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A BATTLE OVER BIRTH “CONTROL”: LEGAL AND LEGISLATIVE EMPLOYER PRESCRIPTION CONTRACEPTION BENEFIT MANDATES*

Under the Pregnancy Discrimination Act (PDA), employers are prohibited from discriminating against women by treating pregnancy and childbirth different from other medical conditions. Employers who offer medical benefits to their employees have thus been required to cover pregnancy-related medical costs on the same terms as other medical coverage. The cost of prescription contraception, however, has generally not been covered by employer-sponsored medical plans, even while other prescription drugs were. This Note examines the recent case of Erickson v. Bartell Drug Co., which challenged this practice of excluding prescription contraception coverage as discriminatory under the PDA, and argues that further federal legislation is necessary to ensure the equal treatment of women in the workplace.

* * *

INTRODUCTION

In June 2001, Judge Robert S. Lasnik, of the Western District of Washington reached the groundbreaking conclusion that, under federal law, if an employer offers a prescription drug benefit to its employees and their dependents, it must include coverage for prescription contraceptives.¹ In itself, such a ruling might seem unremarkable. In a historical context, however, it is quite an extraordinary accomplishment, as it would seem that women have taken a large step forward on the ever-shortening road to full legal equality. And what could be seen as the “final frontier” in the fight for unfettered reproductive freedom has been reached.²

Having achieved suffrage in the early twentieth century, women were finally

* This Essay is dedicated to my beautiful wife Trish, who brought this matter to my attention. Thank you for your unwavering support and boundless love.

¹ Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266 (W.D. Wash. 2001).

² Of course, it is not meant to be exerted that the fight for gender equality or full reproductive freedom is over. Unfortunately, attitudes and social structures do not change quickly, even though the law may pivot on a dime. At least in terms of *legal* reproductive freedom, however, in a thumbnail, women (and men for that matter, at least those who are one-half of a “couple”) have the right to have sex while limiting the risk of pregnancy, the right to terminate a pregnancy in the its early stages, the guarantee that one will not be fired if one chooses to have a child, and now finally, to require their employers, if they offer a drug benefit package, to pay for the means by which women control all of the proceeding functions. This is no small feat.

granted legislative equality via Title VII of the Civil Rights Act of 1964.³ On paper, women were to be treated the same as men — most notably, for the purposes of this Essay, in the realm of employment.

As is often the case, however, with most legislation that is designed to magically affect longstanding attitudes with a simple ceremonious bill signing, Title VII, as it was enacted, did not anticipate all of the pernicious ways in which gender discrimination can rear its ugly head. Though it was designed to make men and women coequals, it was flawed for that very reason. Of course, men and women are not the same, especially because of their differing functions in the process of procreation.

In 1976, when the General Electric Company's employer benefit package did not carve out benefits as they related to pregnancy, the Supreme Court concluded that, because female employees received the exact same benefits as their male counterparts, facial equality was achieved.⁴ Such a literal interpretation of Title VII ignored the realities of biology, exploited the infirmities in the drafting of the law, and disregarded the best intentions of those who passed such a momentous piece of legislation.

Responding directly to that Supreme Court decision, Congress passed the Pregnancy Discrimination Act (PDA)⁵ in 1978, recognizing that, in order to ensure *true* employment equity, legislation must account for the differences inherent in our respective biological compositions. The PDA required employers to account not just for the actuality, but for the *possibility*, that a female employee could become pregnant. Although the PDA never mentioned contraception specifically, in retrospect it would not have required a large logical leap to think that it compelled employers who offered their employees drug benefits to have included in that benefit coverage for female prescription contraception. Inexplicably, it took twenty-three years not just for a court to rule that the PDA covers contraception, but for an employee to even challenge the exclusion of such a benefit from her employer-sponsored drug plan.⁶

One might ask why such a conclusion matters. At first blush, it seems trivial

³ Pub. L. No. 88-352, §§ 701–716, 78 Stat. 241, 253–66 (1964) (codified as amended at 42 U.S.C. §§ 2000e to e-17 (2000)).

⁴ Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976).

⁵ Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. 2000e(k) (2000)).

⁶ Although the article “her” is being used in this context, male employees who have female dependants also have standing to raise such issues. See, e.g., Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983) (finding that a health insurance plan covering pregnancy-related costs for female employees while spouses of male employees were not covered violated the PDA); EEOC v. United Parcel Serv., No. CIV 00-2229 (D. Minn. 2001) (consent decree) (on file with author) (reaching a settlement in which a male employee sued for the out-of-pocket expenses he and his wife incurred in buying prescription contraception over the course of seven years).

that a relatively reasonable out-of-pocket expense is now covered under insurance. Delve deeper, however, and one will see that it is about choices and power. Prescription contraception can cost over \$300 a year.⁷ For some women or couples, that amount may be significant, and it becomes a choice between "risking it" or adding it to the long list of monthly bills that must be paid. However, when the expenses of contraception coverage are pooled, the increase in cost to employers and employees is negligible and, in fact, saves enormous costs in other areas where employers have either voluntarily extended coverage or were forced to do so by the PDA.⁸ Additionally, when the total effect of unintended pregnancy is examined, it becomes apparent that society as a whole greatly benefits when women of childbearing age have unfettered access to prescription contraceptives.⁹

Even in light of the above discussion, it is estimated that forty-nine percent of all health care plans still do not offer prescription contraceptives.¹⁰ "[W]hereas most drugs approved by the Federal Drug Administration (FDA) appear almost immediately on health plans . . . [o]ral contraceptives are the only class of FDA-approved prescriptions routinely excluded from insurance coverage."¹¹ And, because men do not require such prescriptions, "women pay 63 to 68 percent higher out-of-pocket healthcare costs than men . . . (with) [a]lmost 5 million privately-insured women between the ages of 14 and 44 hav[ing] out-of-pocket health expenditures exceeding 10 percent of income."¹²

⁷ Rowena Bonoan & Dr. Julianna S. Gonen, *Family Health*, FAMILY HEALTH, Aug. 2000, at 5.

⁸ See JACQUELINE E. DARROCH, COST TO EMPLOYER HEALTH PLANS OF COVERING CONTRACEPTIVES: SUMMARY, METHODOLOGY AND BACKGROUND (1998) ("The added cost for employers of providing this coverage corresponds to \$1.43 per month, which represents a mean increase of less than 1% in employers' costs of providing employees with medical coverage."), available at http://www.agi-usa.org/pubs/kaiser_0698.html.

⁹ See *infra* text accompanying Laylocks 78–94.

¹⁰ *Catholic Charities of Sacramento, Inc. v. Superior Court*, 109 Cal Rptr. 2d 176, 181 (Ct. App. 2001), review granted, 31 P.3d 1271 (Cal. 2001); Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363, 372 (1998) (citing ALAN GUTTMACHER INST., UNEVEN & UNEQUAL: INSURANCE COVERAGE AND REPRODUCTIVE HEALTH SERVICES 12 (1995)).

¹¹ *Catholic Charities*, 109 Cal. Rptr. 2d at 181–82.

¹² *Id.* at 182. The court was alluding to the study conducted in 1994 by the Women's Research and Education Institute which posited that, due in large part to their functions as potential bearers of children, women of reproductive age spend sixty-eight percent more in out-of-pocket health care costs than men. WOMEN'S RESEARCH AND EDUCATION INSTITUTE, WOMEN'S HEALTH INSURANCE COSTS AND EXPERIENCES 2 (1994). This has been referred to as a "gender tax" by Senator Barbara A. Mikulski, member of the Senate Committee on Health, Education, Labor and Pensions. *Improving Women's Health: Why Contraceptive Insurance Coverage Matters: Hearing on S. 104 Before the Comm. on Health, Educ., Labor, and Pensions*, 107th Cong. 4–5 (2001) [hereinafter *Hearing*] (statement of Senator Barbara A. Mikulski).

The question then becomes: If it makes economic sense, why do an enormous number of benefit plans still not offer prescription contraception coverage, even in the wake of a groundswell of support?¹³ The answer may reveal an unflattering picture of the power structure that dominates this country. Employers choose what coverage their benefit packages will offer, and, because the upper echelons of Corporate America are overwhelmingly male, it is easy to deduce why prescription contraception coverage is still not the norm.¹⁴ This point is highlighted by the fact that in 1998, two months after Viagra became available in the United States, more than half of all Viagra prescriptions in this country received some insurance reimbursement. It took forty years for oral contraceptives to attain the same level of coverage.¹⁵

Whether the absence of such benefits is a manifestation of a conscious moral policy decreed from upon high or a genuine lack of empathy¹⁶ and understanding from those in the decision-making loop, many women in this country are forced to pay (or not pay, as is often the case) for contraceptives even though all other prescriptions are covered. Given that Corporate America has been slow to react and that any gains resulting from lawsuits are only directly applicable to the parties in each particular case, legislation is the key to ensuring that women are reimbursed for choosing to employ prescription birth control. So far, two-fifths of the states have chosen to enact an insurance mandate, and the federal government has had similar legislation pending for three years.

This Note argues that federal legislation is imperative to ensure that full

¹³ There is no doubt that the use of contraception has become such an accepted practice in our culture and an integral part of our society, that even the American Life League acknowledges that trying to outlaw contraception would be impossible. "We would have more success if we were to dig a hole in the sand and attempt to empty an ocean into that hole. After all, legal or not, the practice of contraception has become a social behavior that is accepted." Position Paper, Am. Life League, Birth Control: Contraceptive Compromise [hereinafter Position Paper, Birth Control], at <http://www.all.org/issues/nr07.htm> (last visited Nov. 13, 2002). In fact, as of 1995, 85.1 percent of all women (including 81.2 percent of Catholics) between the ages of twenty and forty-four have used oral contraceptives. DARROCH, *supra* ten days, at 6, at 9. And it is not just women that support wider access to coverage — one poll found that "eight in ten Americans, both male and female, would support insurance coverage of contraceptives up to a hypothetical increase of five dollars per month." Sarah E. Bycott, Note, *Controversy Aroused: North Carolina Mandates Insurance Coverage of Contraceptives in the Wake of Viagra*, 79 N.C. L. REV. 779, 783 (2001).

¹⁴ The implication is not that it is easy to understand, but simply that the cause and effect are quite clear.

¹⁵ Amy Goldstein, *Viagra's Success Fuels Gender Bias Debate: Birth Control Advocates Raise Issue*, WASH. POST, May 20, 1998, at A1. Coverage for diaphragms and IUDs has yet to reach this mark. *Id.*

¹⁶ This term is not necessarily meant to be employed in a pejorative way but instead simply as a means to point out the very obvious: a man simply does not know what it means to be a woman (and of course *vice versa*).

contraceptive equality is achieved. The decision in *Erickson v. Bartell*, though revolutionary and a legitimate reflection of contemporary society, is not necessarily on firm legal footing as the PDA is silent on the matter of contraception. Though many state legislatures have succeeded where the federal government has failed, state mandates do not have the same reach as a federal directive. Thus many women in those enlightened states are still left unprotected.

While it may seem unlikely given the current composition of Congress that such a bill will ever see the light of day, it is almost universally recognized that health care costs are spiraling out of control. Not only does this affect the vast majority of Americans directly, but also indirectly as cash-strapped states feel the economic burden of maintaining Medicare and Medicaid. Therefore, the only convincing argument that would be effective at this time in Washington would be not that it is the right thing to do, but that it makes economic sense. This Note attempts to present all of the evidence to support that position.

Finally, one of the perils of such legislative action will be examined: the inevitable collision of ideals between the mandate to achieve equality and religiously affiliated employers that object to contraception on the basis of conscience. One such case is currently making its way through the California court system and provides us with a dynamic analysis of First Amendment doctrine.¹⁷ The outcome of this case is important because, where the California legislation has created a religious exemption, the proposed federal legislation has no such exclusion.

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Prior to 1964, the only measures the federal government could take in eliminating employment discrimination were in its own hiring and awarding of contracts to nongovernmental entities.¹⁸ Executive Orders addressing discrimination in federal hiring were initiated during the administration of Franklin Delano Roosevelt, and decrees involving government contracts were promulgated from the White House beginning with the Truman administration.¹⁹ Any attempts to broaden such ideals through federal legislation were invariably stalled and inevitably thwarted. The only legislative success in this area was realized in a handful of states.²⁰

It was not until the death of President Kennedy that Congress felt the need to

¹⁷ *Catholic Charities*, 109 Cal. Rptr. 2d 176 (Ct.App. 2001), *review granted*, 31 P.3d 1271 (Cal. 2001).

¹⁸ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLES VII & XI OF THE CIVIL RIGHTS ACT OF 1964, at 3 (1968).

¹⁹ *Id.* at 1-3.

²⁰ *Id.* at 1.

extend the ideal of equality. As a tribute to the slain President who championed civil rights more than any of his predecessors, President Johnson made the passing of the Civil Rights Act a priority.²¹ Gender equality, however, was not the same hot-button issue as was race at the time. All executive action prior to the passage of the Civil Rights Act of 1964 dealt exclusively with race or religion; gender equality was not part of the original legislative proposal.²² Gender was included in the Act at the last minute when a Congressman from Virginia offered an amendment that passed through the House of Representatives by a vote of 168 to 133.²³

Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."²⁴ This proscription extends to the benefit packages an employer offers to its employees, including health insurance, because such benefits are seen as compensatory.²⁵ Title VII prohibits both intentional discrimination (unless it is a "bona fide occupational qualification") and *de facto* discrimination manifested by policies that are "neutral in form but discriminatory in effect."²⁶

To establish a *prima facie* disparate impact claim, a plaintiff must show that the challenged employment practices "in fact fall more harshly on one group than another, without justification. . . ." Once a plaintiff has established a *prima facie* case that a policy has a disproportionate adverse impact upon women, the employer may defend the policy by showing it is justified by business necessity.²⁷

²¹ *Id.* at 10.

²² *Id.* at 3-10.

²³ *Id.* at 10. The opinion in *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001), suggests that the powerful Representative Smith might have proposed the amendment in an attempt to create another controversial hurdle to be overcome in the passing of the legislation. Whatever the impetus for his proposing the amendment, it is known that Smith voted against final passage of the Civil Rights Act of 1964. *Id.* at 1269.

²⁴ 42 U.S.C. § 2000e-2(a)(1) (2000).

²⁵ *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 (1983) (establishing that such benefits are "conditions" and/or "privileges of employment").

²⁶ Law, *supra* note 10, at 374 (citing *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 681 (8th Cir. 1996)).

²⁷ *Id.* at 374-75 (quoting *Krauel*, 95 F.3d at 681, and citing *Dothard v. Rawlinson*, 433 U.S. 321, 331-32 (1977)) (footnotes omitted). The author goes on to say: "It is difficult to imagine how an employer could show that 'business necessity' requires excluding prescription contraceptive services from insurance coverage." Law, *supra* note 10, at 375.

GENERAL ELECTRIC V. GILBERT

In 1976 the Supreme Court granted certiorari to hear a suit brought against General Electric (GE) in which the plaintiff argued that GE's failure to provide disability benefits arising from pregnancy violated Title VII.²⁸ The majority of the Court, led by Justice Rehnquist, found that the plaintiffs failed to show "that the financial benefits of the Plan 'worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program.'"²⁹ Justice Rehnquist went on to write:

The Plan, in effect . . . is nothing more than an insurance package, which covers some risks, but excludes others. The "package" [in its coverage of male and female employees] covers exactly the same categories of risk, and is facially nondiscriminatory in the sense that "[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." As there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme simply because women disabled as a result of pregnancy do not receive benefits; that is to say, gender-based discrimination does not result simply because an employer's disability-benefits plan is less than all-inclusive. . . . [P]regnancy-related disabilities constitute an additional risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded inclusion of risks.³⁰

However, a vigorous dissent by Justice Brennan in *Gilbert* pointed out that the majority's ruling was contrary to the findings of six Courts of Appeals that ruled on the subject and guidelines published by the Equal Employment Opportunity Commission (EEOC) in 1972.³¹ Justice Brennan stated that the EEOC ruling in particular should have been afforded "great deference" because that is the very *raison d'être* of the commission — to carry out the mandate of Title VII.³² To Justice Brennan, evidence that the EEOC spent seven years promulgating

²⁸ *General Elec. Co. v. Gilbert*, 429 U.S. 125, 127–28 (1976), *superseded by* Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. 2000e(k) (2000)).

²⁹ *Id.* at 138 (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496 (1974)).

³⁰ *Id.* at 138–39 (quoting *Geduldig*, 417 U.S. at 496–97) (citations and footnotes omitted).

³¹ *Id.* at 146–47 (Brennan, J., dissenting).

³² *Id.* at 155–58.

pregnancy-oriented policy according to its own interpretation of Title VII was particularly illustrative of the deliberate and thorough nature of its findings.³³ Justice Brennan gave a backhanded defense for GE's disability policy in saying that, like so many other companies, it was devised in a different era when women were not as strong a presence in the workforce.³⁴ For Justice Brennan, *Gilbert* was clearly an opportunity to adopt a progressive interpretation of the Civil Rights Act that reflected modern society.

An additional dissent by Justice Stevens was just as persuasive. He concluded that the Court was creating a class of persons that was at risk — those who are absent due to pregnancy.³⁵ “By definition, such a rule discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male.”³⁶ Justice Stevens argued that discrimination “analysis is the same whether the rule relates to hiring, promotion, the acceptability of an excuse for absence, or an exclusion from a disability insurance plan.”³⁷

THE PDA

The incongruous ruling by the Supreme Court in *Gilbert* and the compelling dissents found therein mobilized Congress to create the Pregnancy Discrimination Act (PDA)³⁸ to directly circumvent the Court's ruling.³⁹ The PDA amended the definitions section of Title VII and added:

The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work⁴⁰

The effect of the PDA was to identify “pregnancy discrimination” as being discrimination on the basis of gender. The PDA, however, does not require that employers treat pregnancy leave differently than any other type of leave offered to

³³ *Id.* at 156–57.

³⁴ *Id.* at 159–60.

³⁵ *Id.* at 161 (Stevens, J., dissenting).

³⁶ *Id.* at 161–62.

³⁷ *Id.* at 162.

³⁸ Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2000)).

³⁹ HAROLD S. LEWIS, JR., CIVIL RIGHTS AND EMPLOYMENT DISCRIMINATION LAW 199 (1997).

⁴⁰ 42 U.S.C. § 2000e(k) (2000).

all of its employees for any other medical conditions.⁴¹

A RULING FROM THE EEOC

Despite Congress' relatively quick reaction decrying the Supreme Court's ruling in *Gilbert*, the EEOC did not rule that the PDA requires prescription contraception to be offered under otherwise comprehensive drug plans until December 14, 2000.⁴²

In its decision, the EEOC bolstered its position by citing a more contemporary Supreme Court case, *UAW v. Johnson Controls, Inc.*⁴³ In that case, the Court found that classifying employees merely on the basis of their capacity to have children is sex-discrimination, regardless of whether they are pregnant.⁴⁴ "Under the Court's analysis, the fact that it is women, rather than men, who have the ability to become pregnant cannot be used to penalize them in any way, including in the terms and conditions of their employment."⁴⁵ The Commission went on to say:

Contraception is a means by which a woman controls her ability to become pregnant. The PDA's prohibition on discrimination against women based on their ability to become pregnant thus necessarily includes a prohibition on discrimination related to a woman's use of contraceptives. Under the PDA, for example, Respondents could not discharge an employee from her job because she uses contraceptives. So, too, Respondents may not discriminate in their health insurance plan by denying benefits for prescription contraceptives when they provide benefits for comparable drugs and devices. . . . [T]he PDA's prohibition of discrimination in connection with a woman's ability to become pregnant necessarily includes the denial of benefits for contraception.⁴⁶

⁴¹ LEWIS, *supra* note 39, at 199 ("[T]he amendment's dominant principle is nondiscrimination, rather than preference."). Individual state statutes granting longer leaves for pregnancy, however, were determined by the Supreme Court *not* to be preempted by the PDA because such grants are in keeping with the *purpose* of the PDA. See *UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991).

⁴² Comm'n Decision on Coverage of Contraception, 2000 WL 33407187 (Equal Employment Opportunity Comm'n (Dec. 14, 2000)) [hereinafter EEOC Decision].

⁴³ 499 U.S. 187 (1991).

⁴⁴ *Id.* at 1210.

⁴⁵ EEOC Decision at *2 (holding that female employees of childbearing age could not be discriminated against from being employed in an area of the company where exposure would place a pregnant woman and her baby in grave danger) (citing *Johnson Controls*, 499 U.S. at 199, 211).

⁴⁶ *Id.* at *2-*3.

In *EEOC Decision*, the EEOC reasoned that Congress' failure to explicitly mention contraception spoke volumes because it had expressly limited the PDA's applicability to abortion.⁴⁷ Among those items the EEOC believed that Congress attempted to address was the assumption that female employees would become pregnant.⁴⁸ "Congress thus prohibited discrimination against women based on 'the whole range of matters concerning the childbearing process,' and gave women 'the right . . . to be financially and legally protected before, during, and after [their] pregnancies.'"⁴⁹

The Commission therefore stated that its interpretation of the PDA was the clearest manifestation of Congress' intent when it enacted the amendment to provide equal standing to men and women in their capacities of being either actual or potential employees.⁵⁰ Such a ruling, then, would ensure that women would not be deprived of equality because of their status as actual or potential bearers of children.

A NEW ERA

In 1998, Professor Sylvia Law observed that, "if excluding contraception from employment-based health insurance is pervasive, damaging, and illegal (in other words, a slam-dunk legal argument), no one has noticed or asserted it."⁵¹ On June 12, 2001, twenty-three years after the PDA was enacted to amend the Civil Rights Act of 1964, the first case to adopt Law's argument was decided. In *Erickson v. Bartell Drug Co.*,⁵² Jennifer Erickson, a Seattle pharmacist for the Bartell Drug Company, challenged the status quo.⁵³ Ms. Erickson not only was unable to receive benefit coverage from her own health plan for prescription contraceptives, but through her profession she encountered many women each day who faced the same problem.

In September of 2001, Ms. Erickson testified in front of Congress and elucidated her motivation for filing suit:

Contraception is one of the most common prescriptions I fill for women. I am often the person who has the difficult job of telling a woman that her insurance plan will not cover contraceptives. It is an unenviable and frustrating position to be in, because the woman is often upset and

⁴⁷ *Id.* at *3.

⁴⁸ *Id.*

⁴⁹ *Id.* (quoting H.R. REP. NO. 95-948, at 5 (1978); 124 CONG. REC. H38, 574 (daily ed. Oct. 14, 1978)) (footnote omitted) (alterations in original).

⁵⁰ *Id.* at *3.

⁵¹ Law, *supra* note 10, at 364.

⁵² 141 F. Supp. 2d 1266 (W.D. Wash. 2001).

⁵³ *See id.*

disappointed, and I am unable to give her an acceptable explanation. Why? Because there is no acceptable explanation for this shortsighted policy. All I could say was, "I don't know why it's not covered. My pills aren't covered either and it doesn't make any sense to me."⁵⁴

Erickson's befuddlement was constrained compared to the many women's groups that became outraged when the drug Viagra became available to help cure male impotence.⁵⁵ Many drug plans began offering coverage for Viagra while continuing to deny prescriptive contraception coverage. Though Erickson and the various feminist groups may have had different motivations, their argument was basically the same: not offering prescription contraception coverage was not only gender-biased and based on antiquated sexual and chauvinistic beliefs, but more specifically, it violated the Pregnancy Discrimination Act.

In ruling that withholding contraception coverage for female employees and dependents of male employees is discriminatory, the court in *Erickson* itself remarked:

Employers in general, and Bartell in particular, might justifiably wonder why, when Title VII has been on the books for thirty-seven years, this Court is only now holding that it includes a right to prescription contraceptives in certain circumstances. The answer, of course, is that until this case, no court had been asked to evaluate the common practice of excluding contraceptives from a generally comprehensive health plan under Title VII.⁵⁶

Adopted as part of its defense then, Bartell argued that there was no precedent for the court to rule that female employees are entitled to prescription contraception coverage if the employer is to offer a generally comprehensive drug plan. Judge Lasnik retorted: "While there are a number of possible explanations for the lack of litigation over this issue, none of them changes the fact that, having now been properly raised as a matter of statutory construction, this Court is constitutionally

⁵⁴ *Hearing, supra* note 12, at 38–39 (statement of Jennifer Erickson, Pharmacist, Bartell Drug Co.).

⁵⁵ See generally Bycott, *supra* note 13, at 779 (discussing the outrage expressed by women toward the speed at which Viagra became available); Goldstein, *supra* note 15. It was noted in the court's opinion in *Erickson* that Bartell's prescription benefit plan did not include coverage for Viagra. In an interesting twist, and conceiving an issue that must wait for another day, the court noted in *dicta* that "such an exclusion may later be determined to violate male employees' rights under Title VII. This issue is not before the Court." *Erickson*, 141 F. Supp. 2d at 1275 n.12.

⁵⁶ *Erickson*, 141 F. Supp. 2d at 1275.

required to rule on the issue before it."⁵⁷

ERICKSON V. BARTELL DRUG CO.

In his analysis, Judge Lasnik noted that the PDA does not specifically cover prescription contraceptives. Undaunted, he boldly asserted that, because the PDA was a direct result of the *Gilbert* decision and an adoption of Justices Brennan's and Steven's respective dissents, a "broader interpretation" of Title VII is required.⁵⁸ Title VII requires employers not only to recognize "that there are sex-based differences between men and women employees, but also require[s] employers to provide women-only benefits or otherwise incur additional expenses on behalf of women in order to treat the sexes the same."⁵⁹

The court went on to note that the facts in *Erickson* regarding the coverage that Bartell offered its employees in essence matched those in *Gilbert*. The similarities were that:

An employer has chosen to offer an employment benefit which excludes from its scope of coverage services which are available only to women. All of the services covered by the policy are available to both men and women, so, as was the case in *Gilbert*, "[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not."⁶⁰

Judge Lasnik remarked, however, that one major difference compelled him to reach a different conclusion than the United States Supreme Court did twenty-five years earlier: timing. The *Gilbert* decision came before (or rather begat) the PDA, and "the intent of Congress in enacting the PDA, even if not the exact language used in the amendment, shows that mere facial parity of coverage does not excuse or justify an exclusion which carves out benefits that are uniquely designed for women."⁶¹

The *Erickson* case's groundbreaking proclamation established that Title VII, as it is amended by the PDA:

is not a begrudging recognition of a limited grant of rights to a strictly defined group of women who happen to be pregnant. . . . [I]t is a broad acknowledgement of the intent of Congress to outlaw any and all discrimination against any and all women in the terms and conditions of

⁵⁷ *Id.* (footnote omitted).

⁵⁸ *Id.* at 1270.

⁵⁹ *Id.*

⁶⁰ *Id.* (quoting *General Elec. Co. v. Gilbert*, 429 U.S. 125, 135 (1976)).

⁶¹ *Id.* at 1271.

their employment, including the benefits an employer provides to its employees. Male and female employees have different, sex-based disability and healthcare needs, and the law is no longer blind to the fact that only women can get pregnant, bear children, or use prescription contraception. The special or increased healthcare needs associated with a woman's unique sex-based characteristics must be met to the same extent, and on the same terms, as other healthcare needs. Even if one were to assume that Bartell's prescription plan was not the result of intentional discrimination,⁶² the exclusion of women-only benefits from a generally comprehensive prescription plan is sex discrimination under Title VII.⁶³

Though Title VII in no way requires employers to offer any type of benefit, when an employer chooses to offer prescription drug coverage, it must legally do so in a way that is equally *comprehensive* to both sexes.⁶⁴

Bartell argued that, because the PDA did not specifically cover contraception, but rather only "pregnancy, childbirth, or related medical conditions," its drug plan was not contrary to the statute. Despite that argument, and in what is one of the major focuses of appeal, Judge Lasnik boldly stated:

Having reviewed the legislative history of the PDA, it is clear that *in 1978 Congress had no specific intent regarding coverage for prescription contraceptives*. The relevant issue, however, is whether the decision to exclude drugs made for women from a generally comprehensive prescription plan is sex discrimination under Title VII, with or without the clarification provided by the PDA. The Court finds that, regardless of whether the prevention of pregnancy falls within the phrase "pregnancy, childbirth, or related medical conditions," Congress' decisive overruling of *General Elec. Co. v. Gilbert* evidences an interpretation of Title VII which necessarily precludes the choices Bartell has made in this case.⁶⁵

⁶² That, in fact, was not argued at all. Judge Lasnik simply remarked that the plan was undoubtedly a relic based on an antiquated notion of the female gender's impact in, and contribution to, the workforce. *Id.* at 1271 n.7. In actuality, Bartell was in the process of adding coverage of female prescription contraception to its plan before the suit was filed. Ironically it was the filing of the suit that reportedly forced them to shelf the idea. Carol M. Ostrom, *Judge: Add Birth Control to Bartell's Health Plan*, SEATTLE TIMES, June 13, 2001, at A1, available at 2001 WL 3512036. In addition, before the decision had come down, its union employees had already received the coverage through collective bargaining. *Id.*

⁶³ *Erickson*, 141 F. Supp. 2d at 1271-72.

⁶⁴ *Id.* at 1272.

⁶⁵ *Id.* at 1274 (emphasis added) (citation omitted).

There is little doubt that one of the greatest objects of criticism in *Erickson* is its broad interpretation of the PDA in relation to Title VII. In the above quoted passage, Judge Lasnik is applying a contemporary judicial amendment to a law that he views as being slightly out of date. He seems to imply that, if Congress were to have enacted the PDA today, it would include contraception coverage, so the Court may as well read it into the Act after consulting Title VII. Though it is enlightened and ideal, the assertion is a bold one, prone to attack.

Precedent to broadly construe the PDA, however, is on the side of Judge Lasnik. When faced with a similar incident of ambiguity in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*,⁶⁶ the Supreme Court decided against reading the PDA narrowly. In that case, the majority held that pregnancy benefits to the female spouses of employees that were inferior to those given to female employees were discriminatory under the PDA.⁶⁷ This despite the fact, as the dissent so stridently pointed out, that the language in the PDA only specifically refers to "employees."⁶⁸ As Sylvia Law observed: "The majority recognized instead that the language of the PDA reflects a broad remedial purpose. In short, the PDA broadly requires employers to treat equally pregnancy and pregnancy-related conditions for which benefits are provided to an employee or his or her otherwise qualified dependents."⁶⁹

THE *BARTELL* APPEAL — INCREASED COSTS OR A FIGHT FOR CONTROL?

As may be expected, though generally hailed as a step in the right direction by most women's groups, *Erickson* has been met with criticism from other fronts, especially religious groups and conservatives.⁷⁰ Putting aside for a moment the inevitable head-on collision with some powerful religious sects, it is argued that requiring equal access to drug benefits will cost insurance companies and employers billions of dollars.⁷¹ The fear is that governmental intervention into the free market may cause many employers to take away drug benefits from all employees altogether because of rising costs.⁷² With the advent of fertility drugs, impotence drugs and the many drugs we are most certain to see in the future that are gender-specific, it is argued that dropping drug benefits entirely may end up being the only

⁶⁶ 462 U.S. 669 (1983).

⁶⁷ *Id.* at 685.

⁶⁸ *Id.* (Rehnquist, J., dissenting).

⁶⁹ Law, *supra* note 10, at 378.

⁷⁰ See a sampling of issues causing consternation from the perspective of the Christus Medicus foundation at <http://www.cmfoundnation.com/EPICC/epicchtm> (last visited Jan. 23, 2003).

⁷¹ See *infra* notes 75 and 97.

⁷² *Infra* note 97.

facially neutral solution possible to ward off the inevitable slippery slope.⁷³

As the lawyers who defended UPS in a similar suit and negotiated the settlement in *EEOC v. United Parcel Service*⁷⁴ that extended prescription contraception coverage to its employees and their dependents argued:

Few, if any, employers can afford to provide health plans that cover any and all treatments [F]or the thirty-seven years since the passage of Title VII, employers have been making numerous cost/benefit decisions on whether to include or exclude various medical treatments If Judge Lasnik's reasoning is adopted by other federal courts, employers are going to be subjected to extensive litigation and potentially billions in additional costs for their health plans.⁷⁵

At first, of course, the impact would be additional costs to employers. However, estimates show that the increase would only be approximately one percent.⁷⁶ That fact is generally recognized by parties on both sides of the argument.⁷⁷

⁷³ *Id.*

⁷⁴ No. CIV 00-2229 PAM JGL (D. Minn. 2001) (consent decree) (on file with author).

⁷⁵ Howard Shapiro & Robert Rachal, *Federal Court Issues Decision That May Cost Health Plans Billions*, MCCALLA E-NEWS UPDATE, June 13, 2001, at http://www.mtphs.com/newsletters/E-Newsletters/e-News_Updates/GenL&E-e-news-PDA-6-13-01.htm. Note that the argument is not that contraception coverage itself will cost employers a significant amount, but that legislatures are getting into the habit of making decrees and the aggregate of other mandates surely has increased costs, and will continue to do so until they spiral out of control. In addition, a legal system that is receptive to employee challenges to an employer's plan will create prohibitive defense costs in litigation matters.

⁷⁶ Darroch, *supra* note 8, at 1. The Alan Guttmacher Institute commissioned Buck Consultants, an employee benefit, actuarial, and compensation consulting firm, to analyze the costs of covering prescription contraception. *Id.* at 1. Of the \$21.40 increase in total costs (including administrative costs and covering employees and dependents) it was assumed that the employee would absorb \$4.28 or twenty percent based on the average co-pay in such drug benefit plans, leaving \$17.12 to be covered by the employer. *Id.* Information was obtained from six pharmacy benefit managers that represented 150 million insured people in the United States to determine that the average number of contraception prescriptions (including oral contraceptives, diaphragms, injectables, implants and IUDs) per employee was 0.80591. That number was then multiplied by the average cost per prescription, \$27.77, to arrive at the \$21.40. *Id.* at 2-3. Almost eighty percent of that cost was attributed to oral contraception, otherwise known as "the pill," the most expensive form of contraception. *Id.* at 3.

⁷⁷ For example, Bartell in its appeal made no assertions at all that the *Erickson* result would foist increased costs upon employers and insurance companies. On the contrary, the appellate brief stressed how low the out-of-pocket expenses would be to Ms. Erickson and her husband and others like them: "Far from being a 'gaping hole' in her benefits coverage, the lack of prescription birth control coverage does not 'cause a materially adverse change in the terms and conditions of employment,' and thus is not substantial enough to constitute

The immediate costs are negligible and far outweighed by the eventual savings that employers should expect to realize. The fact that many health plans do not offer prescription drug coverage is thought to contribute to the alarmingly high rate of unintended pregnancy in this country.⁷⁸ Given that it is estimated that almost sixty percent of pregnancies in the United States are unplanned,⁷⁹ theoretically, employers are destined to see savings.⁸⁰

The consequences of each of these unplanned pregnancies can be enormous, not just to each woman who finds herself in such a position, but also to society as a whole. First, because the parents are ill-prepared in such instances, children of unwanted pregnancies are more susceptible to infant mortality and morbidity⁸¹ and more likely to be a burden on society.⁸² This is nothing new. Medicaid realized

an adverse action." Brief for Appellant at 15, *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001) (No. 00-1213L). In addition, the testimony of Kate Sullivan, on behalf of the U.S. Chamber of Commerce at the same Congressional hearings in which Jennifer Erickson appeared, did not strongly dispute the assumption that there will be nominal costs to employers and certainly offered no evidence to the contrary. *See Hearings, supra* note 16, at 42-45 (statement of Kate Sullivan, Director, Health Care Policy, U.S. Chamber of Commerce).

⁷⁸ Law, *supra* note 10, at 364.

⁷⁹ COMM. ON UNINTENDED PREGNANCY, INST. OF MED., *THE BEST INTENTIONS: UNINTENDED PREGNANCY AND THE WELL-BEING OF CHILDREN AND FAMILIES* 1 (Sarah S. Brown & Leon Eisenberg eds., 1995) [hereinafter *BEST INTENTIONS*]; DARROCH, *supra* note 8, at 6 ("Some 3.04 million women experience an unintended pregnancy each year. . . . Some 53% of these unintended pregnancies are among women who experienced contraceptive failure . . . and 47% are among those who were not using any method during the month they conceived."); Bonoan & Gonen, *supra* note 7, at 1 ("Forty-eight percent of women of reproductive age (15-44) had at least one unplanned pregnancy, 28% had one or more unplanned births, 30% had one or more abortions and 11% had both.").

⁸⁰ *See* EEOC Decision, *supra* note 12, at n.18 (describing the assumption as "common sense"); WILLIAM M. MERCER INC., *WOMEN'S HEALTH CARE ISSUES: CONTRACEPTION AS A COVERED BENEFIT* 5 (1999) ("[F]or every tax dollar used for contraception, Medicaid saves \$4.40 in medical costs and social services cost."). *See also* James Trussell et al., *The Economic Value of Contraception: A Comparison of 15 Methods*, 85 AMERICAN JOURNAL OF PUBLIC HEALTH (1995); James Trussell et al., *Medical Care Cost Savings From Adolescent Contraceptive Use*, 29 FAMILY PLANNING PERSPECTIVE (1997). To be fair, this is the assumption upon which many of those favoring benefit coverage rely, if for no more reason than it intuitively would seem to be true. One commentator suggests, however, that this is not yet a truism as most access studies have focused on developing countries and not the United States. *See* Bycott, *supra* note 11, at 784-85 ("Thus far . . . no studies have been conducted exploring the validity of this basic assumption upon which much of the cost-benefit analysis in favor of contraceptive coverage hinges.").

⁸¹ *BEST INTENTIONS*, *supra* note 79 at 1 ("The child of an *unwanted* conception especially . . . is at greater risk of being born at low birthweight, of dying in its first year of life, of being abused, and of not receiving sufficient resources for healthy development.")

⁸² *See* Law, *supra* note 10, at 365-66 (footnotes omitted):

The adverse effects of unintended pregnancy do not end in infancy. Unwanted

the benefit of providing access to prescription contraceptives in 1993. Disregarding the astronomical costs of an unhealthy birth, even a normal delivery averages over \$6,000, while one requiring a cesarean section averages over \$10,000.⁸³

All of this is assuming that the pregnancy is not terminated. It has been estimated that as many as forty-four percent of all of the unintended pregnancies in this country result in abortion.⁸⁴ In order to reduce the financial and psychological burdens of the approximately one million women who have resorted to abortion, contraception has to be more accessible. Conservatives clamor *ad nauseum* that abortion and unintended pregnancies have an enormous impact in diminishing our collective morality, but those very same people seek to limit a woman's access to a highly effective, and most realistic,⁸⁵ means of eliminating such social ills.

Considering that contraception can be obtained for as little as \$150 a year, the argument that mandating prescription coverage for contraception would increase costs to the health insurance industry and thus to employers has been overblown if not proven to be economically irrational.⁸⁶ Casting that aside, however, and assuming *arguendo* that mandating coverage *would* result in increased costs to employers, Title VII bars such a defense from being raised.

In *Erickson*, Judge Lasnik addressed this issue as a result of Bartell having argued that an extension of contraception coverage to female employees would take the employers' power of controlling the costs of drug benefit plans out of their hands. The Court noted that Title VII contains no opt-out provision on the basis of cost:

While it is undoubtedly true that employers may cut benefits, raise

children and adolescents are nearly twice as likely as wanted children to receive psychiatric care for both mild and severe psychological disorders. In addition, they are twice as likely to have a record of juvenile delinquency and three times more likely to have a record of adult criminal activity.

⁸³ Diana Korte, *Vaginal Birth After Cesarean: A Primer for Success*, MOTHERING, July 1998, at 54 ("in 1995, a hospital vaginal birth averaged \$6,378, and a cesarean, \$10,678, according to the American College of Obstetricians and Gynecologists."); see also Bonoan & Gonen, *supra* note 7, at 1 ("[For a] woman engaged in regular sexual activity . . . use of no contraceptive method over 5 years results in 4.25 unintended pregnancies at a cost of \$14,663.").

⁸⁴ Jacqueline Darroch Forrest, *The Role of Hormonal Contraceptives: Epidemiology of Unintended Pregnancy and Contraceptive Use*, 170 AM. J. OBSTETRICS & GYNECOLOGY 1485, 1485 (1994).

⁸⁵ As opposed to the ongoing campaign to promote abstinence as the only method to ward off unintended pregnancies.

⁸⁶ See Bycott, *supra* note 13, at 788 (discussing the relative prevalence of insurance coverage for childbirth and abortion); James Trussell et al., *supra* note 81, at 494, 500 (1995) (providing data based on a theoretical five year study of various contraceptives and the number of pregnancies each would prevent relative to the cost of each).

deductibles, or otherwise alter coverage options to comply with budgetary constraints, the method by which the employer seeks to curb costs must not be discriminatory Although Bartell is permitted, under the law, to use non-discriminatory cuts in benefits to control costs, it cannot balance its benefit books at the expense of its female employees.⁸⁷

Because Title VII mandates equality regardless of the extra costs incurred by employers, such an argument should inevitably not be entertained — *but only if contraception is deemed to be within the scope of the PDA*. The insurance industry and those similarly situated have thus appealed to the lawmakers. In turn, they may ultimately settle this issue, either by enacting legislation mandating coverage or by continuing to do nothing in the hopes that Bartell and other employers, the number of which is bound to increase dramatically, find more sympathetic ears in other courts.

Another aspect of this case is the nature of contraception as a drug. Though pregnancy and all that medically goes along with it, from pre-natal care to birth, are “medical conditions” that require the extension of health care benefits under the PDA, some argue that the *potential* to become pregnant is not a medical condition.⁸⁸ Rather, it is a normal state for most women. To many, what sets Viagra and prescription contraception apart is that the former is arguably designed to correct a condition that places the sufferer outside of the norm,⁸⁹ whereas the latter is merely designed to facilitate a lifestyle.⁹⁰ And “[t]he insurance industry traditionally has denied coverage for procedures or medications viewed as elective

⁸⁷ *Erickson v. Bartell Co.*, 141 F. Supp. 2d 1266, 1274 (W.D. Wash. 2001).

⁸⁸ See Brief for Appellant at 27, *Erickson* (No. 00-1213L) (“The capacity to become pregnant is not a ‘medical condition’ as this phrase was used in the PDA, or as commonly understood. To conclude otherwise would mean that the capacity to become sick, which every person shares, is also a ‘medical condition.’”).

⁸⁹ An alternative interpretation, adopted by many insurance companies and employers, is that erectile dysfunction is a normal condition of aging, just as the capacity to become pregnant is a normal condition of being a woman, and impotence treatment itself is a quality-of-life treatment. Bycott, *supra* note 13, at 795–96.

⁹⁰ See generally Lisa A. Hayden, *Gender Discrimination Within the Reproductive Health Care System: Viagra v. Birth Control*, 13 J.L. & HEALTH 171 (analyzing whether healthcare inequity truly exists by comparing the intended use of Viagra with the intended use of contraceptives). To see this argument operate from a more ideologically charged vantage point, see Domenico Bettinelli, Jr., *Opinion: A Tough Pill to Swallow*, CATH. WORLD NEWS, July 24, 2000, at <http://www.cwnews.com/Browse/2000/07/13497.htm>; Press Release, Wendy Wright, CONCERNED WOMEN FOR AMERICA, Bill Would Force Companies to Pay for Contraceptives (Sept. 13, 2001), at http://www.cwfa.org/library/misc/2001-09-13_contraceptives.shtml.

or cosmetic and not medically required — so called ‘quality-of-life’ treatments.”⁹¹

Bartell raised the argument in its defense in *Erickson* that “a woman’s ability to control her fertility differs from the type of illness and disease normally treated with prescription drugs in such significant respects that it is permissible to treat prescription contraceptives differently than all other prescription medicines.”⁹² But Judge Lasnik, in regarding all of the information that has already been cited in this Note as significant, ruled that contraception availability is important to women, children and society in general “because it can help to prevent a litany of physical, emotional, economic and social consequences.”⁹³ Whether this justifies classifying the “potential to become pregnant” as a “medical condition,” thus falling within the ambit of the PDA on the one hand, or a judicially manipulated manifestation of an idealistic policy stance favoring greater access on the other is certainly the focus of much debate.⁹⁴

It is easy to summarize the entire battle as this: Just as this issue of access to prescription contraception benefits concerns control over one’s reproductive rights or sexual freedom, on the flip side, it also concerns employers’ and the insurance industry’s control over the terms of doing business.⁹⁵ Some have argued that, if the insurance industry and employers were able to interact freely without government intervention, health care plans would cost less and be more flexible, and fewer people would be without health insurance.⁹⁶ In fact, the U.S. Chamber of Commerce will go so far as to blame the sum total of the recent trend of higher costs as being a “*direct result* of state legislatures’ mandates on insured health plans offered by employers.”⁹⁷

⁹¹ Bycott, *supra* note 13, at 795–96. Reverting back to feminist theory for a moment, there is certainly one sense in which both contraception and Viagra are similar that cannot be overlooked: “Although Viagra and contraceptives are not medicinally parallel in nature or function, both provide a degree of control over an individual’s sexuality that would otherwise be absent.” *Id.*, at 781.

⁹² *Erickson*, 141 F. Supp. 2d at 1272.

⁹³ *Id.* at 1273.

⁹⁴ See Brief for Appellant at 26–29, *Erickson* (No. 00-12-13L).

⁹⁵ For an example of the defense by the insurance industry, see *Hearing, supra* note 12, at 44 (statement of Kate Sullivan, Director Health Care Policy, U.S. Chamber of Commerce):

We make no distinction in our opposition to mandates on the basis of cost, popularity of the benefit, potential indirect benefit to the company, widespread coverage already by employers, or regard for the legislators who support the proposal: The Chamber is an equal opportunity organization when it comes to just saying “No.”

See also Shapiro & Rachal, *supra* note 75 (arguing that the cost to employers of government mandated medical coverage is prohibitive).

⁹⁶ *Hearing, supra* note 12, at 44 (statement of Kate Sullivan).

⁹⁷ *Id.* (emphasis added).

EPICC — A PROPOSED LAW

Though Bartell was going to extend contraception coverage to its employees before the suit was instituted, it has chosen to appeal the decision. There are certainly many other parties that are very interested in seeing Bartell prevail at the appellate level and exploit the perceived “reading in” of prescription contraception coverage by Judge Lasnik as required by the PDA. Of course, the PDA does not specifically mention contraception coverage, giving strict constructionists a strong bit of ammunition should Bartell encounter a like-minded appellate court. In order to give lasting effect to the *Erickson* decision, it is crucial that Congress enact legislation that would make the criticism of the case moot.

The Senate Committee on Health, Education, Labor and Pensions, chaired by Senator Edward Kennedy, titled the hearing in which Jennifer Erickson appeared *Improving Women's Health: Why Contraceptive Insurance Coverage Matters*. The hearing was convened to provide background testimony for the pending Equity in Prescription Insurance and Contraceptive Coverage Act of 2001 (EPICC).⁹⁸ EPICC has been on the table for three consecutive Congresses and would codify the principle that emerged out of the *Erickson* decision, except, of course, it would apply to a much larger group of employers. It may be unlikely that the current Congress will revive the proposal.

EPICC would have amended the Employee Retirement Income Security Act of 1974 (ERISA)⁹⁹ and the Public Health Service Act (PHSA)¹⁰⁰ to require all group health plans and health insurers providing insurance coverage to provide “prescription contraceptive drugs or devices approved by the Food and Drug Administration [(FDA)] . . . if such plan provides benefits for other outpatient prescription drugs or devices.”¹⁰¹ It would also have required the benefit plan to cover the incidental health costs related to prescription contraception, most notably the initial doctor’s visit required to obtain the prescription and the annual visits required to renew it.¹⁰² Additionally, it would have prevented an employer or group

⁹⁸ S. 104, 107th Cong. (2001).

⁹⁹ 29 U.S.C. §§ 1001–1461 (2000). The legislation would add a new section to title I, part 7, subpart B of ERISA. 29 U.S.C. §§ 1185–1185(b).

¹⁰⁰ 42 U.S.C. §§ 201 to 300gg-92 (2000). The legislation would add a new section to title XXVII, part A, subpart 2 of PSHA. 29 U.S.C. §§ 300gg-4 to §§ 300gg-6.

¹⁰¹ S. 104 sec. 3(a), § 714(a)(1); *id.* sec. 4(a), § 2707(a)(1).

¹⁰² *Id.* sec. 3(a), § 714(a)(2); *id.* sec. 4(a), § 2707(a)(2). Seemingly, for plans that do not cover routine doctor’s visits for preventive care, this would be an additional expense part and parcel with the increased costs of the enhanced drug benefits package. This point is an additional bone of contention for Bartell in its appeal, not because of the costs involved, but because of its purported lack of control over that portion of the expanded benefits. The *Erickson* decision also requires the company to cover the costs of these additional expenses on the same basis the insurance plan would pay for doctor’s visits for any other type of ailment to any other employee. Bartell, in its brief, argues that the court is exceeding its

plan from denying eligibility based on the potential for using such items.¹⁰³ EPICC expressly allowed for a drug plan to impose deductibles or coinsurance on the same basis or in the same proportions it does for other drugs covered.¹⁰⁴

Though EPICC languished on Capitol Hill, it provided a blueprint for much of the state action that has been seen in the past few years. Twenty states now have contraceptive equity laws.¹⁰⁵ It is also consistent with the drug plan the federal government has offered its own employees.

Since 1998, the federal government has demanded drug benefit equity within the Federal Employees Health Benefits Program (FEHBP), the largest employer-sponsored health insurance program in the world, ensuring that employees have access to FDA-approved contraception.¹⁰⁶ The Bush Administration attempted to eliminate coverage for contraceptives in its fiscal year 2002 budget, but the language requiring coverage was subsequently restored by the House Appropriations Committee.¹⁰⁷ The Administration appears to have attempted to eliminate contraceptive coverage for federal employees once again with its fiscal year 2003 budget proposal,¹⁰⁸ but the House of Representatives has once again restored the language requiring coverage.¹⁰⁹

jurisdiction because the decision to offer coverage for these "extra doctor's visits" is not Bartell's but rather its insurer's which is not party to the suit. Brief for Appellant at 22, *Erickson* (No. 00-1213L) ("[T]he district court decided that the Bartell plan violated Title VII and then ordered Bartell to provide additional benefits under the Blue Shield plan as well as the Bartell plan . . . [without a] finding that the plaintiff class lacked equal benefits under the Blue Shield plan."). Bartell's *prescription plan* is self-funded, so under that logic, the only way an employee of a company that does not have a self-funded prescription plan could sue to receive benefits would be to enjoin the insurance company as well.

¹⁰³ S. 104 sec. 3(a), § 714(b)(1); *id.* sec. 4(a), § 2707(b)(1).

¹⁰⁴ *Id.* sec. 3(a), § 714(c)(1)(A); *id.* sec. 4(a), § 2702(c)(1)(A).

¹⁰⁵ Adam Sonfield, *Twenty States Now Require Contraceptive Insurance Coverage*, GUTTMACHER REP. ON PUB. POL'Y, Aug. 2002, at 13, available at <http://www.agi-usa.org/pubs/journals/gr050312.pdf>.

¹⁰⁶ See Treasury and General Government Appropriations Act, 1999, Pub. L. No. 105-277, sec. 101(h), § 656, 112 Stat. 2681, 2681-530 (prohibiting government funding for contracts that include prescription drug coverage unless prescription contraceptives are also covered).

¹⁰⁷ Alan Fram, *House Panel Votes on Contraceptives*, AP ONLINE, July 17, 2001, 2001 WL 24713274; see also Treasury and General Government Appropriations Act, 2002, Pub. L. No. 107-67, § 643, 2001 U.S.C.A.N. (115 Stat.) 514, 555.

¹⁰⁸ 148 CONG. REC. H795 (daily ed. Mar. 12, 2002) (statement of Rep. Jones) ("Again in 2002, the Bush Administration has proposed to end contraceptive coverage for federal employees. . . ."), 2002 WL 384547. But see Judy Holland, *Senators Expect to Deliver Contraceptive Coverage*, SEATTLE POST-INTELLIGENCE, July 13, 2002, at A2 ("Last year President Bush tried unsuccessfully to eliminate the budget [for contraceptive coverage], but he has not made that effort this year."), 2002 WL 5937529.

¹⁰⁹ See Treasury and Government Appropriations Act, 2003, H.R. 5120, 107th Cong. § 635 (2002).

Erickson was spawned by the December 2000 ruling by the Equal Employment Opportunity Commission (EEOC).¹¹⁰ Because the EEOC is a federal agency, however, that decision was only a victory for those particular women who appealed to the EEOC.¹¹¹ *Erickson*, though it technically pertains only to the Bartell Drug Company, casts a wider net in that it serves as judicial precedent.¹¹² Other employees have followed Jennifer Erickson's lead, such as those of Wal-Mart,¹¹³ American Airlines¹¹⁴ and UPS.¹¹⁵ In the case of UPS, the matter has been settled, and though the delivery company denied that its previous plan violated Title VII, it agreed to offer prescription contraceptive coverage to its employees and their dependants.¹¹⁶

Though it would seem with this great tide of momentum that establishing equity within *all* prescription drug plans throughout the country is the pervasive trend, the gains that have been seen thus far have been relatively piece meal. The percentage of plans that carry contraceptive prescription coverage is still woefully inadequate.¹¹⁷ However, given the advances witnessed in the last few years, one

¹¹⁰ *Erickson*, 141 F. Supp. 2d at 1275–76; EEOC Decision, *supra* note 12.

¹¹¹ More far reaching than that, however, it also represented adoption of a formal policy by a powerful agency that is in charge of enforcing the Civil Rights Act of 1964, and more specifically in this case, Title VII. Reinforced by *Erickson*, it serves to put employers on notice of their obligations and to inform employees of their rights. That said, Title VII only applies to employers with fifteen or more employees, which account for less than twenty percent of all employers nationwide. Susan A. Cohen, *Federal Law Urged As Culmination of Contraceptive Insurance Coverage Campaign*, GUTTMACHER REP. ON PUB. POL'Y, Oct. 2001, at 11, available at <http://www.agi-usa.org/pubs/journals/gr040510.pdf>.

¹¹² It has already been cited by two published decisions, *see infra* notes 114 and 127, and has certainly spurred other women to follow suit. *See* Cynthia L. Cooper, *Women Fight for Insurance Equity in Court, at Work*, WOMEN'S ENEWS, July 1, 2002, available at <http://www.womensenews.org/article.cfm/dyn/aid/957> (last visited Jan. 23, 2003) (detailing how employees have sued CVS and Walmart, filed with the EEOC against the Wall Street Journal and Dow Jones and Company, Inc., while Daimler-Chrysler, the Associated Press, and Temple University have given into employee demands).

¹¹³ *Mauldin v. Wal-Mart Stores, Inc.*, No. 1:01-CV-2755, 2002 U.S. Dist. LEXIS 21025 (N.D. Ga. Aug. 23, 2002) (certifying class action for refusal to provide health insurance coverage for contraceptives).

¹¹⁴ *Alexander v. Am. Airlines, Inc.*, No. 4:02-CV-0252-A, 2002 WL 731815, at *4 (N.D. Tex. Apr. 22, 2002) (dismissing contraceptives claim for lack of standing and noting in dicta that "[b]y no stretch of the imagination does the prohibition against discrimination based on 'pregnancy, childbirth, or related medical condition' require the provision of contraceptives").

¹¹⁵ *EEOC v. United Parcel Serv.*, 141 F. Supp. 2d 1216 (D. Minn. 2001) (denying motion to dismiss EEOC enforcement action based on refusal to provide health insurance coverage for contraceptives to male employee's dependent spouse).

¹¹⁶ *EEOC v. United Parcel Serv.*, No. CIV 00-2229 (D. Minn. 2001) (consent decree) (on file with author).

¹¹⁷ S. 104 § 2(a), 107th Cong. (2001) ("[P]rivate insurance provides extremely limited

would think that change is imminent. But that may not be true either. The Senate hearing intended to raise awareness on the issue and to build upon the recent momentum was held on September 10, 2001. It was widely anticipated that Congress would vote on its passage soon thereafter. Of course, the world has not been the same since, and legislative matters like EPICC took a backseat to more important concerns. The death knell to EPICC may have been the election of a Republican Congress in the fall of 2002. It is likely, however, that two, five or even 25 years down the road, if Congress has not acted, too many women will still face problems in paying for contraception.

EPICC still remains by far the most effective way to ensure that all women who have access to prescription drug care will be covered for prescription contraceptives. The EEOC is advising employers that not only is contraceptive equality necessary under the PDA, but they are advised to extend their coverage if they wish to ward off potential lawsuits.¹¹⁸ Though many employers are listening, broad voluntary compliance cannot necessarily be expected, because otherwise we would not be having this debate in the first place.

Many states do not have legislation that aids uninsured women, therefore EPICC might be their greatest hope. However, even for those women who live in one of the twenty states that have enacted prescription equity legislation,¹¹⁹ EPICC would be the only way to bind those who have found loopholes in a given state's mandate, either in terms of the *scope* of coverage, or simply to evade the requirement altogether.¹²⁰

coverage of contraceptives: half of traditional indemnity plans and preferred provider organizations, 20 percent of point-of-service networks, and 7 percent of health maintenance organizations cover no contraceptive methods other than sterilization. . . .").

¹¹⁸ Cohen, *supra* note 112, at 11. The advice was prominently displayed on the EEOC's home web page for approximately one year after the decision. It has since given way to more recent developments. See U.S. Equal Opportunity Commission Home Page, at <http://www.eeoc.gov> (last updated Nov. 6, 2002).

¹¹⁹ As of January 2003, the states that require full contraceptive coverage are Arizona, California, Connecticut, Delaware, Georgia, Hawaii, Iowa, Maine, Maryland, Massachusetts, Missouri, Nevada, New Hampshire, New Mexico, New York, North Carolina, Rhode Island, Texas, Vermont, and Washington. Sonfield, *supra* note 106, at 13. For a survey of the various state requirements, see Fact Sheet, Ctr. for Reproductive Law & Policy, Contraceptive Equity Bills Gain Momentum in State Legislatures (Sept. 2002), at http://www.crlp.org/pub_fac_epicchart.html. Several states including Alaska, Florida, Illinois, Michigan, Nebraska, New Jersey, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Utah, and Wisconsin have bills pending. Fair Access to Contraception Project, Planned Parenthood of W. Wash. & Planned Parenthood Fed'n of Am., Inc., States with Contraceptive Equity Bills Pending, at http://www.covermypills.org/facts/states_bill.asp (last visited Nov. 13, 2002). The EEOC has also acknowledged this encouraging trend. EEOC Decision, *supra* note 12, at *2 n.3.

¹²⁰ See, e.g., Bycott, *supra* note 13, at 804-05 ("The vague language of [some of the state] statutes seemingly allows satisfaction of the mandate through coverage of only *some* of the

For example, many states give a "religious employer" the ability to opt out of the coverage requirement if certain conditions are met. The definition of "religious employer" varies from state to state, if defined at all, but in some cases is broad enough to "have the potential to swallow the exemptions altogether."¹²¹ Additionally, state contraceptive coverage mandates do not apply to those employers who, like Bartell, self-insure their drug plans.¹²² Similarly situated employers account for almost half of all workers nationwide.¹²³ Instead, self-insurers are covered by ERISA, "a comprehensive federal act that preempts state law to the extent it relates to employee benefit plans."¹²⁴

Though the *Erickson* decision gives hope to those disheartened by the EPICC's lack of movement from committee, it is far from settled doctrine that the PDA encompasses contraceptive equity. Already, a judge in the Northern District of Texas has said in dicta that "by no stretch of the imagination does the prohibition against discrimination based on 'pregnancy, childbirth, or related medical condition' require the provision of contraceptives."¹²⁵ Like *Erickson*, the multitude of cases that most assuredly will be spawned by the decision will encounter many highs and lows on the various paths that they may take through the judicial system. EPICC would create stability for employees and employers alike and end all speculation as to the breadth of the PDA.

THE CONSCIENCE CLAUSE AND RELIGIOUS EMPLOYERS

An obvious collision of ideals occurs when a statutory requirement mandating access to contraceptives is thrust upon the many religious employers, most notably Catholic, that exist throughout the country. One of the Roman Catholic faith's central tenets is that the use of contraception is a sin.¹²⁶ On one hand, a statute can

FDA-approved contraceptive methods.") (emphasis added).

¹²¹ *Id.* at 809; see also Cynthia Dailard, *State Contraceptive Coverage Laws: Creative Responses to Questions of 'Conscience'*, GUTTMACHER REP. ON PUB. POL'Y, Aug. 1999, at 1, 2, available at <http://www.agi-usa.org/pubs/journals/gr020401.pdf>.

¹²² Bycott, *supra* note 13, at 792-95.

¹²³ Cohen, *supra* note 112, at 3-4.

¹²⁴ Bycott, *supra* note 13, at 792. "Because the ERISA exception that allows state regulation of insurance, banking and securities does not reach self-insured employers, employees with self-insured plans can only hope for mandated coverage through favorable judicial construction of the PDA or from federal law mandating such benefits." *Id.* at 794 (footnotes omitted).

¹²⁵ *Alexander v. American Airlines, Inc.*, 2002 WL 731815, *4 (N.D. Tex., Apr. 22, 2002) (dismissing the plaintiff's case for lack of standing).

¹²⁶ In the interest only of presenting a broad range of opinions on the subject, there are of course other groups that find EPICC and its progeny as being insidious on moral grounds — whether on the assumption that these statutes will increase sexual activity or because some of the more common forms of prescription birth control (like "the pill" or intrauterine devices

address any inequality claims inherent in such a denial of coverage. On the other, however, the First Amendment guarantees an act of Congress can neither infringe upon the free exercise of religion nor in part operate to favor one religion over another.

Though *Erickson* is the first case to deal with the issue of whether women are entitled to contraception benefit coverage when enrolled in a drug plan, perhaps the most contentious case currently making its way through the court system involves Catholic Charities of Sacramento, Inc.,¹²⁷ as it attempts to maneuver around the State of California's newly created laws guaranteeing prescription benefit coverage for female employees.¹²⁸

Though the California statute offers a "conscience clause" for religious employers that the proposed federal law does not, it is a narrowly drawn one that

(IUDs)) are seen as being abortifacients, designed to act post-conception. See, e.g., Position Paper, Birth Control, *supra* note 13; Position Paper, Am. Life League, Activism: 'Pill Bill' Is Nothing but Trouble, at http://www.all.org/activism/pb_chem.htm (last visited Nov. 13, 2002). These groups and arguments are not addressed by this Note, not only because they are marginal and their arguments highly disputable, but also because morality plays no part in First Amendment analysis. Consequently, if such an organization were to be faced with a suit from one of their employees to provide prescription contraception benefits, they would likely not have standing in the same way Catholic Charities of Sacramento, Inc., would. See *infra* text accompanying notes 127–63. These organizations are relegated to operating in the legislative realm, focusing only on lobbying against EPICC.

¹²⁷ Catholic Charities of Sacramento, Inc. v. Superior Court, 109 Cal. Rptr. 2d 176 (Ct. App. 2001) review granted, 31 P.3d 1271 (Cal. 2001). In a controversial and rarely used procedural move practiced almost exclusively in California, the California Supreme Court ordered that the Court of Appeals decision not be cited as law until the issue is resolved by it. See generally Stephen R. Barnett, *Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court*, 26 LOY. L.A. L. REV. 1033 (1993). In his article, Barnett notes:

[T]he court in the "vast majority" of cases, orders depublication "because a majority of the justices consider the opinion to be wrong in some significant way, such that it would mislead the bench and bar if it remained citable as precedent." [Former California Supreme Court] Justice Grodin added that depublication was most frequently used when the court considered the result correct "but regarded a portion of the reasoning to be wrong or misleading," though "there are times . . . when the supreme court considers the result to be wrong as well."

Id. at 1035–36.

¹²⁸ CAL. HEALTH & SAFETY CODE § 1367.25 (West Supp. 2002) (governing health care service plans); CAL. INS. CODE § 10123.196 (West Supp. 2002) (governing disability insurance policies). Prior to enactment, both laws were known as the Women's Contraception Equity Act. Women's Contraception Equity Act, ch. 532, 1999 Cal. Legis. Serv. 3017 (West), Women's Contraception Equity Act, ch. 538, 1999 Cal. Legis. Serv. 3047 (West).

has come under fire.¹²⁹ During the legislative process, Catholic groups sought to include an "opt-out" provision so that they, as employers, would not facilitate what they view as sin by being required to offer prescription coverage to their employees.¹³⁰ As the Court of Appeals noted: "The Legislature sought to address this concern without significantly undermining the anti-discrimination and public welfare goals of the prescription contraceptive coverage statutes, and without imposing the employers' religious beliefs on employees who did not share those beliefs."¹³¹

The compromise that was adopted by the California legislature defined religious employers narrowly and requires that they meet four criteria. First, the purpose of the employer must be "[t]he inculcation of religious values."¹³² Second, the religious employer must primarily employ persons of the same belief.¹³³ Third, the religious employer must serve primarily persons of the same belief.¹³⁴ Finally, the religious employer must be a tax exempt religious organization as described by section 6033(a)(2)(A)(i) or (iii) of the Internal Revenue Code.¹³⁵

Catholic Charities did not meet any of these criteria. It "[d]id not proselytize or attempt to inculcate those it serves with its religious beliefs."¹³⁶ It did not discriminate in hiring,¹³⁷ nor did it do so in providing services to the general public.¹³⁸ And Catholic Charities was organized as a nonprofit public benefit

¹²⁹ California's law is surely not the only one that has (or will) come under attack. For example, the day after New York's Women's Health and Wellness Act was passed, allowing "employers to get out of the requirement only for workers directly involved in religious work," members of the Catholic Conference were already considering a challenge. Erika Rosenberg, *Women's Health Bill Approved*, J. NEWS, June 18, 2002, available at <http://www.thejournalnews.com/newsroom/061802/18nywomen.html>.

¹³⁰ *Catholic Charities*, 109 Cal. Rptr. 2d at 183.

¹³¹ *Id.*

¹³² CAL. HEALTH & SAFETY CODE § 1367.25(b)(1)(A); CAL. INS. CODE § 10123.196(d)(1)(A).

¹³³ CAL. HEALTH & SAFETY CODE § 1367.25(b)(1)(B); CAL. INS. CODE § 10123.196(d)(1)(B).

¹³⁴ CAL. HEALTH & SAFETY CODE § 1367.25(b)(1)(C); CAL. INS. CODE § 10123.196(d)(1)(C).

¹³⁵ CAL. HEALTH & SAFETY CODE § 1367.25(b)(1)(D); CAL. INS. CODE § 10123.196(d)(1)(D).

Such organizations include "churches, their integrated auxiliaries, and conventions or associations of churches," I.R.C. § 6033(a)(2)(A)(i) (2000), and "the exclusively religious activities of any religious order." *Id.* § 6033(a)(2)(A)(iii).

¹³⁶ *Catholic Charities*, 109 Cal. Rptr. 2d at 183.

¹³⁷ *Id.* In fact, seventy-four percent of its employees were not Catholic. *Id.*

¹³⁸ *Id.* It would be interesting to see this analysis in a suit brought by teachers, and to a lesser degree staff, of a parochial school board. Presumably, in most cases, there is a greater percentage of Catholics employed by a school board (certainly among the teachers). So, instead of having seventy-five percent of the employees non-Catholic, seventy-five percent of the teachers may be Catholic, and, instead of serving a population without regard to their faith, Catholics could very well also comprise seventy-five percent or more of the student body. What exactly the California legislature had in mind in drawing this exception is not known, but presumably the paradigmatic case would be something like a large parish that

organization under section 501(c)(3) rather than section 6033(a)(2)(A)(i) or (ii).¹³⁹ Instead of opting not to offer any drug benefits at all to its employees, Catholic Charities filed suit arguing that the statute violates the First Amendment of the United States Constitution¹⁴⁰ and article I, section 4 of the California Constitution.¹⁴¹

The court in *Catholic Charities* reasoned that, although previous impingement upon the free exercise of religion had to undergo a strict scrutiny analysis, the United States Supreme Court's contentious ruling in *Employment Division v. Smith*¹⁴² established that "[a]n otherwise valid and constitutional law in an area in which the state is free to regulate, which law is neutral and of general applicability, need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."¹⁴³ Due to the many different beliefs that exist in our diverse society, to hold otherwise "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind."¹⁴⁴

The California Court of Appeals ruled that prescription contraceptive statutes are valid and constitutional, based on the 1965 Supreme Court ruling of *Griswold v. Connecticut*.¹⁴⁵ Because the statutes are applied generally and are neutral with respect to any religious beliefs, the strict scrutiny test did not apply.¹⁴⁶ Therefore, so long as there was any rational basis for the California legislature to enact such a statute, which in this case was "the elimination of gender discrimination" and "preserv[ation of] public health and well-being," the law was constitutionally valid.¹⁴⁷

The court in *Catholic Charities* gave the EEOC decision great deference and

employed more than fifteen people.

¹³⁹ *Id.* at 184.

¹⁴⁰ "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" U.S. CONST. amend. I.

¹⁴¹ "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion." CAL. CONST. art. I, § 4 (1974).

¹⁴² 494 U.S. 872 (1990). *Smith* had to do with the Native American Church ritual of ingesting peyote for sacramental purposes. *Id.* at 872.

¹⁴³ *Catholic Charities*, 109 Cal. Rptr. 2d at 185-86 (citing *Smith*, 494 U.S. at 878-79, 884-85, 888-90).

¹⁴⁴ *Smith*, 494 U.S. at 889.

¹⁴⁵ 381 U.S. 479 (1965) (determining that married people have a fundamental right to obtain contraceptives).

¹⁴⁶ *Catholic Charities*, 109 Cal. Rptr. 2d at 186-87, 189.

¹⁴⁷ *Id.* at 187. More than merely finding a rational basis, the court recognized these interests as compelling. *Id.*

cited *Erickson* as precedent.¹⁴⁸ Catholic Charities contended that *Gilbert* tipped the balance in their favor, but the court correctly noted that the PDA amended Title VII, and that the Supreme Court's decision in *Newport News* established the fact that a decision not to fund prescription contraceptives, affecting only women, is discriminatory.¹⁴⁹ But most importantly, the court found that the Free Exercise clause did not require a religious exemption "from this neutral and generally applied civic obligation."¹⁵⁰ In rebutting Catholic Charities' argument that this law discriminates against the Catholic Church only, the court responded that, so long as the legislative intent was not to burden the Catholic Church specifically, and its general application is neutral, the law is valid.¹⁵¹ The court went on to say:

[T]he object of the prescription contraceptive coverage statutes is not to infringe upon or restrict Catholics' beliefs about contraception because of their religious motivation, but to accommodate those beliefs to the extent possible while protecting the rights of employees and effectuating the legislative purpose of eliminating gender discrimination in health insurance coverage. Some Catholic employers are exempt from the mandate and others are not, but all religions are treated identically. The limited exemption does not cover all religious-affiliated ancillary organizations engaged in "secular-type" pursuits. The Catholic Church is not the only religious entity with affiliated institutions engaged in secular activities; therefore, it is not the only church whose affiliated entities do not qualify as "religious employers" under the challenged statutory criteria.¹⁵²

The argument that Catholicism is the only religion that prohibits contraception and the only religious entity discussed by the California legislature did not move the court. It noted that that was a product of the Catholic Church being the only one to oppose the bill during the legislative process.¹⁵³ Because the legislature acknowledged the Church's concerns and attempted to deal with its demands, but did not totally accede to them, did not mean there was an anti-Catholic animus behind the passing of the bill.¹⁵⁴

¹⁴⁸ See *id.* at 187-88.

¹⁴⁹ *Id.* at 188.

¹⁵⁰ *Id.* at 189.

¹⁵¹ *Id.* at 190 (countering Catholic Charities' citation of *Church of the Lukumi Babalu, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), which mandated heightened scrutiny "if the object of [the] law is to infringe upon or restrict practices because of their religious motivation.") (quoting *Church of the Lukumi Babalu*, 508 U.S. at 533) (alteration in original).

¹⁵² *Catholic Charities*, 109 Cal. Rptr. 2d at 190.

¹⁵³ *Id.* at 191.

¹⁵⁴ *Id.*

Turning to Catholic Charities' additional arguments, the court was unmoved. It was not compelled that the criteria that an organization must meet to qualify for the religious exemption was invalid.¹⁵⁵ It also rejected Catholic Charities' argument that it is subject to the "ministerial exception" to Title VII because only ministers or clergy, and not layperson employees, qualify.¹⁵⁶

Finally, and to no avail, Catholic Charities also argued that the statutes enacted by the California Legislature infringed upon their right to free speech.¹⁵⁷ Catholic Charities argued that, because the Catholic Church vociferously campaigns against the use of contraception, the statutes prohibit the Church from "practicing what it preaches." This lessens the impact of its message and undermines the Church's authority.¹⁵⁸ The court countered that:

The prescription contraceptive coverage statutes do not require Catholic Charities to repeat an objectionable message out of its own mouth The mere fact that coverage must be provided for certain items . . . is not likely to be viewed as an endorsement of the use of these items Catholic Charities remains free to advise its employees that it is morally opposed to prescription contraceptive methods and to counsel them to refrain from using such methods.¹⁵⁹

The Supreme Court of California's depublishing of the *Catholic Charities* case before the appeal is heard might suggest that the appellate court's reliance on *Smith* is somewhat dubious. The *Smith* decision, authored by Justice Scalia in a slim 5-4

¹⁵⁵ *Id.* at 192-93. The court noted that the two-part strict scrutiny test developed in *Sherbert v. Verner*, 374 U.S. 398 (1963), requires strict scrutiny to be applied only "where (1) there is a mechanism of exemptions open to unfettered discretionary interpretation, and (2) the bureaucratic discretion is enforced in a discriminatory manner against religion." *Catholic Charities*, 109 Cal. Rptr. 2d at 192. In this case there was no "unfettered discretionary interpretation" because the exemption is very much a quantitative process with four objective criteria being analyzed. *Id.* at 193.

¹⁵⁶ *Id.* at 193-94.

¹⁵⁷ *Id.* at 195. This argument was undoubtedly inserted to bring *Cantwell v. Connecticut*, 310 U.S. 296 (1940), into the fold. In *Smith*, Justice Scalia wrote:

The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.

Employment Dir. v. Smith, 494 U.S. 872, 881 (1990). He then cited to *Cantwell* which involved a Jehovah's Witness proselytizer having been charged with breach of the peace for airing his religious views on a street corner. See *Cantwell*, 310 U.S. at 300-01.

¹⁵⁸ See *Catholic Charities*, 109 Cal. Rptr. 2d at 195.

¹⁵⁹ *Id.*

majority, shifted the Supreme Court's long-established doctrine on free exercise cases that had "requir[ed] the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest."¹⁶⁰ Instead of presuming first that religious conduct or a belief is protected by the Free Exercise Clause, the Court following *Smith* finds a neutral and generally applicable statute to be presumptively constitutional. This outcome so angered Congress that it sought to revert back to the old doctrine via statute when it enacted the Religious Freedom Restoration Act of 1993 (RFRA).¹⁶¹

The possibility still exists that given in most cases where the California Supreme Court depublishes an opinion, it does so on the basis that the end result is correct but the analysis is flawed, the California Supreme Court may very well rule that, under the state constitution, the government must show a compelling interest. Holding the government to that task, the court may then very well find that the state has a compelling interest in preserving the public health and well-being of its citizens and in eliminating gender discrimination. Though such a case would be decided under the California Constitution, it may not preclude the issue from going to the United States Supreme Court.¹⁶²

If *Catholic Charities* ever reached the United States Supreme Court, there is no telling whether it would be evaluated within the *Smith* framework or decided by a majority that seeks a return to the compelling interest test. It is different from *Smith* in that this is not a criminal statute that prevents someone from using an integral part of their sacrament ritual.¹⁶³ Instead, it is a civil statute that *forces* an employer to provide access to something that the employer believes is sinful. But whether forcing an employer to provide access is requiring the employer to violate their religious beliefs is an issue in-and-of itself. In the end, it is the employee's choice as to whether she wishes to violate the employer's religious beliefs, even if she is

¹⁶⁰ *Smith*, 494 U.S. at 894 (O'Connor, J., concurring).

¹⁶¹ Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2000)). RFRA's explicit purpose was to overturn *Smith* and "restore the compelling interest test." *Id.* § 2(b)(1) (codified at 42 U.S.C. § 2000bb(b)(1)). The Supreme Court found RFRA unconstitutional as applied to the states in *City of Boerne v. Flores*, 521 U.S. 507 (1997). Congress later amended RFRA to apply only to the federal government. See Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, § 7, 2000 U.S.C.C.A.N. (114 Stat.) 803, 806 (amending 42 U.S.C. §§ 2000bb-2, 2000bb-3(a) (1994)).

¹⁶² Only if the right protected under the California Constitution were *broader* than and independent of the right granted by the U.S. Constitution could it be preserved as a state issue and thus prevented from being ruled on by the United States Supreme Court. See *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (requiring a clear statement of adequate and independent state grounds to avoid federal review). See generally G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 RUTGERS L.J. 841 (1991) (examining reliance on state constitutions as independent sources of rights).

¹⁶³ See *supra* note 142.

Catholic. And making the choice available does not mean that all, or any, female employees will exercise that choice.

The presence of the statute does not infringe upon Catholic Charities' right to exercise their religion in the same way as restricting the use of peyote infringes upon Smith's rights; Catholic employees working for the organization can still refuse to use contraception. A free exercise objection is, therefore, weaker compared to an Establishment Clause argument. Again, however, there is no evidence whatsoever that the statute has any more than an incidental effect on Catholic Charities. Clearly the California legislature was driven to overcome the pernicious effects of gender discrimination and the social consequences of unplanned pregnancies, and, as an employer, Catholic Charities is not exempt from being forced to live up to those ideals. All employers, whether they object on religious or moral grounds, have the same responsibility.

In either the California Supreme Court or the United States Supreme Court, or both, California's Attorney General may be required to demonstrate a compelling interest if the courts find that the Women's Contraception Equity Act indeed infringes upon Catholic Charities' First Amendment rights. As already noted, the state interests are significant and compelling,¹⁶⁴ but of course it is up to each justice to determine which one outweighs the other. However, it is difficult to make an Establishment Clause argument that can overcome the government's interest in promoting gender equality when eighty-one percent of Catholic women have used oral contraception.¹⁶⁵ It would appear that Catholic women are less concerned with their ability to exercise their religion freely than they are with their access to contraception. Because EPICC did not, and many state equivalents to California's Women's Contraception Equity Act do not offer religious exemptions, the *Catholic Charities* case is an important one in providing legislative guidance.

CONCLUSION

An employer would certainly be advised to extend prescription benefit coverage to its female employees and the female dependents of its employees simply for equity sake. We have reached the twenty-first century, where the ideals of true gender equality are not just a pipe-dream, but truly within grasp. But if it is the bottom line that speaks louder than decency, in light of the very recent developments in this area, no employer is safe from the prospect of having to defend itself in a class action lawsuit over a matter that ultimately would have a negligible (if not ultimately positive) impact on their cost of doing business. If an employer, with the knowledge of recent history and in spite of the numbers, still refuses to accept reality, it could face high legal bills in counter-productively defending itself

¹⁶⁴ See *supra* note 147.

¹⁶⁵ DARROCH, *supra* note 8, at 9.

against a morally deflated and antagonistically charged group of employees.

A great number of states have acted to extend prescription contraception benefit coverage to the workforce, realizing that there is a multitude of social benefits to such legislation. Further, the EEOC opinion and the *Erickson* decision combine to give employees a great deal of strength in bargaining with their employers. Finally, the *Catholic Charities* case simply reinforces the point and ensures that religious employers cannot impose their own beliefs upon their own employees, especially ones that don't even share that faith. All of these legislative enactments and cases serve as positive authority and precedent to further extend the ideal of equality piece-by-piece. It is still early in this debate, however, and none stand on firm legal footing.

In the interest of saving time and resources, EPICC could have settled the debate once and for all. It should not be left to the upper echelon of a particular employer's managing body, regardless of the affiliation, to impose its moral judgments on its female employees or force them to suffer from gender bias. In the area of employee prescription benefits, we have already operated under a free market system and the results have been less than stellar. Congress should take advantage of the momentum and popular support for such legislation and do what is right.¹⁶⁶ Such action would achieve uniformity across the nation, not only from state to state, but from one employer to another, and provide *all* women with unfettered access to the most popular means by which they control their own reproductive freedom.

C. Keanin Loomis

¹⁶⁶ One large group of women of childbearing age that is not discussed in this Note, nor addressed by EPICC, is students at institutions of higher learning. An informal survey conducted by Planned Parenthood found that fifty-three percent of one hundred major colleges and universities offered prescription drug coverage under student health care plans but excluded contraceptives. Vox: Voices for Planned Parenthood, Planned Parenthood Fed'n of Am., Inc., Cover My Pills, at <http://www.plannedparenthood.org/vox/insurance.html> (last visited Nov. 13, 2002). Even if EPICC were passed and all female dependents of employees were guaranteed access, it would not mean that a student's parent(s) would allow her to get contraception under their plan or that she would feel comfortable enough doing so. Additionally, many female students would either not qualify due to age restrictions. According to Planned Parenthood, many universities are responding in an encouraging fashion by voluntarily extending coverage upon being enlightened on the issue and the law. *Id.*