveals the Court’s uncertainty in this area. While “happy to concur in the Court’s judgment,” the Chief Justice questioned “whether certainty in the law is promoted by hinging the validity of important statutory schemes on whether five Justices view them to be more akin to the ‘offensive’ provisions rejected in *Weisenfeld* and *Frontiero*, or more like the ‘benign’ provisions upheld in *Ballard* and *Kahn.*”

As with the redistribution and discrimination perspectives on pregnancy, uncertainty and disagreement exists over how best to frame the issues, and how best to compensate women for disadvantages and inequalities which stem from past discrimination. Inconsistency in decisions and weak reasoning suggest that the Court finds a choice between “romantic paternalism” and “remedial affirmative action” even more difficult than a choice between the discrimination and distribution paradigms of the pregnancy benefit cases. Just as one might frame the pregnancy benefits controversy as a redistributive question or a sex discrimination question, depending on competing values among disability and health insurance and seniority, a choice evolves between analyzing benign sex discrimination issues in terms of paternalism or remedial action. The choice depends on such variables as legislative intent, substantive content, and the importance to the individual of the rights involved.

A. REMEDIAL AFFIRMATIVE ACTION VERSUS ROMANTIC PATERNALISM

The most common reason articulated classifying benign discrimination cases as either paternalism or remedial affirmative

39. Id. at 321.
action is whether the statute at issue was based on or likely to perpetuate traditional sex roles or stereotypes, or whether the statute was intentionally and reasonably aimed at remedying women's historically disadvantaged position in society. The "remedial" cases reveal this distinction to be quite untenable. In Kahn, the first of the recent cases in which the Court approved benign sex discrimination, Justice Douglas upheld a Florida law which granted widows (but not widowers) a $500 annual property tax exemption on the grounds that widows would face greater difficulties than widowers finding jobs and supporting themselves after the death of a spouse. Because women tend to become segregated into the lowest paying jobs and earn far less than men, and because widows are likely to be older women with less experience and fewer skills to offer, the Court considered the Florida statute to be reasonably designed to meet a legitimate policy end by reducing the disparity in economic capabilities of men and women.

But if, as Justice Brennan stated in dissent in Kahn, there is a need for remedial measures to correct economic imbalances resulting from "this country's history of pervasive sex discrimination against women," there is also a danger in redressing these imbalances through the use of gender classifications. Surely not all widows are unskilled or disfavored when it comes to finding jobs; many women work their entire lives, some may have even supported their husbands. The category of "all widows" will undoubtedly include some women who do not need help, while omitting many women and men who do.

The overinclusiveness of the gender classification at issue in Kahn is troublesome for two reasons. Initially, it suggests that we can safely assume women are dependent on their husbands and poorly prepared to support themselves. Even if the intent of the statute is to ease the transition from traditionally disfavored status and dependent roles, a tax break may perpetuate precisely those patterns. The legislative provision may reinforce financial dependency. Additionally, special benefits may be used

41. 416 U.S. 351.
42. Id. at 353-55.
43. Id. at 359.
to rationalize continued discrimination against women. Secondly, the statute at issue in Kahn was enacted in 1885,44 which suggests as a policy motivation romantic paternalism rather than a conscious response to such paternalism.

Whether Kahn is part of the solution or part of the problem is unclear because of an uncritical reliance on stereotypical generalizations about women. The Court's remedial-permissible analysis often incorporates some very traditional and paternalistic policy assumptions and consequences. In Schlesinger v. Ballard,45 the Court upheld the Navy policy of allowing female officers a more favorable thirteen years in which to be promoted before mandatory dismissal, as opposed to only nine years for male officers. Justice Stewart explained that "the different treatment of men and women naval officers . . . reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are not similarly situated with respect to opportunities for professional service."46

Interestingly enough, the Court never examined why women "are not similarly situated" in the Navy. Although the Court decided that the policy of differential promotion times was a reasonable way to compensate women for the fact that they have fewer opportunities for advancement than men, the Court did not examine the underlying policy of assigning women only to troop transports and hospital ships. The underlying rationale—presumably, that women are weaker and less suited for combat than men—was not addressed.

The last in the trio of benign sex discrimination cases, Webster,47 legitimately deserves the "remedial affirmative action" description it receives. The Court began with the usual disclaimers:

The more favorable treatment of the female wage
earner enacted here was not a result of 'archaic
and overbroad generalizations' about women, or

44. 416 U.S. at 352.
46. Id. at 508.
47. 430 U.S. 313 (1977).
of ‘the role-typing society has long imposed’ upon women such as casual assumptions that women are ‘weaker sex’ or are more likely to be childrearers or dependants.48

The “only discernible purpose” of the Social Security policy of allowing women a more advantageous baseline for calculating old age benefits than men is “the permissible one of redressing our society’s longstanding disparate treatment of women.”49 Webster presents a modest remedial measure which neither falls short of addressing the practices which have traditionally disfavored women in the job market, like Ballard,50 nor uses overinclusive sexual classifications to remedy economic disparities, as does Kahn.51 Whereas the Kahn statute would give all widows, regardless of need, a $500 property tax exemption, the statute at issue in Webster merely provides that women workers can base their pensions on their seventeen most productive earning years, while men must base their’s on the twenty highest income years. Only women who have worked and actually experienced “inhospitality” of the job market are eligible for the higher benefit baseline. Moreover, also in contrast to Kahn, the legislative history of this enactment makes “clear that the differing treatment of men and women . . . was not ‘the accidental byproduct of a traditional way of thinking about females,’ . . . but was rather deliberately enacted to compensate for particular economic disabilities suffered by women.”52

In the pregnancy benefits cases, the conclusions differ according to whether one views the issues through the prism of distributive justice or through that of sex discrimination. Similarly, in the benign discrimination context a measure can be viewed as reasonably aimed at remedying past discrimination, or as a vestige of paternalistic thinking about the “weaker sex.” Whereas the choice between competing analyses in the pregnancy benefit cases might shift one’s attention from the discriminatory impact to competing economic considerations, choosing between the “remedial” and “paternalistic” paradigms in the benign discrimination cases presents a more subtle linguistic and

48. Id. at 317.
49. Id.
50. For a discussion of Ballard, see notes 45-56 supra.
51. For a discussion of Kahn, see notes 41-44 supra.
perceptual shift. While "paternalistic" and "remedial" may simply flag Court rejection or approval, they may also represent evaluations of statutory intent.

The "paternalistic" and "remedial" paradigms also represent ways of viewing the same facts and perceiving something differently, as in a description of a half glass of water as half full, or half empty. A statute could aim at remedying the disadvantaged position of women, yet make paternalistic assumptions about women's earning capabilities, dependency, and institutional arrangements. Whether one labels a statute remedial or paternalistic may depend on a conception of its impact on sexual equality. In any case, the recognition that certain forms of favoritism will do nothing in the long run to assist the status of women may be the most useful achievement to be gained from considering the analytical choices in benign discrimination cases. The Court's record so far, especially in Kahn and Ballard, suggests that casting issues in facile "remedial" terms may deter exploration of other instances which ostensibly favor women but perpetuate traditional, stereotypical notions about sex roles.

B. OTHER FACTORS IN THE CHOICE OF PARADIGM

While the Court has not been overly careful in distinguishing "remedial" and "paternalistic" uses of benign discrimination, consideration of the occasions most likely to prompt use of the slippery doctrinal tool of "remedial affirmative action," and the subsequent approval of policies favoring women, may be instructive. The discussion of Satty53 suggested that the analytic framework of discrimination might give way to that of distributive justice when policies concerned the allocation of public benefits or taxation. Similarly, the Court may be more likely to permit benign gender discrimination when the policies at stake are in areas in which the Court traditionally defers to legislative prerogative.

Thus, in upholding Florida's $500 tax exemption for widows, Justice Douglas wrote in Kahn, "[w]e have long held that 'where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway

53. For a discussion of Satty, see notes 25-32 supra.
in making classifications and drawing lines which in their judgment produce reasonable systems of taxation. 54 Similarly, courts have tended to be particularly deferential to legislative prerogative in military affairs, which supports the results in Ballard. 55 Even the willingness to support a favorable baseline determination for female Social Security beneficiaries in Webster 56 might be explained in terms of judicial deference to legislative plans for administering public benefits. As Justice Rehnquist stated in dissent in Califano v. Goldfarb, a case factually similar to Webster but decided differently, "[c]ases requiring heightened levels of scrutiny for particular classifications under the Equal Protection Clause, which have originated in areas of the law outside the field of social insurance legislation, should not be uncritically carried over into that field." 57

It is hardly surprising that courts would be more willing to relax sex discrimination standards by choosing paradigms like distributive justice or remedial affirmative action in areas where budgetary constraints or military expertise compel deference to legislative or other judgment. But the consequences of framing issues one way rather than another is a choice too important to leave to a mere recitation that the area is one of traditional deference. The circumstances which invoke a given paradigm need to be more critically studied.

Instead of deciding whether sex discrimination is permissible solely according to the degree of traditional discretion accorded the state in particular spheres, an additional guide to framing gender discrimination issues might encompass the fundamentality of the individual rights at stake. Thus, a case like Weinberger, 58 which involved the right of a single parent to raise his or her child, is distinguishable from a case like Craig v. Boren, 59 which involved the right of eighteen-year-old boys to buy beer. The cases concern rights of entirely different magnitude. Treating men differently than women seems a far more se-

55. For a discussion of Ballard, see notes 45-46 supra and accompanying text.
56. For a discussion of Webster, see notes 47-49 supra and accompanying text.
rious matter in the first case.

The results of choosing an analytical framework on the basis of the importance of the rights affected may not lead to obvious conclusions, but sensitivity to the demands of the competing issues will at least insure a narrowly drawn, carefully crafted approach to remedying the effects of sex discrimination, as in *Webster*.80

Looking at the fundamentality of the rights implicated in a particular case in order to determine whether it is more important to be sensitive to sexual equality, legislative intent, budgetary concerns, or bargaining arrangements, is one alternative to the current practice of relaxing sex discrimination analysis in areas of traditional deferral to legislative judgment. Other grounds for weighing the persuasiveness of competing paradigms wait to be explored and proposed.

III. CONCLUSION

Probably the most recurrent theme in this essay has been that the choice of analytical framework for understanding what is at stake in a given controversy can dictate its resolution. Because such choices entail dichotomous, incommensurable appreciation of what considerations are pertinent to an issue, and because they strongly influence results and are integrally related to a sense of justice, more conscious and critical thought is needed about what they are and how to choose between them when no analysis is overwhelmingly persuasive.

The difference between “distributive justice” and “sex discrimination” in the pregnancy benefit cases was especially apparent. Adopting the former made it easy to appreciate the importance of competing health care needs, of keeping the cost of insurance plans low, and of respecting privately bargained agreements. Conversely, the impact of not including pregnancies in disability programs became easy to overlook. The difference between the “remedial affirmative action” and “romantic paternalism” perspectives on benign discrimination cases, however, was not so sharp. Two of the cases in which the Court upheld benign

60. See text accompanying notes 47-49 *supra*.

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discrimination—Kahn and Ballard—make clear that further thought about the paternalistic assumptions implicit in many remedial schemes is needed.

A pattern of deference to legislative judgment and increased willingness to tolerate sex discrimination in areas of traditional legislative discretion emerges from consideration of the pregnancy benefit and benign discrimination cases. By focusing on the crucial importance of analytical choices and the danger of facile comparison, more conscious thought and less reflexive action is encouraged. The issues presented in pregnancy benefit and benign sex discrimination cases are difficult to resolve. Part of the difficulty stems from genuine uncertainty about what is at stake in such cases and about the proper role of judicial intervention in attempts to redress sex discrimination with remedial laws or costly disability insurance programs. Particularly in unsettled areas of law where courts have difficulty choosing between analytical frameworks and convincingly explaining their choices, reflection about what makes one analysis more persuasive than another is needed if courts are to evaluate contested issues fully and fairly.