The Costs of Reproduction: History and the Legal Construction of Sex Equality

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Today, legal and political actors argue that sex equality does not require society to share the costs of pregnancy, childbirth, and childrearing with individual women and private families. Courts interpret the Pregnancy Discrimination Act of 1978 ("PDA"), amending Title VII of the Civil Rights Act of 1964, to prohibit only market-irrational discriminatory animus. Political pundits oppose paid parental-leave legislation as a mandate that unfairly subsidizes private reproductive choice by shifting its costs onto the larger public.

This Article uses novel historical research to deconstruct the boundaries between cost sharing and sex equality. I recover the redistributive dimensions of the vision for sex equality that legal feminists articulated from the 1960s through the 1980s. Legal feminists' challenge to the family-wage system entailed efforts to redistribute the costs of reproduction between women and men within the home and between the family and society. The history of feminist mobilization, anti-feminist counter-mobilization, and norm evolution in law and policy, illustrates the overlap in the normative purpose and cost effects of antidiscrimination and cost-sharing mandates. To realize women's right to social and economic independence, feminists pursued classic antidiscrimination mandates, the accommodation of pregnancy in the workplace, and affirmative social-welfare entitlements related to caregiving. All of these reforms, moreover, shifted the costs of reproduction from individual women to the larger society.

The history related in this Article holds significant implications for contemporary legal and political debates. The history suggests that courts adopt an artificially narrow perspective when they interpret the PDA to fall short of requiring structural change in the workplace. It also suggests that Congress might build upon an evolving commitment to cost sharing as a critical component of sex equality by augmenting the entitlements created by the Family and Medical Leave Act of 1993 ("FMLA").

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INTRODUCTION

Biological reproduction and caring for young children incurs economic costs. For female employees, the costs of reproduction may include the medical expenses of pregnancy and childbirth; lost income during periods of pregnancy- and childbirth-related disability; and costs associated with reentry to the workforce, if childbearing women lose their jobs.[1] Employers may incur the costs of including pregnancy and childbirth within medical and temporary disability insurance benefits; the administrative costs of providing leave when a pregnant employee is disabled; and the cost of accommodating some women's changed capacity to perform their job duties during pregnancy.[2] Childrearing may cost a parent lost investment in human capital, when they forego education or career advancement to perform caregiving in the home. Childrearing is also expensive, as employees replace parental caregiving with care by a third party.

From the mid-1960s through the 1980s, legal and political debates raged over how to allocate the costs of reproduction. Participants disputed whether individual women, the private family, employers, or the state should shoulder responsibility for the costs of reproduction. Diverse and often opposing groups weighed in on these debates, including employers and union leaders, judges and politicians, feminists and social conservatives. In this Article, I draw upon novel historical research to shed new light on the normative content of contemporary doctrinal and policy debates about how to allocate the costs of reproduction.[3]

Today, legal and political actors sever the issue of cost sharing from that of sex equality. This pattern emerges both in courts' interpretation of Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978 ("PDA"),[4] and in political arguments about work-family policy. Courts often interpret the PDA to prohibit only discriminatory animus against pregnant women. They hold that the PDA does not remedy sex-neutral policies, such as harsh absenteeism or meager sick-leave policies, even when these policies disproportionately exclude childbearing

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[1] Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2166 (1994).

[2] These costs imposed on employees and employers are not independent of each other, but rather interrelated. On the relationship between rational statistical discrimination and women's lesser investment in their human capital, see Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency and Social Change*, 103 YALE L.J. 595 (1993).

[3] Feminist scholars have critiqued the application of market metaphors and economic analyses to justice issues related to sexuality and the family. *See, e.g.*, Katharine T. Bartlett, *Rumpelstiltskin*, 25 CONN. L. REV. 473, 474 (1993); Martha Albertson Fineman, *A Legal (and Otherwise) Realist Response to "Sex as Contract,"* 4 COLUM. J. GENDER & L. 128, 132–36 (1994). Attention to the question of how to allocate the costs of reproduction, however, is a critical issue of distributive justice of central importance to sex equality.

[4] Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k) (2006)).

women from the workplace.[5] In the political arena, pundits argue that sex equality does not require society as a whole to subsidize individuals' private reproductive decisions.

By contrast, this Article argues that cost sharing is a critical component of sex equality. I seek to deconstruct the dichotomy between cost sharing and sex equality via contributions to both historical and normative legal literatures. First, I contribute to a nascent historical literature that revises the conventional understanding of legal feminism in the sixties and seventies.[6] The conventional narrative is that legal feminists—advocates using the law to realize equal citizenship for women—pursued only the right to formal equal treatment.[7] Powerful critiques argue that the sex-equality jurisprudence that emerged out of 1970s feminism has failed to meet the unique needs of poor women and women of color,[8] to realize substantive reproductive justice,[9] or to achieve legal recognition for the social and moral value of caregiving.[10] Social historians, however, are beginning to uncover the diversity of grassroots feminist coalitions,[11] the breadth of activists' goals,[12] and

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[5] *See, e.g.*, Dormeyer v. Comerica Bank-Illinois, 223 F.3d 579, 584 (7th Cir. 2000) (Posner, J.) (arguing that the PDA does not require "subsidizing a class of workers").

[6] *See, e.g.*, SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION (2011) (analyzing feminists' strategy during the 1960s and 1970s of analogizing sex discrimination to race discrimination as well as the broader exchange of legal and political arguments between the women's and civil rights movements); Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 88 (2010) (arguing that Ruth Bader Ginsburg, then counsel to the American Civil Liberties Union Women's Rights Project, pursued not formal equal treatment but rather an anti-stereotyping principle). This Article draws upon research from a larger dissertation project examining a partial transformation in the relationship between motherhood and women's labor-market participation, during the second half of the twentieth century. *See* Deborah Dinner, The Law of Work and Family: Feminism and the Transformation of the American Workplace at Century's End (unpublished Ph.D. dissertation, Yale University) (on file with author) [hereinafter Dinner, Law of Work and Family].

[7] *See, e.g.*, Mary Becker, *The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics*, 40 WM. & MARY L. REV. 209, 210 (1998); Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1286–87 (1991).

[8] *See, e.g.*, Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139–40 (1989); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990).

[9] *See, e.g.*, Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 955 (1984).

[10] *See, e.g.*, Martha Albertson Fineman, *Contract and Care*, 76 CHI. KENT L. REV. 1403, 1405–06 (2001); Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 372–77 (2001).

[11] *See* FEMINIST COALITIONS: HISTORICAL PERSPECTIVES ON SECOND-WAVE FEMINISM IN THE UNITED STATES (Stephanie Gilmore ed., 2008). For social histories of the feminist activism undertaken by women of color in the sixties and seventies, see BENITA ROTH, SEPARATE ROADS TO FEMINISM: BLACK, CHICANA, AND WHITE FEMINIST MOVEMENTS IN AMERICA'S SECOND WAVE (2004); KIMBERLY SPRINGER, LIVING FOR THE REVOLUTION: BLACK FEMINIST ORGANIZATIONS, 1968–1980 (2005); ANNE M. VALK, RADICAL SISTERS: SECOND-WAVE FEMINISM AND BLACK LIBERATION IN WASHINGTON, D.C. (2008).

[12] *See* SARA M. EVANS, TIDAL WAVE: HOW WOMEN CHANGED AMERICA AT CENTURY'S END 3–4 (2003).

the working-class origins of feminists' struggle for economic justice.[13] In this vein, I recover a broader feminist vision for legal sex equality and offer a richer historical explanation of why it never came to fruition. This Article joins recent historical scholarship demonstrating that mid- and late-twentieth-century legal and social movements commonly described as identity based also embraced redistributive agendas.[14]

Legal feminists sought legal recognition for women's right to equal treatment as individuals as well as a set of redistributive aims. In the 1960s and 1970s, legal feminists developed a critique of the family-wage system. The cultural ideal that the nuclear family should consist of an independent male breadwinner, a dependent female caregiver, and children, shaped law as well as social policy and employer practices.[15] Although the family-wage ideal did not comport with demographic reality for many American families, it nevertheless contributed to both gender and racial inequities. The family-wage system "constructed a labor market biased toward men, especially white men, and . . . shored up male-dominated households while weakening others."[16]

Legal feminists articulated a new vision of sex equality premised upon women's right to social and economic independence.[17] Upending the family-wage system would require more than the right to formal, equal treatment. Feminists also fought for the redistribution of childrearing labor between women and men in the home, as well as the redistribution of the costs of pregnancy, childbirth, and childrearing between the family and society.

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[13] *See* DOROTHY SUE COBBLE, THE OTHER WOMEN'S MOVEMENT: WORKPLACE JUSTICE AND SOCIAL RIGHTS IN MODERN AMERICA 3 (2004); NANCY MACLEAN, FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE 117–54 (2006).

[14] *See* RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 10–14 (2007) (arguing that in the 1940s civil rights legal claims focused on economic exploitation under Jim Crow at the hands of private actors rather than state discrimination on the basis of injurious racial stereotypes); William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 1–2 (1999) (arguing that civil rights activists of the 1960s endeavored to realize the promise of the New Deal Era social-citizenship tradition); Sophia Z. Lee, *Hotspots in a Cold War: The NAACP's Postwar Workplace Constitutionalism, 1948–1964*, 26 LAW & HIST. REV. 327, 335–36 (2008) (examining the NAACP's administrative litigation before the National Labor Relations Board challenging racial discrimination in unions on constitutional grounds); Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before* Brown, 115 YALE L.J. 256, 258–59 (2005) (arguing that a legal liberal consensus had not achieved hegemony by the time of *Brown*).

[15] *See* ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA 6–8 (2001).

[16] MACLEAN, *supra* note 13, at 16.

[17] By legal feminists, I mean attorneys, government reformers, litigants, labor leaders, and grassroots activists who used law as a primary tool to advance women's social and economic status. Legal feminists identified what political theorist Nancy Fraser terms the "bivalent" character of gender. In one respect, gender organizes political economy—the division between productive and reproductive labor and hierarchies within remunerated work—and calls for redistribution as remediation. In another respect, gender represents the devaluation of what is culturally coded as feminine and calls for recognition as remediation. *See* NANCY FRASER, JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE "POSTSOCIALIST" CONDITION 19, 26–29 (1997).

Second, in revising the legal history of feminism, my Article uses historical evidence to deconstruct the boundaries between antidiscrimination and accommodation mandates. Some legal scholars argue that individuals have the right to freedom from market-irrational discriminatory animus on the basis of protected characteristics, including sex. But, they argue, groups do not share the same right to accommodation, defined as the prohibition on market-rational discrimination.[18] Other scholars contend that there is no clear categorical distinction between antidiscrimination and accommodation mandates. Rather these categories overlap in their normative purposes[19] and cost effects.[20]

The historical development of work-family law and policy illustrates the shared normative impetus and economic consequences of antidiscrimination and cost-sharing mandates. Legal feminists attempted to transform childrearing and workplace structures within the family-wage system by ending overt, market-irrational employer discrimination. They endeavored to transform, as well, market-rational employer norms that excluded women from equal employment opportunity. In addition, they organized for legislative social-welfare entitlements related to childrearing. Moreover, in the case of pregnancy discrimination, even the prohibition of simple discrimination based on sex-role stereotypes had a redistributive effect. Thus, classic prohibitions on disparate treatment, disparate-impact liability, and accommodation mandates, all imposed unique costs on employers associated with hiring childbearing women.

The redistributive aims imagined by legal feminists in the sixties, seventies, and eighties, are only partially realized today. Over the last half century, both statutory and constitutional law have evolved to affirm the idea that sex equality entails cost sharing. This evolution has brought some of legal feminists' redistributive objectives to fruition. In particular, the PDA

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[18] *See, e.g.*, Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833, 834–37 (2001) (arguing that while individuals have a right to freedom from simple discrimination, defined as market-irrational treatment, freedom from market-rational discrimination is not a right but rather a claim to accommodation within a finite set of social resources allocated among competing interests). Kelman defines "market rational" discrimination as that which occurs when "a business rationally differentiates workers or customers on the basis of the differential input costs associated with serving them." *Id.* at 843.

[19] Samuel Bagenstos argues that both the normative purpose of antidiscrimination and accommodation mandates extend beyond the prohibition of irrational animus. Antidiscrimination law's purpose is to eliminate the social stigma and material inequality that subordinates specific groups, regardless of whether discrimination is market rational or market irrational. Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 839–44 (2003).

[20] Christine Jolls observes that the prohibition on disparate treatment, rectifying what some have termed first-generation discrimination, imposes unique costs on employers associated with hiring members of a protected group. Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 686–87 (2001). Jolls demonstrates that the cost effects of the disparate-impact prong of antidiscrimination law and of accommodation mandates are equivalent. *Id.* at 652–65.

and the Family and Medical Leave Act of 1993 ("FMLA")[21] shift some of the costs of pregnancy, childbirth, and familial caregiving from individuals to the larger society. But opposition foreclosed feminists' most ambitious reforms. Of particular significance, President Nixon vetoed legislation that approximated the feminist vision for universal childcare. The explanation for why feminists succeeded in advocating for some reforms, and met with defeat in advocating for others, lies in the public/private divides constructed between the family, the market, and the state. Reforms that shifted reproductive costs from individual women and families to employers met with greater success than proposals to shift these costs to the state. And reforms that facilitated parental caregiving within the private family came to fruition, whereas those that attempted to transform familial childrearing structures met with deeper political opposition. Today, women continue to shoulder disproportionate responsibility for the costs of reproduction, which inhibits their ability to realize equal employment opportunity.

This Article's historical narrative has powerful implications for both doctrinal controversies and policy debates. The history can illuminate alternative interpretations of the PDA, by complicating the distinctions that courts draw between antidiscrimination and accommodation mandates. Courts often foreclose claims under the PDA that, if successful, would impose redistributive requirements on employers. Such a narrow interpretation of the PDA is evident in the adjudication of claims respecting sex-unique characteristics other than pregnancy, of disparate-treatment claims respecting the denial of light-duty accommodations for pregnant employees, and of pregnancy-related disparate-impact claims. Constrained interpretations of the PDA limit the potential for the statute to advance women's equal employment opportunity. The history presented in this Article points toward more capacious interpretations of the PDA, consistent with the richer vision of sex equality embraced by advocates of the PDA.

In addition to making a legal argument about the interpretation of the PDA, this Article makes a recommendation for the future of social-welfare policy. Contemporary equal-protection doctrine has come to recognize that affirmative social-welfare entitlements form an important component of sex discrimination law.[22] If Congress desired to advance sex equality further, then it should build upon this insight. Among a range of other interventions, Congress should augment the entitlements provided by the FMLA.

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[21] Pub. L. No. 103-3, 107 Stat. 6 (codified as amended in 29 U.S.C. §§ 2601–2654 (2006)).

[22] In *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003), the Supreme Court upheld the FMLA as a valid exercise of Congress's Section Five power under the Fourteenth Amendment. The Court explained that a hypothetical federal statute that merely prohibited sex discrimination in the administration of family-leave policies would have "allow[ed] States to provide for no family leave at all" and thus would not have served Congress's remedial purpose to promote equal employment opportunity for women. *Id.* at 738.

The Article's argument proceeds in four parts. Part I argues that the anti-stereotyping mandates at the heart of the PDA and the FMLA have partially shifted the costs of reproduction from individual women to the larger society. Narrow judicial interpretations of the PDA and limits built into the FMLA's design, however, constrain the extent to which these statutes have dismantled the family-wage system. Part II discusses legal feminists' efforts to transform workplace and childrearing structures during the 1960s and 1970s. Feminists challenged the sex-based division between productive labor and reproductive labor, while also seeking accommodations for pregnancy in the workplace and social-welfare entitlements related to caregiving. Part III examines the evolution of sex discrimination law with respect to pregnancy during the 1970s and 1980s. In the crucible of administrative battles, litigation contests, and legislative debates, the law came *partially* to affirm that accommodating pregnancy, childbirth, and childrearing represents a critical component of sex discrimination law. Part IV discusses the significance that the history of feminist mobilization, of anti-feminist counter-mobilization, and of the evolution in legal norms holds for contemporary doctrinal and political debates. I conclude that advancing sex equality requires judicial interpretations of the PDA that recognize the statute's redistributive purpose, as well as congressional action to augment the FMLA's entitlements.

I. The Redistributive Dimensions of Sex Discrimination Law

The PDA and the FMLA both prohibit sex-role stereotyping and impose cost-sharing mandates on employers. The PDA prohibits employers from taking adverse employment action against pregnant employees who are capable of performing their job duties.[23] The PDA also imposes a cost-sharing mandate, requiring employers to assume partial responsibility for the costs of pregnancy and childbirth, as they do for the costs of temporary disabilities. Lastly, the availability of disparate-impact liability under the PDA has the potential to impose heightened costs on employers that are associated with hiring childbearing women.[24] In 1993, Congress passed the FMLA, which shifts some of the costs of pregnancy and childbirth from employees to employers. The sex neutrality of the statute reflects Congress's intent to undermine sex-role stereotyping in the division of productive and reproductive labor.[25] Analysis of these statutes demonstrates that their cost-sharing mandates are inextricable from their prohibitions on classic, market-irrational discrimination. In other words, the statutes' redistributive provisions

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[23] *See* Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model*, 21 Yale J.L. & Feminism 15 (2009–2010).

[24] *See* Jolls, *supra* note 20, at 660–65.

[25] *See* 29 U.S.C. §§ 2601(a)(2), (a)(5), (b)(4)–(5) (2006).

and prohibitions on sex-role stereotyping serve a common normative purpose.

Courts' current interpretations of the PDA, however, as well as shortcomings in the structure of the FMLA, limit these statutes' transformative potential. Courts' discomfort with the redistributive potential of the PDA, in both disparate-treatment and disparate-impact cases, leads them to interpret the statute narrowly. Cabined interpretations of the PDA dampen the statute's ability to realize equal employment opportunity for women. Although the FMLA is universal in design, in practice, leave-taking patterns under the Act reinforce a sexual division of labor between breadwinning and caregiving. Furthermore, the FMLA's eligibility criteria and the fact that leave under the statute is unpaid make the FMLA's protections inaccessible to a significant proportion of the American workforce. While the PDA and FMLA help women reconcile motherhood and employment, the statutes have only partially unraveled the family-wage system.

A. Stereotyping, Pregnancy, and Costs: General Electric Co. v. Gilbert

The historic allocation of the costs of reproduction to the private family reflected the influence of the family-wage ideal on both employer practices and jurisprudence. This dynamic is well illustrated by the mid-1970s litigation that catalyzed the PDA's enactment. The litigation concerned the exclusion of pregnancy from the temporary disability benefits that General Electric Co. offered to employees. In defending the plan, General Electric appealed to traditional gender norms respecting women's primary role as mothers rather than workers. Feminists argued that employers should share the costs of pregnancy-related disability, just as they did the costs of other forms of physical disability. Anything short of equal treatment would reinforce sex-role stereotypes. In the 1976 case of *General Electric Co. v. Gilbert*, the Supreme Court held that the pregnancy exclusion did not constitute sex discrimination in violation of Title VII.[26] The case exemplified how normative conceptions of gender, work, and family were embedded in legal controversies respecting the allocation of the costs of reproduction.

The *Gilbert* litigation emerged as part of a longer effort by the International Union of Electrical, Radio, and Machine Workers ("IUE") to organize against pregnancy discrimination. Since 1955, the IUE had attempted to bargain collectively with General Electric to gain pregnancy-related benefits for female workers, but had not met with any success.[27] General Electric remained an important target because the company's disability insurance

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[26] 429 U.S. 125, 145 (1976).

[27] Transcript of Record at 438, 441–44 (July 26, 1973), Gilbert v. Gen. Elec. Co., 375 F. Supp. 367 (E.D. Va. 1974) (No. 142-72-R) (on file with Special Collections and University Archives, Alexander Library, Rutgers University, International Union of Electrical, Radio, and Machine Worker Records ("IUE Records"), box 243) (statement of Thomas F. Hilbert, Jr., Labor Counsel for General Electric).

policy affected a total of 85,000 unionized and non-unionized female employees.[28]

The evolving stance of the Equal Employment Opportunity Commission ("EEOC") spurred legal activism on the part of General Electric workers. In the fall of 1971, an EEOC decision concluded that discrimination on the basis of pregnancy violated Title VII.[29] Following this decision, 300 women immediately asked for EEOC forms to file pregnancy-discrimination claims.[30] Women in the shops began to file charges of discrimination based on the denial of sick pay for pregnancy-related disabilities at a rate that, within a few years, outstripped the filing of charges related to equal pay or to promotions.[31]

IUE national headquarters also began encouraging locals to pressure companies to revise contracts to conform to the EEOC guidelines.[32] Over a two-year period, the IUE engaged in negotiations with 400 employers to secure rights to pregnancy disability benefits. Many locals successfully achieved favorable contract revisions.[33] General Electric proved particularly stubborn, however. In March 1972, the IUE filed a lawsuit alleging that the pregnancy exclusion violated Title VII.[34] When the Fourth Circuit affirmed a district court decision ruling for the plaintiffs,[35] General Electric appealed to the Supreme Court.

Members of the business lobby, including the National Association of Manufacturers, the U.S. Chamber of Commerce, several insurance associations, and private companies, submitted amicus curiae briefs on behalf of General Electric Co. and the defendants in its companion case, *Liberty Mutual Insurance Co. v. Wetzel*.[36] The defendants and business amici argued that excluding pregnancy from temporary disability insurance plans did not amount to facial sex discrimination. Pregnancy-based classifications could

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[28] Transcript of Record, at 3 (July 14, 1973), *Gilbert*, 375 F. Supp. at 367 (No. 142-72-R) (on file with Special Collections and University Archives, Alexander Library, Rutgers University, IUE Records, box 241, folder: pleadings 11-72 to 12-73).

[29] EEOC Dec. No. 71-1474, 3 Fair Empl. Prac. Cas. (BNA) 588 (1971).

[30] *To Amend Title VII of the Civil Rights Act of 1964 to Prohibit Sex Discrimination on the Basis of Pregnancy*: *Hearings Before the Subcomm. on Labor of the S. Comm. on Human Resources*, 95th Cong. 300-01 (1977) [hereinafter *S. 995 Hearings Apr. 1977*].

[31] Brief of Int'l Union of Elec., Radio & Mach. Workers, AFL-CIO-CLC as Amicus Curiae at 14, Geduldig v. Aiello, 417 U.S. 484 (1974) (No. 73-640), 1974 WL 185751.

[32] *See* Letter from Ruth Weyand, Int'l Union Elec. Counsel, to William R. Pierce, Chairman, IUE-GM Conference Board (Nov. 9, 1971); Letter from Ruth Weyand to Dudley L. Bedford, President, IUE District 11 (Nov. 10, 1971); Letter from Carl DeVinney, President, Local 336, to Ruth Weyand (Mar. 8, 1972) (all letters on file with Special Collections and University Archives, Alexander Library, Rutgers University, IUE Records, box 244, folder: pregnancy letters).

[33] Brief of Int'l Union of Elec., Radio & Mach. Workers, AFL-CIO-CLC as Amicus Curiae, *supra* note 31, at 4–5.

[34] For the complicated procedural history of the litigation, see Gilbert v. Gen. Elec. Co., 347 F. Supp. 1058 (E.D. Va. 1974); Gilbert v. Gen. Elec. Co., 59 F.R.D. 267 (E.D. Va. 1973).

[35] Gilbert v. Gen. Elec. Co., 519 F.2d 661 (4th Cir. 1975).

[36] 424 U.S. 737 (1976).

not constitute sex discrimination because men and women were not similarly situated with regard to pregnancy.[37]

In addition to these formal arguments, the defendant companies and business amici stressed the costs of providing pregnancy disability benefits. They attempted to persuade the Court that the pregnancy exclusion derived from a legitimate economic calculus rather than from sex-based animus. In *Gilbert* and *Wetzel*, the defendants and business amici argued that the costs of the benefits—rather than discriminatory intent—motivated the policies. An actuary who had testified for General Electric in district court estimated that including pregnancy in the temporary disability insurance plan would cost an estimated $1.35 billion annually,[38] and an insurance alliance predicted that pregnancy disability benefits would increase employers' premiums by 65% if women comprised half of the workforce.[39] The defendants argued that because cost concerns motivated their disability policies, the pregnancy exclusion did not serve as a pretext for sex discrimination.[40]

Defendants and amici further argued that women's marginal relationship to the workforce did not justify the costs of pregnancy disability benefits. Providing disability benefits related to pregnancy would not comport well with the purpose of such benefits to "generate loyalty . . . [by] assisting [employees] during periods of financial hardship until their return to the workforce."[41] Because pregnant workers "more often than not, d[id] not return to work after delivery,"[42] employers argued, pregnancy disability benefits would function as "a unique form of severance pay."[43] In addition, employers argued, even those childbearing women who returned to the workforce would be tempted to malinger by requesting leaves that would "extend[ ] beyond the period of inability to work" to a longer time period "determined by the welfare of the child rather than the mother."[44] Thus, the defendants in *Gilbert* and *Wetzel*, joined by business amici, argued that wo-

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[37] Brief of the Chamber of Commerce of the United States of America as Amicus Curiae at 5–7, Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1976) (No. 74-1245) [hereinafter Amicus Brief of the Chamber of Commerce]; Supplemental Brief for Petitioner, General Electric Company on Reargument at 7–8, Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (Nos. 74-1589, 74-1590) [hereinafter Supplemental Brief for Petitioner in *Gilbert*].

[38] Brief for Petitioner at 17, Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1976) (No. 74-1245) [hereinafter Brief for Petitioner in *Wetzel*].

[39] Brief of Am. Mut. Ins. Alliance et al. as Amici Curiae at 4–5, Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1976) (No. 74-1245) [hereinafter Brief of Am. Mut. Ins. Alliance].

[40] Brief for Petitioner in *Wetzel*, *supra* note 38, at 5–6.

[41] Brief of Am. Mut. Ins. Alliance, *supra* note 39, at 30.

[42] Brief of Am. Life Ins. Assoc. et al. as Amici Curiae at 5, Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1976) (No. 74-1245); *see also* Motion of and Brief of Alaska Airlines, Inc. et al. for Leave to File brief as Amici Curiae at 9, Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1976) (No. 74-1245) [hereinafter Motion of and Brief of Alaska Airlines] (arguing that 40–50% of women workers did not return to their jobs following childbirth).

[43] Brief for General Motors as Amicus Curiae at 13, Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1976) (No. 74-1245); Brief for the American Telephone & Telegraph Co. at 8, Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1976) (No. 74-1245).

[44] Brief for General Motors as Amicus Curiae, *supra* note 43, at 12.

men did not merit pregnancy disability benefits in large part because childbearing women did not represent committed workers.

The defendant in *Wetzel*, Liberty Mutual Co., also presented the cost of providing pregnancy disability benefits as an affirmative defense to the alleged disparate effects that the pregnancy exclusion had on women.[45] The defendant and business amici distinguished the pregnancy exclusions from the employment practices struck down by the Court in the landmark 1971 case *Griggs v. Duke Power Co.*, which held that facially neutral employment practices may in certain circumstances violate Title VII.[46] In *Griggs*, the Court concluded that the employment tests, which did not accurately measure job qualifications, did not represent "a genuine business need."[47] Liberty Mutual argued under *Griggs* that the pregnancy exclusion served rational business interests.[48] Amici reasoned that the pregnancy exclusions maintained the plans' solvency, without either raising premiums or decreasing other non-pregnancy-related benefits.[49] In seeking to distinguish *Griggs*, the defendant and amici suggested that the costs of providing pregnancy disability benefits justified a policy that both derived from and further entrenched women's lesser labor-force attachment.

By contrast, IUE Counsel Ruth Weyand framed a distributive claim as the logical consequence of the prohibition on sex-role stereotyping. The EEOC, labor organizations, and feminist and public-interest law firms argued on behalf of the plaintiff-respondents as amici curiae. They attempted to persuade the court that the pregnancy exclusion deepened women's inequality. Plaintiffs and amici argued that the purposes of disability benefits—providing replacement income, improving worker morale and loyalty, and preventing sick and disabled workers from returning to work before they were capable—applied equally to women disabled by pregnancy and child-

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[45] *Compare* Brief of the Chamber of Commerce, *supra* note 37, at 10–13, *with* Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae at 10–11, 17, 23, 26, Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1976) & Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (Nos. 74-1245, 74-1589, & 74-1590) [hereinafter Brief for the United States and Equal Employment Opportunity Commission].

[46] 401 U.S. 424, 424 (1971).

[47] *Id.* at 431–32.

[48] *See* Brief for Petitioner in *Wetzel*, *supra* note 38, at 21–23. Liberty Mutual also argued that the pregnancy exclusion did not have a disparate effect on women because it did not result in lesser aggregate disability benefits accruing to female than to male employees; indeed, female employees accrued a greater share of the total dollar value of the benefits than did male employees. *Id.* Unlike Liberty Mutual, General Electric Co. did not offer a direct defense to a disparate-impact theory of liability. Instead, General Electric argued that *Geduldig*'s logic that pregnancy discrimination did not constitute sex discrimination applied under any theory of liability; that the *Griggs* standard applied only in the case of a deprivation of employment opportunities and not in cases concerning job benefits; and that the disparate-effects standard applied only in cases of race and not sex discrimination. *See* Supplemental Brief for Petitioner in *Gilbert*, *supra* note 37, at 2–16.

[49] Brief of the Chamber of Commerce, *supra* note 37, at 13; Motion of and Brief of Alaska Airlines, *supra* note 42, at 3.

birth and to other temporarily disabled workers.[50] The pregnancy exclusion, however, meant that "only women [experienced] . . . a substantial risk of total loss of income because of temporary medical disability."[51] General Electric provided insurance against the periodic dependence experienced by the quintessentially masculine worker: that associated with temporary disability. Yet, the company failed to protect against the dependence most salient to women's experience.

The plaintiffs-respondents argued that unlawful sex-role stereotypes motivated the pregnancy exclusion. The Center for Constitutional Rights explained: "Employer pregnancy rules . . . result[ ] from the assumption that women will marry, become pregnant and leave the workforce."[52] Indeed, employers viewed a female employee's pregnancy "as the confirmation that she is participating in the expected pattern."[53] The Communication Workers of America argued that "the economics [of the pregnancy exclusion] merely shroud a societal stereotype of women as mothers first and workers second."[54] To combat the "view that mothers and expectant mothers are not or should not be attached to the labor market,"[55] amici provided statistics to show that, in reality, the majority of "women who work do so out of compelling economic necessity."[56]

The plaintiffs and sympathetic amici argued that the exclusion of pregnancy from temporary disability insurance formed part of a set of interconnected discriminatory practices. Employers forced pregnant women to take mandatory, unpaid maternity leaves; wiped out their accumulated seniority when they returned to the job; and denied women workers medical-insurance benefits related to pregnancy.[57] The EEOC's brief to the Court concluded that in enacting Title VII, Congress had "intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes," including the exclusion of pregnancy from disability benefits.[58]

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[50] Brief for the American Federation of Labor and Congress of Industrial Organizations and International Union UAW as Amici Curiae at 16–18, Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1976) (No. 74-1245) (delineating the purposes of temporary disability benefits and arguing for their applicability to women affected by pregnancy-related disabilities).

[51] Brief for the United States and Equal Employment Opportunity Commission, *supra* note 45, at 12.

[52] Brief of Center for Constitutional Rights et al. as Amici Curiae at 8, Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1976) (No. 74-1245) [hereinafter Brief of Center for Constitutional Rights].

[53] *Id.*

[54] Brief for Communications Workers of America, AFL-CIO as Amicus Curiae at 7, Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1976) (No. 74-1245).

[55] Brief of American Civil Liberties Union and National Education Association as Amici Curiae at 18, Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1976) (No. 74-1245) [hereinafter Brief of ACLU and National Education Association].

[56] Brief for Communications Workers of America, *supra* note 54, at 13.

[57] Brief of ACLU and National Education Association, *supra* note 55, at 15.

[58] Brief for the United States and Equal Employment Opportunity Commission, *supra* note 45, at 9–10.

Last, plaintiffs and amici argued that sex-role stereotypes led the defendants to exaggerate the projected costs of providing pregnancy disability benefits. The actuarial calculations cited by defendants anticipated maternity leave durations that far exceeded the average six to eight weeks of disability.[59] The argument that women would malinger and illegitimately use pregnancy disability leave to care for their infants "embodie[d] an unjustifiable presumption . . . that women have cavalier attitudes toward their jobs, are not the 'breadwinners' in their families and so can be left without income during a period of disability."[60] Furthermore, the argument that pregnancy disability benefits would constitute severance pay was fallacious. Employers could always require that all workers, including childbearing women, return to the workforce or forfeit payments.[61] The plaintiffs and amici argued that sex stereotypes constructed the social realities they purported to describe. The American Civil Liberties Union ("ACLU") explained: "[W]omen exposed to treatment which makes clear their low status in the work force sometimes fulfill the employer prophecy: they do lose interest in pursuing advancement in gainful employment because the odds against them seem overwhelming."[62]

In deciding *Gilbert*, the Supreme Court applied a formalist interpretation of sex equality under Title VII, rather than interpreting sex equality, as urged by the plaintiffs, to prohibit sex-role stereotypes. Two years earlier, in the case of *Geduldig v. Aiello*, the Court had held that the exclusion of pregnancy from a state temporary disability insurance plan did not violate the Equal Protection Clause.[63] The Court held that exclusion distinguished not between women and men but between pregnant and non-pregnant persons.[64] Following *Geduldig*, every federal court to consider the issue concluded that Congress had intended Title VII to set forth a more capacious definition of sex equality than that which the Supreme Court interpreted the Equal Protection Clause to guarantee.[65] Justice Rehnquist's majority opinion in *Gilbert*, joined by Chief Justice Burger and Justices Blackmun, Stewart, White, and Powell,[66] held that the definition of sex equality set forth in *Geduldig* applied

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[59] Brief of ACLU and National Education Association, *supra* note 55, at 43.

[60] Brief of Amici Curiae Commonwealths of Massachusetts et al. at 5–6, Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1976) (No. 74-1245).

[61] Brief of ACLU and National Education Association, *supra* note 55, at 46.

[62] *Id.* at 19–20.

[63] Geduldig v. Aiello, 417 U.S. 484, 496 (1974).

[64] *Id.* at 496 n.20.

[65] *See* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 147 (1976) (Brennan, J., dissenting) (citing Commc'ns Workers of Am. v. Am. Tel. & Tel. Co., 513 F.2d 1024 (2d Cir. 1975)), Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199 (3d Cir. 1975), *vacated on jurisdictional grounds*, 424 U.S. 737 (1976); Gilbert v. Gen. Elec. Co., 519 F.2d 661 (4th Cir. 1975); Tyler v. Vickery, 517 F.2d 1089, 1097–99 (5th Cir. 1975); Satty v. Nashville Gas Co., 522 F.2d 850 (6th Cir. 1975); Hutchinson v. Lake Oswego Sch. Dist. No. 7, 519 F.2d 961 (9th Cir. 1975); Union Free Sch. Dist. No. 6 v. N.Y. Human Rights Appeal Bd., 35 N.Y.2d 371 (N.Y. 1974).

[66] The Court heard oral argument in *Gilbert* twice. In the 1975 term, Blackmun sat out the arguments and the Court deadlocked on the case 4–4, with Burger, Stewart, Rehnquist, and White voting for the defendants and Powell, Brennan, Marshall, and Stevens voting for the

in the instant case as well.[67] The exclusion of pregnancy from an otherwise comprehensive temporary disability insurance scheme constituted neither facial sex discrimination nor a pretext for discrimination.[68] The Court held that the Guidelines on Sex Discrimination issued by the EEOC in April 1972, which interpreted Title VII to require employers to treat employees disabled by pregnancy in the same manner as they did other temporarily disabled employees, did not merit judicial deference.[69] The Court thus rejected EEOC guidelines, which reflected the influence of feminist advocacy, and instead imported a formalist interpretation of sex equality from the constitutional context.

Rehnquist's majority opinion in *Gilbert* limited not only the definition of facial sex discrimination but also the theory of disparate-impact liability under Title VII. Rehnquist questioned whether plaintiffs could bring a disparate-impact claim under the section of Title VII at issue in *Gilbert*, prohibiting discrimination in the terms and conditions of employment, rather than the section at issue in *Griggs*, prohibiting the discriminatory denial of employment opportunity.[70] Justice Blackmun unsuccessfully attempted to persuade Rehnquist to include further language that would keep a wider door open for future disparate-impact claims.[71] Accordingly, Blackmun wrote a concurrence stating that he did "not join any inference or suggestion in the Court's opinion—if any such inference or suggestion is there—that effect may never be a controlling factor in a Title VII case, or that *Griggs* . . . is no longer good law."[72]

The construction that the majority opinion in *Gilbert* placed on disparate-impact theory, assuming its availability, diluted the theory's capacity to redress structural inequality in the workplace. The opinion held that to prove a disparate effect, plaintiffs would have to show that General Electric

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plaintiffs. In 1976, Blackmun participated when the Court heard the case on re-argument and placed his vote on the side of the defendants. Powell also switched his vote to join the majority. *See* Harry A. Blackmun conference notes (Jan. 21, 1976) (on file with the Library of Congress, Harry A. Blackmun Papers, box 238, folder: General Electric Co. v. Gilbert). The same six Justices formed the majorities in both *Geduldig* and *Gilbert.*

[67] *Gilbert*, 429 U.S. at 135–36.

[68] *Id.* at 136–37.

[69] The majority opinion held that the 1972 EEOC guidelines were not entitled to deference because they were enacted eight years after the passage of Title VII and represented an abrupt departure from earlier guidelines. *Gilbert*, 429 U.S. at 141–45. As Kevin Schwartz has demonstrated, the majority's conclusions rested on a mistaken assumption that the 1972 guidelines were sudden and not thoroughly deliberated. Kevin Schwartz, *Equalizing Pregnancy: The Birth of a Super-Statute* 10 (2005), *available at* http://digitalcommons.law.yale.edu/ylsspps_papers/41.

[70] Rehnquist's opinion included the following caveat: "assuming that it is not necessary in this case to prove intent to establish a prima facie violation of § 703(a)(1). But cf. *McDonnell Douglas Corp. v. Green* . . . ." *Gilbert*, 429 U.S. at 137.

[71] *See* Letter from Harry A. Blackmun to William H. Rehnquist (Nov. 22, 1976); Memorandum from Diane Wood, clerk, to Justice Harry A. Blackmun 7–8 (Oct. 29, 1976); Memorandum from WHB to Harry A. Blackmun (Nov. 8, 1976) (on file with the Library of Congress, Harry A. Blackmun Papers, box 238, folder: General Electric Co. v. Gilbert).

[72] 429 U.S. 125, 146 (1976) (Blackmun, J., concurring) (citation omitted).

offered a temporary disability benefit plan that was worth more to male workers, in the aggregate, than to female workers.[73] Rehnquist effectively confined legitimate disparate-impact claims relating to pregnancy disability benefits to those supported by evidence of what might be taken as intentional discrimination. Rehnquist explained that a finding of disparate effects in *Gilbert* "would endanger the commonsense notion that an employer who has no disability benefits program at all does not violate Title VII even though the 'underinclusion' of risks impacts . . . more heavily upon one gender than upon the other."[74] In Part IV, I will discuss how today courts evince a similar resistance to recognizing disparate-impact liability that would create affirmative entitlements.

The *Gilbert* case produced two dissents, one decided from a formalist perspective and one from a socio-historical perspective. Justice Stevens employed formalist reasoning: "[T]he rule at issue places the risk of absence caused by pregnancy in a class by itself. By definition, such a rule discriminates on account of sex . . . ."[75] Stevens explained that "it is the capacity to become pregnant which primarily differentiates the female from the male."[76]

Justice Brennan's dissent, joined by Justice Marshall, evaluated *Gilbert* on the basis of the historical contexts in which General Electric designed its disability insurance program and in which Congress enacted Title VII. Brennan acknowledged that at first glance, the opposing conceptual frameworks employed by the plaintiffs and the majority both appeared plausible. The analysis might focus on the unique exclusion of a risk experienced only by women or on the sex-neutral coverage of risks experienced by both sexes.[77] Brennan argued, however, that a determination of the appropriate analytic framework required an examination of "the historical backdrop of General Electric's employment practices" as well as "the broad social objectives promoted by Title VII."[78] He concluded that an evaluation of General Electric's program design, in the context of the company's historic discrimination against women, suggested that the pregnancy exclusion constituted a pretext for sex discrimination.[79] In addition, Brennan argued that the EEOC had the competence to evaluate "whether the social policies and aims to be furthered by Title VII and filtered through the phrase 'to discriminate' contained in § 703(a)(1) fairly forbid an ultimate pattern of coverage that insures all risks except a commonplace one that is applicable to women but not to men."[80] Brennan concluded that the Court wrongly

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[73] 429 U.S. at 138–39.
[74] *Id.* at 137–39.
[75] *Id.* at 161–62 (Stevens, J., dissenting).
[76] *Id.* at 162.
[77] *Id.* at 147–48 (Brennan, J., dissenting).
[78] *Id.* at 148.
[79] *Id.* at 153.
[80] *Id.* at 155.

declined to extend deference to the EEOC guidelines.[81] In enacting the PDA, Congress would explicitly endorse the reasoning of Stevens's and Brennan's dissents.

B. The Pregnancy Discrimination Act of 1978 and the Problem of (Non)-Neutral Employment Policies

In enacting the Pregnancy Discrimination Act of 1978, Congress overrode *Gilbert.* The PDA defines unlawful sex discrimination under Title VII to include discrimination "because of or on the basis of pregnancy, childbirth, and related medical conditions."[82] This first clause of the Act rejects the formalist interpretation of sex equality found in the *Gilbert* majority opinion, which distinguished between pregnancy- and sex-based classifications. The PDA's second clause reflects advocates' effort to draft the legislation in direct response to the fact pattern at issue in *Gilbert.* The clause requires employers to treat "women affected by pregnancy, childbirth, or related medical conditions . . . the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work."[83] The PDA overrides *Gilbert*'s holding that parity of disability benefits for men and women with respect to all conditions except pregnancy complies with Title VII. Instead, the PDA adopts the perspective of the *Gilbert* dissenters that sex equality under Title VII requires equally comprehensive coverage for men and women under employment-benefit plans.

The PDA connects a simple antidiscrimination mandate to a redistributive mandate. General Electric appealed to traditional gender norms as a bulwark against sex discrimination law's redistributive consequences. The PDA responded by linking the prohibition on sex-role stereotyping to a cost-sharing requirement. The history of the *Gilbert* litigation and the PDA's enactment might caution courts to consider whether sex-role stereotypes lie embedded within market rationales for pregnancy discrimination. Even after the enactment of the PDA, apparently sex-neutral, cost-based arguments for adverse employment actions may reflect sex-role stereotypes.

The case of *Troupe v. May Department Stores Co.*,[84] decided by the Seventh Circuit in 1994, provides an apt example. Scholarly critiques of *Troupe* have argued against the doctrinal requirement of comparative evidence to prove disparate treatment under Title VII.[85] My critique focuses not on technical doctrinal standards but on the implicit assumptions about gender that feature in arguments that childbearing workers are too costly to employ. *Troupe* demonstrates that in contemporary case law, just as in *Gilbert*,

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[81] *Id.* at 156–58.
[82] 42 U.S.C. § 2000e(k) (2006).
[83] *Id.*
[84] 20 F.3d 734 (7th Cir. 1994).
[85] *See, e.g.*, Jessica Carvey Manners, *The Search for Mr. Troupe: The Need to Eliminate Comparison Groups in Pregnancy Discrimination Cases*, 66 OHIO ST. L.J. 209 (2005).

sex-role stereotypes shape the way in which courts evaluate employers' cost expenditures related to pregnant workers.

Kimberly Troupe brought a claim of sex-based discrimination under Title VII, as amended by the PDA, challenging her termination. Troupe had worked for the department store Lord & Taylor for about three years when, in December of 1990, during her first trimester of pregnancy, she began to experience unusually severe morning sickness. The store granted her request for a part-time schedule, but Troupe continued to arrive late to work as a result of her condition. After giving her verbal and written warnings about her tardiness, Troupe's employer placed her on a sixty-day probation period. In June, after Troupe arrived late to work on eleven additional occasions, Lord & Taylor fired her.[86]

The Seventh Circuit affirmed a district court decision granting summary judgment for Lord & Taylor on the ground that Troupe could not convince a reasonable fact finder that her termination constituted unlawful sex discrimination. An opinion written by Judge Posner concluded that Troupe had failed to show that Lord & Taylor would not have fired her "except for the fact of her pregnancy."[87] Posner observed that Troupe produced only two pieces of evidence that might enable a fact finder to draw an inference of discrimination: a suspicious statement made by her immediate supervisor and the timing of her discharge. Troupe testified at her deposition that her immediate supervisor told her on the way to the meeting at which the human resources manager fired her that "'I [Troupe] was going to be terminated because she [the supervisor] didn't think I was coming back to work after I had my baby.'"[88] Posner acknowledged that the statement revealed that Troupe's employer fired her because she did not expect her to return to work after childbirth. Nevertheless, the Seventh Circuit held that the statement could not constitute circumstantial evidence of sex discrimination.[89] The court also held that the timing of Troupe's termination, the day before her scheduled maternity leave, likewise could not constitute circumstantial evidence of sex discrimination.[90]

Posner interpreted the PDA to set a limit on the costs that a business has to expend to employ childbearing workers. His opinion instructs the reader to "imagine a hypothetical Mr. Troupe, who is as tardy as Ms. Troupe was, also because of health problems, and who is about to take a protracted sick

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[86] *Troupe*, 20 F.3d at 735.
[87] *Id.* at 738.
[88] *Id.* at 735–36.
[89] *Id.* at 738.
[90] Posner conceded that Troupe's "employer fired her one day before the problem that the employer says caused her to be fired was certain to end." *Id.* at 737. Posner concluded, however, that Lord & Taylor might well have timed the termination to deter future infractions of the kind made by Troupe. *Id.* Moreover, Troupe had proffered evidence regarding the timing of her discharge only to buttress her interpretation of the incriminating statement by her supervisor. *Id.* at 738.

leave."[91] Posner concluded that "[i]f Lord & Taylor would have fired our hypothetical Mr. Troupe, this implies that it fired Ms. Troupe not because she was pregnant but because she cost the company more than she was worth to it."[92] The opinion considered another hypothetical plaintiff: a black man "scheduled to take a three-month paid sick leave for a kidney transplant," fired either because of his company's assumption "that he would not return to work when his leave was up" or because of its reluctance "to incur the expense of paying him while on sick leave."[93] To prove race discrimination, the black plaintiff would need to show that the company treated sick employees of other races more favorably. Troupe might have overcome summary judgment had she provided evidence of a non-pregnant employee who was not fired before undertaking a leave "similar in length to hers."[94]

Upon first glance *Gilbert* and *Troupe* differ significantly. One might argue that *Gilbert* upheld the use of sex (via the proxy of pregnancy) as an actuarial category, while *Troupe* did not. Instead, the argument proceeds, *Troupe* upheld a sex-neutral employment policy: the refusal to pay for sick leave of an employee not expected to return to work.

Upon closer analysis the logic of the *Gilbert* and *Troupe* opinions share a key similarity. The view of *Troupe* as upholding a sex-neutral policy misses the way in which Posner evaluated equal treatment in a manner that ratified a sex-role stereotype. Why did Lord & Taylor presume that Kimberly Troupe would not return to work? Posner's opinion mentions no evidence suggesting that Troupe feigned her morning sickness or that she did not intend to return to the job that she had held for several years. Is *Troupe* a case about the lawful limits that an employer might place on the costs it expends on sick employees, or is it a case about sex-role stereotypes? The view that childbearing women are not committed to the workplace has a deep history; employers have long used women's normative gender role within the family to justify blatant discrimination against women workers.[95] Indeed, *Gilbert* ratified an employer policy that rested on the same sex-role stereotypes regarding childbearing women's marginal commitment to the workforce.

Antidiscrimination doctrine under Title VII has evolved over the last decade in a manner that questions the continued legitimacy of the reasoning employed in *Troupe*. The Civil Rights Act of 1991 established that a defendant is liable for discrimination under Title VII if a prohibited criterion constituted "a motivating factor for any employment practice, even though other

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[91] *Id.* at 738.

[92] *Id.*

[93] *Id.* Posner's analogy contemplated the employer's reluctance to pay for sick leave, although he had noted that the evidence did not make clear whether Troupe would have received paid maternity leave. *Id.* at 736.

[94] *Id.* at 739.

[95] *See generally* ALICE KESSLER-HARRIS, OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES 311–13 (2d ed. 2003).

factors also motivated the practice."[96] In 2003, the Supreme Court held, in *Desert Palace, Inc. v. Costa*, that plaintiffs could bring mixed-motive claims of discrimination under Title VII solely on the basis of circumstantial evidence.[97] And, in 2007, the EEOC issued guidelines titled "Unlawful Disparate Treatment of Workers with Caregiving Responsibilities."[98] The guidelines interpret antidiscrimination statutes, including Title VII, the PDA, and the FMLA, to prohibit employer animus and stereotyping with respect to employees' status as caregivers.[99]

The EEOC guidelines on caregiver discrimination enshrine the concept of "Family Responsibilities Discrimination" ("FReD") developed most prominently by Joan Williams over the last decade.[100] The EEOC Guidelines and court decisions applying FReD theory set forth two doctrinal innovations. First, they eviscerate the distinction between discrimination on the basis of sex per se and discrimination on the basis of stereotypes about a person's caregiving status.[101] Second, to prove caregiver discrimination, a plaintiff need not establish comparative evidence demonstrating disparate treatment of similarly-situated individuals.[102]

The mixed-motive claim enshrined in the Civil Rights Act of 1991, the *Desert Palace* decision, and the EEOC guidelines together undermine the logic employed in *Troupe*.[103] The availability of a mixed-motive claim suggests that Lord & Taylor would have been liable if it was shown that discriminatory attitudes about pregnancy and motherhood, as well as sex-neutral cost concerns, motivated Kimberly Troupe's termination. Moreover,

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[96] Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m) (2006). Proof that the defendant "would have taken the same action in the absence of the impermissible motivating factor" does not allow the defendant to escape liability but limits the remedies available to the plaintiff to declaratory and certain injunctive relief, as well as attorneys' fees. 42 U.S.C. § 2000e-5(g)(2)(B) (2006).

[97] 539 U.S. 90, 99–101 (2003).

[98] Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities, 2 EEOC Compl. Man. (BNA) § 615 (May 23, 2007), *available at* http://www.eeoc.gov/policy/docs/caregiving.pdf [hereinafter Enforcement Guidance].

[99] *Id.* at 7.

[100] *See* JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 101–10 (2000) (arguing that the design of work on the basis of masculine norms is actionable under existing antidiscrimination laws); *see also* Joan C. Williams & Stephanie Bornstein, *The Evolution of "FReD": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311 (2008) (advocating for the utility of "Family Responsibilities Discrimination" as an antidiscrimination theory that might remedy work-family conflict).

[101] *See* Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 121 (2004) (explaining that *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), "makes pellucidly clear, however, that, at least where stereotypes are considered, the notions that mothers are insufficiently devoted to work, and that work and motherhood are incompatible, are properly considered to be, themselves, gender-based").

[102] Enforcement Guidance, *supra* note 98, at 8; *see also Back*, 365 F.3d at 121–22.

[103] Although the EEOC does not have rulemaking authority to issue binding regulations respecting Title VII, the guidelines can nonetheless aid plaintiffs in litigation. *See* Julie Chihye Suk, *Antidiscrimination Law in the Administrative State*, 2006 U. ILL. L. REV. 405, 441–43 (2006).

under *Desert Palace*, Troupe could use circumstantial evidence to establish the mixed-motive claim. Finally, the EEOC guidelines on caregiver discrimination suggest that a stereotype that a woman will not return to work after childbirth, even in the absence of comparative evidence, constitutes sex discrimination.

Indeed, a significant trend in the case law is to reexamine whether defenses that echo the reasoning of *Troupe* are in reality sex neutral. FReD theory and the motivating-factor doctrine redirect the courts' frame of reference to the stereotypes operating in a particular fact pattern.[104] The case of *Matthews v. Connecticut Light and Power Co.*,[105] for example, involved a fact pattern and procedural posture resembling *Troupe*. The plaintiff had requested schedule changes, missed work, and left early from work as a result of her pregnancy and child-care responsibilities.[106] Nonetheless, the United States District Court for the District of Connecticut in *Matthews* denied the defendant employer's motion for summary judgment with respect to the plaintiff's claim that her termination violated Title VII.[107] Even before the plaintiff's absences, her supervisor had expressed concern that the job would not be a "good match" for her because of her pregnancy and motherhood.[108] Citing a landmark FReD decision by the Second Circuit, the district court held that a jury could interpret these statements as unlawful stereotypes about the capacity of a woman with a young child to perform her job duties.[109] The district court in *Matthews* might have followed the logic of *Troupe* to grant summary judgment to the employer on the basis of a sex-neutral employment absenteeism policy. The court instead recognized that an apparently sex-neutral defense rooted in business considerations, such as an absenteeism policy, may have hidden illegitimate sex-role stereotypes.

C. Pregnancy-Related Disparate-Impact Claims under Title VII

Plaintiffs may use the disparate-impact theory of liability under Title VII to challenge workplace regulations that disproportionately exclude women from employment opportunity.[110] The Supreme Court has long recognized that employers may be liable under Title VII for "employment

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[104] *See* Michelle A. Travis, *The PDA's Causation Effect: Observations of an Unreasonable Woman*, 21 YALE J.L. & FEMINISM 51, 59–60 (2009) (arguing that the PDA instructs courts to attribute causation for adverse employment decisions to structural bias and intentional discrimination, rather than an employee's decision to have a child).

[105] Matthews v. Conn. Lights & Power Co., No. 3:05cv226(PCD), 2006 WL 2506597 (D. Conn. Aug. 29, 2006).

[106] *Id.* at *1–2.

[107] *Id.* at *10.

[108] *Id.* at *7.

[109] *Id.* at *7–8 (citing Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107 (2d Cir. 2004)).

[110] Mary Joe Frug offered an early explanation of the way in which workplace policies and labor-market patterns, which the courts did not construe as discriminatory, nonetheless enforced social norms encouraging women to bear children and to assume disproportionate re-

practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity."[111] Because the PDA is a definitional amendment to Title VII, rather than a separate statute, pregnancy-discrimination claims are decided according to the general principles that govern Title VII.[112] The availability of disparate-impact theory to plaintiffs bringing pregnancy-based sex-discrimination claims under Title VII is indisputable.[113]

The controversy in the case law centers on what types of employment terms and conditions might render an unlawful disparate impact on women. Plaintiffs have brought disparate-impact claims challenging strict absenteeism rules,[114] harsh sick-leave policies,[115] inadequate family leave,[116] heavy-lifting requirements,[117] and restrictive light-duty policies.[118] As an empirical matter, however, few plaintiffs have met with success in litigating these claims.[119] The redistributive character of pregnancy-related disparate-impact claims explains courts' hostility toward these claims. Courts often understand the employment terms and conditions at issue in these cases as neutral, market-driven policies. Courts reason that employers do not have any responsibility to rectify the burdens that biology has placed uniquely on women.[120] They evince skepticism regarding lawsuits that challenge market-rational policies.[121] Their resistance stems in part from the fact that as law and economics scholars have noted, disparate-impact liability can be coextensive with accommodation mandates.[122] The employment terms and con-

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sponsibility for childrearing. Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1059–62 (1992).

[111] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

[112] Scherr v. Woodland Sch. Cmty. Consol. Dist., 867 F.2d 974, 977–81 (7th Cir. 1988).

[113] Numerous courts of appeals acknowledge the theoretical availability of disparate-impact liability. *See, e.g.*, Urbano v. Continental Airlines, 138 F.3d 204, 208 (5th Cir. 1998); Lang v. Star Herald, 107 F.3d 1308, 1314 (8th Cir. 1997); Troupe v. May Dep't Stores Co., 20 F.3d 734, 738 (7th Cir. 1994).

[114] *See, e.g.*, Stout v. Baxter Healthcare Corp., 282 F.3d 856, 859–60 (5th Cir. 2002); Dormeyer v. Comerica Bank-Illinois, 223 F.3d 579, 581–83 (7th Cir. 2000).

[115] *See, e.g.*, *Lang*, 107 F.3d at 1310; Abraham v. Graphic Arts Int'l Union, 660 F.2d 811, 818 (D.C. Cir. 1981); EEOC v. Warshawsky & Co., 768 F. Supp. 647, 651–55 (N.D. Ill. 1991).

[116] *See, e.g.*, Maganuco v. Leyden Cmty. High Sch., 939 F.2d 440, 441–42 (7th Cir. 1991); Roberts v. U.S. Postmaster Gen., 947 F. Supp. 182, 187–88 (E.D. Tex. 1996).

[117] *See, e.g.*, Spivey v. Beverly Enters., Inc., 196 F.3d 1309, 1311–12 (11th Cir. 1999); Garcia v. Woman's Hosp. of Tex., 97 F.3d 810, 811–12 (5th Cir. 1996).

[118] *See, e.g.*, Germain v. County of Suffolk, No. 07-CV-2523, 2009 WL 1514513, at *1–2 (E.D.N.Y. May 29, 2009).

[119] *See infra* Part I.C.

[120] *See, e.g.*, Stout v. Baxter Healthcare Corp., 282 F.3d 856, 861–62 (5th Cir. 2002).

[121] *See, e.g.*, *Spivey*, 196 F.3d at 1313 (upholding the denial of a light-duty assignment to a pregnant employee pursuant to a policy that restricted light-duty assignments to employees with non-occupational injuries); Urbano v. Cont'l Airlines, 138 F.3d 204, 207–09 (5th Cir. 1998) (same). The policies upheld in these cases are market rational in the sense that they limit an employers' obligation to expend resources to accommodate workers' needs for light-duty assignments.

[122] *See* Jolls, *supra* note 20, at 652–53.

ditions at issue, however, also represent the product of affirmative decisions to design the workplace according to gendered norms respecting work and family. From this perspective, we see that disparate-impact liability redresses workplace structures that replicate and reinforce the historical subordination of women. The question is not whether disparate-impact claims impose a cost-sharing mandate on employers—they do by definition—but why courts are peculiarly uncomfortable with this consequence in the case of pregnancy.

Catharine Albiston argues that disparate-impact claims challenging employment policies that disproportionately burden pregnant women implicate culturally entrenched workplace time standards. These standards developed during the transition to industrial capitalism, from the eighteenth to the early twentieth centuries.[123] Interlocking ideologies facilitated this process: the family-wage ideal, a separate-spheres ideology that associated femininity with the domestic sphere, and the pastoralization of housework that veiled the economic value of women's domestic labors.[124] Law and social-welfare policy constructed women's unpaid caregiving in the home as labor other than work and constructed work to mean full-time, paid-wage labor organized according to inflexible time standards.[125] The history of race ideologies can augment Albiston's analysis. The social construction of race deepened the distinction between the domestic ideal and work as well as between the social role of mother and worker. In the early Republic, separate-spheres ideology associated white womanhood with hearth and family.[126] Throughout the twentieth century, political culture continued to associate white women's entry into the labor market and public space with vulnerability to racial danger.[127] Today, as Albiston argues, the normative character of workplace time standards obscures the gender and race ideologies that shaped their development. Indeed, the time standards contested in disparate-impact cases "are so deeply entrenched . . . that they no longer appear to be business practices, but instead simply seem to define what work means."[128]

Congress has clearly signaled that disparate-impact liability has a critical role to play in realizing equal employment opportunity under Title VII. The Civil Rights Act of 1991 clarified the standards governing disparate-impact claims under Title VII, overriding the weakened standards that the Court had set forth in *Wards Cove Packing Co. v. Antonio*.[129] Defendants

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[123] Catherine Albiston, *Institutional Inequality*, 2009 WISC. L. REV. 1093, 1107–15 (2009).

[124] *Id.* at 1115–19.

[125] *Id.* at 1112, 1120–23.

[126] *See* NANCY F. COTT, BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND 1780–1835 (2d ed. 1997).

[127] *See* DONALD G. MATHEWS AND JANE SHERRON DE HART, SEX, GENDER, AND THE POLITICS OF ERA: A STATE AND THE NATION 165 (1992).

[128] Albiston, *supra* note 123, at 1146.

[129] 490 U.S. 642, 659 (1989) (stating that "the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer" and

carry the burden of persuasion, rather than merely production, once plaintiffs establish a prima facie case that a specific employment practice has a disparate impact on a protected group.[130] Furthermore, defendants must prove "business necessity" to escape liability, rather than simply any legitimate business rationale for the employment practice.[131]

As a practical matter, however, courts' hostility to pregnancy-related disparate-impact claims limits the utility of the theory for plaintiffs. For example, in granting summary judgment to Lord & Taylor in *Troupe*, the Seventh Circuit rejected the possibility that the company's absenteeism policy could have a disparate impact on women.[132] Posner qualified his statement that "[e]mployers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees" by acknowledging "that disparate impact is a permissible theory of liability under the Pregnancy Discrimination Act . . . ."[133] By definition, disparate-impact theory suggests that "bad" treatment applied uniformly may nevertheless be unlawful when it has a disproportionate, injurious effect on a protected class. Posner dismissed the potential for a disparate-impact theory of liability in *Troupe*, however, by observing that "disparate impact . . . is a means of dealing with the residues of past discrimination, rather than a warrant for favoritism."[134] In Part IV, I will return to the question of whether "favoritism" of the kind identified by Posner is truly distinguishable from a history of pregnancy discrimination.

The reasoning employed by Posner to deny disparate-impact liability in *Troupe* is pervasive in the case law. Most courts have rejected plaintiffs' pregnancy-related disparate-impact claims. Although these courts recognized the abstract validity of disparate-impact claims under the PDA, they nonetheless foreclosed such claims categorically prior to conducting the analysis ordinarily required to resolve disparate-impact claims under Title VII. In the more than a quarter century between 1978 and 2006, only a handful of courts found for the plaintiffs,[135] or denied employers' motions for summary judgment, dismissal, and judgment as a matter of law[136] in cases

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that a defendant carries the burden of production—not persuasion—once a plaintiff has established a prima facie case of disparate impact).

[130] Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k)(1)(A) (2006).

[131] *Id.*

[132] Troupe v. May Dep't Stores Co., 20 F.3d 734, 738 (7th Cir. 1994).

[133] *Id.*

[134] *Id.*

[135] EEOC v. Warshawsky & Co., 768 F. Supp. 647, 651–55 (N.D. Ill. 1991) (holding that an employer policy of terminating employees who during their first year of employment required long-term sick leave, in the absence of evidence establishing a business justification, had an unlawful disparate impact on women).

[136] *See* Garcia v. Woman's Hosp. of Tex., 97 F.3d 810, 813 (5th Cir. 1996); Scherr v. Woodland Sch. Cmty. Consol. Dist., 867 F.2d 974, 983–94 (7th Cir. 1988); Vosdingh v. Qwest Dex, Inc., No. Civ.03-4284 ADM/AJB, 2005 WL 914732, at *16 (D. Minn. Apr. 21, 2005) (holding that a genuine issue of material fact existed as to whether an employer policy of giving a zero on performance reviews to employees on personal leave from work, affecting performance reviews for the next two years, disproportionately harmed female employees).

alleging that employment policies had an unlawful disparate impact on women because they disproportionately excluded pregnant employees from the workforce. Cases from the past three years present evidence of a nascent trend toward finding for the plaintiffs in pregnancy-related disparate-impact claims.[137]

The longer pattern of courts' rejection of pregnancy-related disparate-impact claims reflects courts' ambivalence about disparate-impact liability, generally. Michael Selmi argues that the disparate-impact theory could only realize substantial change in a society that evinced greater commitment than ours does to remedy the ongoing inequalities produced by workplace structures that exclude disadvantaged groups from employment opportunity.[138]

The 2009 case of *Ricci v. DeStefano*[139] exemplifies a deepening hostility to disparate-impact theory within the Supreme Court's jurisprudence. *Ricci* limits employers' ability voluntarily to redress disparate impact via remedies that take into account characteristics protected under Title VII. The case concerns the City of New Haven's failure to certify the results of a firefighter promotional examination because of the city's belief that the examination had an unlawful disparate impact on minority firefighters.[140] Justice Kennedy's majority opinion concludes that New Haven's rejection of the test results constituted a race-conscious discriminatory employment action.[141] *Ricci* holds that before taking race-conscious action to remedy a perceived disparate impact, an "employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability."[142] The case reveals the majority's profound skepticism regarding the centrality of disparate-impact liability to Title VII's purpose,[143] as well as Justice Scalia's skepticism regarding the constitutionality of disparate-impact liability under the Equal Protection Clause.[144] *Ricci*'s application, however, is limited.[145] The case concerns the legitimacy of employer actions to avoid disparate-impact liability that involve explicit disparate treatment on the basis of a protected char-

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[137] *See* Lochren v. County of Suffolk, No. CV 01-3925(ARL), 2008 WL 2039458, at *1 (E.D.N.Y. May 9, 2008).

[138] *See* Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 781–82 (2006) [hereinafter Selmi, *Disparate Impact Theory*].

[139] 129 S. Ct. 2658 (2009).

[140] *Id.* at 2665–72.

[141] *Id.* at 2673–74.

[142] *Id.* at 2677.

[143] *Compare id.* at 2672–73, 2674–75 (depicting Title VII's "principal non-discrimination provision" as disparate-treatment rather than disparate-impact liability and rejecting the argument that a good-faith effort to avoid disparate-impact liability can justify race-conscious action) *with* Ricci v. DeStefano, 129 S. Ct. 2658, 2696–97 (2009) (Ginsburg, J., dissenting) ("Only by ignoring *Griggs* could one maintain that intentionally disparate treatment alone was Title VII's 'original, foundational prohibition,' and disparate impact a mere afterthought.").

[144] *Id.* at 2682–83 (Scalia, J., concurring) (questioning the constitutionality of disparate-impact liability).

[145] *See* Charles A. Sullivan, Ricci v. DeStefano: *End of the Line or Just Another Turn on the Disparate Impact Road?*, 104 NW. U. L. REV. 201, 201 (2010) (arguing that contrary to common opinion *Ricci* did not signal the "death" of disparate-impact liability).

acteristic. When such disparate treatment is absent, *Ricci* will not directly govern the adjudication of disparate-impact claims.

D. Beyond Disparate Impact: The Family and Medical Leave Act of 1993

The FMLA creates an affirmative social-welfare entitlement that shifts some of the costs of pregnancy, childbirth, and early infant care from employees to employers. The FMLA gives covered male and female employees the right to twelve weeks of unpaid leave annually to care for a child following birth or adoption, to care for a seriously-ill family member, or to seek care for one's own serious illness.[146] The FMLA guarantees the right to return to one's job following leave,[147] the right to continued benefits during the leave,[148] and the right not to suffer employer retaliation for taking an authorized leave.[149] Scholars, including Joanna Grossman and Christine Jolls, argue that the FMLA accommodates pregnant women and mothers by remedying the disparate impact on these groups that would occur in the absence of the leave entitlement.[150] The entitlements provided by the FMLA exist, however, regardless of whether employment practices have an unlawful disparate impact on women or another protected group. Because the FMLA establishes an affirmative entitlement to leave, business necessity is not a lawful justification for failing to provide the leave. Thus, the FMLA has a more capacious redistributive effect than does disparate-impact liability under Title VII.

The FMLA aims to destabilize sex-role stereotypes by enabling women to occupy dual roles as workers and mothers. The FMLA facilitates the labor-force attachment of childbearing women by requiring covered employers to offer at least a minimum amount of leave for pregnancy- and childbirth-related disability. The FMLA also facilitates the labor-force attachment of parents and mitigates their experience of work-family conflict by requiring employers to provide sex-neutral leave for caregiving following childbirth and adoption, regardless of any associated disability. Of central importance to the FMLA's anti-stereotyping implications, however, is the statute's universal character. The FMLA restructures the baseline employment relationship for all workers covered by the statute, requiring covered employers to internalize the costs of providing unpaid medical and family leave for all eligible employees. The FMLA not only accommodates

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[146] 29 U.S.C. § 2612(a)(1) (2006).
[147] *Id.*
[148] *Id.* §§ 2614(a)(2), 2614(c)(1).
[149] *Id.* § 2615(a)(1).
[150] On the FMLA's accommodation effects, see Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15 WASH. U. J.L. & POL'Y 17, 57 (2004); Jolls, *supra* note 20, at 649–50, 679–84.

mothers but also allows fathers to assume non-traditional caregiving roles.[151] It provides leave not only for childcare but also for care of spouses and parents. Indeed, the type of FMLA leave most frequently taken is for employees to care for themselves.[152] Thus, even if the FMLA disproportionately benefits mothers, it does so within a conceptual framework that destabilizes rather than reinforces sex-role stereotypes.

The FMLA accomplishes what Elizabeth Emens terms "integrating accommodation" by making accommodations useful, durable, and visible for parties other than the primary beneficiaries.[153] To use Chai Feldblum's visual metaphor, the FMLA rectifies the tilt resulting from women's disproportionate experience of work-family conflict by helping everyone to stand upright.[154] The universal dimension of the FMLA can erode sex-role stereotypes by promoting mutual respect and support, rather than resentment, among women and men, caregivers and non-caregivers, in the workplace.[155] For example, the FMLA further normalizes pregnancy-related medical leave because such leave represents only one instantiation of medical leave available for all eligible workers.[156] By promoting accommodation within a universal framework, the FMLA has the potential to protect childbearing women's ability to maintain labor-force attachment, without further stigmatizing women as a subordinate class of workers.[157]

The FMLA's potential to undermine sex-role stereotypes is limited, however, in two respects.[158] First, although the FMLA guarantees leave on a sex-neutral basis, the pattern of leave-taking under the statute reinforces the traditional division of childrearing and breadwinning labor between men and women. Women are more likely to take leave under the FMLA, to take longer leaves, and to take leave to care for family members rather than for

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[151] *See* 29 U.S.C. §§ 2601(a)(2), 2601(b)(4), 2611(2), 2612(a)(1) (2006).

[152] *See* Michael Selmi, *Is Something Better than Nothing? Critical Reflections on Ten Years of the FMLA*, 15 WASH. U. J.L. & POL'Y 65, 67 (2004); Katherine B. Silbaugh, *Is the Work-Family Conflict Pathological or Normal Under the FMLA? The Potential of the FMLA to Cover Ordinary Work-Family Conflicts*, 15 WASH. U. J.L. & POL'Y 193, 203 (2004).

[153] Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 846–48 (2008). Emens defines integrating "accommodation as a process of interrogating the existing baseline, by focusing on part of the population that was neglected in the creation of that baseline, to make changes to that baseline that may affect everyone." *Id.* at 894.

[154] *See* Chai R. Feldblum, *Rectifying the Tilt: Equality Lessons From Religion, Disability, Sexual Orientation, and Transgender*, 54 ME. L. REV. 160, 183–84 (2002).

[155] On the positive social effects of accommodations with third-party benefits, see Emens, *supra* note 153, at 884–90.

[156] *See* Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 1 (2010) (arguing that business fears of abuse of sick leave foreclose the possibility of more generous maternity leave under a regime that ties the two types of leave together).

[157] *See* FRASER, *supra* note 17 (contrasting affirmative with transformative responses to the recognition-redistribution dilemma).

[158] Scholars have also noted another limitation of the FMLA: the lack of coverage for routine familial caregiving. Because the FMLA makes leave available only in the case of serious illness, covered workers are unable to take leave under the Act for routine caregiving such as caring for a child sick with the flu. Silbaugh, *supra* note 152, at 196–97.

themselves. And the gender disparity is greatest with respect to leaves taken to care for a newborn or newly adopted child.[159] The FMLA therefore has not significantly changed the traditional distribution of childrearing responsibilities within the nuclear family. As a result, the statute has not disrupted employers' preference for hiring and promoting men over women because men have less demanding familial responsibilities. The FMLA, as Grossman argues, accommodates motherhood without promoting either egalitarian childrearing or substantive employment equality.[160] In practice, then, the FMLA stops short of fundamentally challenging the family-wage system.

Second, the FMLA largely fails to provide protections for low-income women and men.[161] The FMLA does not cover 40% of America's private workforce.[162] Eligible employees include those who have worked a minimum of 1,250 hours in the past year[163] for a single employer who employs at least fifty workers within a specified radius.[164] These requirements—the small business and part-time worker exemptions and the one-year probationary period—disproportionately exclude low-wage workers from coverage. The majority of ineligible workers are women.[165] Because a significant proportion of employees do not enjoy the benefit of its protections, the FMLA's capacity to erode sex-role stereotypes is partial.

II. The Legal Feminist Vision for Sex Equality, 1964–1974

History can illuminate a richer conception of sex equality than that embodied in the law today. Part II chronicles feminist thought and activism respecting the relationship between motherhood and women's labor-market participation. Feminists pursued a redistribution of the costs of reproduction, from individual women to the larger society as well as between women and men within the family. This history documents the relatively successful struggle for the right to formal equal treatment in the workplace as well as the origins of the temporary disability paradigm, later enshrined in the PDA. But the history also sheds light on goals that feminists were unable to realize, including the extension of genuinely protective state labor standards to men, strict scrutiny for sex under the Equal Protection Clause, and universal childcare.

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[159] *See, e.g.*, Naomi Gerstel & Amy Armenia, *Giving and Taking Family Leaves: Right or Privilege?*, 21 Yale J.L. & Feminism 161, 167 (2009); Wen-Jui Han & Jane Waldfogel, *Parental Leave: The Impact of Recent Legislation on Parents' Leave Taking*, 40 Demography 191, 197–98 (2003).

[160] Grossman, *supra* note 150, at 18–19.

[161] Ann O'Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 Berkeley J. Empl. & Lab. L. 1, 45–47 (2007).

[162] *State Family and Medical Leave Laws that are More Expansive than the Federal FMLA*, Nat'l P'ship for Women & Families, http://www.nationalpartnership.org/site/DocServer/StatesandunpaidFMLLaws.pdf?docID=968 (last visited Mar. 11, 2011).

[163] 29 U.S.C. § 2611(2)(A)(ii) (2006).

[164] *Id.* § 2611(4)(A)(i).

[165] O'Leary, *supra* note 161, at 43–44.

The history related in this Part contributes to an emerging legal history of feminism in the second half of the twentieth century. Much of this new, important scholarship focuses on constitutional litigation, recovering expansive feminist visions and explaining the historical contingencies that resulted in their partial fulfillment and frustration. Serena Mayeri analyzes the accomplishments and limitations of legal feminists' coalescence around a dual constitutional strategy to achieve sex equality under the Fourteenth Amendment and the Equal Rights Amendment.[166] Cary Franklin argues that legal feminists did not seek to eliminate sex-based classifications from the law, but rather pursued an anti-stereotyping principle that set constitutional limits on the extent to which the law might reinforce the male-breadwinner, female-caregiver dyad.[167] Rather than focusing on feminists' constitutional litigation, I examine legislative and administrative strategies to transform the political economy of work and family.

Legal feminists advocated for simple antidiscrimination mandates, workplace accommodations, and affirmative social-welfare entitlements. In challenging sex-specific protective labor laws, feminists disputed overbroad, market-irrational generalizations regarding women's abilities.[168] Similarly, litigation to invalidate pregnancy-discharge policies targeted irrational stereotypes concerning women's abilities. But the effort to include pregnancy within temporary disability insurance schemes involved a classic prohibition on disparate treatment and a simultaneous prohibition on market-rational discrimination. The campaign for federal childcare legislation represented a demand for an affirmative social-welfare entitlement. The normative commitment to deconstruct the family-wage system underlay feminist efforts to realize prohibitions on market-irrational discrimination as well as cost-sharing objectives.

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[166] *See, e.g.*, Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CALIF. L. REV. 755, 790–93 (arguing that the dual constitutional strategy enabled a compromise between the protectionist and equalitarian camps but also narrowed the constitutional vision of feminist activists).

[167] Franklin, *supra* note 6, at 86 (arguing "that the dominant historical narrative, which identifies formal equality as the philosophical ideal at the core of the [ACLU Women's Rights Project] campaign, masks a richer set of claims regarding the constitutional limits on the state's power to enforce sex-role stereotypes"); *see also* Neil S. Siegel & Reva B. Siegel, *Pregnancy and Sex Role Stereotyping: From* Struck *to* Carhart, 70 OHIO ST. L.J. 1095, 1099–1106 (2009) (arguing that the women's movement of the 1970s challenged laws regulating pregnant women that reinforced traditional sex roles).

[168] The conclusion that protective laws were market irrational requires qualification. The protective laws reflected overbroad generalizations and stereotypes rooted in cultural biases; eradicating them would not require employers to expend any special resources to hire female workers at the same level of productivity as male workers. But the protective laws were also market rational in the sense that they provided a rationale for employers to pay female workers less than men.

A. The Protective Laws Debate and the 1960s Transformation in Legal Feminism

In the context of an impassioned debate about protective laws in the late 1960s,[169] legal feminists came to embrace equal employment opportunity. The conventional narrative portrays feminists as divided between two hostile camps, one committed to difference feminism and the other to sameness feminism. This narrative concludes that, by 1970, sameness feminism had won.[170] The narrative is oversimplified. A more fluid and complex relationship existed among legal feminists of opposing views. The division between advocates of sex-specific protective laws and their critics derived not from inherent ideological positions, but rather from differences of strategy and priorities in the face of historical contingencies, including anti-feminist opposition.[171] The protective-laws debate is better understood not as an ideological competition between difference and sameness feminism, special and equal treatment, but rather as a strategic conflict about how to remedy the economic costs that the family-wage system imposed on women.

Many labor and social feminists fought to preserve protective laws in the late 1960s. Proponents believed that the laws prevented employers' exploitation of female labor in the workforce,[172] while also mitigating women's disproportionate responsibility for childrearing and unpaid domestic labor within the home.[173] Minimum-wage statutes shifted the social costs of substandard wages back onto employers.[174] Maximum-hours statutes alleviated

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[169] Protective laws for female workers originated in Progressive-era reformers' strategy to use notions of female difference as a means to circumnavigate the *Lochner* Court's adherence to doctrines of substantive due process and freedom of contract. *See* Joan Zimmerman, *The Jurisprudence of Equality: The Women's Minimum Wage, the First Equal Rights Amendment, and* Adkins v. Children's Hospital*, 1905–1923*, 78 J. AM. HIST. 189 (1991). By 1924, forty-three states had enacted legislation regulating female workers' maximum hours, minimum wages, and the amount of weight that they could lift; prohibiting women from entering specific occupations; and regulating women's work conditions by providing for rest periods, meal periods, toilet facilities, night-shift transportation, and similar benefits. LISE VOGEL, MOTHERS ON THE JOB: MATERNITY POLICY IN THE U.S. WORKPLACE 27 (1993).

[170] *See, e.g.*, Becker, *supra* note 7, at 210.

[171] For further discussion, see Deborah Dinner, *Debating Protective Legislation: The Origins of a Legal Sex/Gender Distinction, 1964–1974* (manuscript on file with the author) [hereinafter Dinner, *Debating Protective Legislation*].

[172] *See, e.g.*, AFL-CIO Comments on Minimum Wage and Maximum Hours Legislation for Women to Subcommittee on Protective Labor Legislation of President's Commission on Status of Women, at 3, (Nov. 27, 1962) (on file with the Schlesinger Library, Radcliffe Inst., Harvard Univ., Catherine East Papers, Box 8, Folder 28) (arguing that for women workers, a greater proportion of whom worked in nonunionized industries and workplaces in comparison to male workers, state protective laws substituted for the protection otherwise provided by collective bargaining).

[173] *See, e.g.*, Resolution No. 1 Hotel and Restaurant Employees and Bartenders International Union (on file with the Schlesinger Library, Radcliffe Inst., Harvard Univ., Catherine East Papers, Box 16, Folder 12) (explaining that a woman's work day did not end when she punched out her time card but continued when she "don[ned] the mantle and responsibility of a mother and a wife").

[174] Issacharoff & Rosenblum, *supra* note 1, at 2176.

the burden placed upon women by the unequal division of childrearing labor within the home, without challenging its normative correctness.[175] The labor and social feminist defenders of protective laws did not dispute the legitimacy of the family-wage system but nevertheless sought to spread its costs from individual women to employers.

Other labor and legal feminists argued that sex-specific labor standards not only protected but also imposed economic costs on women in the form of lower wages and diminished job opportunities. Scholars of law and economics have since confirmed this insight.[176] The opponents of protective laws tried to use Title VII to expand women's access to employment opportunities. Legal feminists drew upon a social-scientific distinction between biological sex difference and the social construction of gender roles.[177] They maintained that protective laws illegitimately regulated women not on the basis of real and meaningful sex differences but on the basis of overbroad gender stereotypes. Equal treatment, by contrast, required the evaluation of individual capacity rather than classification on the basis of group characteristics.[178]

Despite the contention by many supporters that sex-specific protective laws held special importance for low-income female workers, working-class women and women of color in particular, often spearheaded the campaign against the laws. Women of color long participated in the paid workforce at higher rates than did white women.[179] African American women, moreover, worked disproportionately in occupations excluded from the Fair Labor Standards Act as well as from state protective-labor laws.[180] The ideology of protection held little economic or cultural purchase for African American

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[175] *See, e.g.*, Harry Bernstein, *Debate Grows over Job Discrimination Due to Sex*, L.A. TIMES, Mar. 7, 1966, at A1 (quoting California Advisory Commission on the Status of Women "chairman" and Amalgamated Clothing Workers education director Ruth Miller: " '[W]oman's role and responsibilities in our culture are not the same as those of the male . . . : She may be gainfully employed but at the same time be a wife, mother, homemaker, nurse or any combination of these at different stages of her life.' ").

[176] Issacharoff & Rosenblum, *supra* note 1, at 2173–76.

[177] As early as the 1930s, the anthropologist Margaret Mead distinguished between sex and sex roles, and in the mid-1950s scientists and social scientists started to use the word "gender" as it is used today. Like their intellectual forebears, second-wave feminists argued that socio-historical forces rather than biology determined gender. Feminists' unique contribution was to question the necessity and normative desirability of gender roles. *See* Joanne Meyerowitz, *A History of 'Gender,'* 113 AM. HIST. REV. 1346, 1353–55 (2008).

[178] For example, the Chair of the Citizens' Advisory Council on the Status of Women argued that sex could serve as a "bona fide occupational qualification" ("BFOQ") under Title VII in only extremely limited instances. Sex could not serve as a BFOQ by reason of bias on the part of customers or coworkers, assumptions about women's life patterns such as their turnover rate in the workforce, or overbroad characterizations of women's physical or psychological characteristics. *See* Memorandum from Margaret Hickey, Chairman, to members of the Citizens' Advisory Council on the Status of Women 6–9 (Sept. 11, 1965) (on file with the Schlesinger Library, Radcliffe Inst., Harvard Univ., Catherine East Papers, box 9, folder 8).

[179] *See generally* JACQUELINE JONES, LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY, FROM SLAVERY TO THE PRESENT (rev. ed. 2010).

[180] *See generally* Phyllis Palmer, *Outside the Law: Agricultural and Domestic Workers Under the Fair Labor Standards Act*, 7 J. POL'Y HIST. 416 (1995).

women.[181] Furthermore, working-class women faced the greatest economic need to access the higher-paying blue-collar jobs that protective laws placed beyond their reach. Whether the majority of women workers in a given industry defended or opposed protective laws depended on several factors. These included the institutional cultures of specific unions[182] as well as the degree of sex-segregation and work cultures in various sectors.[183] The plaintiffs who brought suit challenging protective laws as unlawful under Title VII worked as manufacturing workers,[184] telephone operators,[185] and railroad agents.[186]

Neither sex-specific labor standards nor the erosion of protective-labor standards, however, would end the economic burden that the family-wage system placed on women. While protective laws forced women to internalize the costs of social protection, the erosion of these laws failed to address the consequences of childrearing responsibilities for women's labor-force participation. Both proponents and opponents of sex-specific labor standards shared as an ideal the extension of genuinely-protective labor laws, especially maximum-hours laws, to men. This might have achieved some objectives held by advocates for social protection while mitigating the economic costs that sex-specific labor standards imposed upon women. The extension of universal protective laws would have promoted socioeconomic security, as well as time for familial and civic life apart from work, without reinforcing stereotypes regarding women's role as caregivers and without diminishing women's job opportunities. Historical contingencies, including the courts' reluctance to extend protective laws to men as a remedy for the laws' violation of Title VII and employers' political opposition to their extension in state legislatures, prevented the realization of this ideal.[187]

Under both the social-protective and equal-treatment regimes, women internalized the cost of pervasive pregnancy discrimination. At the same time as legal feminists began to critique protective laws, they also turned their attention to the lack of social protection for childbearing workers. From the late sixties through the seventies, legal feminists would expose the

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[181] The architect of legal feminists' dual constitutional strategy, Pauli Murray, explained in making a case for the ERA: "Negro women enjoy neither the advantages of the idealizations of 'womanhood' and 'motherhood' which are part of American mythology, nor the 'protections' extended to women which opponents of the Equal Rights Amendment are so zealous to preserve." Pauli Murray, *The Negro Women's Stake in the Equal Rights Amendment*, 6 HARV. C.R.–C.L. L. REV. 253, 254 (1971).

[182] *See* NANCY GABIN, FEMINISM IN THE LABOR MOVEMENT: WOMEN AND THE UNITED AUTO WORKERS, 1935–1975 (1990) (showing how activists within the Women's Bureau of the United Auto Workers ("UAW") assumed a frontrunner position in the labor movement's changing stance on protective laws and the Equal Rights Amendment).

[183] COBBLE, *supra* note 13, at 186–87.

[184] Mengelkoch v. Indus. Welfare Comm'n, 284 F. Supp. 950 (C.D. Cal. 1968); Bowe v. Colgate-Palmolive Co., 272 F. Supp. 332 (S.D. Ind. 1967).

[185] Weeks v. S. Bell Tel. & Tel. Co., 277 F. Supp. 117 (S.D. Ga. 1967).

[186] Rosenfeld v. S. Pac. Co., 293 F. Supp. 1219 (C.D. Cal. 1968).

[187] *See* Dinner, *Debating Protective Legislation*, *supra* note 171, at 65.

price women paid "for bearing a child" or "simply [being] . . . of childbearing age": deprivation "of the opportunity to get an education, to work, even to buy a house."[188] Legal feminists attributed such discrimination to traditional gender norms, including "archaic assumptions about the physical and emotional effects of pregnancy," "moralistic attitudes, [directed] particularly toward teenagers and unmarried women," and cultural ideas about "the duties of a mother to take sole responsibility for raising children."[189]

B. Pregnancy-Discharge Policies and Constitutional Sex Equality

In the early 1970s, women began to bring lawsuits challenging pregnancy-dismissal policies as unconstitutional under the Equal Protection Clause and unlawful under Title VII. Their claims challenged the widespread practice of firing female employees at the fourth or fifth month of pregnancy or forcing them to take mandatory, unpaid leave without any guarantee of a job following childbirth. Pregnancy-dismissal policies reflected traditional conceptions of the pregnant body as an emblem of sexuality, stereotypes about pregnant women's incapacity to work, and values about new mothers' place in the home. Labor activists and legal feminists used union organizing and litigation to combat the policies and sought to replace them with alternative provisions that would require individual evaluations of pregnant employees' capacity to continue working and new mothers' readiness to return to work.[190] These efforts proved largely successful.[191] Requiring employers to treat pregnant women and new mothers in a manner consistent with their capacities constituted a mandate that employers act in a market-rational manner. Part of the success of the pregnancy-dismissal suits lay in the fact that these claims did not place courts in a redistributive role.[192] Feminist advocates, however, did not meet with success in using the pregnancy-dismissal cases to realize strict scrutiny for sex under the Equal Protection Clause.

The effort to invalidate pregnancy-dismissal policies as unconstitutional formed an early centerpiece of the litigation campaign to achieve strict scrutiny for sex under the Equal Protection Clause. Ruth Bader Ginsburg, then counsel for the ACLU Women's Rights Project, pursued a carefully coordinated strategy in the early 1970s to make sex a suspect class. Before work-

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[188] TRUDY HAYDEN, PUNISHING PREGNANCY: DISCRIMINATION IN EDUCATION, EMPLOYMENT AND CREDIT 1 (1973).

[189] *Id.* at 2.

[190] *See generally* Deborah Dinner, *Recovering the LaFleur Doctrine*, 22 YALE J.L. & FEMINISM 343 (2010) [hereinafter Dinner, *LaFleur Doctrine*].

[191] *See e.g.*, Green v. Waterford Bd. of Educ., 473 F.2d 629 (2d Cir. 1973); Monell v. Dep't of Soc. Servs., 394 F. Supp. 853 (S.D.N.Y. 1975), *aff'd* 532 F.2d 259 (2d Cir. 1976), *rev'd* 436 U.S. 658 (1978); Bravo v. Bd. of Educ., 345 F. Supp. 155 (N.D. Ill. 1972); Heath v. Westerville Bd. of Educ., 345 F. Supp. 501, 505 (S.D. Ohio 1972); Williams v. S.F. Unified Sch. Dist., 340 F. Supp. 438 (N.D. Cal. 1972).

[192] Dinner, *LaFleur Doctrine*, *supra* note 190, at 361, 398.

ing on the *Frontiero v. Richardson* case that resulted in a plurality opinion affording strict scrutiny to sex,[193] Ginsburg had pinned her hopes on another case: *Struck v. Secretary of Defense*.[194] In the fall of 1970, Ginsburg filed a case on behalf of Susan Struck, a Captain in the Air Force who became pregnant while serving in Vietnam.[195] The case challenged the constitutionality of an Air Force regulation requiring the immediate discharge of a female officer upon the determination that she was pregnant or had given birth to a live child.[196]

Ginsburg aspired to realize strict scrutiny for sex in the *Struck* case.[197] Only from a formalist perspective did a case involving pregnancy—the exemplar of sex difference—seem an odd choice for Ginsburg to argue that the Court should make sex a suspect class. In analyzing the *Struck* case, the Ninth Circuit exemplified this kind of formalist reasoning. The Circuit upheld the regulation on the basis that that the Air Force rationally took account of the physical differences between an expectant mother and father.[198] Ginsburg and other feminist attorneys, by contrast, believed that sex-role stereotypes regarding pregnancy formed a root cause of sex discrimination. From this perspective, asking for strict scrutiny in a pregnancy-discrimination case made sense.

Cary Franklin shows that Ginsburg's theory of constitutional sex equality derived in significant part from Ginsburg's admiration for the philosophy of John Stuart Mill and the social policy innovations undertaken by the Swedish government during the 1960s and 1970s to advance sex equality. Mill's 1869 essay, *The Subjection of Women*, argued that what society understood as male and female nature actually represented the product of social and economic circumstances.[199] The essay became an inspirational text for the late-twentieth century feminist movement in the United States. Mill's philosophy also provided the intellectual foundation for Swedish social policy designed to undermine the male breadwinner-female caregiver model. Ginsburg became an expert on Swedish law while a professor at Columbia Law School, and, in litigating *Struck*, she applied some of the insights gleaned from the Swedes' perspective on gender policy.[200] She attempted to persuade the Court that the legal regulation of pregnancy did not originate

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[193] 411 U.S. 677, 682 (1973) (plurality opinion).

[194] Brief for the Petitioner at 26–47, Struck v. Sec'y of Def., 409 U.S. 1071 (1972) (No. 72–178) (arguing for strict scrutiny for sex) [Brief for the Petitioner in *Struck*].

[195] Struck v. Sec'y of Def., 460 F.2d 1372, 1373–74 (9th Cir. 1971).

[196] Brief for the Petitioner in *Struck*, *supra* note 194, at 56–57.

[197] *See* Letter from Ruth Bader Ginsburg to Dean Harriet Rabb (Aug. 2, 1975) (on file with the Library of Congress, Ruth Bader Ginsburg Papers, box 7, folder: Schattman v. Texas Employment Commission 1972); Letter from Ruth Bader Ginsburg to Joseph J. Levin, Jr. (Dec. 20, 1972) (on file with the Library of Congress, Ruth Bader Ginsburg Papers, box 3, folder: Frontiero v. Richardson 1972).

[198] *Struck*, 460 F.2d at 1375.

[199] *See generally* JOHN STUART MILL, THE SUBJECTION OF WOMEN (1869).

[200] Franklin, *supra* note 6, at 91–105.

from the physical differences between males and females, but rather from a set of social values regarding gender.

Ginsburg's brief to the Supreme Court in *Struck* did not contest the classification drawn by the Air Force Policy per se. Instead, the brief challenged the sex-role stereotypes that the policy embodied.[201] Ginsburg's brief noted that while the Air Force took multiple affirmative steps to accommodate fathers in service, it presumed Susan Struck "unfit for service under a regulation that declares, without regard to fact, that she fits 'into the stereotyped vision . . . of the "correct" female response to pregnancy.'"[202] The regulation did not reflect the Air Force's concern with the physical incapacity associated with childbirth. Had Struck experienced any other temporary disability she would have easily obtained leave for rehabilitation.[203] The assumption that a pregnant woman would "devote herself to child care" following childbirth undergirded the Air Force policy.[204] The regulation imposed traditional sex roles on pregnant women by "reinforc[ing] societal pressure to relinquish career aspirations for a hearth-centered existence."[205] Furthermore, the regulation left low-income and single women discharged upon pregnancy financially destitute and without prenatal care.[206]

The Supreme Court never considered Ginsburg's arguments in *Struck* about the relationship between pregnancy and sex equality. In December 1972, after the Court had granted Struck's petition for a writ of certiorari,[207] the Air Force waived the discharge regulations in her case.[208] Although Ginsburg argued that the waiver did not moot the case, the Court took the chance to avoid ruling upon the controversial issue of pregnancy-discharge policies.[209] *Struck*'s enduring significance lies not in its doctrinal influence but in its historical role as one of the first attempts by a feminist litigator to apply a prohibition on sex-role stereotyping to the legal regulation of pregnancy.

C. The Creation of the Temporary Disability Model for Pregnancy

Legal feminists contested not only pregnancy-discharge policies but also the exclusion of pregnancy from the benefit schemes designed to enable the socioeconomic independence of workers. As historians and sociologists

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[201] *Id.* at 126–27; Neil S. Siegel & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771, 773–75, 784–85 (2010).

[202] Brief for the Petitioner in *Struck*, *supra* note 194, at 50–51 (quoting Heath v. Westerville Bd. of Educ., 345 F. Supp. 505, 506 n.1 (S.D. Ohio 1972)).

[203] *Id.* at 50.

[204] *Id.* at 52.

[205] *Id.* at 37.

[206] *Id.* at 36–37.

[207] Struck v. Sec'y of Def., 409 U.S. 947 (1972) (cert. granted).

[208] Opposition to Memorandum for the Respondents Suggesting Mootness at 2, Struck v. Sec'y of Def., 409 U.S. 1071 (1972) (No. 72-178).

[209] *Struck*, 409 U.S. at 1071.

have demonstrated, gender ideologies shaped a two-tier welfare system in the United States. Over the course of the twentieth century, government had developed universal, relatively high-quality entitlements targeting workers—presumed to be male breadwinners. By contrast, female caregivers received inferior, means- and morals-tested benefits.[210] Childbearing workers confounded the distinction between independent breadwinners and dependent caregivers.[211] The socio-cultural distinctions between mother and worker, home and market, translated into the exclusion of pregnancy and childrearing from state- and employer-sponsored social protections.[212] Law and policy privatized the economic burdens of pregnancy, childbirth, and childrearing even as a changing economy made the family-wage ideal increasingly anachronistic.[213]

In 1970, the Citizens' Advisory Council on the Status of Women made a dramatic announcement. The Council issued a statement of principles concluding that employment policies should treat childbirth- and pregnancy-related complications as temporary disabilities for purposes of health insurance, disability benefits, and sick leave.[214] The temporary disability paradigm represented a sea change in the Council's stance on the legal regulation of pregnant workers. In the late sixties, the Advisory Council had advocated for "'special recognition' of absence due to pregnancy" in the form of maternity leaves from work.[215] Now, the Council publicly opposed a separate system of maternity leaves and benefits and, instead, advocated for the recognition of pregnancy within a pre-existing sex-neutral legal and personnel category.

Advocacy for the temporary disability paradigm fused reformers' longstanding commitment to achieving social protections for women workers with a newer commitment to advancing women's equal employment opportunity. The Citizens' Advisory Council succeeded the President's Commission on the Status of Women, created by President Kennedy in 1961. The Commission represented the culmination of advocacy by a coterie of labor

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[210] *See generally* LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE (1994); Barbara J. Nelson, *The Origins of the Two-Channel Welfare State: Workmen's Compensation and Mothers' Aid*, *in* WOMEN, THE STATE, AND WELFARE 123 (Linda Gordon ed., 1984).

[211] The historical literature focusing on social-welfare policies targeting female caregivers has not studied how the family-wage ideal shaped the legal regulation of childbearing workers.

[212] On the historical struggles that resulted in a welfare state reliant on employer-provided benefits, see JENNIFER KLEIN, FOR ALL THESE RIGHTS: BUSINESS, LABOR, AND THE SHAPING OF AMERICA'S PUBLIC-PRIVATE WELFARE STATE (2003).

[213] By 1975, 39% of women with children under the age of six were in the workforce. U.S. DEP'T OF LABOR, FUTUREWORK: TRENDS AND CHALLENGES FOR WORK IN THE 21ST CENTURY 31 (1999), *available at* http://www.dol.gov/oasam/programs/history/herman/reports/futurework/report/chapter3/main.htm#chart3-3.

[214] CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, JOB RELATED MATERNITY BENEFITS 1 (1970).

[215] INTERDEPARTMENTAL COMM. ON THE STATUS OF WOMEN & CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, REPORT ON PROGRESS IN 1966 ON THE STATUS OF WOMEN 46 (1967) [hereinafter INTERDEPARTMENTAL COMM. & CACSW].

and social feminist organizations that coalesced around the Women's Bureau of the U.S. Department of Labor. The Women's Bureau coalition formed a strand of post-World War II activism with roots in the Progressive and New Deal eras that supported protective laws and opposed advocacy on the part of the National Woman's Party for the Equal Rights Amendment.[216] Even as the President's Commission embraced principles of gender-protective liberalism, however, it also adopted evolving antidiscrimination principles of equal treatment and individual opportunity. The Commission played an important role in the early 1960s in legitimating women's rights, solidifying a national network of female reformers, and negotiating compromise positions between adherents to the opposing philosophies of the Women's Bureau and the National Woman's Party.[217] The Commission at times favored retaining protective legislation for women, such as maximum-hours laws and maternity leaves, but also advocated for equal-pay legislation and the extension of state minimum-wage laws to include male workers.[218] When Kennedy created the Citizens' Advisory Council in 1963, it operated in an increasingly liminal ideological space. After the passage of Title VII the next year, the Council grappled with how to reconcile the prohibition on sex discrimination in employment with the peculiar needs and vulnerabilities of women workers within the family-wage system.

The Advisory Council's innovation of the temporary disability paradigm represented a simultaneous effort to prohibit sex-role stereotyping and to realize material benefits related to pregnancy and childbirth. Requiring pregnancy to be treated within the temporary disability framework had the potential to undermine stereotypes about pregnancy's physical and psychological effects on women workers. In place of the assumption that pregnant women could not work without jeopardizing their own or their fetuses' health, the temporary disability paradigm called for the evaluation of individual pregnant women's particular capabilities. By distinguishing between pregnancy and early infant care, the temporary disability model undermined the ideal that women belonged in the home following childbirth. The temporary disability model also promised economic security for women workers during periods of pregnancy- and childbirth-related absences from work.

Advocacy for the temporary disability paradigm implicated a normative purpose broader than formal equality and posed redistributive consequences. Feminists did not advocate for the temporary disability model because of a commitment to eliminating sex-based classifications. Instead, advocates sought to realize economic security for childbearing women, as well as continued access to the social citizenship that accompanies employment. The temporary disability paradigm held the promise of ending market-*irrational*

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[216] *See* CYNTHIA HARRISON, ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES, 1945–1968, at 6–15 (1988).

[217] *See generally id.*

[218] *Id.* at 152–54.

discrimination: if pregnant women had the capacity to work, employers should not fire them. The paradigm, however, also represented an effort to end market-*rational* discrimination. Including pregnancy in temporary disability and medical-benefit schemes imposed unique economic costs on employers. Thus, legal feminist mobilization to achieve equal treatment necessarily entailed a call for cost sharing.

i. The Challenge of Pregnancy Discrimination

In the late 1960s, the Citizens' Advisory Council on the Status of Women set about studying the economic condition and legal status of pregnant workers. The question of how to reconcile pregnancy with women's workforce participation constituted one of the most difficult and complex issues that the Council considered.[219] The Council discovered that the gendered rhetoric of social protection, which had long justified both restrictions and privileges unique to women workers, rang hollow when it came to the very reproductive functions that purportedly necessitated state intervention. The Council expressed dismay at its findings: "Contrary to popular belief, the state laws singling out maternity for special treatment in employment all are exclusionary or restrictive."[220]

Many employers routinely terminated pregnant workers and required women to take unpaid leave without job security both during their pregnancies and for specified durations following childbirth.[221] In 1970, only 29% of large, unionized workplaces made some provision for job-secure maternity leave.[222] Non-unionized employees were in even more dire straits. Without job-guaranteed leave, women faced termination or forced resignation when they needed to take leave from work as a result of pregnancy-related disability or childbirth.

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[219] Catherine East, the Executive Secretary of the Advisory Council, assembled data on the treatment of pregnant workers, reported in an article that bore the byline of the Director of the Women's Bureau of the Department of Labor. Elizabeth Duncan Koontz, *Childbirth and Childrearing Leave: Job Related Benefits*, 17 N.Y. L. FORUM 480 (1971).

[220] *Id.* at 482.

[221] Most school systems, for example, ordered female teachers to leave work beginning at the fourth or fifth month of pregnancy and prohibited women from returning to teaching for several months to a year following childbirth. *Id.* at 492 (citing NAT'L EDUC. ASS'N, EDUCATIONAL RESEARCH SERVICE CIRCULAR NO. 3 (1966)); *see also* Hutchison v. Lake Oswego, 374 F. Supp. 1056 (D. Or. 1974); Bravo v. Bd. of Educ., 345 F. Supp. 155 (N.D. Ill. 1972); Heath v. Westerville Bd. of Educ., 345 F. Supp. 501 (S.D. Ohio 1972); Pocklington v. Duval Cty. Sch. Bd., 345 F. Supp. 163 (M.D. Fla. 1972); Green v. Waterford, 349 F. Supp. 687 (D. Conn. 1972); Williams v. S.F. Unified Sch. Dist., 340 F. Supp. 438 (N.D. Cal. 1972); Guelich v. Mounds View Indep. Pub. Sch. Dist., 334 F. Supp. 1276 (D. Minn. 1972); Jinks v. Mays, 332 F. Supp. 254 (N.D. Ga. 1971); Cohen v. Chesterfield, 326 F. Supp. 1159 (E.D. Va. 1971); La Fleur v. Cleveland Bd. of Educ., 326 F. Supp. 1208 (N.D. Ohio 1971); Cerra v. E. Stroudsburg Sch. Dist., 285 A.2d 206 (Pa. Commw. Ct. 1971).

[222] Koontz, *supra* note 219, at 490–91 (citing U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, CHARACTERISTICS OF AGREEMENTS COVERING 5,000 WORKERS OR MORE, BULLETIN NO. 1686 (1970)).

Neither private employers nor state or federal government entities stepped in to protect the economic security or physical wellbeing of pregnant women alienated from the workforce. States deemed pregnant women, even those fired on the basis of their condition alone, unable to work and thus ineligible for unemployment benefits.[223] At the same time, private employers excluded pregnancy- and childbirth-related disability from temporary disability benefits.[224] Of the six jurisdictions that had state-level temporary disability insurance systems, three states—California, Hawaii, and New York—as well as Puerto Rico excluded pregnancy-related disability from coverage. New Jersey's and Rhode Island's temporary disability insurance systems provided unequal coverage for pregnancy.[225] Finally, nearly 40% of private health-insurance policies excluded maternity-related coverage for employees, employees' spouses, or both of these groups.[226] Private employer practices and state law excluded pregnant women from the means to economic autonomy—paid employment—while simultaneously denying childbearing women the socioeconomic protections extended for other forms of human dependence.

ii. The Aspirations for the Temporary Disability Paradigm

The Citizens' Advisory Council on the Status of Women devised the temporary disability paradigm as a new means to regulate pregnant workers consistent with Title VII. The paradigm challenged the exclusion of pregnant women from employment opportunity as well as from the public-private welfare benefits that insured workers against economic insecurity. The Council's position on maternity, disability, and insurance transformed in the context of the late sixties' debate over protective laws. Before devising the temporary disability model, the Citizens' Advisory Council had claimed that "substantial equality" required "special" benefits for pregnant workers.[227] In a 1966 report on the status of women, the Council suggested that Title VII's sex-equality mandate might require employers to provide maternity leaves distinct from any other system of leaves.[228] Only four years later, in

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[223] Thirty-eight states disqualified pregnant women from unemployment insurance, even if they were fired on the basis of pregnancy alone. *Id.* at 486 (citing U.S. DEP'T OF LABOR, MANPOWER ADMINISTRATION, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS: COMPARISON REVISION, ser. 2, No. 4 (1970)).

[224] A 1969 study of policies issued by eleven large insurance companies found that 9,700 provided some maternity benefit and 10,700 did not. *Id.* at 491 (citing SOC'Y OF ACTUARIES, 1969 REPORTS OF MORTALITY AND MORBIDITY EXPERIENCE No. 2, at 168 (1970)).

[225] *Id.* at 483.

[226] Even those policies that provided maternity coverage set special maximums on reimbursable costs. *Id.* at 491 (citing HEALTH INS. INST., NEW GROUP HEALTH INSURANCE 10 (1971)).

[227] INTERDEPARTMENTAL COMM. & CACSW, *supra* note 215, at 46.

[228] *Id.* at 47 ("Absence due to illness or injury should not be equated with absence due to maternity, since maternity is a temporary disability unique to the female sex which should be anticipated.").

October 1970, the Citizens' Advisory Council issued a statement of principles concluding: "Childbirth and complications of pregnancy are, for all *job-related purposes*, temporary disabilities and should be treated as such under any health insurance, temporary disability insurance, or sick leave plan of an employer, union or fraternal society."[229] The temporary disability paradigm sought to realize economic security for childbearing workers, without reinforcing sex-role stereotypes or employment discrimination against women.

The temporary disability paradigm challenged sex-role stereotypes by affirming individual opportunity, by distinguishing between women's biological and social roles in reproduction, and by seeking benefits for women workers within a universal framework. Legal feminists argued that, as in the case of other temporary disabilities, employers should conduct an individual evaluation of a pregnant woman's capacity to perform her job duties. They aimed to combat entrenched cultural notions that pregnant women did not belong in public space and that work jeopardized the health of pregnant women and their fetuses. Citizens' Advisory Council Chair Jacquelyn Gutwillig explained: "[R]equirements that pregnant women take leave while they are still physically able to work . . . are a hangover from the days, not so ancient, when pregnant women were shut up at home—when pregnancy was considered obscene."[230] Legal feminists hoped that the temporary disability paradigm would diminish sex-role stereotypes about pregnant women's incapacity to work and about women's place in the home.

Legal feminists understood the distinction between childbirth and childrearing as essential to combat the legal reification of the family-wage system. Gutwillig explained: "The subject of childrearing we felt was a separate topic that required separate treatment as both men and women have the responsibility to rear children."[231] Gutwillig considered this "semantic separation" to be "one of the most important contributions of our [the Council's] consideration of this issue."[232] The temporary disability paradigm rested on the premise that women should receive leave and benefits when physically incapacitated by pregnancy or childbirth, but that women should not receive special protections for childrearing that parents of either sex might undertake.[233] In advocating for distinct legal paradigms addressing the biological and social dimensions of reproduction, feminists aspired to unravel women's capacity for pregnancy from the prescription of normative gender roles. They also believed that distinguishing between pregnancy disability leave and parental leave would, in turn, allow for a redistribution of childrearing responsibility. An ACLU Women's Rights Project Report

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[229] CITIZENS' ADVISORY COUNCIL, JOB RELATED MATERNITY BENEFITS, *supra* note 214, at 1.

[230] CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, WOMEN IN 1971, at 53 (1972).

[231] *Id.* at 54.

[232] *Id.* at 53.

[233] HAYDEN, *supra* note 188, at 24–25.

stated: "Gestation is . . . a function of the female sex alone . . . But child*rearing* . . . *can* be done by men as well as by women, *can* be shared between parents, and *can* enlist the services of persons and institutions outside the home."[234]

Classifying pregnancy within the temporary disability framework also represented an effort to extend socioeconomic protection to childbearing workers without discouraging women's employment. The temporary disability model promised to camouflage the costs that such protection imposed on employers. The debate over protective laws in the late sixties had convinced Mary Eastwood, an attorney with the Department of Justice Office of Legal Counsel and a member of the Citizens' Advisory Council, that treating pregnancy as a separate issue would not comport with evolving principles of constitutional sex equality. Indeed, a distinct system of maternity benefits would function as a "new 'protective' technique for giving job preference to men" and would disadvantage women in the labor market.[235] The Council explained the problem with maternity benefits: "[I]n the United States where the employer frequently pays all or part of the cost of such benefits, such [special maternity] policies could very well result in reluctance to hire women of childbearing age."[236] Although the temporary disability paradigm would itself impose upon employers costs associated with employing women,[237] legal feminists believed that providing pregnancy-related benefits within a pre-existing, sex-neutral category might mitigate the negative consequences of that cost.

Employers mobilized against the classification of pregnancy as a temporary disability. Employers, as well as legislators sympathetic to business, contended that pregnancy should not be classified as a temporary disability because pregnancy represented a "normal physiological condition"[238] and occasioned voluntary, rather than unanticipated, periods of physical incapacity.[239] Employers also marshaled traditional characterizations of women's role to oppose the temporary disability paradigm. They reasoned that women did not merit disability benefits for pregnancy because they would not

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[234] *Id.*

[235] Mary Eastwood, *Fighting Job Discrimination: Three Federal Approaches*, 1 FEMINIST STUD. 75, 91 (1972).

[236] CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, WOMEN IN 1970, App. D at 21 (1970).

[237] Depending on the degree of enforcement of prohibitions on hiring and wage differentials, as well as the degree of sex segregation in an industry, antidiscrimination mandates have the potential to discourage the hiring or depress the wages of women. Jolls, *supra* note 20, at 690–91.

[238] *See* Erica B. Grubb & Margarita C. McCoy, Comment, *Love's Labors Lost: New Conceptions of Maternity Leaves*, 7 HARV. C.R.–C.L. L. REV. 260, 287 (1972) (quoting CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, REPORT OF THE TASK FORCE ON SOCIAL INSURANCE AND TAXES 45 (1968)).

[239] *See* CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, WOMEN IN 1971, *supra* note 230, at 53–54; Grubb & McCoy, *supra* note 238, at 288 (1972) (citing BUREAU OF NAT'L AFFAIRS, THE NEGRO & TITLE VII, SEX & TITLE VII 22 (Personnel Policies Forum, Survey No. 82, 1967)).

return to work following childbirth.[240] Employers also suggested that childbearing women would abuse the disability benefits. Women would malinger by claiming benefits for time periods beyond the phase of physical incapacity to care for their infants.[241] Employers' arguments against the pregnancy disability model depicted the costs of reproduction as the inherent responsibility of the private family and represented women's place following childbirth as in the home.

iii. Mobilization and Administrative Adoption

Confusion and ambivalence characterized the initial response of the EEOC, the agency charged with enforcing Title VII, to the antidiscrimination rights of pregnant workers. The agency's equivocal stance on pregnancy discrimination reflected a broader reluctance to take the sex provision of Title VII seriously. The National Organization for Women ("NOW") formed in 1966 with the primary objective of pressuring a recalcitrant EEOC to enforce the sex provision of Title VII.[242] NOW engaged in media campaigns, public protest, and lobbying activities to change the attitude of the EEOC toward sex discrimination.[243]

In the two years following the passage of Title VII, the EEOC's Office of General Council treated pregnancy as unique and distinct from other medical conditions.[244] The Office issued opinion letters suggesting that childbearing women had an affirmative right to maternity leave, regardless of whether employers offered leave to other temporarily disabled workers.[245] These opinions, however, also stated that employers did not violate Title VII when they excluded pregnancy from temporary disability insurance.[246]

The EEOC stance on pregnancy began to evolve in response to both NOW's lobbying activities and internal pressure. A young EEOC staff attorney, Susan Deller Ross, met the Executive Secretary of the Citizens' Advisory Council, Catherine East, when both testified before Congress regarding women's issues. Ross found persuasive the Council's argument for classifying the physical effects of pregnancy and childbirth as temporary disabili-

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[240] Grubb & McCoy, *supra* note 238, at 292.

[241] Catherine East, Equality Under the Law and Images of Women, Invited Address at the 81st Annual Convention, American Psychological Association, Montreal, Canada 19 (Aug. 28, 1973) (on file with the Schlesinger Library, Radcliffe Inst., Harvard Univ., Catherine East Papers, box 5, folder 77).

[242] MacLean, *supra* note 13, at 127–28.

[243] *See* John David Skrentny, The Minority Rights Revolution 111–19 (2002).

[244] *See* Schwartz, *supra* note 69, at 11–13.

[245] *See, e.g.*, General Counsel Opinion Letter (Nov. 15, 1966), *as reprinted in* E.E.O.C. Dec. No. 70-360, Empl. Prac. Dec. (CCH) ¶ 6084 (1969).

[246] General Counsel Opinion Letter (Nov. 10, 1966), reprinted in Empl. Prac. Guide (CCH) ¶ 17,304.49 (1966); General Counsel Opinion Letter (Oct. 17, 1966), *reprinted in* E.E.O.C. Dec. No. 33-41, Empl. Prac. Dec. (CCH) ¶ 17,304.43 (1966).

ties.[247] Ross campaigned for the adoption of the temporary disability paradigm within the EEOC.

By 1971, the EEOC Office of Compliance, which determined whether reasonable cause existed to believe that an employer unlawfully discriminated, began to adopt the temporary disability paradigm. In the spring of that year, a reasonable-cause decision stated that the exclusion of pregnancy from temporary disability payments violated Title VII.[248] After the Supreme Court handed down *Griggs*, the Office of Compliance issued decisions stating that several employer practices related to pregnancy had an unlawful disparate impact on women.[249] These practices included the exclusion of pregnancy from temporary disability insurance schemes,[250] the requirement that female employees work one year before becoming eligible for maternity leave,[251] and the denial of seniority credit for the time that female employees took off from work for maternity leave.[252] Finally, in the spring of 1972, the EEOC issued guidelines interpreting Title VII to require employers to treat pregnancy as a temporary disability.[253] The guidelines represented a victory for legal feminists who had devised the temporary disability paradigm as a strategy to promote childbearing women's economic security, social wellbeing, and equal employment opportunity.

D. Feminist Childcare Activism

Feminists advocated for social-welfare legislation, in addition to antidiscrimination law, as a means to dismantle the family-wage system. In the late 1960s, the claim to childcare as a right echoed across diverse strands of the women's movement.[254] Grassroots activists demanded free, twenty-four hour universal childcare, funded by the federal government but controlled by local communities.[255] Feminists sought to redefine childrearing as a collective, public responsibility rather than a private responsibility of individual women. The National Organization for Women's 1966 Statement of Purpose, for example, asserted that childcare did not represent "the unique

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[247] Interview with Susan Deller Ross at Georgetown Law Center in Washington, D.C. (Dec. 17, 2008).

[248] For further discussion of this evolution, see Schwartz, *supra* note 69, at 17–19 (arguing that reasonable-cause decisions issued by the Office of Compliance show a gradual evolution of the EEOCs policy on pregnancy that belies the *Gilbert* majority's understanding that the EEOC suddenly switched its position in 1972).

[249] *Id.* at 18.

[250] E.E.O.C. Dec. No. 71-1474, Empl. Prac. Dec. (CCH) ¶ 6221 (1971).

[251] E.E.O.C. Dec. No. 72-1919, Empl. Prac. Dec. (CCH) ¶ 6370 (1972).

[252] E.E.O.C. Dec. No. 71-413, Empl. Prac. Dec. (CCH) ¶ 6204 (1970).

[253] 37 Fed. Reg. 6819, 6837 (Apr. 5, 1972) (codified at 29 C.F.R. § 1604.10).

[254] For a more comprehensive discussion of feminist rights consciousness and activism regarding childcare, see Deborah Dinner, *The Universal Childcare Debate: Rights Mobilization, Social Policy, and the Dynamics of Feminist Activism, 1966–1974*, 28 L. & HIST. REV. 577 (2010) [hereinafter Dinner, *Universal Childcare Debate*].

[255] *Id.* at 586–601.

responsibility of each individual women [sic]" but "rather . . . a basic social dilemma which society must solve."[256]

Historically, social movements for women's rights dealt with the economic value of childrearing in very different ways. Childrearing has two forms of economic value. First, in the absence of unpaid caregiving labor, there exist replacement costs for the social, cognitive, physiological, and psychological nurture of young children.[257] Second, childrearing poses costs in the sense that primary caregivers in the home face a consequent disadvantage in labor-market competition. Scholars call this derivative or secondary dependency.[258] Both of these types of costs might be either veiled within the private family, in a manner that hides their economic dimensions, or assigned public economic value.

In the mid-nineteenth century, women made claims for remuneration for household labor that would recognize the economic value of the unpaid domestic labor performed by women, including the material dimensions of childrearing.[259] In the early 1970s, the demand for "wages for housework" resurged briefly at the margins of the women's movement.[260] In addition, the post-World War II welfare-rights movement echoed the normative commitments of that demand. Most prominently, the National Welfare Rights Organization voiced a claim that the government should pay single women, who lived outside of the familial arrangements imagined by the family-wage system, to care for their children within the home.[261] The dominant strands within late-twentieth-century feminism, however, did not demand the remuneration of childrearing performed by mothers within the home. Instead, activists sought a redistribution of childrearing responsibilities between men and women in the home and across society.

The feminist claim to universal childcare aspired to transform the family-wage system by liberating women from primary responsibility for childrearing and by enabling women to participate in the public activities that

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[256] National Organization for Women (NOW) Statement of Purpose, Adopted at the Organizing Conference in Washington, D.C. (Oct. 29, 1996), *in* FEMINIST CHRONICLES, 1953–1993, at 159, 162 (Toni Carabillo & Judith Meuli eds., 1993).

[257] *See* Nancy Folbre & Jayoung Yoon, *The Value of Unpaid Child Care in the United States in 2003*, *in* HOW DO WE SPEND OUR TIME?: EVIDENCE FROM THE AMERICAN TIME USE SURVEY 31 (Jean Kimmel ed., 2008).

[258] *See* MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 35–36 (2004); EVA FEDER KITTAY, LOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY 46–48 (1999).

[259] *See* Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880*, 103 YALE L.J. 1073, 1075, 1153–57 (1994).

[260] *See* Silvia Fedirici, *Putting Feminism Back on Its Feet*, 9 SOC. TEXT 338, 338–39 (1984).

[261] On the maternalist claims of the welfare-rights movement, *see generally* FELICIA KORNBLUH, THE BATTLE FOR WELFARE RIGHTS: POLITICS AND POVERTY IN MODERN AMERICA (2007); PREMILLA NADASEN, WELFARE WARRIORS: THE WELFARE RIGHTS MOVEMENT IN THE UNITED STATES (2005); ANNELISE ORLECK, STORMING CAESAR'S PALACE: HOW BLACK MOTHERS FOUGHT THEIR OWN WAR ON POVERTY (2005).

represented an important source of social citizenship.[262] Feminists argued that universal childcare, by shifting responsibility for childrearing from individual women to the larger society, would enable women's full participation as equals in the realms of education, employment, and politics. The Strike for Women's Equality, held on August 26, 1970 to mark the fiftieth anniversary of the Nineteenth Amendment granting women suffrage, made three central demands: universal childcare, equal employment opportunity, and free abortion on demand. The Strike symbolized for feminists the significance of universal childcare as a prerequisite for equal citizenship.[263]

The feminist vision for universal childcare posed a deeper threat to the public/private divide than did either litigation challenging pregnancy discharge policies or advocacy for the temporary disability paradigm. Rather than legislating women's right to equal opportunity in the public sphere, universal childcare legislation would engage the federal government in transforming the private sphere. Radical feminists' rooted their claim for the right to childcare in their account of the subordination that women experienced within the nuclear family.[264] The radical feminist Ti-Grace Atkinson wrote in 1970 that society linked women as a political class by exploiting women's biological capacity for childbirth to make childrearing their primary social function.[265] Others argued that women's role as childrearers isolated women in the home[266] and produced women's "passive and self-sacrificing" psychology.[267] Socialist feminists argued further that women's unpaid domestic labors subsidized a capitalist system that estranged women from production outside of the home and offered them access only to low-pay, low-status jobs.[268] Just as women's subordination within the nuclear

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[262] On childcare as a form of social citizenship, *see generally* SONYA MICHEL, CHILDREN'S INTERESTS/MOTHERS' RIGHTS: THE SHAPING OF AMERICA'S CHILD CARE POLICY 2 (1999); GRETCHEN RITTER, THE CONSTITUTION AS SOCIAL DESIGN: GENDER AND CIVIC MEMBERSHIP IN THE AMERICAN CONSTITUTIONAL ORDER 260 (2006).

[263] *See* Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1998–99 (2003).

[264] Radical feminism emerged in the late 1960s as a strand of the larger mass women's movement. Its participants included young women, many previously active in the New Left, who attributed women's oppression to "patriarchy" and who pioneered the organizing technique of "consciousness-raising." *See generally* ALICE ECHOLS, DARING TO BE BAD: RADICAL FEMINISM IN AMERICA, 1967–1975 (1989).

[265] Ti-Grace Atkinson, *Radical Feminism*, *in* NOTES FROM THE SECOND YEAR: WOMEN'S LIBERATION: MAJOR WRITINGS OF THE RADICAL FEMINISTS 34 (Shulamith Firestone ed., 1970).

[266] *See, e.g.*, Pamela Booth et al., Manifesto for a New Women's Liberation Organization in NY (Apr. 1970) (on file with the Schlesinger Library, Radcliffe Inst., Harvard Univ., Vertical File Series, Feminists—New York City file).

[267] *Day Care*, OLD MOLE, Feb. 20, 1970, at 6 (on file with the Schlesinger Library, Radcliffe Inst., Harvard Univ., Nancy Grey Osterud Papers, 83-M121—86-M197, box 1, folder 8f+) [hereinafter *Day Care*].

[268] *See, e.g.*, Chicago Women's Liberation Union, Why We Are Against Capitalism (on file with the Schlesinger Library, Radcliffe Inst., Harvard Univ., Vertical File Series, Chicago Women's Liberation Union File); *Bread and Roses Declaration: The Rights of Women*, OLD MOLE, Mar. 6, 1970 (on file with the Schlesinger Library, Radcliffe Inst., Harvard Univ., Vertical File Series, Bread and Roses File).

family had spatial, psychological, and material dimensions, so too would universal childcare liberate women along both social and economic lines.[269]

Childcare had robust political meanings for welfare rights and civil rights, as well as women's liberation. African American feminists noted that black women had always worked; indeed, it was "idle dreaming" to think that they only took care of their homes and families.[270] They valued women's economic autonomy and thought that childcare was important for this purpose.[271] Leaders of the National Welfare Rights Organization held more ambivalent attitudes toward childcare. While some advocated for increased public childcare funding, others feared that welfare bureaucracies might use childcare to place poor children in custodial rather than educational daycare centers and to force poor women to substitute menial work for the more important and rewarding task of raising their children.[272] African American childcare activists emphasized the right to quality care and to community control over publicly-funded centers.[273] Despite the important differences in the political meanings that activists attributed to childcare, the universal character of rights discourse catalyzed coalitions among women across class, race, and ideological lines.[274]

The distinction that feminists drew between public, universal childcare and for-profit or employer-sponsored childcare elucidates the content of their claim. Feminist activists argued that public childcare "should rationally be a right" as opposed to a "commodity."[275] Even if hypothetically characterized by accessibility, quality, and affordability—all contested presumptions[276]—commodified childcare would still define childrearing as the wholly private responsibility of the nuclear family. For that reason, feminist activists for universal childcare criticized the use of the tax code, and specifically deductions for childcare expenses, as an insufficient mechanism to realize their normative commitments.[277] Public childcare, by contrast, would redefine childrearing as the responsibility of the larger society, posing a fun-

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[269] *See, e.g.*, Female Liberation—Cell 16, Strategy and Tactic for a Female Liberation Movement 2 (July 27, 1969) (on file with the Schlesinger Library, Radcliffe Inst., Harvard Univ., Vertical File Series, Female Liberation File).

[270] Frances Beal, *Double Jeopardy: To Be Black and Female*, *in* THE BLACK WOMAN: AN ANTHOLOGY 90, 91 (Toni Cade ed., 1970).

[271] *See* PAULA GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA 307–08 (1984).

[272] *See* KORNBLUH, *supra* note 261, at 89–100.

[273] Dinner, *Universal Childcare Debate*, *supra* note 254, at 600.

[274] *Id.* at 604–05.

[275] Katy Dawley, Phyllis MacEwan & Jane Melnick, *Fleecing the Pre-School Sheep*, OFF OUR BACKS, July 31, 1970, at 5.

[276] *The Day Care Busine$$*, EVERYWOMAN, Mar. 26, 1971, at 15 (arguing that for-profit day care prioritized financial gain over quality).

[277] Lisa Leghorn, *Child-Care for the Child*, EVERYWOMAN, Jan. 22, 1971, at 8 (arguing that for-profit day care would prepare children for obedience to the bureaucratized schedule of wage labor rather than instill progressive and liberating values in children); Florika & Gilda, *The Politics of Day Care*, WOMEN: J. LIBERATION, Winter 1970, at 31 (arguing that corporations used day care to discipline women workers).

damental challenge to traditional gender norms. In articulating a right to childcare, feminist activists demanded more than simply the money to afford childcare so that they could work. Instead, they demanded the engagement of the federal government in a repositioning of the legal, social, and economic boundaries dividing the public from the private spheres.

The Comprehensive Child Development Act of 1971 ("CCDA") nearly brought to fruition the feminist vision for universal childcare. The political feasibility of enacting federal childcare legislation resulted from a confluence of factors: the growth of a mass feminist movement, increasing maternal employment, the popularization of child-development theory, and politicians' interest in using day care to advance welfare reform.[278] In 1971, Congress passed the CCDA sponsored by Senator Walter Mondale (D-Minnesota) and Representative John Brademas (D-Indiana). The CCDA would have allocated $2.1 billion in its first year for childcare services available for free to lower-middle-income families and on a sliding-fee scale thereafter.[279]

The CCDA was only one of several childcare bills in Congress at the time, including another sponsored by Representatives Bella Abzug and Shirley Chisholm, both Democrats from New York City. These two feminist leaders believed that federal childcare legislation should be framed explicitly as a women's rights bill as well as a social service for children.[280] They expanded the statement of purpose to recognize the harms that the dearth of childcare inflicted upon women,[281] proposed substantially more generous funding,[282] provided for twenty-four hour care,[283] and prohibited sex-role stereotyping in both childcare staffing and programming.[284] Although not an explicitly feminist bill, in the manner of the legislation proposed by Abzug and Chisholm, the CCDA came close to recognizing childcare as a universal right, rather than a means-based entitlement.

The CCDA's creation of an entitlement for middle-class families and its association with local community activism prompted counter-mobilization by social conservatives within the Nixon administration.[285] At the time, Nixon was pushing his Family Assistance Plan, part of an effort to replace a service-based welfare system with a national guaranteed income. The

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[278] Kimberly J. Morgan, *A Child of the Sixties: The Great Society, the New Right, and the Politics of Federal Child Care*, 13 J. POL'Y HIST. 215, 222 (2001).

[279] Dinner, *Universal Childcare Debate*, *supra* note 254, at 614.

[280] *See To Provide a Comprehensive Child Development Program in the Department of Health, Education, and Welfare: Hearings Before the Select Subcomm. on Educ. on H.R. 6748 and Related Bills*, 92d Cong. 64 (1971) [hereinafter *CCDA House Hearings*] (statement of Rep. Bella S. Abzug).

[281] *Id.*

[282] *Id.* at 65.

[283] *High Points of the Chisholm-Abzug Child Care Bill* 3 (on file with the Rare Book & Manuscript Library, Columbia University, Bella Abzug Papers, box 140, folder: Child Care Abzug – Legislation).

[284] *CCDA House Hearings*, *supra* note 280, at 65–66.

[285] For further discussion of social conservatives' mobilization against the CCDA within the Nixon administration, see Morgan, *supra* note 278, at 231–38.

CCDA, by contrast, raised the specter of a social-service entitlement for the middle class that would expand with political pressure.[286] Furthermore, Congress linked the CCDA with the reauthorization of the Office of Economic Opportunity, which funneled federal monies to local civil rights and welfare struggles and which Nixon opposed.[287] Civil rights, welfare, and women's movement activists had, moreover, won a legislative battle to keep the units of administration small under the bill, so that local governments and nonprofits rather than the states might control the delivery of childcare services. This only exacerbated the association in the Nixon administration between the CCDA and community activism.[288]

In publicly disputing the CCDA, conservatives in the administration and Congress spoke neither of the Family Assistance Plan nor the Office of Economic Opportunity. Instead, conservatives emphasized the threat that the CCDA posed to the family. By offering federally-sponsored childcare to a broad swath of the population, rather than offering public childcare purely as a social service for poor women, the CCDA imperiled middle-class, white gender norms. A Congressional Representative opposing the CCDA reminded his constituents that the bill would "cover the children of 32% of all American families, not just these in the low-income level."[289] Opponents warned that the bill would "destroy . . . the institution of the family"[290] by putting "government in place of the parent."[291] The construction of childrearing as a private familial function had unmistakably gendered overtones. An article in the conservative newspaper *Human Events* suggested that the CCDA appealed to "middle-income couples that would like to farm out their children while they pursue individual careers."[292] New Right activists attributed the rise of maternal employment and the erosion of the nuclear-family ideal to cultural changes, including feminism, rather than to economic factors.[293] Within New Right ideology, the CCDA represented a direct attack on women's role as caregivers within the home. The legislation threatened the public/private divide by making childcare a public as well as a private responsibility and by suggesting that childcare could be performed adequately outside the home.

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[286] *Id.* at 225, 231–32.

[287] *Id.* at 232–33.

[288] Dinner, *Universal Childcare Debate*, *supra* note 254, at 614–15.

[289] Letter from Rep. Tom Pelly (R-WA), Our Freedoms Threatened by Child Care Program (Oct. 13, 1971) (on file with the National Society of the Daughters of the American Revolution, Washington, D.C., National Defense Committee Papers, box 77, folder 5).

[290] *Nixon Must Veto Child Control Law*, HUMAN EVENTS, Oct. 9, 1971, at 1, 10.

[291] Letter from Rep. John G. Schmitz (R-CA), Federal Child Control Act Passed (Oct. 13, 1971) (on file with the National Society of the Daughters of the American Revolution, Washington, D.C., National Defense Committee Papers, box 77, folder 5).

[292] Paul Scott, *Radical Child Care Legislation Moves Through Congress*, HUMAN EVENTS, July 10, 1971, at 13.

[293] Matthew D. Lassiter, *Inventing Family Values*, *in* RIGHTWARD BOUND: MAKING AMERICA CONSERVATIVE IN THE 1970S 13, 14–17 (Bruce J. Schulman & Julian E. Zelizer eds., 2008).

Tropes of gender and the family offered President Nixon powerful political language with which to veto the legislation. In December 1971, Nixon issued a veto message, drafted by speechwriter Patrick Buchanan, describing the CCDA as "the most radical piece of legislation to emerge from the Ninety-second Congress" and "a long leap into the dark for the United States Government and the American people."[294] Nixon's veto message stated that the CCDA jeopardized the family, the "keystone of our civilization."[295] While feminists identified the transformation in the structures of childrearing as essential to women's equality and social liberation, many conservatives read this transformation as a harbinger of social crisis. And Nixon exploited that fear to justify his veto of the bill.

Feminists fought the family-wage system in the late sixties and early seventies, with the purpose of ending women's subordination in both the labor market and the home. Feminists faced the greatest opposition not when they pursued equal treatment in the workplace, but rather when they sought to change childrearing structures in the private sphere. By the decade's turn, they achieved some success redistributing the costs of pregnancy and childbirth when the EEOC adopted the temporary disability paradigm. But Nixon's veto of the CCDA marked the defeat of feminists' most ambitious attempt to redistribute the social and economic burdens of childrearing from individual women within the private family to the larger society. The defeat of the CCDA, in contrast to the EEOC's adoption of the temporary disability paradigm, preserved two public/private divides: that between the state and the family with respect to childrearing and that between the state and the market with respect to the costs of pregnancy. Feminists achieved greater success advocating for the temporary disability paradigm, which shifted the costs of reproduction from the private family to employers, than they did advocating for childcare legislation, which would have shifted the costs of reproduction from the private family to the state.

Despite the distinctions between the pregnancy disability paradigm and the claim to universal childcare, both of these objectives shared another important characteristic. They represented universal rather than gender-specific strategies to realize a just distribution of the costs of reproduction. An alternative strategy would have been to seek social policies that specifically targeted mothers. These policies might have included maternity-leave entitlements that covered both pregnancy and infant care or welfare benefits targeting mothers and their children. Instead, the disability paradigm assimilated pregnancy to a medical category and delineated between pregnancy and infant care, distinguishing women's biological role in reproduction from their social role as mothers. Feminists claimed childcare as a right of all women, rather than a social service targeting poor women who, in the ab-

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[294] Veto of the Economic Opportunity Amendments of 1971, 1 PUB. PAPERS 387, 1177 (Dec. 10, 1971).

[295] *Id.* at 1176.

sence of breadwinning male partners, might become dependent on the state. These universal strategies represented syntheses of commitments to social protection and to deconstructing the family-wage ideal. Legal feminists in the sixties and seventies organized for caregiving-related entitlements that would challenge rather than reinforce traditional gender roles. Feminists sought access to equal employment opportunity, as well as support for women in their roles as mothers.

III. Norm Evolution in the Supreme Court & Congress, 1974–1987

In the 1974 case of *Geduldig v. Aiello* and in *General Electric Co. v. Gilbert*, decided two years later, the Supreme Court held that neither constitutional nor statutory sex equality required equal coverage of pregnancy within temporary disability insurance plans. The Court's formalist decisions in these cases obscured how insurance plans, in allocating the costs of pregnancy to the private family, reflected and reinforced sex-role stereotypes. The Pregnancy Discrimination Act of 1978 de-legitimated sex-role stereotypes by normalizing the presence of pregnant women in the workforce and by requiring the inclusion of pregnancy and childbirth in benefit plans regulated by Title VII. By promoting childbearing workers' labor-force attachment and socioeconomic independence, the PDA undercut the family-wage ideal. Congress's passage of the PDA, however, did not resolve the precise contours of the statute's distributive dimensions. The text and legislative history of the PDA did not clarify whether the PDA requires, or even allows, measures beyond equal treatment to accommodate pregnancy and childbirth. That question sparked a heated debate during the 1980s among legal feminists and in the courts.

A. *The Supreme Court Decisions in* Geduldig *v.* Aiello *and* Gilbert

The Court's holding in the 1974 case of *Geduldig v. Aiello* was not inevitable. Antidiscrimination doctrine under both the Equal Protection Clause and Title VII had changed dramatically in the early 1970s. The Court had recognized a disparate-effects claim under Title VII,[296] had invalidated cost as a defense to discriminatory state action on the basis of sex, and had found the regulation of pregnant workers on the basis of sex-role stereotypes to violate the Due Process Clause. Ample basis existed for the Court to conclude that the exclusion of pregnancy from an otherwise comprehensive temporary disability insurance scheme violated the Equal Protection Clause.

In the 1971 case of *Griggs v. Duke Power Co.*,[297] the Supreme Court interpreted the purpose of Title VII expansively, to "proscribe[ ] not only

[296] "Disparate Effects" was the term at the time used to describe what is now most commonly termed a disparate-impact claim.

[297] 401 U.S. 424 (1971).

overt discrimination but also practices that are fair in form, but discriminatory in operation."[298] The narrowest reading of *Griggs* suggested that the function of disparate-impact theory was to expose a discriminatory purpose behind facially neutral employment policies.[299] The opinion, however, also allowed for a much more expansive reading.[300] *Griggs* contained extensive language explaining that Congress enacted Title VII with the purpose of removing structural barriers to equal employment opportunity.[301] The Court concluded that Title VII prohibited employment practices that were unrelated to job capability and that operated to block a disadvantaged group's access to employment opportunity.[302] *Griggs* also suggested that employment policies might violate Title VII, even in the absence of proof of discriminatory purpose, when they excluded a disadvantaged group from employment opportunity. In 1974, when the Court was deciding *Geduldig*, the standards of constitutional and statutory discrimination were fluid and mutually informing. The possibility existed that the Court might also recognize a disparate-effects theory under the Equal Protection Clause to prohibit state action resulting in significant racial or sex-based disparities, regardless of discriminatory intent.

The Court had also begun to interrogate cost-related defenses to facial sex discrimination. In 1971, the first Supreme Court case to strike down a state law as a violation of constitutional sex equality, *Reed v. Reed*, held that a state could not establish a preference for male over female estate administrators merely to avoid the cost of holding hearings on the merits.[303] *Frontiero v. Richardson*,[304] decided two years later, involved a challenge to a U.S. Air Force policy that automatically granted a housing allowance and medical benefits to the spouses of male officers but required female officers to prove their spouses' dependence as a precondition to obtaining the same benefits.[305] Arguing as amicus before the Court, Ruth Bader Ginsburg suggested that *Frontiero*, like *Reed*, implicated a "legislative judgment . . . derived from the same stereotype, [that] the man is, or should be, the independent partner in a marital unit. The woman, with an occasional exception, is dependent,

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[298] *Id.* at 431.

[299] The Court emphasized that Duke Power Company implemented educational and testing requirements immediately subsequent to policies that explicitly discriminated on the basis of race. *Id.* at 426–27. The majority opinion also stressed the total irrelevance of intelligence tests to demonstrate job capability. *Id.* at 432–33, 436.

[300] In the early 1970s, the Court had not yet expressed the kind of skepticism about disparate-impact theory evident in the recent *Ricci* opinion. *See supra* notes 143-4and accompanying text.

[301] *Griggs*, 401 U.S. at 429–30 (stating that Title VII's purpose "was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees").

[302] *Id.* at 432.

[303] 404 U.S. 71, 76–77 (1971).

[304] 411 U.S. 677 (1973).

[305] *Id.* at 679–81.

sheltered from breadwinning experience."[306] The Air Force defended the policy by citing the additional administrative costs of requiring proof of spousal dependence from male as well as female officers.[307] The Court held "that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates [the] constitutionality" of "gross, stereotyped distinctions between the sexes."[308] In the early 1970s, the Court began to interrogate the racism and sexism that rested beneath the surface of cost-based justifications in cases involving both disparate effects and facial discrimination.

Then, in the 1974 case of *Cleveland Board of Education v. LaFleur*,[309] the Court held that the regulation of public school teachers on the basis of overbroad sex stereotypes violated the Due Process Clause. *LaFleur* invalidated school board policies that required female teachers to take mandatory, unpaid maternity leaves without job security when they reached four or five months of pregnancy and that barred women from returning to work for three months following childbirth.[310] The Court did not decide *LaFleur* under the Equal Protection Clause, as advocates had hoped. The Court instead concluded that the irrebuttable presumptions created by the pregnancy-dismissal policies penalized women's right to reproductive liberty under the Due Process Clause.[311]

The Court's studious avoidance of the Equal Protection Clause in *LaFleur* stemmed, at least in part, from its upcoming docket. The Court had already accepted an appeal in *Geduldig v. Aiello*,[312] and the Justices likely desired to avoid a ruling in *LaFleur* that would commit the Court to ruling in favor of the plaintiffs in *Geduldig*.[313] Nevertheless, *Griggs*, *Reed*, *Frontiero*, and *LaFleur* together gave the Court a basis on which it could find for the plaintiff in *Geduldig*. The Court might have extended the disparate-effects theory to the constitutional context. Alternatively, it could have found that the pregnancy exclusion constituted facial sex discrimination not justified by a cost-based defense. Or, perhaps, it could have built upon the reasoning in *LaFleur*, if not the opinion's technical doctrinal holding, that regulation on the basis of sex-role stereotypes infringed upon women's reproductive liberties.

Justice Stewart authored the majority opinion in *Geduldig*, joined by Chief Justice Burger and Justices White, Blackmun, Powell, and Rehnquist. The Court ratified the distinction that California drew between pregnancy-based classifications and sex discrimination. In a footnote, Stewart ex-

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[306] Serena Mayeri, *When the Trouble Started: The Story of* Frontiero v. Richardson, *in* WOMEN AND THE LAW: STORIES 12 (Elizabeth Schneider & Stephanie M. Wildman eds., 2010).

[307] *Frontiero*, 411 U.S. at 688–90.

[308] *Id.* at 685, 690 (internal citation omitted).

[309] 414 U.S. 632 (1974).

[310] *Id.* at 634–37, 647–48, 650.

[311] *Id*. at 648.

[312] 417 U.S. 484 (1974).

[313] *See* Dinner, *LaFleur Doctrine*, *supra* note 190 at 398.

plained that California did not "exclude anyone from benefit eligibility because of gender but merely remove[d] . . . pregnancy—from the list of compensable disabilities."[314] California's program divided the state's workers into "pregnant women and nonpregnant persons."[315] While only women comprised the first group, both men and women comprised the second group accruing the program's benefits.[316] The plaintiffs had argued that the pregnancy exclusion derived from stereotypes about women's place in the home and lack of commitment to the workforce.[317] The Court interpreted the Equal Protection Clause to prohibit invidious classification between men and women, rather than to prohibit sex-role stereotypes derived from the family-wage ideal.

Once the Court had held that the pregnancy exclusion did not constitute sex discrimination, it had ample room to decline to intervene in a social-welfare program's distributive consequences. The majority opinion held that the state legislature had discretion to design a social-welfare remedy as it sees fit, so long as the distinctions drawn by the program were rational. California possessed authority to set appropriate benefit levels, select the risks to be insured, and determine the employee-contribution rate necessary to maintain the program's solvency.[318] The Court expressed concern for the threat that the plaintiffs' claim posed to the solvency of California's temporary disability insurance program.[319]

Although the plaintiffs had not brought a disparate-impact claim in *Geduldig*,[320] the majority opinion analyzed the effect of the pregnancy exclusion on women workers' benefits. The opinion concluded that California's insurance plan did not discriminate "in terms of the aggregate risk protection derived" by women compared to men.[321] The majority observed that the proportion of the benefits received by women exceeded the proportion of the contributions made by women.[322] The majority thus assessed equity of benefits in terms of the dollar amount accrued to men and women rather than in

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[314] 417 U.S. at 496 n.20.

[315] *Id*.

[316] *Id.*

[317] Brief for Appellees at 73, *Geduldig*, 417 U.S. 484 (No. 73-640) (observing that "changes in [women's] labor force participation have not yet changed the stereotypes that employers may have regarding female employee absenteeism and turnover rates"); Brief of International Union of Electrical, Radio, and Machine Workers, AFL-CIO-CLC as Amicus Curiae at 100, *Geduldig*, 417 U.S. 484 (No. 73-640) (arguing that "[t]here is not greater failure of females to return to work after childbirth than the turnover rate of employees of like pay and status").

[318] *Geduldig*, 417 U.S. at 494–95.

[319] *Id.* at 492–93.

[320] The plaintiffs did not see a need to bring a disparate-effects claim because they believed that the pregnancy exclusion constituted facial sex discrimination. *Id.* at 417 U.S. at 496–97 & n.20–21

[321] *Geduldig*, 417 U.S. at 496.

[322] *Id.* at 497 n.21 *and* Brief for Appellees, *supra* note 317, at 80–81 (observing that "lower paid workers will get proportionally more in benefits than they contribute to the fund").

terms of the comprehensiveness of coverage each sex experienced.[323] The Court's cabined interpretation of the effect of the pregnancy exclusion on women foreshadowed the Court's 1976 opinion in *Washington v. Davis*, which would foreclose disparate-impact claims under the Equal Protection Clause.[324] The majority opinion in *Geduldig* reflected an emerging reluctance, in both the race and the sex contexts, to interpret the constitutional prohibition on discrimination to reach structural inequality as well as discriminatory intent.

Legal feminists viewed *Geduldig* as a decision that reinforced stereotypes about women's childbearing role. When the Court handed down *Geduldig*, the National Organization for Women criticized the decision for buttressing the notion that female "anatomy is destiny."[325] Legal feminists understood *Geduldig* to entrench the political economy that made sex-role stereotypes self-fulfilling.

In 1976, in *General Electric Co. v. Gilbert*, the Court imported both *Geduldig*'s formalist distinction between pregnancy and sex, as well as its narrow interpretation of the scope of disparate effects, from the constitutional to the statutory context.[326] Some social conservatives lauded *Gilbert* as a decision that upheld the family-wage ideal. Phyllis Schlafly, the prominent conservative activist who spearheaded the STOP ERA campaign in the states,[327] praised the decision. Schafly asserted that paying for the cost of pregnancy should remain a private responsibility: "Pregnancy is a privilege and a right, but you can't make industry or government pay for it."[328] To buttress her argument about the just allocation of the costs of pregnancy, Schlafly appealed to traditional gender norms. She reasoned: "Disability benefits are supposed to pay the lost wages of the family provider."[329] She concluded that the law should not require the extension of temporary disability insurance to pregnancy and childbirth because neither government nor industry paid for the pregnancies of women who stayed in the home.[330] Schlafly's praise for *Gilbert* suggested that women should not serve as

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[323] *Cf. Geduldig*, 417 U.S. at 501 (Brennan, J., dissenting) (arguing that California's plan imposes "a limitation . . . upon the disabilities for which women workers may recover, while men receive full compensation for all disabilities suffered").

[324] Washington v. Davis, 426 U.S. 229, 239 (1976).

[325] Press Release, Nat'l Org. of Women (June 18, 1974) (on file with the Schlesinger Library, Radcliffe Inst., Harvard Univ., NOW Records, MC 496, carton 30, folder 63).

[326] *See supra* notes 63–74 and accompanying text.

[327] Schlafly organized the STOP ERA campaign in 1972, after Congress passed the Equal Rights Amendment to the Constitution. STOP ERA acted as a national coordinating committee that oversaw a loose network of state campaigns to end ERA ratification. By early 1973, STOP ERA groups had formed in twenty-six states, including many critical to the battle over the constitutional amendment. *See* Donald T. Critchlow, *Phyllis Schlafly and Grassroots Conservatism: A Woman's Crusade* 216–20 (2005).

[328] Joseph Sjostrom, *Women Hit Ruling on Maternity Aid*, CHI. TRIB., Dec. 9, 1976, at 18.

[329] *Id.*

[330] *Id.*

breadwinners and that even those in the workforce, in actuality, did not serve as breadwinners.

Legal feminists, too, viewed *Gilbert* as entrenching the family-wage ideal and responded with great outrage to the decision. The legislative coordinator for the Wisconsin Commission on the Status of Women, Mary Ann Rossi, wrote in a mailgram to Chief Justice Burger that *Gilbert* represented "a giant step backward in the national effort to extirpate deep-seated discrimination against women in the law."[331] Mary Dunlap, a founding attorney of the law firm that had litigated *Geduldig*, excoriated the Burger Court for "select[ing] only those forms of sex discrimination that offend it . . . or that are cheap and easy to remedy, involving symbolic rights as opposed to economic ones."[332]

Gilbert, critics feared, would legitimate a broad swath of employment discrimination against women, extending well beyond the exclusion of pregnancy from temporary disability benefits. ACLU Attorney Kathleen Miller circulated a memorandum within the organization warning that "[e]mployers may interpret the decision as a license to fire pregnant women, to refuse to hire them, to strip them of seniority rights, to force them on long unpaid leaves of absence, and to deny them medical and sick leave benefits given other workers when disabled."[333] The IUE catalogued 100 complaints of pregnancy discrimination for every one complaint based on equal pay or other forms of sex discrimination.[334] IUE Counsel Ruth Weyand explained that the stereotypes that *Gilbert* sanctioned were, moreover, those that undergirded discrimination against *all* women workers. The female membership of the IUE had told Weyand: "We do not get promoted . . . make supervisor[ ] . . . [get] higher paid jobs, because we might get pregnant. When they pay us lower wages, they say that it costs more to employ women because of the turnover when we are home with our children."[335]

B. The Congressional Override of Gilbert: The Pregnancy Discrimination Act of 1978

Legal feminists' disillusionment following *Gilbert* led them to turn almost immediately to Congress for a legislative remedy. A coalition of labor,

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[331] Mailgram from Mary Ann Rossi to Chief Justice Burger (Dec. 8, 1976) (on file with the Schlesinger Library, Radcliffe Inst., Harvard Univ., Catherine East Papers, folder 14, box 10).

[332] Mary C. Dunlap, Summary of Memorandum Concerning Implications of General Electric Co. v. Gilbert, 45 U.S.L.W. 4031 (12/7/76) for Sex Discrimination Litigation (Dec. 10, 1976), at 1 (on file with the Schlesinger Library, Radcliffe Inst., Harvard Univ., Catherine East Papers, box 10, folder 14).

[333] Women's Rights Activists Memorandum from Kathleen Miller to All ACLU Affiliates and Legislative Liaisons, Pregnancy Discrimination Bill 1, 9 (circa 1977) (on file with the Schlesinger University, Radcliffe Inst., Harvard Univ., Human Rights for Women Records, 83-M229, box 4, folder: Wetzel v. Liberty Mutual Insurance).

[334] *S. 995 Hearings Apr. 1977*, *supra* note 30, at 300 (Testimony of Ruth Weyand).

[335] *Id.* (internal quotation marks omitted).

feminist, and civil rights groups, along with sympathetic congressional staff, mobilized in support of federal legislation to amend Title VII, which would override *Gilbert* by obligating private employers to treat pregnancy as a temporary disability. One week after the decision, the ACLU spearheaded a two-day meeting of more than 100 individuals representing fifty organizations to devise a legislative strategy.[336] Ruth Weyand and attorney Susan Deller Ross co-chaired the Campaign to End Discrimination Against Pregnant Workers, headquartered in Washington, D.C. The Campaign ultimately amassed the support of over 200 organizations and sustained legislative advocacy for twenty-one months, from December of 1976 through August of 1978.[337]

Representatives supporting the PDA echoed legal feminist claims to sex equality, to women's socioeconomic independence, and to the eradication of sex-role stereotypes. The Senate Report described the bill's purpose as combating "the assumption that women will become pregnant and leave the labor market . . . at the core of the sex stereotyping resulting in unfavorable disparate treatment of women in the workplace."[338] Senator Birch Bayh argued that women should not have to choose between motherhood and paid employment: "The entire thrust . . . behind this legislation is to guarantee women the basic right to participate fully and equally in the work force, without denying them the fundamental right to full participation in family life."[339] Representative Augustus Hawkins, the prime sponsor of the PDA in the House, emphasized the material harms rendered by sex stereotypes: "[P]regnancy discrimination accounts in large part for the fact that women were—and are—in lower paying and less responsible jobs."[340] Congressional proponents thus argued that the PDA would prohibit discriminatory employment practices rooted in sex-role stereotypes, which contributed to women's economic insecurity and social subordination.

Congressional proponents of the PDA, however, differed significantly from legal feminists in their political commitments. While legal feminists had emphasized the importance of women's economic independence from men, legislators focused on the economic insecurity that families faced when the male-breadwinner ideal crumbled. Congressional proponents frequently referenced the changed demographic circumstances that made sex-role ste-

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[336] Patricia Beyea, Susan Deller Ross & Marjorie M. Smith, *Pregnancy Discrimination Is Alive and Well—Temporarily!*, Notes from the Women's Rts. Project (ACLU/Women's Rts. Project, New York, N.Y.), Feb. 15, 1977, at 1, 3 (on file at Yale Univ. Library, Manuscripts and Archives, Thomas Irwin Emerson Papers Series No. I, MS 1622, Box 11, Folder 162).

[337] Peggy Simpson, *Pregnant Workers Have a Tough Ally*, PARADE, May 20, 1979, at 31 (on file with the Women's Equity Action League Records, Schlesinger Library, Radcliffe Inst., Harvard Univ., folder 59, box 4).

[338] S. REP. NO. 95-331, at 3 (1977).

[339] S. COMM. ON LABOR & HUMAN RES., LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, PUBLIC LAW 95-555, at 117 (Comm. Print 1980) [hereinafter PDA LEGISLATIVE HISTORY] (statement of Sen. Birch Bayh).

[340] *Id.* at 25–26 (statement of August F. Hawkins).

reotypes anachronistic. Senator Dick Clark testified that, "[i]n March 1973, 42 percent of employed women were single, widowed, divorced, or separated" and that "in all probability they were the sole support of themselves and possibly a family."[341] Because single motherhood correlated with poverty, members of Congress suggested that these families were peculiarly vulnerable when pregnant employees lost their jobs or were denied disability benefits during childbirth-related absences from work.[342] Another one-fifth of female employees were married to men earning less than $7,000 per year.[343] In Congress, the political argument for pregnancy disability benefits shifted subtly from the *right* of women to socioeconomic independence to the *fact* of demographic change undermining the family-wage system.

Members of Congress, as well as feminist and labor advocates, highlighted the story of Sherrie O'Steen, who had served as one of the named plaintiffs in *Gilbert*. They used O'Steen's experience to exemplify the material harms rendered by the stereotype that the private family should absorb the costs of reproduction. General Electric forced O'Steen, who had worked at a Virginia parts facility, to resign from her job at the end of her seventh month of pregnancy. O'Steen's paycheck had served as her only source of income. Her husband had abandoned her shortly after she found out that she was pregnant. Without work, O'Steen could no longer pay her electric bills. She spent part of a winter, until she received a state welfare check, caring for herself, her two year-old daughter, and ultimately her newborn baby, in a house that lacked heating, lighting, an operable stove, and a working refrigerator.[344] The PDA's congressional proponents argued for antidiscrimination protections for pregnant women to prevent situations like the one O'Steen faced, in which loss of income meant "dissipating family savings and security and being forced to go on welfare."[345] The portrait of the family painted by congressional proponents of the PDA showcased the importance of pursuing women's equal employment opportunity, not to further women's socioeconomic independence, but to shore up familial security when reality fell short of the male-breadwinner ideal.[346]

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[341] *S. 995 Hearings Apr. 1977*, *supra* note 30, at 393 (statement of Sen. Dick Clark).

[342] *Id.* at 14 (statement of Sen. Birch Bayh).

[343] *Id.* at 393 (statement of Sen. Dick Clark).

[344] *See id.* at 14–15 (statement of Sen. Birch Bayh), 135 (statement of Wendy W. Williams, Asst. Professor, Georgetown Law Center), 224 (statement of David J. Fitzmaurice, President, International Union of Electrical, Radio, and Machine Workers).

[345] PDA LEGISLATIVE HISTORY, *supra* note 339, at 3 (statement of Sen. Harrison Williams).

[346] Mixed normative commitments contributed to the passage of the PDA. Abortion politics split social from market conservatives regarding the legislation. In defending the pregnancy exclusions at issue in *Geduldig* and *Gilbert*, business had appropriated legal advances in reproductive privacy to argue that pregnancy should remain a private economic responsibility. The specter of abortion, however, led some social conservatives to support the PDA as a new form of state protection for motherhood. Members of Congress who both opposed and supported abortion rights emphasized the PDA's "pro-life" dimensions. By offering pregnant women greater protection against employment discrimination, the PDA would enhance women's economic security and create greater incentives for them to carry their pregnancies to

Business mobilized against the PDA in Congress by attempting to sever the bill's redistributive effects from Title VII's prohibition on sex discrimination in employment.[347] The National Retail Merchants Association argued that women did not merit pregnancy disability benefits because they were "not the primary breadwinners in their families, but [were] people who [took] jobs . . . to supplement the family's primary source of income or to earn extra spending money."[348] The National Association of Manufacturers ("NAM") recommended that if Congress desired to augment economic protections for childbearing women, then Congress should do so within the framework of legislation regulating employment, such as ERISA, and not by amending Title VII.[349] "[T]he essential question to be asked," according to NAM, did not involve sex discrimination but rather how far "society chooses to go in subsidizing parenthood."[350] NAM thus portrayed the PDA as an attempt to socialize the costs of reproduction, independent of any remedy for sex discrimination. The PDA went "too far in requiring employers . . . to assume the financial responsibilities of parenthood" and, further, to share the burden with "all of their employees . . . and ultimately the consumer."[351] Business opponents attempted to disaggregate the commitment to sex equality from its redistributive implications, characterizing the PDA as burdensome "social legislation"[352] rather than an application of Title VII's prohibition on sex discrimination.

In enacting the PDA against the cost-based objections of business, Congress connected the prohibition on sex-role stereotyping to the redistribution of the costs of pregnancy and childbirth. Notably, the PDA posed less of a challenge to the public/private divide inherent to the family-wage system than the CCDA had posed. Feminists had believed that universal childcare

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term. The role of anti-abortion politics in the passage of the PDA came with a price for feminists. Representative Edward Beard (D-Rhode Island) successfully attached an anti-abortion rider to the PDA, which exempted employers from mandatory coverage of abortion except when necessary to save the life of the mother. *See* Deborah Dinner, Presentation at the American Society for Legal History Annual Meeting: The Costs of Life: Feminism, Choice, and the Debate Over Pregnancy Disability Benefits (Nov. 19, 2010).

[347] The American Council of Life Insurance and the Health Insurance Association of America submitted a statement to the House Subcommittee on Education and Labor estimating that additional pregnancy disability benefits would cost $0.5 billion per year and that medical benefits related to pregnancy and childbirth would cost $0.8 billion. *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearing on H.R. 6705 Before the Subcomm. on Employment Opportunities of the H. Comm. on Education and Labor*, 95th Cong. 107 (1977) [hereinafter *H.R. 6075 Hearings*] (supplemental statement of The American Council of Life Insurance and the Health Insurance Association of America).

[348] *Id.* at 255.

[349] *Compare S. 995 Hearings Apr. 1977*, *supra* note 30, at 89 (testimony of Francis T. Coleman, attorney on behalf of the National Association of Manufacturers) ("I don't think it [pregnancy benefits] properly belongs under a discrimination bill"), *with id.* at 92 (testimony of Sen. Williams) ("It hasn't anything to do with ERISA, occupational safety, workers compensation. It has to do with discrimination in employment.").

[350] *Id.* at 94.

[351] *Id.* at 97.

[352] *Id.* at 107.

would liberate women from subordination within the family. In contrast, the PDA gave women access to employment opportunity but did not involve the state in transforming the private family. The distinction between childbirth and childrearing central to the temporary disability paradigm allowed space for social change in the sexual division of childrearing labor. But the PDA did not affirmatively encourage men to take greater responsibility for childcare. The PDA generated less political opposition than the CCDA because it posed less of a threat to the organization of the family, socially constructed as private.

Still, the PDA represented an enormous achievement for legal feminists. Statutory sex discrimination law now prohibited the stereotypes about pregnancy that had comprised the foundation for sex discrimination in employment. Legal norms had evolved such that statutory sex equality now required the inclusion of pregnancy in social-insurance schemes that protected workers' against the periodic dependence arising from disability. The PDA reset the baseline for measuring equal treatment of female and male employees under employment-benefit schemes. The Act required the inclusion of pregnancy within cost-sharing schemes, even though that mandate meant that employers might expend more resources to employ women of childbearing age.

C. The Affirmation of Accommodation as a Dimension of Antidiscrimination

The PDA, however, did not resolve the limits of the equal-treatment model as a constraint on sex equality. To what extent would disparate-impact liability under Title VII, as amended by the PDA, require employers to accommodate pregnancy, when employment policies structured according to the model of the masculine breadwinner excluded childbearing workers from employment opportunity? Did the PDA allow for state legislation creating entitlements to workplace accommodations for pregnancy? These questions would vex both legal feminists and the courts through the 1980s. The extent to which the PDA required or allowed for the workplace accommodation of pregnancy would determine the degree to which the Act shifted the costs of pregnancy and childbirth from individual female employees to employers.

Since the mid-1960s, legal feminists had taken note of the limits of the temporary disability paradigm's equal-treatment mandate. Disparate treatment alone could only aid childbearing workers insofar as employers offered benefits and accommodations for temporary disability generally. Feminists had early identified as potential solutions either the expansion of state temporary disability insurance programs or the establishment of a comparable

federal program.[353] Neither of these aspirations proved politically feasible, however.

While legal feminists did not succeed in expanding government-sponsored temporary disability insurance, state legislatures augmented workplace accommodations for childbearing women. In particular, states passed legislation in the 1970s establishing affirmative guarantees of childbearing leave. In 1974, a legislative subcommittee in Montana charged with harmonizing an equal rights amendment to the state constitution with the "essential protections" provided by the state government,[354] drafted the Montana Maternity Leave Act. The Act coupled antidiscrimination provisions protecting pregnant workers with an entitlement to a "reasonable [and non-mandatory] leave of absence for the pregnancy."[355] In 1978, California responded to the *Gilbert* decision by passing a law that, among other provisions, required employers to grant pregnancy- and childbirth-related disability leave for "a reasonable period of time" not exceeding four months.[356] The passage of the law reflected changes as well as continuities in the political environment in California. In the early 1970s, California had defended the exclusion of pregnancy from temporary disability insurance in the *Geduldig* case. Just a few years later, in the context of deepening commitments to both sex equality and pro-natalist policies, California passed a law granting pregnant women an affirmative right to disability leave. Yet, as a result of business lobbying efforts, this law also allowed employers to cap pregnancy disability benefits at six weeks and to exclude pregnancy entirely from health-insurance benefits.[357]

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[353] *See* Koontz, *supra* note 219, at 502 ("A long range goal is the achievement of protection against loss of income for temporary disabilities for the forty per cent of working men and women who now have *no* protection."). In 1968, the Citizens' Advisory Council Task Force on Social Insurance and Taxes "recommended the establishment of a federal temporary disability insurance system as a part of a [pre-existing] federal-state unemployment insurance program." *Id.* at 497–98.

[354] MONT. JOINT SUBCOMM. ON THE JUDICIARY: EQUALITY OF THE SEXES: INTERIM STUDY 3 (1974).

[355] MONT. CODE ANN. §§ 49-2-310–49-2-311 (1983).

[356] The statute defined "reasonable" to "mean[ ] that period during which the female employee is disabled on account of pregnancy, childbirth, or related medical conditions." CAL. GOV'T CODE ANN. § 12945(b)(2) (1980) (current version at CAL. GOV'T CODE ANN. § 12945(a) (2005)).

[357] Opponents of California's proposed law included statewide associations representing California's manufacturing, agricultural, electronic, restaurant, telecommunications, and health-insurance industries. AB 1960—Opposition (circa 1978) (Susan Deller Ross Personal Papers, on file with the author). Business successfully lobbied for a provision allowing the exclusion of pregnancy from health-insurance benefits. Amendments to Assembly Bill No. 1960 (Jan. 16, 1978) (Susan Deller Ross Papers, on file with the author) (inserting the language: "Nothing in this paragraph shall be construed to require an employer to provide his or her employees with full health insurance coverage for the medical costs of pregnancy, childbirth, or related medical conditions, except as provided elsewhere . . . ."); Memorandum from Dale Brodsky, Commission Counsel, to Alice A. Lytle, Chief, State of California Department of Industrial Relations, Fair Employment Practices Division (Sept. 14, 1978) (Susan Deller Ross Personal Papers, on file with the author). The final bill also exempted employers from providing temporary disability benefits related to pregnancy and childbirth for a period ex-

Controversy regarding the strategic and normative propriety of the Montana and California laws divided legal feminists. Some argued that the state laws remedied the disparate impact that inadequate sickness and disability leave had on women.[358] Others suggested that the equal-treatment mandate contained in the PDA did not allow for more favorable treatment of childbearing workers compared to other temporarily disabled workers. The debate echoed that which had taken place in the late sixties regarding state protective laws. Wendy Williams, the attorney who had litigated *Geduldig* and who subsequently joined the faculty at the Georgetown University Law Center, worried that Montana and California's maternity entitlements would encourage sex discrimination in employment. The laws would discourage the hiring of women of childbearing age by increasing the relative costs to businesses of employing these workers and would reify stereotypes that a woman's primary social role lay in motherhood.[359]

Williams, however, did not favor mere formal equality. Instead, she believed that disparate-impact lawsuits were normatively preferable to statutes guaranteeing disability leave because they changed the baseline employment relationship for all workers. Williams claimed that successful disparate-impact litigation would result in more generous leave policies for childbearing women and other temporarily disabled persons as well.[360] Williams took a radical stance on the social construction of gender. She disputed the idea that even pregnancy represented a "real difference." Accordingly, she argued that the accommodation of pregnancy must take place within a universal framework that also accommodated other temporary disabilities.[361] Frequent and successful disparate-impact suits might indeed have redressed the inadequacy of leave for both pregnancy and other temporary disabilities. Given the difficulty of successfully litigating disparate-impact suits, however, the defenders of the state laws took the more pragmatic position on how best to further women's integration in the workforce.[362]

In 1986, the Supreme Court granted a writ of certiorari in the case of *California Federal Savings and Loan v. Guerra.*[363] *Guerra* concerned an

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ceeding six weeks. Memorandum from Alice A. Lytle, Chief, State of California Department of Industrial Relations, Fair Employment Practices Division, to Assemblyman Howard Berman (Sept. 6, 1978) (Susan Deller Ross Personal Papers, on file with the author). For further discussion, *see* Dinner, Law of Work and Family, *supra* note 6, at ch. 5.

[358] Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U. L. REV. 513, 527 (1983); Reva B. Siegel, Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929 (1985).

[359] Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/ Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 352–53, 370–71 (1985).

[360] *Id.* at 332, 372–73.

[361] *Id.* at 360–61, 362 n.144.

[362] For further discussion of idealism and pragmatism in the *Guerra* controversy, see WILLIAMS, *supra* note 100, at 224–26.

[363] 474 U.S. 1049 (1986) (granting petition for writ of certiorari).

employer's challenge to California's maternity-leave law on the ground that the PDA preempted the state legislation. Feminist organizations submitted opposing amicus curiae briefs. The National Organization for Women and the ACLU took the position that the PDA's equal-treatment mandate preempted the California law, which offered a special benefit to pregnant workers.[364] NOW and the ACLU, however, did not conclude that the Court should strike down the California law. Instead, they argued for a remedy that would require California Federal to comply with both the federal and state laws by extending the leave guarantee available to pregnant women to all temporarily disabled workers.[365] By contrast, a coalition of California labor union and advocacy groups, called the Coalition for Reproductive Equality in the Workplace ("CREW"), argued that the PDA did not preempt the California law. CREW reasoned that both the state law and the PDA fostered the goal of equal employment opportunity for women.[366] In sum, legal feminist briefs disputed whether the PDA allowed for special accommodations for pregnancy in recognition of the peculiarly burdensome conflict between workplace structures and childbearing.

The Supreme Court's decision in *Guerra* held that the PDA did not preempt the California law, which advanced the PDA's goal of equal employment opportunity for women. The PDA established "a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise."[367] *Guerra* interpreted the "same treatment" language in the second clause of the PDA in its historical context, not as "a limitation on the remedial purpose of the PDA" but as an expression of intent to override *Gilbert*.[368] The interpretation of the PDA's purpose as harmonious with that of the California statute obviated the need to "address the question whether [the California statute] could be upheld as a legislative response to leave policies that have a disparate impact on pregnant workers."[369] Yet, Justice Marshall's majority opinion did not draw a sharp analytic distinction between disparate-impact liability and the PDA's equal-treatment mandate. The opinion quoted *Griggs* to demonstrate that the California statute and the PDA both furthered the purpose of Title VII "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees."[370] Im-

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[364] Brief Amici Curiae of the Nat'l Org. for Women et al. in Support of Neither Party at 36–47, Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1989) (No. 85-494) [hereinafter Brief of NOW]; Brief of the Am. Civil Liberties Union et al. as Amici Curiae at 48–64, *Guerra*, 479 U.S. 272 (1989) (No. 85-494) [hereinafter Brief of ACLU].

[365] Brief of NOW, *supra* note 364, at 11–20; Brief of ACLU, *supra* note 364, at 48–64.

[366] Brief Amici Curiae of Coal. for Reproductive Equal. in the Workplace et al. in Support of Respondents, *Guerra*, 479 U.S. 272 (1989) (No. 85-494).

[367] *Guerra*, 479 U.S. at 285 (quoting Cal. Fed. Sav. & Loan Ass'n v. Guerra, 758 F.2d 390, 396 (9th Cir. 1985)).

[368] *Id.*

[369] *Id.* at 292 n.32.

[370] *Id.* at 288 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971)).

portantly, *Guerra* observed that the California statute applied only to "the period of *actual physical disability* on account of pregnancy, childbirth, or related medical conditions," and did not "reflect archaic or stereotypical notions about pregnancy and the abilities of pregnant workers."[371] *Guerra* thus interpreted the PDA's antidiscrimination mandate as consistent with state legislative mandates creating workplace accommodations for pregnancy. Although *Guerra* stood for the harmony of antidiscrimination law and affirmative social-welfare entitlements, it did not resolve persistent questions about the scope of disparate-impact liability under the PDA.

IV. Sex Equality and Cost Sharing in Contemporary Law And Policy

Debates over the costs of reproduction did not end in the mid-eighties but rather continued through the nineties and remain current today. Indeed, the question of how to allocate the costs of reproduction lies at the center of doctrinal controversies and political battles regarding work-family conflict. Consideration of history illuminates the normative stakes of judicial interpretations of the PDA and highlights the principles that might guide Congress's policymaking.

Part IV makes both a legal argument respecting antidiscrimination doctrine and a policy recommendation. First, I argue that in interpreting the PDA courts draw false, bright-line distinctions between antidiscrimination law and cost sharing. Courts' resulting narrow interpretations of the PDA thwart litigants' efforts to use the statute to challenge vestiges of the family-wage system. Second, I suggest that the vision for cost sharing as a dimension of sex equality law represents an evolving commitment in U.S. law and policy. Congress might build on this commitment to render sex-role stereotypes less indelible.

Both reinvigoration of the PDA's transformative potential and social-welfare legislation are necessary to realize equality. Legal scholars debate whether to pursue reform via antidiscrimination law or structural interventions. Critics of the antidiscrimination model contend that the focus on bias occludes the mechanisms by which workplace structures reproduce gender inequalities.[372] Courts interpret antidiscrimination laws in ways that preserve entrenched definitions of work, without interrogating how these definitions developed historically in relationship to social constructions of gender that subordinated women.[373] Yet, utilizing antidiscrimination law to redress sex inequality is important as a means to connect present-day structural disadvantage to history. Naming the workplace structures that exclude childbear-

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[371] *Id.* at 290.
[372] *See* Albiston, *supra* note 123, at 1096–97.
[373] *Id.* at 1155–57.

ing women from the workplace as "discrimination" insists on recalling how workplace policies and norms derived from the family-wage system.

Structural reform taking the shape of affirmative social-welfare entitlements is also essential. Disparate-treatment claims remain hampered by the need to prove animus or bias and disparate-impact liability by the business-necessity defense. Lawsuits, especially when they require the statistical expertise necessary to prove an unlawful disparate impact, are expensive, difficult to win, and place the burden of reform on individual litigants. Affirmative legislative entitlements are necessary to reform workplace structures that lie beyond the scope of disparate-impact liability and that, while not reflecting intentional bias on the part of employers, nevertheless reproduce gender inequalities. Critics of structural reform argue that accommodation mandates preserve dominant workplace norms and label persons requiring the accommodation as inferior.[374] But universal accommodations change the structure of work for all employees, even when pregnant women and primary caregivers disproportionately benefit. Such accommodations can change the employment relationship in a manner that facilitates women's labor-force attachment while also challenging social constructions of gender.

A. Gilbert's Shadow

The reasoning of *General Electric Co v. Gilbert*, though not its specific holding, continues to exert a shadow over the jurisprudence of the lower federal courts. Deborah Widiss observes the phenomenon of "shadow precedents," in which courts apply the logic and rationale of a prior non-constitutional precedent, despite a congressional override negating that precedent's holding and the associated judicial interpretation of statutory language.[375] The lower federal courts' use of *Gilbert* as a shadow precedent is in tension with a 1983 Supreme Court decision holding that Congress, by enacting the PDA, "not only overturned the specific holding in *General Electric Co. v. Gilbert*, but also rejected the test of discrimination employed by the Court in that case."[376] Widiss argues that the practice of shadow precedents threatens legislative supremacy.[377] But it is not necessary to rely on a theory about the intent of the Congress that enacted the PDA to critique the application of *Gilbert*'s logic in Title VII jurisprudence. Rather, I show that *Gilbert*'s influence as a shadow precedent replicates the decision's formalism and its artificial distinction between antidiscrimination and cost sharing. Such judicial constructions of the PDA reinforce women's inequality, just as the *Gilbert* majority's interpretation of Title VII did.

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[374] *See* Williams & Bornstein, *supra* note 100, at 1322–26.

[375] Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 532–33 (2009).

[376] *See id.* at 553 (quoting Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 676 (1983)).

[377] *Id.* at 519.

The courts typically invoke *Gilbert*'s logic in cases involving claims of sex discrimination that, if affirmed, would impose costs other than punitive damages on employers. Specifically, courts invoke the reasoning of *Gilbert* in three instances: when adjudicating plaintiffs' claims of discrimination on the basis of sex-unique reproductive characteristics other than pregnancy, when identifying the appropriate comparison group in cases challenging the denial of light duty to pregnant workers, and when evaluating plaintiffs' pregnancy-related disparate-impact claims. These cases' distributive implications likely explain courts' reluctance to interpret the PDA as an override of *Gilbert*'s reasoning. By severing the question of cost sharing from that of sex equality, courts obscure the "gendered imagination" that historically rationalized the allocation of the costs of reproduction to the private family.[378]

i. Sex-Unique Characteristics

Courts invoke the logic of *Gilbert*, and the decision itself as precedent, to hold that the PDA does not protect against discrimination on the basis of sex-unique reproductive characteristics, including lactation and use of oral contraception.[379] Courts hold, first, that breastfeeding and contraceptive use are not covered within the plain language of the PDA protecting women from discrimination on the basis of "pregnancy, childbirth, or related medical conditions."[380] Courts then invoke *Gilbert*'s reasoning to conclude that discrimination on the basis of a sex-unique characteristic alone does not discriminate on the basis of sex because men and women are not similarly situated regarding the characteristic.[381] One court explained that *Gilbert* "made clear more than twenty years ago" that "[t]he drawing of distinctions among persons of one gender on the basis of criteria that are immaterial to the other . . . is not the sort of behavior covered by Title VII."[382] Courts further hold that plaintiffs cannot bring a sex-plus claim under Title

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[378] On the role of a "gendered imagination" in the historical development of U.S. law and policy, see ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA 5–18 (2001).

[379] Several commentators have observed the difficulty that plaintiffs face in bringing breastfeeding- and contraception-related claims under the PDA. *See, e.g.*, Henry Wyatt Christup, *Litigating a Breastfeeding and Employment Case in the New Millenium*, 12 YALE J.L. & FEMINISM 263, 273–75 (2000); Widiss, *supra* note 375, at 554–55.

[380] *See In re* Union Pac. R.R., 479 F.3d 936, 941–42 (8th Cir. 2007) (holding that the PDA does not reach contraceptive use); Wallace v. Pyro Mining Co., 789 F. Supp. 867, 869 (W.D. Ky. 1990) (holding that the PDA does not reach breastfeeding), *aff'd*, 951 F.2d 351 (6th Cir. 1991); Fejes v. Gilpin Ventures, Inc., 960 F. Supp. 1487, 1491–92 (D. Col. 1997) (same); Jacobson v. Regent Assisted Living, No. CV-98-564-ST, 1999 WL 373790, at *11 (D. Or. Apr. 9, 1999) (same). *But see* Cooley v. DaimlerChrysler Corp., 281 F. Supp. 2d 979, 985–86 (E.D. Mo. 2003) (denying defendant's motion to dismiss because the exclusion of prescription coverage may constitute disparate treatment and have a disparate impact upon women in violation of Title VII); Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266, 1271–72 (W.D. Wash. 2001) (holding that the exclusion of prescription contraception constituted unlawful sex discrimination).

[381] *See Wallace*, 789 F. Supp. at 868–69.

[382] Martinez v. N.B.C. Inc., 49 F. Supp. 2d 305, 309 (S.D.N.Y. 1999).

VII[383] because of the absence of a comparator,[384] what one commentator has called a "lactating male."[385]

In enacting the PDA, Congress explicitly rejected the kind of formalist reasoning exemplified by the majority opinion in *Gilbert* and present today in Title VII cases concerning breastfeeding and contraceptive use. The House and Senate Reports explicitly adopted the reasoning of Justice Stevens's dissent in *Gilbert* that " 'it is the capacity to become pregnant which primarily differentiates the female from the male.' "[386] Similarly, females and not males have the capacity to lactate and, as of yet, oral contraceptives are only available for effective use by females. Thus, if one follows the formal interpretation of sex equality espoused by Stevens, discrimination with respect to lactation and oral contraceptive use constitutes sex discrimination because these are precisely the reproductive characteristics that define sex.

One does not need to adopt a formalist interpretation of Title VII, however, to reach the conclusion that breastfeeding discrimination and the exclusion of oral contraception from health-insurance coverage constitute sex discrimination. The legislative history of the PDA demonstrates that Congress intended to prohibit discrimination on the basis of those reproductive characteristics that triggered the most egregious sex-role stereotyping on the part of employers. Accordingly, the courts might investigate whether unlawful sex-role stereotypes underpin employer policies respecting contraception and lactation. With respect to the exclusion of oral contraception from benefit coverage, for example, evidence that the policy emerged in the context of other discriminatory policies, such as the exclusion of pregnancy disability benefits, might amount to circumstantial evidence of sex-role stereotyping.

Courts are correct that the PDA does not require employers to extend pregnancy disability leave to breastfeeding women who have physically recovered from childbirth if the employers do not extend personal leaves for similar reasons.[387] The holding that the PDA does not reach any kind of

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[383] The "sex plus" doctrine allows plaintiffs to bring claims under Title VII alleging that an employer discriminated on the basis of sex plus another characteristic. Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971). A plaintiff bringing a "sex plus" claim, however, must show that the employer treated more favorably a subgroup of the opposite sex sharing the same or a comparable characteristic. *See, e.g.*, Fisher v. Vassar College, 70 F.3d 1420, 1446 (2d Cir. 1995) (*Fisher I*), *rev'd en banc*, 114 F.3d 1332 (2d Cir. 1997), *cert. denied*, 522 U.S. 1075 (1998).

[384] *See, e.g.*, *Martinez*, 49 F. Supp. at 311; *see also* Derungs v. Wal-Mart Stores, Inc., 374 F.3d 428, 438-39 (6th Cir. 2004).

[385] Maureen E. Eldredge, *The Quest for a Lactating Male: Biology, Gender, and Discrimination*, 80 CHI.-KENT L. REV. 875 (2005) (arguing that courts continue to apply the logic of *Gilbert* in cases involving reproductive sex differences).

[386] H.R. REP. NO. 95-948, at 2 (1978).

[387] The PDA's mandate is that pregnant women be treated the same as others similarly situated with respect to their ability to work, and breastfeeding women are generally capable of working.

breastfeeding discrimination, however, forecloses other legitimate claims. For example, plaintiffs have brought disparate-treatment claims alleging that when they returned to work after childbirth, employers denied them breaks during work to pump breast milk,[388] or denied them an appropriate private area in which to do so.[389] Hypothetically, the employers in these cases might have denied any employee the opportunity to take twenty-minute breaks for physical needs—to smoke a cigarette, measure one's insulin level, or to use the restroom. But the plaintiffs in these cases were professionals who worked in settings typified by relative flexibility.[390] Nevertheless, the court opinions in these cases do not consider whether the employer behavior exhibited peculiar animus or the uniform application of a universal policy. Furthermore, even in the absence of comparative evidence, the EEOC Guidelines on caregiver discrimination adopting FReD theory, coupled with the availability of a mixed-motive claim based on circumstantial evidence, suggest that discrimination on account of a worker's breastfeeding status constitutes sex discrimination if motivated by sex-role stereotypes.[391] Instead of analyzing circumstantial evidence that stereotypes about new mothers and lactation motivated the adverse employment actions,[392] courts reject breastfeeding discrimination claims categorically.

The conclusion that the PDA does not prohibit the exclusion of oral contraception from benefit coverage also replicates *Gilbert*'s logic. *Gilbert* reasoned that the removal of a sex-unique condition from a benefit package does not violate Title VII, so long as employees are not denied benefits for a covered condition on the basis of sex.[393] Congress, however, explicitly adopted the reasoning of Justice Brennan's dissent that equal treatment must be measured by the comprehensiveness of coverage offered to each sex, rather than by the total value of the benefit packages accruing to each sex.[394] In the 1983 case of *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, the Court held that the greater cost of providing complete health insurance for females, compared to males, cannot serve as a defense to sex discrimina-

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[388] *See* Jacobson v. Regent Assisted Living, No. CV-98-564-ST, 1999 WL 373790, at *4 (D. Or. Apr. 9, 1999).

[389] *See Martinez*, 49 F. Supp. 2d at 306–07.

[390] The plaintiffs in these cases did not work in jobs that are highly routinized or automated such as retail clerks, airline-ticket agents, or assembly-line workers. Rather, they worked as professionals in positions generally affording greater personal autonomy. *See Martinez*, 49 F. Supp. 2d at 306 (describing plaintiff's job as an associate producer at a cable television network); *Jacobson*, 1999 WL 373790, at *2 (describing plaintiff's job as the controller heading a company's accounting department).

[391] *See supra* notes 97–102 and accompanying text.

[392] Such circumstantial evidence may include but should not be limited to comparative evidence. For the kind of comparative evidence that might be proffered in a successful breastfeeding discrimination case, see Christup, *supra* note 379, at 282–83.

[393] Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 134–35 (1976).

[394] *In re* Union Pac. R.R., 479 F.3d 936, 948–49 (8th Cir. 2007) (Bye, J., dissenting) ("[T]he *Gilbert* dissenters recognized, to be equal, a plan would have to cover for the uniquely female risk of pregnancy, although this required giving women additional benefits men would not receive.").

tion.[395] The exclusion of contraception from benefit coverage is consistent with the norm, validated by the majority opinion in *Gilbert* but de-legitimated by the PDA, that individual women bear private responsibility for the costs of reproduction. Yet, only women directly bear the physical and economic burdens of pregnancy, and currently, only women have access to oral contraception. Thus, the exclusion of contraception from benefit coverage uniquely subjects women to the risk of pregnancy, including the risk of a temporary separation from the workforce. Whether one believes that this is just or discriminatory depends not on a simple determination about the neutral allocation of costs, but rather on a normative view of women's role as mothers and workers.

The adjudication of discrimination claims on the basis of sex-unique characteristics replicates the logic set forth in *Gilbert*, which the PDA overrode. These cases draw a distinction between sex and reproductive sex-unique characteristics explicitly rejected by the PDA. They interpret sex equality under Title VII to prohibit invidious classifications between women and men insofar as the sexes are similarly situated, rather than to prohibit sex-role stereotypes that reinforce women's social and economic dependence. Furthermore, these cases measure parity of coverage according to the distribution of benefits, excepting sex-unique conditions. This is inconsistent with the PDA, which overrode *Gilbert* to require that courts analyze parity of coverage from the perspective of the risks and burdens borne by women and men. While the cases exemplify the sticky character of formalist reasoning in courts' interpretation of Title VII, a historical perspective reveals that the PDA's broader purpose is to integrate childbearing women into the workforce and to distribute more equitably the costs of reproduction.

ii. Comparative Baselines in Disparate-Treatment Cases

A circuit split exists within the federal courts regarding the appropriate comparison group for certain disparate-treatment claims under Title VII. The split concerns claims in which plaintiffs challenge the denial of light-duty modifications to pregnant employees under policies that restrict such duty to employees with on-the-job injuries. The Eleventh and Fifth Circuits have held that the correct comparison, for the purpose of analyzing disparate-treatment claims, is between pregnant employees and other employees

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[395] Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 685 n.26 (1983). In *Newport News*, the Court stated that it did not "need to consider the average monetary value of the plan's coverage to male and female employees" because Congress had defined the exclusion of pregnancy coverage as a form of gender-based discrimination. *Id.* at 685. The same logic would apply if a court held that contraceptive use constituted a medical condition related to pregnancy. If, however, a court did not interpret the plain language of the PDA to reach contraception, then it would have more discretion to take account of a benefit plan's relative value to male and female employees.

with non-occupational disabilities.[396] When the comparison group is set in this manner, the denial of light duty to pregnant employees does not appear to constitute disparate treatment. These courts reason that because only employees with on-the-job injuries receive light duty, and because pregnant employees are similarly situated to employees with non-occupational injuries, employers do not discriminate against pregnant employees by denying them light duty.[397] The Tenth and Sixth Circuits, by contrast, have held that the plain language of the PDA requires that courts compare the treatment of pregnant employees to the treatment of "nonpregnant employees *similarly situated with respect to their ability to work*."[398] When courts set this broader comparison group, denying pregnant employees light duty that is extended to other employees appears to constitute disparate treatment. These courts hold that the source of the temporary disability is irrelevant because the PDA focuses the comparison on capacity or incapacity to work.[399] The differing comparison groups set by courts may either contract or expand women's employment opportunities.[400]

The light-duty cases pose the larger question whether employers, and by extension coworkers and consumers, should pay for workplace accommodations for pregnant employees or whether individual women should bear the costs of the conflict between workplace design and pregnancy's physical effects. The text of the PDA does not establish a definitive comparison group in adjudicating these disparate-treatment claims. Accordingly, other substantive values influence how a court sets the appropriate comparison group to resolve these cases.[401]

Indeed, the courts' analysis of these disparate-treatment claims depends on their interpretation of the history and purpose of the PDA. Courts that limit the appropriate comparison group to employees with non-occupational injuries interpret the PDA to establish a mere prohibition on unequal treatment, incompatible with a claim for accommodation. For example, one court reasons that a "pregnancy-blind" employment policy satisfies Title VII unless evidence exists proving that the policy is a pretext for sex discrimination.[402] Another court characterizes the majority of courts as holding that the PDA "does not impose an affirmative obligation on employers to grant pref-

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[396] Spivey v. Beverley Enters., 196 F.3d 1309, 1313 (11th Cir. 1999); Urbano v. Cont'l Airlines, 138 F.3d 204, 207–08 (5th Cir. 1998).

[397] *Spivey*, 196 F.3d at 1313; *Urbano*, 138 F.3d at 207–08.

[398] Ensley-Gaines v. Runyon, 100 F.3d 1220, 1226 (6th Cir. 1996) (quoting Int'l Union v. Johnson Controls, 499 U.S. 187, 204–05 (1991)); *see also* EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184, 1195 n.7 (10th Cir. 2000).

[399] *Ensley-Gaines*, 100 F.3d at 1226; *Horizon/CMS*, 220 F.3d at 1195 n.7.

[400] *See* Grossman & Thomas, *supra* note 23.

[401] For a discussion of the circularity of the Aristotelian definition of equality that like things be treated alike, see Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 542–48 (1982).

[402] *See* Reeves v. Swift Transp. Co., 446 F.3d 637, 641 (6th Cir. 2006).

erential treatment to pregnant women."[403] The use of the pregnancy-blindness rationale to justify employment policies that disadvantage childbearing women echoes the historical claims by opponents of pregnancy disability benefits that such benefits would constitute preferential treatment. The majority opinion in *Gilbert* exhibited pregnancy blindness in defining sex equality to mean equitable coverage of all disabling conditions aside from pregnancy. Likewise, employers and some courts today conclude that extending light-duty accommodations to pregnant workers would constitute a special preference, inconsistent with equal treatment of pregnant and nonpregnant employees.

This type of reasoning does not recognize two lessons that we may glean from historical debates about the costs of reproduction. First, it fails to acknowledge that the denial of light duty to pregnant employees may well be rooted in sex-role stereotypes. History teaches us that arguments for allocating the costs of reproduction to the private family are often intertwined with a normative endorsement of the family-wage ideal. That historical lesson translates into a contemporary doctrinal insight. For example, as the Tenth Circuit observes, an employer might have implemented a policy restricting light duty to employees with occupational injuries, with the unlawful intent of devising a mechanism to terminate pregnant employees while retaining other temporarily disabled employees.[404] Especially with the advent of family-responsibilities discrimination theory, enshrined in recent EEOC Guidelines, courts have an obligation to look more deeply for the presence of sex-role stereotypes in the design of light-duty policies before dismissing plaintiffs' claims as demanding preferential treatment.

The more powerful historical lesson is that, even if not explicitly motivated by conscious sex-role stereotyping, the allocation of the costs of pregnancy and childbirth to the private family reinforces women's subordinate position within the family-wage system. From the 1960s through the 1980s, feminists advocated for legal reforms that would enable women to maintain labor-force attachments throughout pregnancy and childbirth. Their objectives included the prohibition of both market-irrational discrimination and market-rational discrimination. This history belies the easy distinction that some courts draw between antidiscrimination and accommodation, or "preferential treatment" in the light-duty cases.

Advocacy for a broad comparison group in disparate-treatment cases regarding light-duty accommodations represents not a departure from the PDA's norms but rather continuity with the goals of activists who mobilized for the legislation. The denial of light duty to pregnant employees can result in alienation from the labor force, especially for women who work in physically-demanding jobs such as nurses, postal mail handlers, airline ticket agents, and truck drivers. The lack of access to light duty thus results in

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[403] *See, e.g.*, Urbano v. Cont'l Airlines, 138 F.3d 204, 207 (5th Cir. 1998).
[404] *Horizon/CMS*, 220 F.3d at 1195 n.7.

women's loss of salary, seniority, and benefits. The experience of this separation may also influence a woman's decision about whether she should return to the labor market after childbirth. Allocating the cost of the conflict between workplace structures and pregnancy to individual women thus entrenches women's role as socially- and economically-dependent caregivers within the family. By contrast, setting a broad baseline for comparison in the light-duty cases would enable more women workers to continue to perform their job duties throughout pregnancy. One can argue that the PDA's purpose, in its historical context, militates in favor of requiring the extension of light duty to pregnant women, when light duty is available for other temporarily disabled workers.

Certainly, courts have a range of discretion in determining the baseline for comparison in disparate-treatment claims respecting the denial of light duty. Interpreting the PDA's antidiscrimination mandate to require only pregnancy-blindness preserves workplace structures that alienate childbearing women from the labor market. Interpreting this mandate broadly to further the integration of childbearing women into the labor force promotes women's socioeconomic independence. The debate about where the costs of pregnancy and childbirth should lie is inextricably linked to normative views on how motherhood should shape women's workforce participation.

iii. Disparate-Impact Claims Under the PDA

While courts are skeptical of disparate-impact claims generally,[405] they are particularly reluctant to recognize disparate-impact claims challenging employment terms and conditions that disproportionately exclude pregnant women from employment opportunity. Courts offer several interrelated reasons for rejecting pregnancy-related claims categorically, before undertaking the burden-shifting analysis that ordinarily governs disparate-impact claims.

First, courts characterize such claims as ones that seek, in Judge Richard Posner's words, to "excuse pregnant employees from having to satisfy the *legitimate* requirements of their job."[406] Courts thereby prejudge the merits of plaintiffs' disparate-impact claims respecting absenteeism policies.[407] The categorical dismissal of plaintiffs' claims circumvents the question whether plaintiffs have established a prima facie case.[408] Courts bypass the doctrinal inquiry requiring analysis of whether a specific employment practice has injurious, disparate effects on women; whether the disparate

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[405] *See* Selmi, *Disparate Impact Theory*, *supra* note 138.

[406] Dormeyer v. Comerica Bank-Illinois, 223 F.3d 579, 583–84 (7th Cir. 2000).

[407] Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567, 617 (2010).

[408] *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2673 (2009) (citing 42 U.S.C. § 2000e-2k(1)(A)(i) (2006)).

impact is justified by business necessity; and whether an alternative, less discriminatory practice exists.[409]

Second, courts argue that disparate-impact claims represent illegitimate demands for preferential treatment for pregnant workers.[410] Courts argue that the "same treatment" language of the second clause of the PDA sets a limit on such preferential treatment. In *Guerra*, however, the Court interpreted the PDA's second clause not to set such limits. Instead, *Guerra* interpreted the purpose of the PDA to be harmonious with special entitlements accommodating pregnancy in the workplace. An important distinction exists between the holding in *Guerra*, a preemption case, and the argument that disparate-impact theory under Title VII *requires* changes in workplace structures to accommodate pregnant women. Nevertheless, *Guerra* makes suspect courts' use of the second clause of the PDA to foreclose disparate-impact claims.

The preferential-treatment argument, moreover, ignores the history of sex stereotyping that resulted in workplace structures designed around what Joan Williams has termed the ideal-worker norm.[411] Courts re-characterize claims that workplace structures disproportionately burden women as claims for uniquely favorable treatment of pregnant women. As scholars writing in the disability context have shown, however, whether one sees a group in need of accommodation, or even demanding preferential treatment, or whether one sees discrimination, depends only on perspective.[412] To take an example, as a short woman, I might not reach the podium. If I ask for an adjustable podium, am I demanding preferential treatment? Or does the fact that manufacturers consistently design podiums according to average male measurements require that I receive an accommodation to be treated as an equal?[413] An adjustable podium would offer a universal benefit and would

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[409] A three-part analysis governs disparate-impact claims. Plaintiffs must establish a prima facie case by showing that an employer "uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex or national origin." Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 105(a), § 703(k)(1)(A), 105 Stat. 1071, 1074 (codified as amended at 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006)). The burden of persuasion then shifts to the defendant, who can defeat liability by showing that the practice is "job related" and represents a "business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006). Following this demonstration, "the burden of persuasion shifts back to the plaintiffs to establish the availability of an alternative policy or practice that would also satisfy the asserted business necessity, but would do so without producing the disparate effect." 42 U.S.C. § 2000e2(k)(1)(A)(ii)(C) (2006).

[410] Stout v. Baxter Healthcare Corp., 282 F.3d 856, 861 (5th Cir. 2002).

[411] *See* WILLIAMS, *supra* note 100, at 64–113. Williams defines the ideal-worker norm as that of a "worker who works full time and overtime and takes little or no time off for childbearing or child rearing." *Id.* at 1.

[412] *See* Feldblum, *supra* note 154, at 181–83 (explaining that society's affirmative decisions and actions create specific norms that disadvantage minority groups and that require rectification for members of those groups to achieve equality).

[413] Christine Littleton first used the podium example to contrast prevailing norms with acceptance of sex difference. Christine A. Littleton, *Reconstructing Sex Equality*, 75 CALIF. L. REV. 1279, 1314 (1987). While Littleton used the anecdote to argue for the acceptance of real

thus avoid further stigmatization of particular groups.[414] The history of debates over the costs of reproduction helps us to see pregnancy-related disparate-impact claims from a new vantage. Like the example of the podium, rectifying the conflict between workplace structures and pregnancy does not represent so much a claim for preferential treatment as a remedy for exclusionary practices.[415]

The reluctance to understand disparate-impact claims as remedies for discrimination, rather than claims for preferential treatment, stems in part from the notion that a pregnant woman's disadvantages result from biological difference rather than the socioeconomic structures that give that difference salience. For example, Posner writes that the purpose of the PDA is not to make it as easy for a pregnant woman to stay in the labor force as it is for her husband to do so.[416] The purpose of disparate-impact liability, Posner argues, is to remedy historical discrimination, not to serve as a basis for preferential treatment.[417] This Article has shown, however, that the design of workplace structures in a manner that disproportionately burdens women derives from a family-wage system that constructed men as breadwinners and women as caregivers. The line between remedying historical discrimination and establishing affirmative entitlements to overcome the biological disadvantage of pregnancy is so nebulous as to be nearly impossible to define.[418]

Third, courts conclude that pregnancy-related disparate-impact claims seek illegitimately to transform an antidiscrimination mandate into a substantive entitlement. For example, the Fifth Circuit rejected a disparate-impact suit brought by Wilma Stout, a material handler for a healthcare corporation who had a perfect employment record during her first two months of work but who missed work for over two weeks during her third month of employment, after she suffered a miscarriage. Stout's employer fired her pursuant to an employment policy that provided for the termination of employees who missed more than three days of work during a ninety-day probationary period. The Fifth Circuit held that to allow Stout's disparate-

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biological sex difference, I differ from Littleton in my focus on how social structures render differences salient.

[414] *See* Emens, *supra* note 153 (analyzing the possible costs and benefits of accommodations); Feldblum, *supra* note 154 (arguing that modifications to societal norms could be the best way to create a level ground for all).

[415] *See generally* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990) (arguing that legal accommodations do not represent special treatment for protected groups but rather remedies for the design of institutions according to dominant social norms that construct difference in an exclusionary manner).

[416] Troupe v. May Dep't Stores Co., 20 F.3d 734, 738 (7th Cir. 1994) ("The Pregnancy Discrimination Act does not . . . require employers to offer maternity leave or take other steps to make it easier for pregnant women to work . . . to make it as easy, say, as it is for their spouses to continue working during pregnancy.").

[417] *Id.*

[418] For a critique of antidiscrimination theories rooted either in models of biological difference or social construction and an argument for focusing instead on the alleviation of human vulnerability, see Martha T. McCluskey, *How the Biological/Social Divide Limits Disability and Equality*, 33 WASH. U. J.L. & POL'Y 109 (2010).

impact suit would illegitimately "transform the PDA into a guarantee of medical leave for pregnant employees."[419] This argument does not make clear why pregnancy should be an exception to the general rule that when an employment practice disproportionately excludes a protected group from employment opportunity, it may entitle the group to alternative practices that impose special costs on employers. If disparate-impact liability can generally create affirmative entitlements, then the pregnancy-related challenges to leave policies should be no exception. Business necessity, furthermore, will serve as an adequate defense to liability if employers can show that more robust leave policies are not financially feasible.

Fourth, and relatedly, courts have concluded that the PDA does not allow "for subsidizing a class of workers"[420] and thus interpret the PDA as confined to a prohibition on market-irrational disparate treatment.[421] This argument ignores the cost effects of both the disparate-treatment and disparate-impact prongs of antidiscrimination law. As we have seen, the demand for equal treatment of pregnancy imposed heightened cost burdens on employers associated with employing women of childbearing age; the Court acknowledged this consequence of the PDA in *Newport News*.[422] Furthermore, disparate-impact liability by definition requires employers to assume extra costs associated with employing a protected class.[423]

The relevant question is not whether disparate-impact claims should require subsidization of a class of workers—they do—but rather why courts are especially reluctant to allow the redistributive effects of disparate-impact claims in cases under the PDA. The notion that employers should not have to pay for unique costs associated with employing childbearing women historically derived from the family-wage ideal. Through the 1970s, employers argued that women's marginal position in the labor force justified the exclusion of pregnancy from temporary disability benefits. The presumption that male breadwinners would provide for dependent child-bearers buttressed the view that employers did not bear any responsibility for extending pregnancy-related benefits. Today, the workplace standards contested in disparate-impact cases are so hegemonic that their gendered origins often remain un-interrogated. The history related in this Article reveals, however, that

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[419] Stout v. Baxter Healthcare Corp., 282 F.3d 856, 861 (5th Cir. 2002).

[420] Dormeyer v. Comerica Bank-Illinois, 223 F.3d 579, 584 (7th Cir. 2000).

[421] *Id.* at 583 (stating that the PDA "does not protect a pregnant employee from being discharged for being absent from work even if her absence is due to pregnancy or to complications of pregnancy, unless the absences of nonpregnant employees are overlooked").

[422] Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 685 n.26 (1983).

[423] Christine Jolls argues that cases such as *Troupe* and *Dormeyer* evince an extraordinarily narrow view of disparate-impact liability. Jolls demonstrates that the broader caselaw, as well as theoretical scholarship, recognizes that disparate-impact liability contains an accommodation mandate and that the "business" necessity defense requires proof that the policy rendering a disparate impact can be justified by more than a minimal business interest. Jolls, *supra* note 20, at 660–65.

appeals to market efficiency historically maintained employers' economic stakes in the family-wage system.

In a departure from the pervasive hostility to pregnancy-related disparate-impact claims, in recent years courts have begun to uphold these claims. In two cases, the United States District Court in the Eastern District of New York held that the restriction of light duty to employees with on-the-job injuries can have an unlawful disparate impact on pregnant women.[424] Legal Momentum, formerly the NOW Legal Defense Fund, has brought two additional suits challenging light-duty policies, which are pending.[425] These disparate-impact cases set aside the question of the appropriate comparison group at issue in disparate-treatment claims to focus on the effects of the policies. The cases pose the question of whether individual women should internalize the costs imposed by workplace structures that disproportionately alienate childbearing women from the workforce, or whether employers should share those costs by providing workplace accommodations.

In deciding these and similar cases, courts might do well to hesitate before separating the issue of sex equality from that of cost sharing, and antidiscrimination from affirmative entitlements. Instead, courts might consider the significant historical role that normative ideals about the family-wage system have played in the design of allegedly sex-neutral workplace structures. They might consider, as well, the historic struggles to remedy the discriminatory design of employment terms and conditions on the basis of sex-role stereotypes. These struggles entailed shifting the cost of conflict between pregnancy and workplace norms, from individual women to the larger society.

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[424] Following a jury trial, which found that the Suffolk County Police Department's light-duty policy disproportionately harmed women, Suffolk County entered into a consent decree with the plaintiffs that altered the policy by allowing pregnant police officers to receive limited-duty assignments. Lochren v. County of Suffolk, No. CV 01-3925 (ARL), 2008 WL 2039458, at *1 (E.D.N.Y. May 9, 2008). In a second case, the Eastern District of New York denied the defendant Suffolk County's motion for summary judgment on the basis that a genuine issue of material fact existed whether business necessity justified the Park Department's policy of restricting light duty to employees with occupational injuries. Germain v. County of Suffolk, No. 07-CV-2523 (ADS)(ARL), 2009 WL 1514513, at *1–2, *4 (E.D.N.Y. May 29, 2009).

[425] The EEOC issued a determination that American Airlines discriminated on the basis of sex against Angie Welfare when it forced her to go on unpaid leave rather than granting her light duty restricted to employees with occupational injuries. Press Release, Legal Momentum, EEOC Finds American Airlines Policy Towards Pregnant Women Violates Discrimination Laws (Feb. 8, 2010) (on file with author). Advocates state that the EEOC's reasonable-cause determination did not specify whether Welfare's suit could proceed under a disparate-treatment or disparate-impact theory. Interview with Michelle Cialo, Senior Counsel, Legal Momentum, in New York, N.Y. (Mar. 4, 2010). Legal Momentum has also partnered with the Detroit-based Sugar Law Center to represent a Michigan firefighter denied the opportunity to work in one of several available light-duty positions during her pregnancy. *See Sugar Law Helps Firefighter Fight Discrimination*, SUGAR L. CTR. NEWS (Sugar Law Ctr., Detroit, Mich.), Summer 2008, at 8.

B. Cost Sharing and Social-Welfare Policy

In the 2003 case of *Nevada Department of Human Resources v. Hibbs*,[426] the Supreme Court considered the relationship between affirmative social-welfare entitlements, enacted by Congress, and equal-protection doctrine. The Court held that affirmative entitlements related to family leave passed pursuant to Section Five of the Fourteenth Amendment can remedy and deter sex discrimination that violates Section One. I suggest that because the aspirations for the FMLA detailed in *Hibbs* are not wholly realized in practical terms, Congress might consider enhancing the family-leave entitlements created by the statute. Although the Supreme Court's construction of the Equal Protection Clause does not obligate Congress to enact social-welfare legislation related to family leave and childcare, doing so would advance the normative commitment to sex equality that has developed in both constitutional and statutory law over the last half century.[427]

Congress might enact either enhanced funding for childcare available to a broad swath of the population or paid parental-leave legislation.[428] These options are not mutually exclusive and the purpose of this Article is not to advocate for one or the other. But I discuss the example of parental-leave legislation because, in all likelihood, greater political will supports this legislative path.[429] The most powerful political argument against such legislation asserts that society should not be forced to subsidize the childrearing decisions of individuals and couples. That argument, however, severs the issue of cost sharing from that of sex equality. The history related in this Article provides a lens by which to reconnect these two issues.

i. The Redistributive Dimensions of Contemporary Equal Protection Doctrine

Hibbs involved a lawsuit brought by a male plaintiff who, in seeking leave under the FMLA to care for his severely-ill wife, inhabited a caregiv-

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[426] 538 U.S. 721 (2003).

[427] On Congress's constitutional obligations beyond that of remedying state action that the Supreme Court has determined to violate Section One of the Equal Protection Clause, see generally Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

[428] For discussions of the normative imperatives in favor of workplace leave, see generally Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1 (2005); Patricia A. Shiu & Stephanie M. Wildman, *Pregnancy Discrimination and Social Change: Evolving Consciousness About a Worker's Right To Job-Protected, Paid Leave*, 21 YALE J.L. & FEMINISM 119 (2009); Linda A. White, *The United States in Comparative Perspective: Maternity and Parental Leave and Child Care Benefits Trends in Liberal Welfare States*, 21 YALE J.L. & FEMINISM 185 (2009).

[429] *See infra* Part II.D for a discussion of political opposition to universal childcare. No state has passed legislation that parallels the Comprehensive Child Development Act of 1971. By contrast, two states—California and New Jersey—have passed paid family-leave legislation. *See* CAL. UNEMP. INS. CODE §§ 3300-3306 (West Supp. 2010); N.J. STAT. ANN. § 34:11B (West 2011).

ing role stereotyped as the domain of women. The Nevada Department of Human Resources contested Hibbs's rights to both FMLA leave and leave under a separate state program.[430] The Department defended against the lawsuit that Hibbs brought following his termination by arguing that the FMLA's provision allowing employees to sue state entities did not represent a valid exercise of Congress's Section Five power.[431] Writing for a six-Justice majority, Chief Justice Rehnquist rejected Nevada's sovereign immunity argument to uphold the provision of the FMLA allowing employees to sue state entities, as employers, for monetary damages.[432]

Under the relevant federalism doctrine, Hibbs needed to establish the congruence and proportionality of the FMLA as a remedy or deterrent to a constitutional violation under Section One.[433] To demonstrate the appropriate nexus between the FMLA and a pattern of unconstitutional state action, Rehnquist highlighted the evidentiary record that Congress had amassed regarding the states' discriminatory provision of family-leave benefits. States established formal rights to maternity leave but not to paternity leave; applied facially neutral leave policies in a discriminatory manner by denying fathers' request for such leave; and provided for leave only via discretionary approval or weakly enforced administrative regulations, which allowed for supervisors to grant or deny leave according to sex-role stereotypes.[434] In addition, states granted maternity leave of durations that far exceeded the average six weeks of physical disability accompanying childbirth. These leaves extended well into a period of infant care that might be performed by either women or men.[435] Rehnquist wrote that "differential leave policies were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women's work."[436] The Court held that the FMLA remedied and deterred the states' pattern of discrimination by establishing a sex-neutral entitlement to family leave "targeted at the faultline between work and family—precisely where sex-based overgeneralization has been and remains strongest."[437]

Hibbs affirmed that social-welfare entitlements can form an essential component of antidiscrimination law. The Court acknowledged that an entitlement to twelve weeks of caregiving leave extended beyond the constitutional violation described: the sex-based differential in a state's provision of

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[430] *See* Brief for Respondent at 7–9, Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003) (No. 01-1368), 2002 WL 31655020.

[431] *Id.* at 9–10; *Hibbs*, 538 U.S. at 724.

[432] *Hibbs*, 538 U.S. at 725.

[433] *Id.* at 728 (discussing federalism cases, including City of Boerne v. Flores, 521 U.S. 507 (1997) and Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000)).

[434] *Id.* at 730–34.

[435] *Id.* at 731 & nn.4–5.

[436] *Id.* at 731.

[437] *Id.* at 738.

caregiving leave.[438] The Court, however, concluded that a law merely mandating equal treatment of the sexes in the provision of family leave would not have achieved Congress's remedial purposes because it would have allowed states to provide *no* family leave to workers. The absence of family leave would have had a negative disparate impact on women workers: "Where '[t]wo-thirds of the nonprofessional caregivers for older, chronically ill, or disabled persons are working women,' and state practices continue to reinforce the stereotype of women as caregivers, such a policy would exclude far more women than men from the workplace."[439] The dissent sought to disaggregate cost sharing from antidiscrimination, representing the FMLA as a "substantive entitlement" rather than a prohibition on sex discrimination.[440] By contrast, Rehnquist's majority opinion in *Hibbs* held that the sharing of the costs of reproduction forms an integral component of the eradication of sex-role stereotypes from legal and employment structures.

ii. Future Legislative Reform

The FMLA has not yet reached the aspirations for the legislation outlined in *Hibbs*. As explained in Part I, two significant limitations exist on the FMLA's capacity to combat sex-role stereotypes. First, leave-taking patterns under the FMLA have reinforced a sexual division of caregiving labor within the family, which in turn deepens sex-role stereotypes that prompt employer discrimination against women. Second, FMLA leave is disproportionately inaccessible to low-income men and women—those who need its protections the most—who either do not meet the eligibility criteria or who cannot afford to take unpaid leave. Enhancing the social-welfare entitlement established by the FMLA, by either amending the statute or passing new legislation, would further erode the family-wage system.

Although outlining a distinct policy agenda lies beyond the scope of this Article, I offer a brief sketch of the form that legislation augmenting the FMLA might take. First, the legislation's design should maintain the universal commitments of the feminist movement. Some scholars have recently critiqued a universal turn in antidiscrimination theory. Drawing on a comparison with European social democracies such as France, Julie Suk contends that reforms targeting women's "special" relationship with their children hold greater potential to resolve work-family conflict than does the U.S. antidiscrimination paradigm.[441] Suk acknowledges that policies such as

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[438] *Id.* at 737 (observing "that Congress 'is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment,' but may prohibit 'a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text'" (quoting *Kimel*, 528 U.S. at 81)).

[439] *Id.* at 738 (citation omitted).

[440] *Id.* at 754–55 (Kennedy, J., dissenting).

[441] Suk, *supra* note 156, at 49–51, 60–63.

family leave, even when gender neutral, may also reinforce gendered patterns of employment and caregiving.[442] Suk concludes by recommending that to promote gender equality and to disrupt the male-breadwinner, female-caregiver dyad, the U.S. legal system should loosen its commitments to anti-stereotyping and to anti-paternalism.[443] A vision for law and policy that may have both disrupted the family-wage system and promoted supports for caregiving, however, can be found in our own history.

Legal feminists' historic vision for sex equality synthesized commitments to destabilizing sex-role stereotypes and to realizing redistributive social protections. The classification of pregnancy within the temporary disability framework distinguished between women's biological and social reproductive roles while also enhancing the economic security of childbearing workers. Likewise, feminist advocates campaigned for family-leave legislation that was both sex-neutral and paid. Certainly, divisions existed within the feminist movement regarding the extent to which reforms should be gender specific or universal. These divisions, however, did not represent inherent ideological commitments to "equal" or "special" treatment as is often assumed. Instead, divisions of legal and political strategy emerged in response to external constraints.

Augmenting the entitlements of the FMLA by enacting paid-caregiving leave strikes an apt balance between universalism and reforms that specifically target women's disproportionate responsibility for caregiving. Jessica Clarke raises provocative concerns about universalism. She warns that replacing feminist reforms with increasingly universal interventions, such as substituting work-life policies for caregiving reforms, may reinforce essentialist identities, benefit most those who assimilate to dominant norms, foster backlash, and dilute resources available for those most in need. Clarke makes a compelling argument for a tiered approach that maintains antidiscrimination laws for civil-rights harms and new governance solutions for universal harms. Under this framework, Clarke endorses a legislative entitlement to paid family leave and private employer policies promoting work-life balance.[444] Careful framing of the leave mandate on the basis of sex equality, rather than on the basis of repronormative arguments about the value of childbearing, will minimize the threat that leave legislation will further essentialize women's identities as caretakers.[445]

To ensure that paid parental leave challenges rather than reinforces the family-wage ideal, legislation must establish strong incentives for male participation. If utilized disproportionately by women, family-leave policies have the potential to increase occupational segregation, decrease the job continuity and work experience of women who might otherwise take shorter

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[442] *Id.* at 66–67.
[443] *Id.* at 68–69.
[444] Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. (forthcoming 2011).
[445] *Id.*

leaves, and increase employer discrimination against women. Morover, all of these consequences are mutually reinforcing.[446] Thus, if male participation is not encouraged, family leave may enable women to reconcile work and family but retard their ability to realize sex equality in the labor market.

Legal incentives can help to overcome the unique social pressures that make it difficult for fathers to reject ideal-worker norms and participate more actively in caregiving.[447] Sweden's family-leave policy, for example, implements a rule of partial non-transferability requiring fathers to either use or lose a portion of the parental leave available to each family. Making the leave as flexible as possible would offer a further incentive for higher wage-earners within couples—disproportionately men—to take the leave. For example, leave policy might be structured to allow part-time work and part-time caregiving[448] or to take leave non-consecutively over the first two years of a child's life.[449]

If Congress desired to advance sex equality by making family leave more accessible to low-income women and men, it might begin by making such leave paid. Instead of a mandate requiring employers to offer paid family leave, the entitlement should be publicly financed through a social-insurance mechanism. Public financing would reduce the likelihood that employers might respond to a legislative mandate by discriminating against stereotypical caregivers in hiring and promotion.[450]

Additional elements of the legislative design would enhance the accessibility of leave for low-income workers. Congress might broaden the eligibility criteria for FMLA leave by reducing the requisite number of hours a person must have worked in the prior year. In addition, Congress might consider eliminating the requirement that the hours worked must be for a single employer. Low-income women, in particular, have especially volatile work histories, changing employers frequently, and therefore will benefit from a family-leave entitlement based on total work hours for all employ-

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[446] *See* Hadas Mandel and Moshe Semyonov, *Family Policies, Wage Structures, and Gender Gaps: Sources of Earnings Inequality in 20 Countries*, 70 AM. SOC. REV. 949, 950–53 (2005).

[447] *See* Leslie Gross Klaff, *When Dad Takes Care of Baby*, WORKFORCE MGMT, Dec. 1, 2003, at 24–25; Melinda Ligos, *The Fear of Taking Paternity Leave*, N.Y. TIMES, May 31, 2000, at G1. *But see* Amy Armenia & Naomi Gerstel, *Family Leaves, the FMLA and Gender Neutrality: The Intersection of Race and Gender*, 35 SOC. SCI. RES. 871, 888 (2006) (observing that women who take family leave are often viewed as fulfilling their expected social roles, while men who take family leave are lauded as "exceptional" and "heroic").

[448] The "Workplace Flexibility 2010" initiative promotes workers' ability to pursue meaningful life projects, including but not limited to childrearing. *See* WORKPLACE FLEXIBILITY 2010, http://www.workplaceflexibility2010.org (last visited Mar. 12, 2011).

[449] This rule would help to combat the manner in which breastfeeding entrenches cultural divisions in caretaking patterns within couples. *See, e.g.*, Hannah Rosin, *The Case Against Breast-Feeding*, ATLANTIC MONTHLY, Apr. 2009, at 64.

[450] Lester, *supra* note 428, at 73–74.

ers.[451] Although business will likely mobilize in opposition to efforts to make parental leave more robust,[452] the success of advocates in campaigning for paid parental leave in California attests to the political feasibility of such a bill.[453] This section, however, has attempted to outline some elements of ideal legislation rather than to discuss its political implementation.

Conclusion

The vision for cost sharing as a critical component of sex equality is not confined to the dustbins of history. Rather, it has evolved as a significant component of sex discrimination law from the Supreme Court opinions in *Geduldig* and *Gilbert*, to the enactment of the Pregnancy Discrimination Act, to the *Guerra* decision, to the passage of the Family and Medical Leave Act. The PDA and FMLA have challenged the family-wage system by redistributing the costs of reproduction. These statutes help women realize dual roles as mothers and workers, include pregnancy and childbirth within social-insurance mechanisms providing economic security, and shift some of the costs of caretaking from individuals to the larger society. Market and social conservatism, however, foreclosed other aspects of the legal feminist agenda. These included the extension of state protective labor standards to men, the enactment of universal childcare legislation, and the expansion of public temporary disability insurance plans.

Vestiges of the family-wage ideal persist today in both the exclusion of childbearing workers from equal employment opportunity and women's ongoing disproportionate responsibility for caregiving. To advance sex equality, courts should interpret the PDA to entail a prohibition on market-rational discrimination. Congress would facilitate more egalitarian caregiving patterns by augmenting the entitlements provided by the FMLA. Both courts and political pundits construct rhetorical and theoretical boundaries between sex equality and cost sharing to justify the status quo. A historical perspective reveals that these boundaries are largely illusory.

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[451] If a national social-insurance system rather than individual employers fund family leave, the consideration of fairness to private companies would no longer justify the restriction of family-leave eligibility on the basis of hours worked for a single employer.

[452] When legal feminists began a campaign for family and medical leave in Congress in the mid-1980s, they had envisioned more expansive coverage of low-income workers. Over the course of a nine-year legislative battle, however, they made compromises with business including the small business and probationary period exemptions and the lack of coverage for part-time workers that constrained the bill's coverage of low-income workers. O'Leary, *supra* note 161, at 39–45.

[453] California's Paid Family Leave law, funded by payroll deductions, provides partial-wage replacement to employees who take leave to care for a new child or seriously-ill family members. Cal. Unemp. Ins. Code §§ 3300-3306 (West Supp. 2010).