THE *CAL FED* CONTROVERSY:

Distinguishing California's Pregnancy Leave Law and the Family and Medical Leave Act

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In the modern history of the United States, the feminist movement has been marked by a great divide between those women favoring formal equality and those favoring substantive equality.[1] While supporters of formal equality believe that men and women should be treated the same, including under the law, supporters of substantive equality believe that where men and women are actually situated differently, different rules may be needed in order to achieve equal results.[2] The debate rose to a peak in the 1970s and 1980s in a national debate over pregnancy discrimination and benefits in the workplace.[3] After two devastating U.S. Supreme Court decisions in the 1970s, the divide appeared most prominently between

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[1] Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 Harvard C.R.-C.L. L. Rev. 415, 417–20 (2011).

[2] Katherine T. Bartlett & Deborah L. Rhode, Gender And Law: Theory, Doctrine, Commentary 1, 127 (5th Ed. 2010).

[3] Joan Williams, *Do Women Need Special Treatment? Do Feminists Need Equality?*, 9 J. Contemp. Legal Issues 279 (1998). Williams also provides a comprehensive analysis of the theoretical debate between feminists in the different ideological camps.

California women's activists and those working on the national level. For the most part, California women's groups came out in support of a substantive approach to equality which provided leave specifically to pregnant women while not specifically mandating leave for other temporarily disabled employees.[4] On the other hand, national women's groups generally favored a formal approach where pregnant women would receive the same leave benefits as any other employee.[5]

In 1987, a Supreme Court case involving California's substantive approach to equality showcased the feminist debate to everyone in the country.[6] *California Federal Savings & Loan Association v. Guerra* truly illuminates the main figures in the leave debate and their beliefs on the issue.[7] But the debate was not over then — national women's groups worked in Washington to promote their formal view. The long-standing feud between supporters of formal and substantive equality can perhaps best be observed in the history of pregnancy and parental leave statutes in the U.S.

"IT NEVER OCCURRED TO ME THAT I MIGHT LOSE MY JOB BECAUSE I'D HAD A CHILD."[8]

In 1982 Lillian Garland, an employee at California Federal Savings & Loan Association (Cal Fed), took maternity leave to have a cesarean section.[9] When she returned to work, she had been replaced, and her job was no longer available.[10] Garland filed a complaint with the California Fair Employment and Housing Commission (FEHA) claiming that Cal Fed had violated California's Pregnancy Disability Leave Law.[11] She was among 300 other women who had filed complaints for violations of that law in

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4 *See, infra*, text associated with fns. 110–119, for more detail.

5 *Id.*

6 California Federal Sav. & Loan Ass'n v. Guerra (*Cal Fed*), 479 U.S. 272, 278 (1987).

7 *Id.*

8 Tamar Lewin, *Maternity Leave: Is It Leave, Indeed?*, N.Y. Times, Jul. 22, 1984, at F1 (quoting Lillian Garland).

9 Ronald D. Elving, Conflict and Compromise: How Congress Makes the Law 17 (1995).

10 *Id.*

11 *Cal Fed*, 479 U.S. at, 278.

1982.[12] Before the administrative hearing date with FEHA, Cal Fed filed suit in the Federal District Court for the Central District of California seeking a declaration that California's Pregnancy Disability Leave Law had been preempted by the federal Pregnancy Discrimination Act.[13] Cal Fed was joined by the Merchants and Manufacturers Association and the California Chamber of Commerce in what the business community saw as an opportunity to attack the leave law.[14]

In 1984, the District Court characterized the California law as requiring "preferential treatment" for pregnant employees, and agreed with Cal Fed that the Pregnancy Disability Leave Law was preempted by the Pregnancy Discrimination Act.[15] In his opinion, Judge Real not only invalidated a law aimed at helping women achieve equality, but he did so by using another law aimed at the same purpose.[16] The decision caused consternation among many women activists.[17]

"DEBATE OVER PREGNANCY LEAVE"[18]

Cal Fed wound its way through the courts and in October of 1986, the case reached the U.S. Supreme Court.[19] Amicus briefs were filed in support of various points of view — Cal Fed's stance was supported by business and commerce associations, California women's groups supported the Pregnancy Disability Leave Law, and national women's groups supported Lillian Garland's right to leave, but not the Pregnancy Disability Leave Law itself.[20] If the debate between different camps of feminist thought was not

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12 ELVING, *supra* note 9, at 18.

13 *Cal Fed*, 479 U.S. at 278–79.

14 *Id. See* ELVING, *supra* note 9, at 18.

15 *California Federal Sav. & Loan Ass'n v. Guerra*, 34 FAIR EMPL. PRAC. CAS. (BNA) 562, 1 (1984).

16 *Id.*

17 ANNE L. RADIGAN, CONCEPT & COMPROMISE: THE EVOLUTION OF FAMILY LEAVE LEGISLATION IN THE U.S. CONGRESS 6 (1988).

18 Title of a *New York Times* article describing *Cal Fed*. Tamar Lewin, *Debate Over Pregnancy Leave*, N.Y. TIMES, Feb. 3, 1986, at D1.

19 *Cal Fed*, 479 U.S. at 272.

20 *See, e.g.,* Brief for the Chamber of Commerce of the United States as Amicus Curiae in Support of the Petition, *Cal Fed*, 479 U.S. 272 (1986) (No. 85-494); Brief of Equal Rights Advocates, the California Teachers Ass'n, the Northwest Women's Law

clear before, Cal Fed's amici highlighted the internal dispute. While both California and national women's groups called for Lillian Garland's right to leave, they did so with significant differences.

First, California women activists pointed out that the Pregnancy Disability Leave Law was not inconsistent with Title VII and the Pregnancy Discrimination Act; in fact, they shared the same goals of ending discrimination against women in the workplace.[21] While Title VII preempted legislation which relied on stereotypical notions of women's proper roles, California's legislation simply recognized an objective difference between the sexes, namely pregnancy.[22] Accordingly, different policies are necessary to ensure equal opportunities for women.[23] For example, the Equal Rights Advocates Brief suggested comparing men who have engaged in reproductive behavior to pregnant women.[24] That way any difference in treatment between the two groups could be seen as manifestly unjust.[25] Title VII, their brief pointed out, prohibits facially neutral policies that result in adverse impacts on women, and that is what happens when pregnant women are treated the same as everyone else.[26] True to their ideological underpinnings, the California women's groups were not afraid to point out the differences between men and women, and they were not afraid to demand a right to equality while taking that difference into consideration.[27]

Center, the San Francisco Women Lawyers Alliance as Amici Curiae, *Cal Fed*, 479 U.S. 272 (1987) (No. 85-494) [hereinafter *Equal Rights Advocates Brief*]; Brief for the National Organization for Women, Now Legal Defense and Education Fund, National Bar Ass'n Women Lawyers' Division Washington Area Chapter, National Women's Legal Defense Fund as Amici Curiae in Support of Neither Party, *Cal Fed*, 479 U.S. 272 (1987) (No. 85-494) [hereinafter *NOW Brief*].

21 *Equal Rights Advocates Brief, supra* note 20.

22 *Id.*

23 Brief for California Women Lawyers, Child Care Law Center, Jessica McDowell, Lawyers Committee for Urban Affairs, Mexican American Legal Defense and Education Fund, Women Lawyers' Association of Los Angeles, and Women Lawyers of Sacramento as Amici Curiae in Support of Respondents, *Cal Fed*, 479 U.S. 272 (1986) (No. 85-494) [hereinafter *California Women Lawyers Brief*].

24 *Equal Rights Advocates Brief, supra* note 20.

25 *Id.*

26 *Id.*

27 *See infra*, text associated with fns 110–119.

California women were also quick to point out that their legislation did not give women special or protective treatment. First, the Pregnancy Disability Leave Law's intent was different. While protective legislation attempted to bar women from doing men's work, California's legislation was attempting to allow women access to that work.[28] In a similar argument, the California Women Lawyers Brief stated that the legislation was not an effort to put women in a superior, or special, position, but rather just an equal opportunity to compete with men in employment.[29] The Pregnancy Disability Leave Law, then, was just a form of recognition that facially neutral policies do not always provide equality.[30]

Alongside the California groups in favor of the Pregnancy Disability Leave Law, stood Betty Friedan, a nationally-recognized feminist, who was one of the founders of the National Organization for Women (NOW) in 1966, and 9 to 5, another national women's rights organization.[31] Like the California organizations, Betty Friedan and 9 to 5 argued in their brief that gender-neutral policies failed to provide equality in procreative choices between men and women.[32] Additionally, the authors went out of their way to show that the Pregnancy Disability Leave Law was not protective legislation.[33] But what was most interesting about this brief was the fact that Betty Friedan was one of the signatories. NOW, like Friedan, had also submitted an Amicus Brief for the *Cal Fed* case — only it was for the different argument of extending leave to all temporarily disabled workers, rather than solely pregnant women.[34]

Also in support of California's Pregnancy Disability Leave Law were the states of Connecticut, Hawaii, Montana, and Washington, all of which

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28 *Equal Rights Advocates Brief, supra* note 20.

29 *California Women Lawyers Brief, supra* note 23.

30 *Id.*

31 Brief of the Coalition for Reproductive Equality in the Workplace, Betty Friedan, 9 to 5 National Association of Working Women, Congressman Howard Berman, et al. as Amici Curiae In Support of Respondents, *Cal Fed*, 479 U.S. 272 (1986) (No. 85-494); Rita Kramer, *The Third Wave*, The Wilson Quarterly (Autumn 1986), at 115.

32 *Id.*

33 *Id.*

34 *NOW Brief, supra* note 20.

had similar leave laws on their books.[35] Connecticut's statute, for example, allowed women a "reasonable leave of absence for pregnancy" and guaranteed women their same, or substantially similar jobs, upon their returns.[36] The other states also maintained their interest in protecting their statutes and the way they related to Title VII.[37]

National women's groups had the difficult task of upholding Lillian Garland's right to leave while simultaneously disagreeing with California's approach to pregnancy leave generally. Their solution was to argue not that California's pregnancy leave be denied, but that leave be extended to *all* temporarily disabled employees.[38] While they did not agree that California should provide leave solely for pregnant women, these groups stated that the Pregnancy Disability Leave Law did not conflict with Title VII and the Pregnancy Discrimination Act.[39] Cal Fed was in violation of the Pregnancy Discrimination Act where it was providing leave only for pregnant women and not for other temporarily disabled workers, but it was possible for them to comply with both laws by extending leave to all temporarily disabled employees.[40] Therefore, the two statutes were not in direct conflict per se, but only in the way Cal Fed was applying California's law.[41] The two statutes could lawfully coexist.

Looking more closely at the briefs submitted by the national women's organizations, there were other clues marking the divisiveness of the debate even more clearly than their differing stances on the legal issues. NOW's brief was authored in part by Wendy Williams and Susan Deller Ross, the very women Donna Lenhoff called to her side to resist Berman's attempts

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35 Brief of the State of Connecticut, Connecticut Commission on Human Rights and Opportunities, Connecticut Permanent Commission on the Status of Women, State of Hawaii, State of Montana, and State of Washington as Amici Curiae, *Cal Fed*, 479 U.S. 272 (1986) (No. 85-494).

36 *Id.*

37 *Id.*

38 *NOW Brief, supra* note 20; Brief for the American Civil Liberties Union, the League of Women Voters of the United States, the League of Women Voters of California, the National Women's Political Caucus, and the Coal Employment Project as Amici Curiae, *Cal Fed*, 479 U.S. 272 (1986) (No. 85-494) [hereinafter *ACLU Brief*].

39 *Id.*

40 *Id.*

41 *Id.*

at a national pregnancy leave law.[42] At the same time they were submitting this brief, they were continuing their work on Federal gender-neutral leave legislation.[43] The same year that NOW submitted its amicus brief, Deller Ross was actually quoted in the *New York Times* as saying, "We think there is a conflict between the Federal Pregnancy Discrimination Act . . . and the California Law . . . . [W]e think that the correct remedy is not to take away the benefits for women disabled by pregnancy, but to extend those same benefits to any disabled workers."[44] Women on different sides of the debate were openly stating their critiques of the other's approach.

Additionally, while on a national level the American Civil Liberties Union (ACLU) filed an amicus brief to show that it rejected "laws that single out pregnancy, pregnancy-related conditions, or the capacity to become pregnant for ostensibly advantageous treatment," the ACLU of Southern California openly rejected the national organization's stance on the issue.[45] Not only did they refuse to sign on to the amicus brief, but the Southern California branch firmly stated that it agreed with upholding the Pregnancy Disability Leave Law in the same way other California organizations were expressing in their amicus briefs.[46]

The debate among the advocates was also picked up by the general public. A *New York Times* article from 1986 exposed what many people working directly on addressing leave already knew: the leave issue was dividing feminists in the U.S.[47] One article showcased the divide between California and federal law and also the divide between different women's rights organizations. The article summarized what was being said in the amicus briefs — both sides of the debate wanted women to be able to take time off for pregnancy, they just disagreed as to how that should work.[48]

On the one hand, NOW and the ACLU were quoted as taking a stance against gender-specific legislation.[49] They were afraid that labeling

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42 *NOW Brief, supra* note 20.

43 Elving, *supra* note 9, at 60–61.

44 Lewin, *supra* note 18.

45 *ACLU Brief, supra* note 38.

46 *Id.*

47 Tamar Lewin, *Maternity-Leave Suit Has Divided Feminists*, N.Y. Times, Jun. 28, 1986, at 52.

48 *Id.*

49 *Id.*

pregnancy as a "special disability" would allow the use of stereotypes against women.[50] Stereotyping had been used to produce so much harm to women in the past, that the better approach was to remain gender-neutral.[51]

But Betty Friedan and 9 to 5 preferred leave policies aimed at creating equality of procreative choice, and they wanted to do away with the traditional male model for employees.[52] Betty Friedan was quoted as saying, "[T]he time has come to acknowledge that women are different from men, and that there has to be a concept of equality that takes into account that women are the ones who have the babies. We shouldn't be stuck with always using a male model."[53] Like California feminists, they were willing to accept that women were different from men in their ability to become pregnant, but they were not willing to let that hold women back from being gainfully employed.[54]

"THE STATUTE IS NOT PRE-EMPTED BY TITLE VII"[55]

In the end, the U.S. Supreme Court upheld California's Pregnancy Disability Leave Law.[56] Writing the opinion, Justice Marshall first looked to Congress's intent in passing the Pregnancy Discrimination Act in order to determine whether it preempted any state fair employment laws.[57] What the Court determined was that Congress's intent in passing the Pregnancy Discrimination Act was much the same as the California State Legislature's intent in passing the Pregnancy Disability Leave Law, that is "to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life."[58] Therefore, California's law did not conflict with Congress's intent in passing the Pregnancy Discrimination Act.

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50 *Id.*

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.*

55 Majority decision in *Cal Fed.* 479 U.S. at 292.

56 *Id.*

57 *Id.* at 280.

58 *Id.* at 289 (quoting 123 Cong. Rec. 29658 (1977) (Statement of Senator Williams in support of the PDA).

Furthermore, Congress did not show any intent to prevent states from passing statutes granting pregnant women further protection than that provided for in the Pregnancy Discrimination Act.[59] While the record showed that Congress had acknowledged the existence of such state statutes in Connecticut and Montana, nothing was said about any possible conflicts with those and the proposed PDA.[60] As well as having a common goal, state statutes promoting substantive equality were not considered as overstepping the bounds of the Pregnancy Discrimination Act when it was enacted. Indeed, the Court found that Congress had intended the PDA "to construct a floor beneath which pregnancy disabilities may not drop — not a ceiling above which they may not rise."[61]

Justice Marshall, much like California women's rights organizations had done in their amicus briefs, distinguished California's law from historically protective legislation.[62] He did so by pointing out how limited the statute was — it only applied to the period of actual physical disability due to pregnancy.[63] Therefore, it was not analogous to statutes employing "archaic and stereotypical notions about pregnancy and the abilities of pregnant workers."[64] California's law defined a more objective and clearly determined time period that could not be as easily subjected to stereotyping. This seemed to be a blow to the formal equality argument, which had rested on the negative effect of stereotypes found in gender-specific statutes.[65]

"GOOD WOMEN ARE IN DEMAND NOW. . ."[66]

From the 1950s to the 1970s, the rates of both U.S. women who worked and the proportion of the workforce made up of women rose significantly.[67] By 1977, women even constituted 18 percent of traditionally male-occupied blue

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59 *Id.* at 286.

60 *Id.* at 287.

61 *Id.* at 280 (quoting *Cal Fed*, 758 F.2d at 395).

62 *Id.* at 290.

63 *Id.*

64 *Id.*

65 *See* Lewin, *supra* note 47.

66 Quote from a husband with an employed wife, referring to women in the workplace. Georgia Dullea, *Vast Changes in Society Traced to the Rise of Working Women*, N.Y. Times, Nov. 29, 1977, at 77.

67 *Id.*

collar jobs involving heavy manufacturing.[68] This rise in employment held ramifications for both the home and the workplace, playing a role in increased divorce rates, higher reported incidents of sexual harassment, and more out-of-home child care.[69] The last issue became particularly salient in the 1970s.

In the early 1970s, a recession hit multiple sectors of the economy with decreasing levels of both employment and consumer purchasing.[70] Additionally, high rates of inflation were making it more difficult to raise a family on a single income.[71] For many, the only way to afford to have children was if both parents worked outside the home.[72] That meant that women had to work in order to have children, raising concerns regarding the ease with which women could become pregnant, have children, and maintain their employment at the same time.

A number of Supreme Court decisions decided in the 1970s expanded the rights of women in different facets of society. For example, *Reed v. Reed* overturned an Idaho state statute which automatically appointed a father as administrator of a deceased child's estate because it discriminated based on sex.[73] And a mandatory unpaid maternity leave regulation was struck down by the Court in *Cleveland Board of Education v. LaFleur*.[74] For that reason, some may have been optimistic about women in the workplace and their ability to have children.

"SHOCK AND ANGER EXPRESSED"[75]

However, the U.S. Supreme Court shocked women's rights activists around the country with two major decisions in the mid-1970s. First, in 1974 it

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[68] *Id.*

[69] *Id.*

[70] Peter T. Kilborn, *More Sectors of Economy Are Pinched by Recession*, N.Y. Times, Oct. 31, 1974, at 1.

[71] Dullea, *supra* note 66.

[72] Fewer than half of the jobs in the U.S. economy in 1976 were sufficient to reasonably sustain a family. Ellen Goodman, *Pregnancy disability — the battle has just begun*, S.F. Chronicle, Dec. 22, 1976, at 15.

[73] 404 U.S. 71 (1971).

[74] 414 U.S. 632 (1974).

[75] Subheading from a *New York Times* article describing *General Electric v. Gilbert*, *infra* note 185. Lesley Oelsner, *Supreme Court Rules Employers May Refuse Pregnancy Sick Pay*, N.Y. Times, Dec. 8, 1976, at 53.

held that discrimination against pregnant women did not constitute sex discrimination under the Equal Protection Clause of the Fourteenth Amendment.[76] California had developed a disability insurance program for temporarily disabled workers and the program excluded pregnancy from its definition of disability.[77] When the state was sued for discriminating against women by failing to provide insurance for pregnancy while providing it for other temporary disabilities, the Supreme Court held in *Geduldig v. Aiello* that California had not discriminated on the basis of sex, but instead on the basis of pregnancy.[78] According to the Court, they were not one and the same.[79] In the Court's own words, "The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition — pregnancy."[80] Excluding pregnancy from state-distributed disability insurance was permissible.[81]

Then, in 1976, the Supreme Court handed down its decision in *General Electric v. Gilbert*, holding that pregnancy discrimination did not amount to sex discrimination under Title VII, either.[82] Until then, the Equal Employment Opportunity Commission (EEOC) had construed the words, "because of sex," in Title VII as protecting against pregnancy as well as other forms of sex discrimination.[83] In *Gilbert*, however, Justice Rhenquist distinguished the discrimination as only against pregnant versus non-pregnant persons, not against women versus men.[84] Therefore, a private company could also exclude pregnancy from its disability benefits while at the same time covering other temporary disabilities.[85]

The two decisions were major blows to the women's rights movement not only because they approved both state and private exclusion of pregnancy benefits, but also because they differentiated pregnancy discrimination

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76 Geduldig v. Aiello, 417 U.S. 484, 496–97 (1974).

77 *Id.* at 486.

78 *Id.* at 497.

79 *Id.*

80 *Id.* at n.20.

81 *Id.*

82 429 U.S. 125 (1976).

83 29 C.F.R. § 1604.10(b) (1975).

84 *Gilbert*, 429 U.S. at 135.

85 *Id.* at 145.

from sex discrimination. Indeed, they both caused an uproar. There were a wide range of opinions on the issue. Writing on the opinion page of the *San Francisco Chronicle*, Andrew Tully said that while he supported pregnancy disability benefits, including them in disability insurance programs could only be done by Congress, not through the EEOC's "presumptuous guidelines."[86] Ellen Goodman, on the contrary, referred to the *Gilbert* majority as "six upper-class, upper-aged men whose own children were born and weaned long ago" to bring some reason to their "bizarre" decision to distinguish pregnant working women from other women.[87] And James Kilpatrick applauded the decision, going so far to as to call the Burger Court "the girls' best friend" due to some of its decisions on gender equality.[88]

For many who supported the opinions it seemed that feminists wanted it both ways — equality and special treatment. Even though they had gained equality and could work some of the same trades jobs as men, they still wanted female-only pregnancy disability insurance, which many considered special treatment. For example, *Washington Star* cartoonist Pat Oliphant depicted the National Organization for Women (NOW) as electrical workers griping about their lack of pregnancy disability insurance despite gaining equality.[89] Like Kilpatrick, Oliphant's observant insect in the cartoon (facing page) shows that some people believed feminists would never be happy with the state of gender relations no matter what the Court held.[90]

On the other hand, writing in the *New York Times*, Lesley Oelsner pointed out that the Gilbert decision had overruled six different Courts of Appeal in addition to the EEOC's guidelines in its interpretation of pregnancy discrimination under Title VII.[91] Additionally, companies which had provided pregnancy benefits now felt that they could drop them,

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86 Andrew Tully, *Insult to Mothers*, S.F. Chronicle, Dec. 27, 1976, at 33.

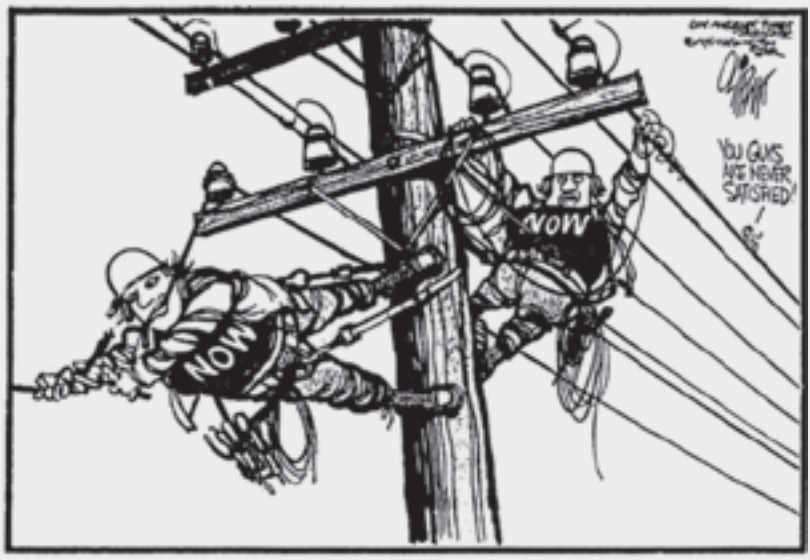
87 Goodman, *supra* note 72.

88 James Kilpatrick, *The Court Was Right*, S.F. Chronicle, Dec. 17, 1976, at 60. *See, e.g., Kahn v. Shevin*, 416 U.S. 351, which struck down a Florida state tax exemption for widows but not widowers because it discriminated on the basis of sex in assuming that women were less economically capable than men; *LaFleur*, 414 U.S. 632.

89 Pat Oliphant, S.F. Chronicle, Jan. 3, 1977, at 38 (via L.A. Times Syndicate).

90 *Id.*

91 Oelsner, *supra* note 75.



©1976, Pat Oliphant, *The Washington Star*[92]
Courtesy The Washington Post

while companies lacking those benefits no longer felt any pressure to adopt them.[93] Oelsner's article certainly hinted at despair when it quoted an attorney at the ACLU's Women's Rights Project claiming that the Court had "legalized sex discrimination."[94]

While the decisions produced a wide range of opinions among the more general populace, women's organizations both in California and on the national level promised to fight back to ensure that discrimination against pregnant women would be legally barred.[95] Their motives to promote equality for women were the same, but their approaches were distinct.

[92] Oliphant, *supra* note 89.

[93] Oelsner, *supra* note 75.

[94] *Id*.

[95] *See* Damon Stetson, *Women Vow Fight For Pregnancy Pay*, N.Y. Times, Dec. 9, 1976, at 19.

"THIS LEGISLATION PROTECTS PREGNANT WOMEN FROM UNFAIR EMPLOYMENT PRACTICES"[96]

In California, discrimination against women may have felt like a bigger problem than almost anywhere else in the country. In 1977, San Francisco had the second highest number of federal employment sex discrimination cases filed in the country at 259.[97] It was well above much larger cities like New York (181) and Chicago (224).[98] Despite the difficulty with time delays, high expenses, and the psychological stress associated with bringing sex discrimination suits, a significant number of people in San Francisco thought it was necessary to take their grievances to court.[99]

Some attorneys working on sex discrimination cases also noticed that many of the complaints they received from women dealt with issues they faced upon becoming pregnant.[100] According to Shauna Marshall, previously a staff attorney at Equal Rights Advocates, one of California's first organizations focusing on women's legal rights, attorneys working with female employees at the time largely saw pregnancy as the main impediment to women's long-term employment.[101] Linda Krieger, then an attorney at the Employment Law Center in San Francisco was also quoted as saying, "I get calls all the time from women . . . who lost their jobs when they took time off for pregnancy or childbirth."[102] More so than equal pay or sexual harassment, pregnancy was not a problem to be ignored.

According to Marshall, women on the West Coast were also more comfortable accepting that women and men were inherently different when it

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96 Summary of AB 1960, the bill for the Pregnancy Disability Leave Law. Governor's Chaptered Bill File: LL Summary, Bill No. AB 1960, Dep't of Industrial Relations (Jan. 17, 1978).

97 Ralph Craib, *How S.F. Sex Bias Suits Are Faring*, S.F. Chronicle, Jan. 7, 1978, at 4.

98 *Id.*

99 *Id.*

100 Interview with Shauna Marshall, Academic Dean, UC Hastings College of the Law, in San Francisco (Apr. 16, 2012).

101 *Id.*

102 Tamar Lewin, *Maternity Leave: Is It Leave, Indeed?*, N.Y. Times, Jul. 22, 1984, at F1.

came to pregnancy.[103] While women's rights activists at the national level were aiming for equal treatment, California women's activists were looking to redefine the model for employment.[104] Instead of treating women as exactly the same as men, California feminists wanted to do away with the straight white male model of an employee and embrace differences among workers.[105] For example, while attorneys working at the national level at the ACLU were afraid that treating pregnancy differently would raise historic issues of discrimination against women, Brian Hembacher, an attorney at California's Department of Fair Employment and Housing (DFEH) who eventually represented Lillian Garland in her suit against Cal Fed, agreed with pregnancy-specific leave, stating, "A lot of things that seem to be unequal on their face actually create equal effects."[106] Furthermore, Linda Krieger, then an attorney at the Employment Law Center in San Francisco, believed that "[t]he point isn't that men and women must be treated alike, it's that they must have equal opportunities."[107] In fact, Krieger was known for frequently debating Wendy Williams, a professor at Georgetown University Law School, on the issue of pregnancy leave.[108] Williams was an outspoken formal equality feminist who opposed pregnancy-specific leave as a form of special treatment that would actually prevent women from entering the workforce.[109]

And while many of these women believed that difference should be embraced, they also believed that both parents should participate in the raising of a child.[110] Passing a leave law addressing only pregnancy was considered by many to be just a first step.[111] The ultimate goal seemed to be passage of a leave law for both parents.[112] In fact, years after California's

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103 Interview with Shauna Marshall, *supra* note 100.

104 *Id.*

105 *Id.*

106 *Id.*

107 Lewin, *supra* note 102.

108 *Id.*

109 *Id. See* Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. Rev. L. & Soc. Change 325 (1984) for more detail on her stance on the equality debate.

110 Interview with Shauna Marshall, *supra* note 100.

111 *Id.*

112 *The Family and Medical Leave Act of 1987: Hearing on H.R. 925 Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the H.*

Pregnancy Disability Leave Law was passed, its author, Howard Berman, recognized that "*all* workers face the prospect of needing to take time off due to disability or serious family responsibilities . . . ."[113] Passing a maternity leave statute, many seemed to have thought at the time, was easier than trying to pass a leave law that would apply to all workers.[114]

Soon after the *Gilbert* decision, Howard Berman, then a California Assembly member, began working on a bill that would extend workplace protections to pregnant women.[115] As the legislative history for the bill shows, the *Geduldig* and *Gilbert* decisions were central to the California Legislature's motivation in considering a bill extending pregnancy leave to working women.[116] About half of the documents in the California State Archives concerning AB 1960's legislative history include an analysis of the *Geduldig* and *Gilbert* decisions.[117] Furthermore, California legislators were apprehensive about the possibility that the California Supreme Court might make a similar decision regarding state pregnancy protections.[118] As the Department of Industrial Relations noted, neither the Division of Fair Employment Practices nor the Fair Employment Practices Commission, California's state equivalents to the EEOC, had developed regulations on how to address pregnancy disabilities, and there was fear that the state supreme court might interpret the current state of fair employment law to exclude pregnancy disability due to the cost to employers.[119]

The legislative record also shows that legislators were aware that the California Supreme Court viewed gender in much the same way as the U.S. Supreme Court.[120] A memo from the Department of Industrial Relations recognized that while the U.S. Supreme Court did not recognize sex classifications as suspect and the California Supreme Court did recognize them as

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Comm. on Education and Labor, 100th Cong. 2 (1987) (statement of Howard L. Berman, U.S. Representative, 26th District, California).

113 *Id.*

114 Interview with Shauna Marshall, *supra* note 100.

115 Governor's Chaptered Bill File: Bill No. AB 1960, Office of the Legislative Counsel (Jan. 4, 1977).

116 *See generally*, Governor's Chaptered Bill File: Bill No. AB 1960.

117 *Id.*

118 Governor's Chaptered Bill File: Enrolled Bill Rpt., Bill No. AB 1960, Dep't of Industrial Relations (Sep. 26, 1978).

119 *Id.*

120 Governor' s Chaptered Bill File: Bill No. 1960, Memorandum from the Agriculture and Services Agency to Howard Berman (Sep. 14, 1978).

suspect, "the actual record of the U.S. Supreme Court in sex discrimination cases is not that bad . . . and the record of the California Supreme Court is not that good."[121] In other words, the courts analyzed gender similarly, and that could mean that the California Supreme Court could come out with a decision similar to *Gilbert* in the absence of any contrary legislation.

Additionally, a California case regarding workers' compensation made clear that the California Supreme Court preferred leaving extension of employment benefits to the State Legislature.[122] In *Arp v. Workers' Compensation Appeals Board*, the state supreme court determined that a statute providing workers' compensation benefits to widows whose husbands died on the job, but not to widowers whose wives died on the job, was unconstitutional in its differential treatment of men and women.[123] Instead of automatically extending the benefits to include widowers as well as widows to correct the differential treatment, the state supreme court struck down the entire provision and expressed its belief that the Legislature should be in charge of determining what to do with the now unconstitutional law.[124] Legislators took this to mean that the Court would most likely be unwilling to correct discrimination by extending a benefit because of the potential cost to employers.[125] Instead, it would leave that type of decision to the Legislature, which was better equipped to handle such potentially costly decisions.[126] Therefore it was clear to the 1978 California Legislature that the Court would probably not be willing to extend pregnancy benefits unless the Legislature expressly stated it, and that is what it set out to do.[127]

It may have been fortuitous that California already had a labor code protecting pregnant school employees against discrimination and providing them with leave.[128] The code prohibited discrimination based on pregnancy or a related medical condition in hiring, promoting, discharging, or compensating pregnant employees.[129] AB 1960 was to amend the La-

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121 *Id.*

122 Arp v. Workers' Compensation Appeals Board, 19 Cal. 3d 395, 409 (1977).

123 *Id.*

124 *Id.*

125 *Id.*

126 *Id.*

127 Enrolled Bill Rpt., *supra* note 118.

128 Cal. Labor Code § 1420.2 (1975) (repealed 1980).

129 *Id.*

bor Code to allow pregnant school employees to take maternity leave for a reasonable period of time, and guaranteed that they receive the same benefits and privileges as other employees not affected by pregnancy.[130] Then AB 1960 was to extend those same benefits awarded to pregnant school employees to all pregnant employees throughout the state.[131] In doing so, California would be naming pregnant women a protected class.[132]

California also looked to other states to see what approaches they had taken to address the leave issue. For example, Oregon was looked to for information on its pregnancy disability laws and the problems in passing and implementing them.[133] Oregon, much like California, responded to the *Gilbert* decision by passing subsequent legislation to protect against pregnancy discrimination, and it prohibited employers from failing to provide pregnant women with equal medical benefits, disability benefits, and sick leave as other employees.[134] Furthermore, after the *Gilbert* decision the New York Court of Appeals, the highest court in that state, determined that private employers were required to pay disability benefits under the state human rights law prohibiting pregnancy discrimination.[135] Employer costs were brushed aside in favor of upholding human rights and protection against discrimination.[136]

Interestingly, there were few objections to the substantive changes AB 1960 proposed. One of the major concerns happened to be the fear that new federal changes to Title VII might preempt, and therefore undermine, the California Legislature's efforts.[137] However, one provision was clearly exempt from preemption: the four months of time permissible for pregnancy

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130 Governor's Chaptered Bill File: Bill No. AB 1960, Assembly Committee on Labor, Employment and Consumer Affairs (Jan. 11, 1978).

131 *Id.*

132 *Id.*

133 *See* Governor's Chaptered Bill File: Bill No. AB 1960, Minnesota House Committee on Labor-Management Relations to California Senate Committee on Industrial Relations (Feb. 15, 1978); Governor's Chaptered Bill File: Bill No. AB 1960, Oregon Department of Justice Memo (Sep. 21, 1977).

134 Id.

135 LL Summary, *supra* note 96.

136 *Id.*

137 Memorandum from the Agriculture and Services Agency, *supra* note 120 ("The main objection to the signing of AB 1960 is § 4, the federal preemption of state legislation . . .").

leave.[138] Perhaps this demonstrated the conviction with which California legislators adopted the leave provision above all else. Despite those fears, AB 1960 was passed as California's Pregnancy Disability Leave Law in September of 1978.[139] It provided for up to four months of pregnancy leave, inclusion of pregnancy and childbirth into any employer-administered disability program, and mandatory accommodation upon request for a woman disabled by pregnancy.[140]

"THE TERMS 'BECAUSE OF SEX' AND 'ON THE BASIS OF SEX' INCLUDE . . ."[141]

The California Legislature was correct in anticipating federal legislation addressing pregnancy discrimination. Just a short while after the Pregnancy Disability Leave Law was passed in California, the Pregnancy Discrimination Act was passed in the U.S. Congress.[142] However, Congress took a different path in remedying the *Geduldig* and *Gilbert* decisions. Instead of setting forth affirmative rights to which pregnant women were entitled, the Pregnancy Discrimination Act simply made clear that pregnancy discrimination was tantamount to sex discrimination — they were one and the same.[143] Therefore, the words "because of sex" in Title VII were clarified to include "because of or on the basis of pregnancy, childbirth, or related medical conditions."[144] Furthermore, "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."[145] However, there is evidence in the legislative record that Congress did not intend to create any particular

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138 *Id.*

139 Enrolled Bill Rpt. to Governor, *supra* note 118.

140 *Id.*

141 Wording of the Pregnancy Discrimination Act as it amended Title VII in 1978. 42 U.S.C.A. § 2000e(k) (1978).

142 RADIGAN, *supra* note 17, at 5.

143 § 2000e(k), *supra* note 141.

144 *Id.*

145 *Id.*

disability benefits or special treatment for pregnant workers, significantly distinguishing it from California's Pregnancy Disability Leave Law.[146]

"AN ARGUMENT OVER MEANS, NOT ENDS"[147]

Simultaneously with Cal Fed's challenge to California's Pregnancy Disability Leave Law, Howard Berman, the law's author, was campaigning for a seat in the U.S. House of Representatives.[148] The leave law was one of his great successes as a state legislator, and he hailed it during his campaign for representative.[149] He touted his belief that the law would be upheld, but that he would also work toward a similar federal leave law upon arriving at Washington.[150] Soon after the district court decision, Berman, now a member of the House of Representatives, sought help from Donna Lenhoff at the Women's Legal Defense Fund, an organization now known as the National Partnership for Women and Families that works toward ending employment discrimination against women.[151] When she was hired there, Lenhoff had participated in the effort to draft and pass the Pregnancy Discrimination Act, and she was considered a seasoned expert in legislation aimed at guaranteeing equality.[152] Lenhoff, however, did not share Berman's views on how to handle the leave issue.[153] First, Lenhoff disagreed with a legislative reaction to the recent *Cal Fed* decision — she believed the case should be appealed through the courts.[154] Second, she was firm in her support of a leave policy applicable to all workers, regardless of sex, for either a temporary disability or a family medical issue.[155] When Berman requested a written proposal, Lenhoff turned to her Washington colleagues, including Judith Lichtman, Wendy Williams, and Susan Deller Ross, who shared her ideas on how to approach leave.[156]

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146 H. R. Rep. No. 95-948, at 4 (1978).
147 Radigan, *supra* note 17, at 8.
148 Elving, *supra* note 9, at 18.
149 *Id.*
150 *Id.*
151 *Id.* at 19.
152 *Id.* at 19–20.
153 *Id.* at 21–22.
154 *Id.* at 22.
155 *Id.* at 23.
156 *Id.* at 29.

Fresh in these women's minds was not only the recent *Cal Fed* decision, but also a Montana case, *Miller-Wohl v. Commissioner of Labor and Industry*.[157] Montana, like California, had a statute specifically providing pregnancy leave for women, the Montana Maternity Leave Act (MMLA).[158] The statute provided that no employee would be fired due to her pregnancy, and a woman was guaranteed a "reasonable leave of absence for the pregnancy."[159] Tamara Buley, an employee at a store owned by Miller-Wohl, missed time from work due to morning sickness and was shortly thereafter fired.[160] Just like Lillian Garland had done in California, Buley filed a complaint with Montana's Labor and Industry Commissioner, claiming that Miller-Wohl had violated the leave statute when they fired her due to her pregnancy.[161] Miller-Wohl claimed that the MMLA was preempted by the Pregnancy Discrimination Act, and should therefore be invalidated.[162] After being appealed to the Montana Supreme Court, the MMLA was upheld and Miller-Wohl was found to have violated not only the state statute, but also Title VII and the Pregnancy Discrimination Act.[163]

In both cases, employers attempted to pit two pieces of legislation aimed at helping women against one another in order to deny women maternity leave. Only a small number of states had statutes requiring pregnancy leave at this time, and already two such statutes had been seriously challenged.[164] Similar federal legislation, applicable to women and employers all over the country, could have an even more detrimental effect. Moreover, the conservative Reagan administration had given women activists the feeling that they had to fight for long-accepted rights all over again.[165] Passing pregnancy-specific legislation at this time could be politically dangerous,

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157 214 Mont. 238 (1984).

158 Mont. Code Ann. § 49-2-310 (1983).

159 *Id.*

160 214 Mont. at 242.

161 *Id.*

162 *Id.* at 249.

163 *Id.* at 241. Note that the Montana Supreme Court mistakenly refers to the "Pregnancy Disability Act" where it should refer to the "Pregnancy Discrimination Act."

164 Five states, California, Connecticut, Massachusetts, Montana, and Wisconsin, had maternity statutes between 1972 and 1981. Lise Vogel, Mothers on the Job: Maternity Policy in the U.S. Workplace 73 (1993).

165 Radigan, *supra* note 17, at 8.

and any feminist issue presented to Congress should be presented as narrowly as possible if it wished to succeed.[166]

While Lenhoff and her associates worked on a gender-neutral draft of a leave policy, Berman continued in his efforts to create a federal maternity leave law.[167] To him, passing a leave law which would apply to everyone was far-fetched.[168] A maternity leave statute, however, could be spun more easily in order to attract the votes of family-oriented conservatives in Congress.[169] Additionally, as he later stated in a Congressional hearing in 1987, it seemed a maternity leave law could be just a stepping stone to a more broad-spectrum leave law.[170] Much like many California women's activists saw the Pregnancy Disability Leave Law as a gateway to a more expansive leave law, Berman saw the role of a possible federal maternity leave law in the same way. However, after a fateful meeting in June of 1985 with Lenhoff, her associates, and lawyers from the League of Women Voters, the National Organization for Women, the National Women's Political Caucus, and the American Civil Liberties Union, Berman changed course.[171] Observing the strength of women activists in support of a gender-neutral bill, and seeing that some of the congressional staff supported that approach, Berman shifted his position.[172]

Around the same time, the House Select Committee on Children, Youth and Families was preparing legislation of its own based on the importance to children of parents' staying home with them after birth.[173] For the first time, two expert witnesses introduced to a congressional committee scientific research proving that *parents*, and not just mothers, should stay home with their children, ideally for a year after birth.[174] The idea that both parents could and should take part in child-rearing was introduced to Congress.

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166 *Id.*

167 Elving, *supra* note 9, at 30.

168 *Id.*

169 *Id.*

170 *Hearing on H.R. 925, supra* note 112.

171 Elving, *supra* note 9, at 32.

172 *Id.*

173 *Id.* at 23.

174 Sheila Kamerman, Professor at Columbia University's School of Social Work, and Edward Zigler, Professor of Psychology at Yale University's Bush Center in Child

Pat Schroeder, the senior female representative from Colorado and also a member of the Select Committee, was eager to get involved when Berman ceded control of the bill.[175] She was considered the foremost women's rights activist in the House, and she was looking for a big issue to take on herself.[176] In April of 1985, she sponsored the Parental and Disability Leave Act.[177] The bill provided for eighteen weeks of unpaid parental leave, maintenance of existing health benefits during the leave, and the creation of a commission to study the possibility of paid parental leave.[178] Less than two weeks later, the Ninth Circuit Court of Appeals handed down its decision in the *Cal Fed* appeal.[179] The decision brought publicity to the issue of family leave and kept the ball rolling on the federal push for parental leave.[180] While the 1985 bill turned out to conflict with already-existing labor laws, and defined disability in a manner with which disability rights activists disagreed, the Ninth Circuit decision focused enough attention on the issue to allow for revisions.[181] In March of 1986, a new bill addressing disability and labor law issues was once again proposed.[182] After positive votes in two committees, Congress was adjourned before final consideration.[183]

"A WINDFALL FOR THE SUPPORTERS OF THE FAMILY AND MEDICAL LEAVE ACT"[184]

After a long battle, Lillian Garland's right to pregnancy leave was upheld and California's Pregnancy Disability Leave Law was left intact. However, the debate over how to handle leave was not over. A few days after the *Cal*

Development and Social Policy both testified before the House Select Committee on Children, Youth and Families in 1984. *Id.* at 26–28.

175 *Id.* at 26; RADIGAN, *supra* note 17, at 13.

176 *Id.*

177 RADIGAN, *supra* note 17, at 15.

178 THE FAMILY AND MEDICAL LEAVE ACT 4–5 (Michael J. Ossip & Robert M. Hale et al., eds., 2006).

179 California Federal Sav. & Loan Ass'n v. Guerra, 758 F.2d 390 (9th Cir. 1985).

180 RADIGAN, *supra* note 17, at 15.

181 *Id.* at 16.

182 *Id.* at 16–17.

183 THE FAMILY AND MEDICAL LEAVE ACT, *supra* note 178, at 8.

184 RADIGAN, *supra* note 17, at 23 (describing the effect of the Supreme Court's *Cal Fed* decision).

Fed decision was published, the *New York Times* published its own article explaining the decision and proposing an alternative: Schroeder's Parental and Medical Leave Act.[185] Not only did the article display fear that the *Cal Fed* decision would result in companies' refusing to hire women, it also claimed that the proposed act would result in the women's movement doing what it always did: benefiting men by promoting health, job, and family stability.[186] Articles like this one, highlighting leave as it was presented to the Supreme Court, put the issue in the spotlight and brought new energy to those still working on a national leave law.[187]

When the parental leave bill was once again brought before Congress in 1987, many of the same reasons California considered in passing its Pregnancy Disability Leave Law were raised. For example, Howard Berman, Donna Lenhoff, and Karen Nussbaum, then executive director of 9 to 5, all testified about the large percentage of women in the workforce.[188] Nussbaum also emphasized the difficulty of raising a family on one income, which had been a concern in the 1970s as well.[189] However, many of those who testified in 1987 also stressed the bill's modernity in approach — it supported leave for *both* fathers *and* mothers, spotlighting the differences between the California law and the push for a national law.[190]

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185 *Pregnancy Leave for Women, and Men*, N.Y. Times, Jan. 18, 1987, at E28.

186 *Id.*

187 Elving, *supra* note 9, at 80.

188 Statement of Howard Berman, *supra* note 106; *The Family and Medical Leave Act of 1987: Hearing on H.R. 925 Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the H. Comm. on Education and Labor*, 100th Cong. 2 (1987) (statement of Donna Lenhoff, Women's Legal Defense Fund); *The Family and Medical Leave Act of 1987: Hearing on H.R. 925 Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the H. Comm. on Education and Labor*, 100th Cong. 2 (1987) (statement of Karen Nussbaum, Executive Director, 9 to 5 National Association of Working Women).

189 Statement of Karen Nussbaum, *supra* note 188.

190 *See* Statement of Howard Berman, *supra* note 106; statement of Donna Lenhoff, *supra* note 173 ("[I]t makes leaves available to men and women for . . . a variety of their family needs."); *Hearing on H.R. 925 Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the H. Comm. on Education and Labor*, 100th Cong. 2 (1987) (statement of Eleanor Smeal, President, National Organization for Women) ("This bill is a modern bill . . . that takes into consideration our modern living experiences . . . . This bill goes well beyond maternity leave.")

From this point forward, the fears that national women's activists had held earlier about the conservative politics seemed to ring dangerously true.[191] The parental leave bill suffered a series of delays attributed to its lack of support from conservative politicians. When it was proposed again in 1988, it was defeated by a filibuster.[192] In 1989, after passing through both the House of Representatives and the Senate, the bill was vetoed by Republican President George H.W. Bush in his first year in office.[193] It came even closer to passage in 1991 when, despite President Bush's second veto, the Senate overrode the decision.[194] Unfortunately, the House failed to do the same, and the bill went no further that year.[195] Finally, in 1993 under a new Democratic President, Bill Clinton, and a Democratic-majority Congress, the bill passed and was signed into law as the Family and Medical Leave Act.[196]

The Family and Medical Leave Act provides for twelve weeks of unpaid leave for mothers and fathers in order to take care of children and other close relatives.[197] While the process for passing such a bill was long and difficult, national women's activists achieved the result they were in favor of — a gender-neutral protection that would allow women, and men as well, to take the leave necessary to care for their families.

Probably more than any other women's rights issue in the U.S., pregnancy and parental leave has shown the clear division in ideology that has split American feminists for decades. The "shock and anger" that *Geduldig* and *Gilbert* produced could have been an opportunity for feminists in the U.S. to unite and fight discrimination together. Instead, the pregnancy issue became the centerpiece of the ideological and legal debate, and the conflict among American women's rights activists was openly aired to the public. Despite the conspicuous controversy, both California's Pregnancy Disability Leave Law and the federal Family and Medical Leave Act remain in place. Perhaps that is the testament that both approaches really do have value.

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191 *See, supra* page 25.

192 The Family and Medical Leave Act, *supra* note 178, at 11.

193 *Id.* at 13.

194 *Id.* at 14.

195 *Id.*

196 *Id.*

197 29 U.S.C.S. § 2612 (1993).