
Gilbert Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act

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Pregnancy — a health condition that only affects women — raises complicated questions regarding the interaction of employment policies addressing sex discrimination and those addressing disability. The Pregnancy Discrimination Act (“PDA”), enacted in 1978, mandates that employers “shall” treat pregnant employees “the same for all employment-related purposes” as other employees “similar in their ability or inability to work.” Despite the clarity of this language, some courts permit employers to treat pregnant employees less favorably than employees with other health conditions, so long as the employer does so pursuant to a “pregnancy-blind” policy, such as accommodating only workplace injuries or only disabilities protected under the Americans with Disabilities Act (“ADA”). Under this reasoning, recent amendments expanding the scope of disabilities covered under the ADA could have the perverse effect of decreasing employers’ obligations to pregnant employees. This Article argues that these decisions misinterpret the PDA. The same treatment

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clause creates a substantive, albeit comparative, accommodation mandate. Rather than focusing on the presence or absence of discriminatory intent, courts should simply assess whether the employer has accommodated, or under the ADA would be required to accommodate, limitations like those caused by pregnancy. This approach appropriately incorporates consideration of the costs that accommodations impose on employers but insulates that inquiry from still prevalent misconceptions regarding pregnant women's capacity and commitment to work.

This Article is the first to consider in depth how the 2008 amendments to the ADA interact with the PDA. In addition to providing textual analysis, the Article provides historical context that helps confirm that the PDA means what it says. Commentary on the PDA generally characterizes the statute's same treatment language as a response to some feminists' concerns that requiring "special" accommodations for pregnancy would increase the risk of discrimination or backlash against women generally. This Article contributes to the historical literature on the PDA by identifying a distinct — complementary but largely overlooked — benefit of the PDA's same treatment language: it came on the heels of an extraordinary expansion of employer and government support for health conditions other than pregnancy. Thus, although the PDA does not itself require specific pregnancy accommodations, its enactment required many employers to provide far more robust support for pregnancy than they had previously. This historical context has direct relevance for contemporary doctrine since it is closely analogous to the recent expansion of the ADA. The unduly narrow conception of comparators currently used by some courts interpreting the PDA risks relegating pregnancy once again to the basement.

TABLE OF CONTENTS

INTRODUCTION	963
I. PREGNANCY AND WORK	970
II. LEGISLATING PREGNANCY	978
A. (Overbroad) Sex Classifications	979
B. (Underinclusive) Disability Classifications	984
C. The Pregnancy Discrimination Act: Pregnancy As Sex and Disability	989
D. Pregnancy Preferences?	998
III. REALIZING THE PDA'S ACCOMMODATION MANDATE	1004
A. Non-PDA Accommodation Rights	1005
B. Adverse Employment Actions Based on Pregnancy	1011
C. PDA Accommodation Claims	1018
D. Reconceptualizing Accommodation Claims	1025
CONCLUSION	1035

INTRODUCTION

Pregnancy — a health condition that only affects women — raises complicated questions regarding the interaction of employment policies addressing sex discrimination and those addressing disability. Pregnancy, and motherhood more generally, was once a primary justification for laws limiting *all* women’s employment rights. These laws relied upon overbroad stereotypes regarding women’s physical weakness and normative judgments regarding women’s proper sphere, and the lingering effects of such bias remain potent even today.¹ At the same time, although general assumptions of incapacity are clearly unwarranted, pregnancy *can* cause real physical effects that standard workplace policies may fail to accommodate adequately. In this respect, pregnancy is like other health conditions that may interfere with work. Until the 1970s, however, public and private policies that provided health insurance, sick days, and benefits for employees with illnesses or injuries routinely excluded “normal” pregnancies.² In *General Electric Co. v. Gilbert*, the Supreme Court (in)famously held that this practice did not constitute sex discrimination.³ Congress disagreed. It quickly superseded *Gilbert* by enacting the Pregnancy Discrimination Act (“PDA”).⁴ The PDA amends federal employment discrimination law to make clear that discrimination on the basis of pregnancy is a form of discrimination “on the basis of sex” and to mandate that “women affected by pregnancy . . . shall be treated the same for all employment-related purposes . . . as other persons . . . similar in their ability or inability to work.”⁵ Despite the clarity of this language, courts routinely permit employers to treat pregnant employees less favorably than employees with other health conditions. The pregnancy exception persists.

The problem stems from determining who “counts” as a comparator for PDA analysis. Several circuits have held that employees who receive light duty assignments after workplace injuries cannot be used

¹ See *infra* Parts I, II.A.

² See *infra* Parts II.B, II.C.

³ 429 U.S. 125, 145-46 (1976) (holding exclusion of pregnancy from disability policy did not violate Title VII), *superseded by statute*, Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2012)); see also *Geduldig v. Aiello*, 417 U.S. 484 (1974) (holding exclusion of pregnancy from disability policy did not violate Equal Protection Clause).

⁴ Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2012)).

⁵ *Id.*

as comparators for PDA analysis.⁶ More recently, a handful of courts have suggested that employees accommodated pursuant to the Americans with Disabilities Act (“ADA”) are also not appropriate comparators for PDA analysis.⁷ Courts characterize such policies as “pregnancy-blind”; they then conclude that so long as the employer applies such policies without any animus against pregnant employees, the PDA has not been violated.⁸ This has long been a simmering problem, but, as the Equal Employment Opportunity Commission (“EEOC”) has recognized, it has gained new urgency because the ADA was recently amended to dramatically expand the range of disabilities that statute covers.⁹ Pursuant to changes made by the ADA Amendments Act of 2008, the ADA’s statutory language and accompanying regulations now make clear that employers generally must make reasonable accommodations for impairments that substantially limit an individual’s ability to lift, walk, stand, or bend *even on a relatively short-term basis*.¹⁰ This is undoubtedly an important step forward in disability policy. However, the reasoning in these PDA cases suggests that the expansion of ADA rights could have the perverse effect of decreasing employers’ obligations to pregnant

⁶ See *Young v. United Parcel Serv., Inc.*, No. 11–2078, 2013 WL 93132, at *7-9 (4th Cir. Jan. 9, 2013); *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 548-49 (7th Cir. 2011); *Reeves v. Swift Transp. Co.*, 446 F.3d 637, 641 (6th Cir. 2006); *Spivey v. Beverly Enter., Inc.*, 196 F.3d 1309, 1313 (11th Cir. 1999); *Urbano v. Cont’l Airlines, Inc.*, 138 F.3d 204, 206-07 (5th Cir. 1998). *But see* *Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1226 (6th Cir. 1996) (suggesting light duty employees are proper comparators at least for purposes of establishing a prima facie case of discrimination).

⁷ See *Young*, 2013 WL 93132, at *7-10; *Serednyj v. Beverly Healthcare, LLC*, No. 2:08-CV-4, 2010 WL 1568606, at *10 (N.D. Ind. Apr. 16, 2010), *aff’d*, 656 F.3d 540 (7th Cir. 2011).

⁸ See, e.g., *Reeves*, 446 F.3d at 641-42 (“Swift’s light-duty policy is indisputably pregnancy-blind. . . . Consequently, Reeves cannot avoid summary judgment . . . unless a rational juror could find that ‘the employer *intended* to discriminate against the protected group.’”) (citation omitted).

⁹ Americans with Disabilities Act Amendments Act of 2008 (ADA Amendments Act), Pub. L. No. 110-325, 122 Stat. 3553 (2008). The EEOC’s strategic enforcement plan adopted in December 2012 identifies “accommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act (ADAAA) and the Pregnancy Discrimination Act (PDA)” as a priority area for enforcement because it is an “emerging and developing issue.” EEOC STRATEGIC ENFORCEMENT PLAN, FY 2013-2016, at 10 (2012), available at <http://www.eeoc.gov/eeoc/plan/upload/sep.pdf>.

¹⁰ ADA Amendments Act, § 4(a) (codified at 42 U.S.C. § 12102 (2012)) (listing illustrative major life activities and instructing that the definition of disability be construed “in favor of broad coverage”); 29 C.F.R. 1630.2(i) & (j) (2012) (expanding on these principles and stating that “the effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section”); 29 C.F.R. pt. 1630 app. (2012) (similar).

employees by reducing significantly the pool of potential comparators considered under a PDA claim.¹¹

This Article argues that this body of PDA case law misinterprets the statute's same treatment language. The PDA explicitly provides that treating pregnant employees — by definition, only women — less favorably than other employees with health conditions that similarly affect the ability to work *is itself* a form of sex discrimination. In this respect, PDA claims that are premised on the statute's comparative language and that allege a failure to make accommodations differ from standard claims of intentional employment discrimination. The PDA's plain language makes clear that it should not matter *why* an employer accommodates an employee who has limited ability to work. Rather, it should simply matter *whether* the employer has done so. The PDA's same treatment clause thus should be understood to create a substantive, albeit comparative, accommodation mandate. This approach appropriately incorporates consideration of the costs that accommodations impose on employers, while effectively insulating this analysis from still prevalent misconceptions regarding pregnant women's capacity and commitment to work.

This Article is the first to examine in detail how the recent amendments to the ADA interact with the PDA.¹² In addition to

¹¹ If pregnancy substantially limits an employee's ability to lift, walk, stand, or conduct other "major life activities," the pregnant employee might argue that pregnancy itself can qualify as a disability. See generally Jeannette Cox, *Pregnancy as "Disability" and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. 443 (2012) (exploring these arguments in detail). The EEOC, however, has drawn a bright-line distinction between "normal" pregnancies, which it contends are never disabilities even if they cause such limitations, and pregnancy complications, which it contends may be. See 29 C.F.R. pt. 1630 app. § 1630.2(h) ("[C]onditions, such as pregnancy, that are not the result of a physiological disorder are . . . not impairments [and accordingly not disabilities]. However, a pregnancy-related impairment that substantially limits a major-life activity is a disability under the first prong of the definition."). I believe Professor Cox makes strong arguments against this distinction and more generally critiquing any cultural resistance to labeling pregnancy as a disability. See Cox, *supra*, at 480-86 (arguing that pregnancy fits within a social model of disability and that it may be covered under the ADA because the statutory definition of disability encompasses both "disorders" and "conditions"). That said, one virtue of relying on the PDA's same treatment clause is that it permits courts to sidestep the thorny issue of whether pregnancy is itself a disability.

¹² Of course, I build on the work of other scholars and advocates. Shortly after the ADA was enacted, Deborah Calloway argued that employers would need to accommodate pregnancy to the same extent that they accommodated ADA-qualifying disabilities. See Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 STETSON L. REV. 1, 27-33 (1994). Courts interpreted the original ADA so narrowly that this approach was little explored. Now that the ADA Amendments Act makes it salient once again, experts testifying to the EEOC on pregnancy discrimination suggested that

textual analysis, it provides historical context that helps confirm the PDA means what it says. The PDA was a rather elegant response to a longstanding disagreement within the feminist movement that is usually characterized as the “special treatment/equal treatment” debate.¹³ The “special treatment” position began from the premise that workplaces were typically designed to meet the needs of men rather than women and that women’s biologically-determined role in reproduction should be accommodated to ensure equal opportunity. For example, proponents argued that guaranteed maternity leave was necessary so that both women and men could maintain paid employment while having children.¹⁴ The “equal treatment” position,

the EEOC adopt an approach along the lines that I propose. See Emily Martin, Vice President and General Counsel, Nat’l Women’s Law Center, Written Testimony at EEOC Meeting on Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities (Feb. 15, 2012), available at <http://www.eeoc.gov/eeoc/meetings/2-15-12/martin.cfm>; Joan C. Williams, Professor of Law, Univ. of Cal. Hastings, and Director, Ctr. for Worklife Law, Written Testimony at EEOC Meeting on Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities (Feb. 15, 2012), available at <http://www.eeoc.gov/eeoc/meetings/2-15-12/williams.cfm>; see also Joan C. Williams, *Accommodations for Pregnancy-Related Conditions Under the ADA Amendments Act of 2008* (Univ. of California, Hasting Coll. of Law, Legal Studies Research Paper Series, Research Paper No. 12, Oct. 1, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2155817 [hereinafter *Accommodations for Pregnancy-Related Conditions*] (discussing arguments that the scope of protections under the PDA “has grown along with the expansion of the ADA,” as well as the possibility of bringing claims directly under the amended ADA). Jeannette Cox’s article arguing that pregnancy should itself be recognized as a disability under the amended ADA also touches on the ADA-PDA interaction and argues for an interpretation similar to that which I advocate. See Cox, *supra* note 11, at 467-73. And Joanna Grossman and Gillian Thomas have made nuanced and detailed critiques of the analysis in the light duty cases that helped inform my doctrinal analysis of the PDA’s comparative clause. See Joanna Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567, 614-15 (2010); Joanna Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act’s Capacity-Based Model*, 21 YALE J.L. & FEMINISM 15, 39-41 (2009).

¹³ See, e.g., Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1142-63 (1986) (summarizing and critiquing the debate); Wendy W. Williams, *Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. OF L. & SOC. CHANGE 325, 351-70 (1984) [hereinafter *Equality’s Riddle*] (discussing the debate and ultimately arguing that the equal treatment approach is preferable).

¹⁴ See, e.g., Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN’S L.J. 1 (1985), available at <http://scholarship.law.berkeley.edu/facpubs/386> (generally supporting pregnancy-specific benefits); 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 (1983), available at <http://digitalcommons.law.ggu.edu/ggulrev/vol13/iss3/1> (same); Christine A. Littleton,

by contrast, argued that employment policy should not distinguish between women and men. Advocates in this camp were concerned that even policies that were designed to be beneficial, such as mandated maternity leave, were ultimately counterproductive because they reinforced stereotypes that women were less capable than men or less committed to work than men.¹⁵ Commentary that situates the PDA within this debate generally characterizes its same treatment language as reflecting and responding primarily to the concerns voiced by equal treatment advocates.¹⁶

This Article contributes to the historical literature on the PDA by demonstrating a distinct — complementary but largely overlooked — benefit of the PDA's structure: it was enacted following a period in which employers dramatically increased support for health conditions *other than* pregnancy.¹⁷ This growth, due to a combination of policies voluntarily adopted by private employers and statutory mandates regarding workplace injuries and disabilities, was truly stunning. Thus, although the PDA did not itself require specific pregnancy accommodations, its directive that pregnancy be treated “the same” as other health conditions required many employers to provide far more robust support for pregnancy than they had previously. In this respect, the same treatment mandate simultaneously responds to the concerns of both “equal treatment” and “special treatment” advocates. And, crucially important, such “leveling up” was required even if an employer's exclusion of pregnancy from disability, health insurance,

Equality and Feminist Theory, 48 U. PITT. L. REV. 1043 (1987) (same); cf. Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2214-20 (proposing an insurance system for pregnancy leave).

¹⁵ See, e.g., Williams, *Equality's Riddle*, *supra* note 13, at 352-64 (presenting the argument in defense of “equal treatment”); cf. Katharine T. Bartlett, *Pregnancy and the Constitution: The Uniqueness Trap*, 62 CALIF. L. REV. 1532 (1974), available at <http://scholarship.law.berkeley.edu/californialawreview/vol62/iss5/4> (discussing dangers of reliance on damaging and overbroad sex-based stereotypes when pregnancy is treated as a “unique” condition).

¹⁶ See, e.g., David S. Cohen, *The Stubborn Persistence of Sex Segregation*, 20 COLUM. J. GENDER & L. 51, 127 (2011) (“The PDA adopts an equal treatment approach to pregnancy. . . .”); Kevin S. Schwartz, *Equalizing Pregnancy: The Birth of a Super-Statute 20-28* (May 7, 2005) (unpublished manuscript), available at http://digitalcommons.law.yale.edu/ylsspps_papers/41/ (similar). Notably, however, other recent work has sought to complicate the accepted narrative of the debate. See, e.g., Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 444-47, 449-57 (2011) (arguing that the debate should be reconceptualized as a disagreement regarding what interim strategies were most likely to succeed in advancing shared objectives).

¹⁷ See *infra* Part II.B.

sick day, or other policies was due to pregnancy-neutral factors, such as minimizing costs or compliance with other statutory mandates, rather than animus or bias. Accordingly, it was well understood that the PDA would require employers provide additional support for pregnancy and that this would impose costs on employers.¹⁸

This historical context, which establishes that a primary purpose of the PDA was addressing the exclusion of pregnancy from then-recently-expanded public and private disability policies, is important for considering how the PDA interacts with the ADA. It bolsters the argument that ADA-accommodated employees are appropriate comparators for PDA analysis, as well as that pregnancy itself is properly classified as a disability under the ADA. This approach permits courts to effectively “harmonize” the PDA and the ADA, complying with their “duty” to make each statute “effective.”¹⁹ By contrast, when courts hold that ADA-accommodated employees are not proper comparators for PDA analysis, they functionally erase the PDA’s same-treatment language, which constitutes a “repeal by implication” that is highly “disfavored.”²⁰ In a case decided shortly after the PDA was enacted, the Supreme Court famously declared that the PDA set a floor, not a ceiling, on employers’ obligations.²¹ The ADA and the ADA Amendments Act raised the floor for treatment of other disabilities. The blinkered approach some courts use in interpreting the comparative language in the PDA risks relegating pregnancy once again to the basement.

This Article proceeds as follows. Part I discusses the ways in which pregnancy can affect work and the crucial importance of women’s wages to households. It shows that pregnant employees may need both protection from adverse actions based on their condition and accommodations at work. Part II situates the PDA within a longstanding debate over how best to advance women’s equality. It builds a historical record to demonstrate the PDA was intended to ensure that pregnancy receives the same level of employer support as other health conditions that interfere with work, even if the exclusion

¹⁸ See *infra* Part II.C. The PDA also provided explicitly that employers could not reduce the level of benefits provided during a one year transition program. See Pregnancy Discrimination Act, Pub. L. No. 95-555, § 3, 92 Stat. 2076 (1978).

¹⁹ *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (“The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”)

²⁰ *Hagen v. Utah*, 510 U.S. 399, 416 (1994); see also, e.g., *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 132 (2003).

²¹ *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 285 (1987).

is due to cost-based reasons or other statutory mandates rather than discriminatory animus. Part III focuses on current doctrine, arguing that courts therefore err when they assume the PDA only addresses biased treatment and that the standard burden-shifting approach used in intentional discrimination cases should not be used in cases alleging a failure to accommodate. This Part articulates a proposal for reconceptualizing accommodation claims to focus instead on the simple question of whether an employer has accommodated, or under the ADA would be required to accommodate, limitations like those caused by pregnancy.

A few final introductory thoughts: In considering the challenge of accommodating pregnancy within the workplace, I have chosen (for this project at least) to work within existing legal frameworks rather than imagine an ideal solution. I write in the hope that the analysis that follows can help women receive the support they need to work safely and productively through a pregnancy. That said, relying on the PDA has limitations. First, while I argue that the PDA's accommodation mandate is more robust than typically understood, it remains comparative. The PDA thus provides less recourse to pregnant women than recently-proposed bills that would explicitly grant pregnant employees a right to reasonable accommodations.²² Second (and this is a concern that perhaps pulls in the opposite direction), framing the need for modifications at work as "accommodations" obscures the extent to which "standard" workplace structures are themselves socially-constructed and deeply gendered.²³ As reformers recognized in the debates over the PDA, if support for pregnancy is perceived as "special treatment," it could increase other forms of sex discrimination or harassment. With these concerns in mind, the Conclusion briefly discusses how the pregnancy accommodation story hints at an alternative path to reform: the successful universalization of other provisions that were once "special treatment" for women — minimum wage, mandatory breaks, and overtime — into basic workplace entitlements. This is a helpful reminder that enactment of broad-based labor standards can establish new baselines of "normal" workplace practices. Perhaps in the future more general changes will be made that address not only the physical needs of pregnancy, but

²² Pregnant Workers Fairness Act, H.R. 5647, 112th Cong. (2012); Pregnant Workers Fairness Act, S. 3565, 112th Cong. (2012).

²³ See, e.g., Catherine Albiston, *Institutional Inequality*, 2009 WIS. L. REV. 1093, 1112-24 (showing how the forty-hour five-day workweek became the standard for wage labor and how such wage work, typically performed by men, became defined in opposition to labor, typically performed by women, that took place within the home).

also the larger challenges faced by both men and women struggling to balance work and family responsibilities.²⁴

I. PREGNANCY AND WORK

It was once widely believed that women could — and should — stop working when they became pregnant. Husbands were expected to shoulder breadwinning responsibilities during their wives' pregnancy and the years of child raising that followed.²⁵ That assumption was always inaccurate as a positive statement and unduly limiting as a normative principle. Now it is patently unrealistic. Women currently make up 47% of the workforce in the United States, and most pregnant women and their families depend on their earnings.²⁶

First, the assumption that a pregnant woman has a husband who can provide income is often incorrect. Even as long ago as 1980, 18% of all births in the United States were to single women; in 2009, 41% of all births were to single women.²⁷ Although unmarried women may be able to claim child support, they generally have no legal claim for support for their *own* needs, other than some direct medical expenses, during a pregnancy or after a birth.²⁸ Women who do not have a college degree are more likely than more highly-educated women to

²⁴ The ongoing salience of these questions is well illustrated by Anne-Marie Slaughter's recent article proclaiming "women still can't have it all" and the firestorm of media attention and debate it initiated. See generally Anne-Marie Slaughter, *Why Women Still Can't Have It All*, ATLANTIC MONTHLY, July/Aug. 2012; Editorial Staff, *The Atlantic's 'Women can't have it all' manifesto: The backlash*, THE WEEK, June 26, 2012, available at <http://theweek.com/article/index/229808/the-atlantics-women-cant-have-it-all-manifesto-the-backlash>.

²⁵ See, e.g., Albiston, *supra* note 23, at 1118-20 (describing how the separate spheres ideology, pastoralization of the home, and family wage ideal worked together to define work for women as "at most . . . a short transition period from childhood to marriage").

²⁶ BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, *WOMEN IN THE LABOR FORCE: A DATABOOK*, 28-38 tbl. 11 (2011) [hereinafter 2011 DATABOOK], available at <http://www.bls.gov/cps/wlf-databook-2011.pdf>.

²⁷ U.S. Dep't of Health & Hum. Serv., *Births: Final Data for 2009*, 60 NAT'L VITAL STATS. REPORTS 1, 8 tbl. C (Nov. 3, 2011), available at http://www.cdc.gov/nchs/data/nvsr/nvsr60/nvsr60_01.pdf. Teenagers accounted for just 21% of nonmarital births, down from 29% of all nonmarital births ten years earlier. *Id.* at 8. This figure may also include some women in same-sex marriages, since such marriages are not recognized for purposes of federal law.

²⁸ Cf. Shari Motro, *Preglimony*, 63 STAN. L. REV. 647 (2011) (arguing that support obligation should be created). Of course, a man who impregnates a woman may choose to provide her financial assistance.

be unmarried when pregnant;²⁹ they are also more likely to work for low wages and lack any access to paid leave for pregnancy or childbirth.³⁰ Women who are married also generally need to continue to earn income during pregnancy. On average, working wives contribute 37% of family income³¹ and, in 2009, 38% of wives earned more than their husbands.³² Wives are the sole earner in approximately 6% of marriages (husbands are the sole earner in approximately 18% of marriages).³³ The prevalence of nonmarital births and growing number of married women who out-earn their husbands means that the mother is the primary or sole earner in nearly 40% of all households.³⁴

Given the importance of women's wage earning, it is not surprising that many women now work late into a pregnancy. In the early 1960s, only 35% of first-time mothers worked during the last month of their pregnancy; by contrast, 82% of those who gave birth between 2006 and 2008 worked during the last month of their pregnancy.³⁵ As described more fully in the sections that follow, these numbers, and their dramatic shift, do not necessarily demonstrate a fully endogenous change in women's desires. The first time period predates legal protections against pregnancy discrimination; at that time, it was common for employers in certain industries to require women to stop working as a pregnancy advanced.³⁶ Even now, some women who

²⁹ E.g., Jennifer Manlove et al., *The Relationship Context of Nonmarital Childbearing in the U.S.*, 23 DEMOGRAPHIC RES. 615, 619-20 (2010).

³⁰ See, e.g., 2011 DATABOOK, *supra* note 26, at 53-54, tbl. 17 (showing positive correlation between amount of education and wages); STEPHANIE BORNSTEIN, CENTER FOR WORKLIFE LAW, POOR, PREGNANT, AND FIRED: CAREGIVER DISCRIMINATION AGAINST LOW-WAGE WORKERS 5-7 (2011) (noting that most low-wage workers do not receive paid sick days or paid or unpaid family or medical leave).

³¹ 2011 DATABOOK, *supra* note 26, at 77, tbl. 24. Some estimates are higher. For example, a recent study found that in 2009, employed wives contributed 47% of total family earnings. KRISTIN SMITH, CARSEY INST., WIVES AS BREADWINNERS: WIVES' SHARE OF FAMILY EARNINGS HITS HISTORIC HIGH DURING SECOND YEAR OF THE GREAT RECESSION (Fall 2010), available at <http://www.carseyinstitute.unh.edu/publications/IB-Smith-Breadwinners10.pdf>.

³² 2011 DATABOOK, *supra* note 26, at tbl. 25.

³³ *Id.* at tbl. 23.

³⁴ Heather Boushey, *The New Breadwinners*, in *A WOMAN'S NATION CHANGES EVERYTHING* 31, 36 (Heather Boushey & Ann O'Leary eds., 2009).

³⁵ U.S. Census Bureau, U.S. Dep't of Commerce, *Maternity Leave and Employment Patterns of First-Time Mothers 1961-2008* (2011), at 6 [hereinafter *Maternity Leave and Employment*].

³⁶ See, e.g., DOROTHY SUE COBBLE, *THE OTHER WOMEN'S MOVEMENT: WORKPLACE JUSTICE AND SOCIAL RIGHTS IN MODERN AMERICA* 74-75, 127 (2004) (discussing how school districts and airlines often fired women when they got pregnant, regardless of

would like to work late into their pregnancies may not be able to because of inflexible employment policies or unlawful pregnancy discrimination.³⁷ Many women also return to work relatively quickly after giving birth,³⁸ and significant majorities of both married and unmarried mothers engage in paid work while raising children.³⁹

For both married and unmarried pregnant employees, losing a job or being forced onto unpaid leave during pregnancy is likely to cause significant economic hardship. This is compounded by the fact that the United States is one of the very few countries in the world (the others are Swaziland and Papua New Guinea) that do not guarantee paid maternity leave.⁴⁰ Additionally, as discussed more fully below, even employees who have paid leave may exhaust their benefits if forced onto leave during pregnancy and thus lack any income, or a job to return to, during any period that they wish to remain at home after childbirth.

Pregnant employees may face two distinct, but sometimes interrelated, challenges. The first is what is classically recognized as “discrimination”: that is, adverse employment actions — such as failure to hire or termination — motivated by the employee’s pregnancy. While Title VII, as amended by the PDA, clearly makes such actions illegal, discrimination against pregnant workers persists.⁴¹ Indeed, particularly in low-wage workplaces, it is still common to fire

job performance). Title VII was enacted in 1964 but its key substantive provisions did not take effect until 1965. Civil Rights Act of 1964, Pub. L. 88-352, § 716, 78 Stat. 241 (1964).

³⁷ See *infra* text accompanying notes 41-45.

³⁸ U.S. Census Bureau, *Maternity Leave and Employment*, *supra* note 35, at 14 (stating that of women who work during their first pregnancy, 73% return to work within six months of the birth of a child).

³⁹ 2011 DATABOOK, *supra* note 26, at tbl. 6 (showing 62.5% of married mothers and 68.2% of never-married, divorced, separated, and widowed mothers with children under six engage in paid work, and that the respective numbers rise to 76% and 80% for mothers with children ages six to seventeen).

⁴⁰ HUMAN RIGHTS WATCH, *FAILING ITS FAMILIES: LACK OF PAID LEAVE AND WORK-FAMILY SUPPORTS IN THE U.S.* 33 (2011). For a detailed (but now slightly outdated) compendium of maternity leave policies worldwide, see U.N. DEP’T OF ECON. AND SOCIAL AFFAIRS, *THE WORLD’S WOMEN 2010: TRENDS AND STATISTICS* 103-05 & tbl. 4-D (2010). A rapidly growing number of countries guarantee at least some paid paternity leave as well. See *id.*

⁴¹ In the past ten years, the EEOC and local fair employment agencies received 53,865 charges alleging pregnancy discrimination, and the EEOC obtained \$150.5 million in benefits for charging parties. Peggy Mastroianni, Legal Counsel, EEOC, Written Testimony at EEOC Meeting on Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities (Feb. 15, 2012), *available at* <http://www.eeoc.gov/eeoc/meetings/2-15-12/mastroianni.cfm>.

employees immediately after they announce pregnancies.⁴² Other discrimination is more subtle. Sociological studies demonstrate that pregnant women are perceived to be less capable than other workers.⁴³ Such biases may result in pregnant workers being judged to have failed to perform adequately, leading to refusal to promote, corrective action, or termination. The EEOC has identified pregnancy discrimination as a priority area.⁴⁴ It has pursued cases alleging bias against pregnant employees in large companies such as Bloomberg News, Verizon, and (somewhat ironically) maternity-clothes giant Motherhood Maternity, and several have resulted in sizeable settlements.⁴⁵

The second challenge that pregnant employees may face is a need to request an accommodation — that is, a modification of standard workplace procedures *in the employee's favor* — that would facilitate working through a pregnancy. Importantly, some workers may not require any employer accommodation at all. Others may be able to change their work habits (e.g., take more frequent restroom breaks) without asking their employer, or even conceptualizing such changes as workplace “accommodations.” But for some women, either the nature of their work environment or the nature of their pregnancy may require that they affirmatively request that their employer change standard work requirements.⁴⁶

The necessary changes may be quite minor. For example, an employee may need a uniform modified to accommodate her changing body,⁴⁷ or permission to take extra restroom breaks or to carry a water

⁴² See BORNSTEIN, *supra* note 30, at 11-14; see also Williams, EEOC Testimony, *supra* note 12 (describing women in a variety of jobs who were — shockingly! — pressured to have abortions or risk losing their jobs).

⁴³ See, e.g., Jane A. Halpert et al., *Pregnancy as a Source of Bias in Performance Appraisals*, 14 J. ORGANIZATIONAL BEHAV. 649, 652-53 (1993); see also Stephen Benard et al., *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, 1368-72 (2008) (collecting and discussing other studies finding pregnancy bias).

⁴⁴ Christina Wilkie, *Pregnancy Discrimination In the Workplace Target of New EEOC Crackdown*, HUFFINGTON POST (Sept. 29, 2012), http://www.huffingtonpost.com/2012/09/29/pregnancy-discrimination-eeoc_n_1924603.html.

⁴⁵ Press Release, EEOC, Class of Women to Receive \$48.9 million in EEOC-Verizon Pregnancy Bias Settlement (June 5, 2006), available at <http://www.eeoc.gov/eeoc/newsroom/release/6-05-06a.cfm>; Press Release, EEOC, Maternity Store Giant to Pay \$375,000 to Settle EEOC Pregnancy Discrimination and Retaliation Lawsuit (Jan. 8, 2007), available at <http://eeoc.gov/eeoc/newsroom/release/1-8-07.cfm>.

⁴⁶ For a detailed discussion of physical changes caused by pregnancy and their relationship to work, see, e.g., Calloway, *supra* note 12, at 3-16; Grossman, *supra* note 12, at 578-84.

⁴⁷ See Williams, *Accommodations for Pregnancy-Related Conditions*, *supra* note 12

bottle so that she can drink outside regular break times.⁴⁸ An employee whose job requires standing for long periods of time may need a stool.⁴⁹ Employees whose work occasionally — but not regularly — requires lifting heavy objects may need to be excused from, or helped with, such obligations.⁵⁰ Employees may seek to limit overtime, or avoid night work.⁵¹ Other modifications may be more substantial. Employees in jobs that regularly require lifting heavy loads or significant physical exertion may seek a transfer to a different position,⁵² or the regular assignment of an additional employee to provide assistance.⁵³ Employees may seek to limit their exposure to potentially harmful toxins or chemicals.⁵⁴ Although undoubtedly many employers readily accommodate such needs, published court cases and records of complaints make clear that others do not. This may be particularly true in low-wage highly-regulated work environments.⁵⁵ Denial of such requests may be due to bias, but it may

(describing call from pregnant employee required to take FMLA leave when she could no longer wear her uniform, even though she had no other physical limitations that interfered with her ability to work).

⁴⁸ See, e.g., *Wiseman v. Wal-Mart Stores*, No. 08-1244-EFM, 2009 WL 1617669, at *1 (D. Kan. June 9, 2009) (pregnant employee with urinary and bladder infections fired when her employer prohibited her from carrying a water bottle as recommended by her doctor).

⁴⁹ See, e.g., *Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1223 (6th Cir. 1996) (pregnant postal worker instructed by doctor to stand no more than four hours was refused use of chair and was forced to go to part-time schedule).

⁵⁰ See, e.g., *Serednyj v. Beverly Healthcare LLC*, No. 2:08-CV-4, 2010 WL 1568606, at *1, *3 (N.D. Ind. Apr. 16, 2010), *aff'd* 656 F.3d 540 (7th Cir. 2011) (pregnant director of activities for nursing home instructed by doctor to avoid lifting heavy weights was denied assistance with responsibilities that took only five to ten minutes per day).

⁵¹ See, e.g., *EEOC v. Ackerman, Hood & McQueen, Inc.*, 956 F.2d 944, 946 (10th Cir. 1992) (pregnant secretary fired because, on the advice of her doctor, she refused to work overtime). Some studies suggest that night work may heighten risk of miscarriage. See Grossman, *supra* note 12, at 583 n.79 (citing conflicting studies).

⁵² See, e.g., *Urbano v. Cont'l Airlines, Inc.*, 138 F.3d 204 (5th Cir. 1998) (pregnant airline ticketing agent instructed by doctor to avoid heavy lifting denied transfer to service center agent position which did not require lifting luggage).

⁵³ See, e.g., *Walker v. Fred Nesbit Distrib. Co.*, 156 Fed. Appx. 880, 882 (8th Cir. 2005) (pregnant truck driver denied request to transfer to light duty position or have assistant accompany her on route to assist with heavy lifting).

⁵⁴ See Calloway, *supra* note 12, at 11-14 (discussing numerous chemicals common in workplaces that may present significant risks for fetal health).

⁵⁵ See BORNSTEIN, *supra* note 30, at 14-17; see also Ann O'Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 7-8 (2007) (collecting studies showing low-wage workers have less access to paid and unpaid leave than higher paid workers).

also stem from pregnancy-neutral factors such as a desire to avoid any additional costs.

Additionally, virtually every pregnant employee needs to take some time off from work for labor, delivery, and recovery; earlier in the pregnancy, she may need time off for prenatal appointments, which can be difficult to schedule outside of regular business hours. Medical experts typically agree that women should plan to take four to eight weeks off to recover from a vaginal delivery, and longer if the birth was by cesarean section or if there were other complications.⁵⁶ This time is necessary to address the woman's *own* health needs, independent from the need for infant care, although typically postpartum mothers do both simultaneously. As discussed below, women who work for relatively large employers, and who satisfy length-of-service requirements, have a right to up to twelve weeks off for pregnancy and infant care under the federal Family and Medical Leave Act ("FMLA").⁵⁷ Many smaller employers likewise provide such leave as a matter of standard practice. But if an employee works for an employer with a no-leave policy, or does not satisfy all the requirements of any available policy, such time off is properly framed as a necessary accommodation as well.

"Accommodations" thus can include two distinct categories: (1) changes *at work* that make it possible to continue working safely throughout a pregnancy; and (2) job-protected *leave from work*, ideally with continuation of benefits and pay or other income replacement, for the period of time during pregnancy, childbirth, and recovery from childbirth that a woman is unable to work. They are interrelated, in that denial of modifications at work can expand the period of time that a woman cannot work. To see this, imagine a woman who is told by her doctor to avoid lifting more than twenty-five pounds. If that restriction is accommodated at work (e.g., a coworker helps move heavy objects) the woman will be able to work through her pregnancy and will need a relatively short time away from work for childbirth and recovery. If, however, the lifting restriction is not accommodated, the woman may need to stop working early in her pregnancy or increase the risk of harm to herself or to the fetus she is carrying.

Now consider the two issues — that is, adverse actions against an employee and denial of accommodations — more generally. They are distinct challenges. An employee who is perfectly capable of doing her

⁵⁶ See, e.g., *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 731 & n.4 (2003). That said, women in relatively sedentary jobs might be able to perform their work tasks soon after giving birth, particularly if they can work remotely.

⁵⁷ See *infra* text accompanying notes 190-193.

job without any modification may find herself fired because of unwarranted assumptions that pregnancy interferes with her ability to work. Or an employer who has no problem with women working through their pregnancies may be unwilling to incur costs associated with accommodations. At times, however, the challenges interrelate. For at least some employers, reluctance to make even minor modifications may be motivated by unjustified assumptions that pregnant workers are less capable than other workers or unlikely to return after childbirth. And, of course, denial of accommodations may in turn lead to an adverse action against an employee if the result of the denial is that the employee cannot meet the standard job requirements.

The relationship may run in reverse, as well. Mandating employers provide accommodations for pregnancy may increase discrimination at the hiring stage against pregnant women or against all women of childbearing age. It may also increase the likelihood that a woman will be fired shortly before she otherwise would access benefits such as a paid maternity leave. Most accommodation mandates are accompanied by antidiscrimination and anti-retaliation provisions that are intended to preclude such discrimination. If laws were always perfectly enforced, this would be sufficient; in the real world, however, increased discrimination is a legitimate concern. For example, the president of the influential Merchants and Manufacturers Association was unusually honest in his response to a Supreme Court decision upholding a state law that mandated up to four months of disability leave for pregnancy and childbirth: He stated bluntly that it would mean “[m]any employers will be prone to discriminate against women in hiring and hire males instead.” When the interviewer pointed out that this would be illegal, the manufacturing executive responded, “[T]ry to prove it.”⁵⁸

Accordingly, the challenge for making policy in this area is that the natural response to these dual concerns may pull in different directions. To counter bias against pregnant employees, advocates typically want to emphasize that pregnant women remain competent employees and that employers should ignore pregnancy, just as they should (usually) ignore race, religion, or national origin. At the same time, to receive accommodations, advocates must acknowledge that pregnancy sometimes does interfere with work. This highlights

⁵⁸ See *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327, 1346 (2012) (Ginsburg, J., dissenting) (recounting National Public Radio interview of Don Butler by Nina Totenberg).

pregnancy as a potentially salient condition that employers must consider.

As described more fully in the Parts that follow, the PDA addresses both the need to protect employees from adverse actions stemming from animus or bias and the need to provide accommodations. It does so by defining discrimination on the basis of pregnancy, childbirth, and related medical conditions as a form of sex discrimination, and by separately and affirmatively mandating that employers accommodate pregnancy (at least) to the extent they accommodate other conditions that cause similar limitations. As discussed in Part III, courts err when they conflate the analysis required by these distinct provisions.

That said, courts' under-enforcement of the accommodation mandate may reflect a perceived tension between it and the more general prohibition on biased behavior. In this respect, it is essential to understand that institutional norms regarding work generally determine the extent to which any given woman needs modifications at work. For example, if American law did not permit mandatory overtime, a pregnant (or any other) employee who did not want to work more than forty hours would not need to be specifically excused from overtime responsibilities — she would simply decline to volunteer for extra hours. Similarly, if employers routinely provided stools for employees who are required to stand in a place for many hours (a policy that both male and female employees would certainly appreciate), pregnant employees would not need to request a seat as an “accommodation.”

These examples illustrate the more general theoretical point that, in many instances, failure to make an accommodation can be characterized as a form of discrimination. American workplaces are usually designed to meet the needs of a “typical” male, white, Christian, English-speaking, able-bodied worker who has a partner who will take care of domestic needs. Accordingly, even in the absence of discriminatory intent, the structures of the workplace may exclude employees who differ from this “typical” or “ideal” worker.⁵⁹ This is the central insight of substantive equality theory, as well as a primary justification for statutory disparate impact doctrine⁶⁰ and for explicit

⁵⁹ See, e.g., JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 62-113 (2000) (describing development of a gendered “ideal worker” norm); Chai R. Feldblum, *Rectifying the Tilt: Equality Lessons for Religion, Disability, Sexual Orientation, and Transgender*, 54 ME. L. REV. 159, 181-88 (2002) (developing a metaphor of a “tilted” baseline and arguing reasonable accommodation provisions are best conceptualized as means to rectify the tilt).

⁶⁰ 42 U.S.C. § 2000e-2(k) (2012).

mandates that employers make “reasonable accommodations” for religion and disability.⁶¹ In fact, even standard disparate treatment doctrine bars so-called “rational discrimination” based on true generalizations about groups, thereby prohibiting conduct based on legitimate cost-concerns rather than animus.⁶² Thus, several theorists have argued persuasively that antidiscrimination and accommodation mandates are better understood as overlapping concepts than as distinct and fundamentally different.⁶³ The PDA provides fertile ground for exploring this theoretical debate. Its second clause operationalizes the intuition that a failure to make an accommodation — that is, if the employer has accommodated other employees with comparable limitations — can be a form of discrimination “because of sex.” Recent judicial decisions, however, have robbed the comparative language of the force it should have. The result is that pregnant employees are denied accommodations that they need and that the law, properly interpreted, grants them.

II. LEGISLATING PREGNANCY

In the first half of the twentieth century, it was common and legal for employers to fire pregnant employees, even as pregnancy and maternal caretaking responsibilities were used to justify a network of sex-based “protective” labor legislation that governed many aspects of

⁶¹ *Id.* §§ 2000e(j), 12112(b)(5) (2012).

⁶² *See, e.g.,* *City of Los Angeles, Dep’t of Water & Power v. Manhart*, 435 U.S. 702 (1978) (holding impermissible an employer pension policy that required women to make larger contributions than men to reflect differences in life span); Samuel R. Bagenstos, “Rational Discrimination,” *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825 (2003) (discussing forms of “rational” discrimination and their similarities to accommodation mandates).

⁶³ *See, e.g.,* Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642 (2001) (demonstrating economic effects of accommodation and antidiscrimination provisions, particularly disparate impact, are essentially the same); Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579 (2004) (arguing that accommodations are consistent with other antidiscrimination measures that require alteration of exclusionary workplace norms); Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357 (2009) (arguing third-party harassment doctrine functions as an accommodation mandate). *But see, e.g.,* Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307 (2001) (contending antidiscrimination and accommodation principles are fundamentally different); Stewart J. Schwab & Stephen L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 WM. & MARY L. REV. 1197, 1200-12 (2003) (similar).

women's employment more generally. At the same time, pregnancy was routinely left out of a rapidly emerging network of public and private workplace policies that provided support for other health conditions that could interfere with work. In other words, pregnancy was the justification for overbroad sex-based classifications while it was excluded from disability classifications. The enactment of Title VII, which prohibits discrimination on the basis of sex, called *both* practices into question, and the PDA was ultimately enacted to end *both* practices.

As discussed more fully in Part III, contemporary courts interpreting the PDA focus primarily on the existence or absence of discriminatory animus. This Part retraces the history that led to the PDA to argue that this approach misinterprets the statute. Rather, the history helps confirm the PDA's plain language mandate: pregnancy must be accommodated if other temporarily disabling conditions are accommodated, even if an employer's denial of accommodations is based on pregnancy-neutral factors such as limiting costs or compliance with other statutory mandates.

A. (*Overbroad*) Sex Classifications

Title VII of the Civil Rights Act of 1964 makes it unlawful for a covered employer to "discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin," as well as to "limit, segregate, or classify [its] employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities" because of any of these factors.⁶⁴ As initially introduced, the bill did not include "sex." Sex was added by a representative who was opposed to the law generally, and the traditional (though now contested) explanation has been that he hoped it would work as a "poison pill."⁶⁵ However, several members of Congress quickly rallied around the addition, lobbying both for its retention and for the passage of the law as a whole.⁶⁶

Title VII created an Equal Employment Opportunity Commission ("EEOC") charged with reviewing employee complaints and issuing guidance under the new law. The Commission immediately

⁶⁴ 42 U.S.C. § 2000e-2(a) (2012).

⁶⁵ See, e.g., Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1318 & n.36 (collecting sources discussing various explanations for the amendment).

⁶⁶ See *id.* at 1326-28.

recognized that applying the statutory prohibition on sex discrimination to pregnancy would be challenging. In its first report to Congress, the EEOC stated:

The prohibition against sex discrimination is especially difficult to apply with respect to the female employees who become pregnant. In all other questions involving sex discrimination, the underlying principle is the essential equality of treatment. . . . The pregnant female, however, has no analogous male counterpart and pregnancy necessarily must be treated uniquely. The Commission decided that to carry out the Congressional policy of providing truly equal employment opportunities, including career opportunities, for women, policies would have to be devised which afforded female employees reasonable job protection during periods of pregnancy.⁶⁷

As Kevin Schwarz details in a careful review of early EEOC opinion letters and guidance on pregnancy, the agency initially took an *ad hoc* approach that yielded inconsistent directives. Opinion letters issued by the EEOC's Office of General Counsel in 1966 and 1967 suggested that employers' fringe benefit policies could treat pregnancy less generously than other temporary disabilities, although at least one of these letters also opined that "to provide substantial equality of employment opportunity . . . a leave of absence should be granted for pregnancy whether or not it is granted for illness."⁶⁸ Within a few years, the EEOC's separate Office of Compliance held that exclusion of pregnancy from disability policies violated Title VII, as did denials of leave for pregnancy (whether or not comparable leaves were offered for other disabilities).⁶⁹

These early EEOC documents are external evidence of internal debates occurring not just at the EEOC but within a larger group of feminists and labor activists.⁷⁰ This debate is typically referred to as the "special treatment/equal treatment" debate, and it embodied many of the tensions discussed in Part I between addressing biased decision-making based on pregnancy and accommodation needs.⁷¹ The

⁶⁷ EEOC, FIRST ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 1965-66 40 (1967).

⁶⁸ See Schwarz, *supra* note 16, at 12-13 (quoting letters from 1966 and 1967).

⁶⁹ *Id.* at 17-20 (quoting decisions from 1970-1972).

⁷⁰ See *id.* at 12-32.

⁷¹ See generally sources cited *supra* notes 13-14 (discussing the pros and cons of the equal treatment and special treatment approaches, particularly in the context of pregnancy-specific benefits).

question was whether ending discrimination on the basis of sex required that women be treated exactly like men, or whether, at least with respect to pregnancy, different “special treatment” was necessary to provide women equal opportunity.

This debate was longstanding. In the late nineteenth century, state legislatures began to regulate aspects of employment that had previously been entirely subject to negotiation between employees and employers. Some of these early laws were sex-neutral; others were designed specifically to protect women and children, many of whom worked in appalling conditions in sweatshop-like factories.⁷² The Supreme Court soon heard challenges to the constitutionality of such provisions. In *Lochner v. New York*,⁷³ the Court struck down a sex-neutral regulation on bakers’ hours on the grounds that it interfered with freedom of contract. But just three years later, in *Muller v. Oregon*, the Court upheld an Oregon statute that limited women to working no more than ten hours per day in certain industries.⁷⁴ The Court reasoned that because it was “obvious” that women’s “physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence,” the legislation was justified to protect “not merely her own health, but the well-being of the race” from the “greed as well as the passion of man.”⁷⁵ (It is worth noting the “protection” provided was limited; many men, as well as women, would find it difficult to work more than ten-hour shifts in a physically demanding job.)

In the wake of *Muller*, states rapidly expanded the network of “protective” legislation regulating women’s, but not men’s, employment. By the early 1960s, forty-four states had enacted maximum hour legislation; the caps were rather high, however, generally ranging from forty-eight hours to sixty hours per week.⁷⁶ Many had also enacted minimum wage provisions; prohibitions on night work; limitations on lifting; requirements that seating, washrooms, and restroom facilities be provided; and regular meal

⁷² See, e.g., COBBLE, *supra* note 36, at 95-96; ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES 180-214* (1982). Many other countries enacted similar “women protective” legislation during this period. See *generally* PROTECTING WOMEN: LABOR LEGISLATION IN EUROPE, THE UNITED STATES, AND AUSTRALIA, 1880-1920 (Ulla Wikander et al. eds., 1995).

⁷³ 198 U.S. 45, 57 (1905).

⁷⁴ 208 U.S. 412 (1908).

⁷⁵ *Id.* at 421-22.

⁷⁶ PRESIDENT’S COMM’N ON THE STATUS OF WOMEN, *AMERICAN WOMEN: THE REPORT OF THE PRESIDENT’S COMMISSION ON THE STATUS OF WOMEN AND OTHER PUBLICATIONS OF THE COMMISSION 240-41* (1965) [*hereinafter* PCSW, *AMERICAN WOMEN*].

periods and rest periods.⁷⁷ Several also prohibited women from working at all in a range of occupations.⁷⁸

This body of legislation improved working conditions for many women dramatically. But it came with some serious costs. The Court's decision in *Muller* reinforced stereotypes regarding women's physical weakness and established a constitutional presumption that women's paid work must be subordinated to their duties to home and family life for the "well-being of the race."⁷⁹ There was also truth in the assertion that the laws simply "protected" women out of good jobs.⁸⁰ As noted, some occupations were entirely off limits. Even when women were technically permitted to work in various industries, employers frequently preferred to hire men who could work longer hours or night shifts. After the Fair Labor Standards Act ("FLSA") was enacted in 1938, women in businesses that were covered by FLSA particularly resented not being able to earn premium wages for overtime work.⁸¹ The "protection" was also incomplete. Although justified by women's "maternal functions," none of the laws explicitly facilitated work by pregnant employees and none required job-guaranteed or paid maternity leave. Rather, throughout this time, it remained common to fire women or force them to take unpaid leave as soon as their pregnancies began to show,⁸² and employers sometimes had more general formal or informal bans on married women working at all.⁸³

⁷⁷ *Id.* In 1923, the Supreme Court held that a women-specific minimum wage law violated freedom of contract, distinguishing *Muller* and similar cases on the ground that sex-specific maximum-hour laws responded to "real" physical differences between the sexes and did not reach the "heart of" employment contracts. See *Adkins v. Children's Hosp.*, 261 U.S. 525, 553-54 (1923). Fourteen years later, the Supreme Court overruled *Adkins* and upheld a women-specific minimum wage law, paving the way for additional women-specific minimum wage laws, as well as the sex-neutral Fair Labor Standards Act. See *West Coast Hotel Co. v. Parish*, 300 U.S. 379, 397-400 (1937); Ruth Bader Ginsburg, *Muller v. Oregon: One Hundred Years Later*, 45 WILLAMETTE L. REV. 359, 368-69 (2009).

⁷⁸ PSCW, AMERICAN WOMEN, *supra* note 76, at 240-41.

⁷⁹ 208 U.S. at 422.

⁸⁰ See, e.g., KESSLER-HARRIS, *supra* note 72, at 193-95 (discussing prohibitions on women's night work excluded them from good jobs); Franklin, *supra* note 65, at 1326-27 (quoting similar arguments made in support of adding "sex" to Title VII).

⁸¹ COBBLE, *supra* note 36, at 186-87.

⁸² *Id.* at 127. Cobble notes that the extent of "protection" varied by race and class; African American women were rarely subject to mandatory leave or transferred to light duty positions. *Id.*

⁸³ See CLAUDIA GOLDEN, UNDERSTANDING THE GENDER GAP: AN ECONOMIC HISTORY OF AMERICAN WOMEN 160-79 (1990).

Because the protective labor laws provided both benefits and costs, feminists were divided on their utility and whether they could coexist comfortably with more general commitments to nondiscrimination on the basis of sex. In the 1920s and ensuing decades, many feminist leaders opposed efforts to enact an Equal Rights Amendment because they feared it would require the repeal of protective legislation.⁸⁴ In 1963, just a year before the enactment of Title VII, the Presidential Commission on the Status of Women issued an influential report outlining recommendations for legal and societal reform to advance women's interests. A committee established to review labor standards advocated retention and expansion of women-specific maximum hour laws, characterizing them as the "main bulwark against extensive hours of work" that "create[] a climate in within which American women can function effectively and productively as workers and, at the same time, can participate in community and citizenship responsibilities."⁸⁵ The Commission itself, however, rejected this committee recommendation, advocating that state maximum hour laws should be maintained only while efforts were made to extend FLSA's coverage and that in the long term women would be best served by being treated no differently from men in this respect.⁸⁶

When Title VII was passed, with its general prohibition on discrimination "because of sex," these questions became even more pressing. The EEOC initially took a case-by-case approach to resolving complaints based on exclusions pursuant to these state laws, characterizing the issue as "one of the most difficult legal questions the Commission faced."⁸⁷ At hearings held during 1966 and 1967, some labor feminists urged the Commission to permit "beneficial" laws to be enforced until they could be expanded to cover male and female workers.⁸⁸ Others, led by the newly-formed National Organization for Women ("NOW"), took a more hard-lined approach, arguing that the EEOC should hold sex-based state labor laws violated Title VII.⁸⁹ NOW contended that even seemingly salutary laws hurt

⁸⁴ See *id.* at 60-68; KESSLER-HARRIS, *supra* note 72, at 206-14; Serena Mayeri, *Constitutional Choices: Legal Feminism and the Dynamics of Change*, 92 CALIF. L. REV. 755, 762-63 (2004); see generally Joan G. 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. 188 (1991) (discussing debate and various drafts of the ERA developed to attempt to address these concerns).

⁸⁵ PCSW, AMERICAN WOMEN, *supra* note 76, at 133.

⁸⁶ *Id.* at 56.

⁸⁷ EEOC, FIRST ANNUAL REPORT, *supra* note 67, at 43.

⁸⁸ COBBLE, *supra* note 36, at 186.

⁸⁹ *Id.*

women by reinforcing stereotypes regarding women's need for protection and making women less attractive as employees. Notably, however, as late as 1967, a representative of NOW made a distinction between laws based on "real biological factors, such as maternity leaves, separate rest rooms, pregnancy and the like," which she asserted were "compatible with Title VII," and those "based on stereotypes as to sex," such as maximum hour laws, which she argued should be repealed.⁹⁰ By the following decade, NOW's position was more absolute.

B. (Underinclusive) Disability Classifications

Before the twentieth century, workers generally received no assistance from their employers with medical expenses or lost income caused by illness or injury. During the period that the special treatment/equal treatment debate was heating up, however, employers responded to competitive pressures and government mandates by dramatically increasing their support for health conditions *other than* pregnancy that interfered with work. The benefits provided by this new public-private social safety net were an essential element of the debates over Title VII's application to pregnancy, but the significance and scope of this rapid growth has been little discussed in historical work on the PDA. This section fills in this missing history; Part III shows how it should inform current doctrine.

The first group of laws requiring employers to provide support for physical impairments was workers' compensation laws (originally, and tellingly, called "workmen's" compensation), which address employer responsibility for workplace injuries. In 1910, New York passed the first such law that withstood constitutional scrutiny; in the next five years, thirty-two more states enacted workers' compensation legislation.⁹¹ They continued to expand rapidly. By 1921, forty-four states had programs in place, and by 1949, all states had enacted at least some protections.⁹² These laws typically require employers to cover health-care costs and a portion of wage replacement.⁹³ They are

⁹⁰ *Id.* (quoting *Daily Labor Report*, May 2, 1967; "Statement of UAW [also representing NOW] to EEOC, May 2, 1967").

⁹¹ PRICE V. FISHBACK & SHAWN EVERETT KANTOR, *PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKERS' COMPENSATION* 103-04 (2007). In 1910, New York enacted both a mandatory and an elective program; the former was held unconstitutional, leading to a state constitutional amendment. *See id.*

⁹² *Id.* at 104; Tamela D. Jerrell, *A History of Legally Required Employee Benefits: 1900-1950*, 3 J. OF MANAGEMENT HIST. 193, 199 (1993).

⁹³ For a helpful overview of workers' compensation generally, see Nat'l Acad. of Soc.

based on the understanding that employers often bear at least partial responsibility for accidents that occur at work. Employees who receive workers' compensation generally must waive any potential tort claim they might otherwise have against the employer, and benefits are typically scaled according to the severity of the injury incurred. Employers may reduce the amount they owe under most workers' compensation statutes by offering employees injured at work alternative "light duty" positions or other modified work assignments.⁹⁴

Employer support for medical conditions that do not stem from work — and thus for which employers bear no direct responsibility — became common in the period during and after World War II. After early efforts to develop government-provided health insurance failed in this country,⁹⁵ employers began to sponsor health insurance for their employees as an employee benefit.⁹⁶ These plans used a variety of mechanisms to provide assistance with the cost of hospital and physician services. In 1930, only 1.2 million employees (and an additional 1-2 million dependents) received employer-sponsored health insurance.⁹⁷ By 1940, 6 million members were enrolled, generally through their employers, in Blue Cross plans alone; that number tripled to 19 million in 1945 and almost tripled again to 52 million by 1958.⁹⁸ This exponential growth was partially explained by

Ins., *Workers Compensation: Benefits, Coverage, and Costs 2010* (2012), NASI.ORG, http://www.nasi.org/sites/default/files/research/NASI_Workers_Comp_2010.pdf. For summaries of each state's plan, see Nat'l Fed'n of Indep. Bus., *State by State Comparison of Worker's Compensation Laws*, NFIB.COM, <http://www.nfib.com/legal-center/compliance-resource-center/compliance-resource-item/cmsid/57181> (last visited Jan. 27, 2013).

⁹⁴ See, e.g., R.I. GEN. LAWS § 28-33-18.2 (West 2012) (describing "suitable alternative employment" provisions); see also Nicole Krause et al., *Modified Work and Return to Work: A Review of the Literature*, 8 J. OCCUPATIONAL REHABILITATION 113, 135 (1998) (literature review concluding that modified work programs such as light duty "may lead to substantial reductions in disability and workers' compensation costs").

⁹⁵ See, e.g., INST. OF MED., EMPLOYMENT AND HEALTH BENEFITS: A CONNECTION AT RISK 58-65 (1993) (discussing unsuccessful state and federal efforts during the 1910s and 1920s to mandate government-sponsored insurance).

⁹⁶ See *id.* at 65-70; JENNIFER KLEIN, FOR ALL THESE RIGHTS: BUSINESS, LABOR, AND THE SHAPING OF AMERICA'S PUBLIC-PRIVATE WELFARE STATE 16-52, 162-257 (2006) (discussing emergence of health insurance as an employment benefit); Jennifer Klein, *The Politics of Economic Security: Employee Benefits and the Privatization of New Deal Liberalism*, 16 J. POL. HIST. 34 (2004) (same); William J. Wiatrowski, *Family-Related Benefits in the Workplace*, 113 MONTHLY LAB. REV. 28, 30 (1990) (same).

⁹⁷ INST. OF MED., *supra* note 95, at 66. Health insurance during this period was also sometimes provided through community collectives, unions, or other mechanisms, but these programs were also relatively small. See *id.*

⁹⁸ *Id.* at 68.

federal policies — persisting to this day — that encouraged employers to provide support for health insurance in lieu of cash wages.⁹⁹

In this time period, it also became common for employers to adopt a variety of fringe benefits that shelter employees from income loss otherwise experienced when medical conditions make it impossible to work.¹⁰⁰ For example, paid sick days typically provide full salary for relatively short absences. Temporary disability policies provide partial income replacement for wages lost during longer periods that an employee cannot work, with a typical maximum of twenty-six weeks. Employer-sponsored life insurance, long-term disability insurance, and retirement benefits provide relief for employees who leave the workplace permanently, either through choice or by necessity. These private programs supplemented the public social security system, which began offering pension benefits in 1935 and long-term disability benefits in 1956.¹⁰¹ (Notably, even these public programs use prior employment, or marriage to a wage-earner, to determine eligibility and benefit levels; public benefits for those who lack a regular connection to paid work are less generous and more stigmatized.¹⁰²)

Employers, then and now, generally may choose whether to provide health-related benefits other than workers' compensation. A handful of states, however, mandate temporary disability insurance for short-term interruptions from work. In 1942, Rhode Island passed the first

⁹⁹ *Id.* at 70-71 (discussing importance of federal labor policies excluding health-related benefits from wages — and thus wage caps — during World War II, and of tax policies permitting employers generally to deduct health-related expenses and employees to exclude the value of the benefits from their taxable income). Court rulings in the late 1940s also held that benefits were subject to collective bargaining, further increasing their prevalence. *See* Wiatrowski, *supra* note 96, at 30.

¹⁰⁰ *See, e.g.*, Walter W. Kolodrubetz, *Two Decades of Employee-Benefit Plans, 1950-1970: A Review*, 35 SOC. SECURITY BULL. 10-22 (1972) (reviewing growth in employee benefits in these areas); Wiatrowski, *supra* note 96, at 30-31 (same).

¹⁰¹ *See* Social Security Act of 1935, Pub. L. 74-271, 49 Stat. 620 (codified at 42 U.S.C. ch. 7); Social Security Amendments of 1956, Pub. L. 84-880, 70 Stat. 807.

¹⁰² *See, e.g.*, Stephanie Moller, *Supporting Poor Single Mothers: Gender and Race in the U.S. Welfare State*, 16 GENDER & SOC. 465, 465-66 (2002) (“Individuals with sufficient work history and wages qualify for the relatively generous, federal funded, top-tier social insurance programs such as social security and Medicare. Individuals without consistent work history are relegated to the bottom tier, where they must prove destitution to qualify for meager amounts of assistance from locally administered and highly stigmatized programs.”); *see also* Nancy Fraser & Linda Gordon, *A Genealogy of Dependency: Tracing a Keyword of the U.S. Welfare State*, 19 SIGNS 309, 321-23 (1994) (describing how “first-track programs like unemployment and old age insurance offered aid as an entitlement without stigma” and arguing “second-track” programs like welfare were purposefully stigmatized to make social security more acceptable).

such law, defining a qualifying “sickness” as a “physical or mental condition [that makes an employee] unable to perform his regular or customary work.”¹⁰³ By 1970, four additional states, including the heavily-populated states of New York, New Jersey, and California, had created mandatory temporary disability programs.¹⁰⁴ In most states, the programs are funded through contributions from both employers and employees; employers with qualifying private plans are usually excused from contributing to the government-operated fund.¹⁰⁵

Even in the absence of more general federal or state mandates, employer support for employee health conditions became relatively standard. As a 1972 report declared, “[e]mployee-benefit plans are now the predominant institution through which most workers and their families obtain basic medical care protection.”¹⁰⁶ In 1969, approximately 80% of persons under 65 had health insurance covering at least hospital care, with many receiving this coverage through their employers (either their own or their spouse’s); persons over 65 could receive health insurance through Medicare or Medicaid.¹⁰⁷ At that time, the Social Security Administration estimated that almost two-thirds of all workers were covered by plans providing cash benefits for short-term disabilities.¹⁰⁸ Thus, although this hybrid public-private social safety net certainly had some gaps, it represented a dramatic expansion of employer-provided and employment-related support for health needs.

¹⁰³ 1942 R.I. Pub. Laws ch. 1200, § 2 (13).

¹⁰⁴ See U.S. SOC. SEC. ADMIN., SOCIAL SECURITY PROGRAMS IN THE UNITED STATES 44-49 (1997). For an overview of each state’s law, see SOC. FOR HUMAN RES. MGMT., TEMPORARY DISABILITY BENEFITS LAWS (2012), available at <http://www.shrm.org/legalissues/stateandlocalresources/stateandlocalstatutesandregulations/documents/temporary%20disability%20benefits%20laws.pdf>. For a helpful discussion of the interaction of these programs with workers’ compensation benefits and with social security benefits, see Nat’l Acad. of Soc. Insur., *supra* note 93, at 45-50.

¹⁰⁵ U.S. SOC. SEC. ADMIN., *supra* note 104, at 48.

¹⁰⁶ Kolodrubetz, *supra* note 100, at 10.

¹⁰⁷ Marjorie Smith Mueller, *Private Health Insurance in 1969: A Review*, 34 SOC. SEC. BULL. 2, 3-4 (1971); see also Wiatrowski, *supra* note 96, at 31 (noting that in 1971, 97% of full-time office workers in metropolitan areas had insurance covering hospitalizations and 90% had insurance covering doctors’ visits; the comparable numbers for plant workers were 93% and 75%).

¹⁰⁸ Daniel N. Price, *Cash Benefits for Short-Term Sickness, 1948-69*, 34 SOC. SEC. BULL. 1, 19 (1971). In jurisdictions that did not require temporary disability insurance, only 50% of employees in private industry had formal coverage. *Id.*; see also Wiatrowski, *supra* note 96, at 31 (noting that in 1971, 87% of full-time office, and 82% of full-time plant, workers in metropolitan areas had short-term disability coverage or sick days).

But disability and health insurance policies often excluded pregnancy entirely, or offered less generous support for pregnancy than other medical conditions. On the public side, Rhode Island served as a “cautionary” example against providing generous pregnancy benefits. Its path-breaking temporary disability legislation permitted pregnant employees to claim benefits. Initially, the mere fact of pregnancy was sufficient to meet the disability standard, rather than requiring a showing that pregnancy interfered with the ability to work.¹⁰⁹ Under this generous standard, pregnancy accounted for approximately 30% of all benefits paid by the 1949-50 benefit year.¹¹⁰ Rhode Island responded by restricting pregnancy *more* than other disabilities by placing flat dollar limits on pregnancy benefits; pregnancy benefits then declined to constitute approximately 7% of total benefits paid.¹¹¹ The four states that followed Rhode Island in enacting temporary disability policies learned from Rhode Island’s experience. Three of them excluded pregnancy from coverage entirely, and the fourth (New Jersey) provided less generous coverage for pregnancy than for other disabilities.¹¹² State unemployment insurance statutes generally also had special pregnancy disqualifications.¹¹³

Private policies also tended to exclude pregnancy. Historian Dorothy Sue Cobble asserts that in the early years after World War II, pregnancy was almost always excluded from employers’ temporary disability provisions.¹¹⁴ Coverage increased during the 1950s and 1960s, particularly in unionized workplaces,¹¹⁵ but it was still far from standard. A 1969 report studying temporary disability policies issued by the eleven large insurance companies found that less than half permitted pregnancy-related claims at all.¹¹⁶ Pregnancy was also often excluded from employer-provided health insurance. In 1970, only 61% of individuals with health insurance received maternity benefits, and even those that did often included special limitations on coverage.¹¹⁷

¹⁰⁹ Elizabeth Duncan Koontz, *Childbirth and Child Rearing Leave: Job-Related Benefits*, 17 N.Y. L. FORUM 480, 485 (1971).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*; Dinner, *supra* note 16, at 453.

¹¹³ PCSW, *AMERICAN WOMEN*, *supra* note 76, at 63; Koontz, *supra* note 109, at 486.

¹¹⁴ COBBLE, *supra* note 36, at 127.

¹¹⁵ *Id.* at 129.

¹¹⁶ Koontz, *supra* note 109, at 491.

¹¹⁷ *Id.*

During this time period, there were efforts to support pregnancy specifically and separately from other health needs. The most important of these was the Sheppard-Towner Act of 1921, which provided several years of funding for federal-state partnership programs to improve maternal and infant health, including provision of medical services for childbirth.¹¹⁸ But in 1927, when the legislation was up for reauthorization, the American Medical Association and other organizations successfully lobbied against it and it was allowed to expire two years later.¹¹⁹ During the late 1940s and early 1950s, bills were proposed that would have amended the Social Security Act to provide maternity benefits, but none was enacted.¹²⁰

Advocates considering Title VII's coverage of pregnancy tracked these developments. Indeed, one of the primary sources for the history recounted above is a comprehensive report addressing support for childbirth and childrearing published in 1971 by Elizabeth Duncan Koontz, the Director of the U.S. Department of Labor Women's Bureau.¹²¹

C. *The Pregnancy Discrimination Act: Pregnancy As Sex and Disability*

The special treatment/equal treatment debate regarding labor regulation of women's work and the rapid growth in employer support for health conditions generally sets the backdrop for the debate that led to and followed enactment of the PDA. Advocates disagreed about whether pregnancy was best considered, and specially accommodated, as a sex-based characteristic or whether it should be framed instead as a disability like any other physical condition that sometimes interferes with work. At the same time, the EEOC and courts struggled with the related question of whether exclusion of pregnancy from disability policies or health insurance constituted sex discrimination.

In 1970, the Citizens' Advisory Council on the Status of Women, the successor organization to the influential President's Commission established in the early 1960s, embraced a strongly-worded commitment to the disability approach. The Council passed a resolution declaring:

Childbirth and complications of pregnancy are, for all job-related purposes, temporary disabilities and should be treated as such

¹¹⁸ THEDA SKOCPOL, *PROTECTING SOLDERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* 506-12 (1992).

¹¹⁹ *Id.* at 512-22.

¹²⁰ COBBLE, *supra* note 36, at 129-30.

¹²¹ Koontz, *supra* note 109, at 480 n.*.

under any health insurance, temporary disability insurance, or sick leave plan of an employer, union, fraternal society. . . . No additional or different benefits or restrictions should be applied to disability because of pregnancy or childbirth, and no pregnant woman employee should be in a better position in relation to job-related practices or benefits than an employee similarly situated suffering from other disability.¹²²

As a strategic matter for an organization committed to expanding opportunities for women, this was a prudent position to take. In most instances, other disabilities received more robust support than pregnancy. That said, the policy also explicitly opposed treating pregnant women *better* than those with other disabilities. This position — which was a dramatic shift from the Council’s earlier support for specific maternity leaves¹²³ — reflects the special treatment/equal treatment debate. In explaining its rationale for the 1970 resolution, the Council claimed that offering pregnant employees more generous benefits than those available to men or women with other disabilities would be “divisive” and could lead to “reluctance to hire women of childbearing age.”¹²⁴

The EEOC quickly followed suit. As described in subpart A, the EEOC’s first statements regarding Title VII’s application to pregnancy had been *ad hoc* and inconsistent. An agency official later admitted that they were reluctant to take a position while feminists remained divided.¹²⁵ By 1972, after extensive internal discussion, and the development of a more unified position by women’s rights leaders outside the organization, the EEOC discussed pregnancy in formal guidelines on sex discrimination. The guidelines addressed both discrimination and accommodation issues. On the former, they provided that a “written or unwritten policy which excludes . . . employees because of pregnancy is in *prima facie* violation of Title VII.”¹²⁶ On the latter, they provided that:

Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are,

¹²² Citizens’ Advisory Council on the Status of Women, *Job-Related Maternity Benefits* (1970) (emphasis added), available at <http://www.eric.ed.gov/PDFS/ED094156.pdf>.

¹²³ See Dinner, *supra* note 16, at 450 (stating that in 1966, the Council supported maternity-specific leaves).

¹²⁴ *Id.* at 455.

¹²⁵ Schwartz, *supra* note 16, at 15.

¹²⁶ 29 C.F.R. § 1604.10, as printed in 37 Fed. Reg. 6837 (Apr. 5, 1972).

for all job-related purposes, temporary disabilities, and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment.¹²⁷

The EEOC's guidelines largely follow the Citizens' Advisory Council's approach, but they do not affirmatively oppose granting pregnancy more expansive protections than other disabilities. Rather, the guidelines suggest that pregnant employees could challenge no-leave policies under the disparate impact doctrine then-recently enunciated by the Supreme Court.¹²⁸ Lower courts followed the EEOC's guidance. In the early 1970s, circuit and district courts consistently held that Title VII was violated if employers selectively excluded pregnancy from disability benefits or sick days, as well as if employers discharged employees for pregnancy-related reasons.¹²⁹

The Supreme Court disagreed. In *Geduldig v. Aiello*,¹³⁰ the Court considered whether California's temporary disability insurance program, which excluded coverage for pregnancy, violated the Equal Protection Clause. Significantly, by the time the Supreme Court decided the case, California courts had already interpreted the statute to permit claims for disabilities stemming from pregnancy complications; accordingly, the only issue before the Supreme Court was whether exclusion of benefits for "normal delivery and recuperation" was permissible.¹³¹ The threshold determination was whether the exclusion constituted a classification on the basis of sex, and thus would be reviewed under the Court's just-then-emerging intermediate scrutiny doctrine.¹³² The Court, in a 6-3 decision, held

¹²⁷ *Id.* (emphasis added).

¹²⁸ *Id.* § 1604.10(c); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

¹²⁹ *See, e.g.*, *Comm'n Workers of America, AFL-CIO v. AT&T Co.*, 513 F.2d 1024 (2d Cir. 1975) (exclusion of pregnancy from employer disability policy violated Title VII); *Wetzel v. Liberty Mut. Ins. Co.*, 511 F.2d 199 (3d Cir. 1975) (same); *Farkas v. South Western City Sch. Dist.*, 506 F.2d 1400 (6th Cir. 1974) (failure to pay pregnant employees for sick days violated Title VII); *Green v. Waterford Bd. of Educ.*, 473 F.2d 629 (2d Cir. 1973) (requiring pregnant teacher take leave of absence violated Title VII).

¹³⁰ 417 U.S. 484 (1974). For a detailed discussion of early pregnancy dismissal cases, see generally Deborah Dinner, *Recovering the LaFleur Doctrine*, 22 *YALE J. L. & FEMINISM* 343 (2012).

¹³¹ *Geduldig*, 417 U.S. at 491-92. Three of the four individual appellees had disabilities that were attributable to "abnormal complications" during pregnancy; the fourth claimed benefits based on a "normal pregnancy." *Id.* at 489. California courts subsequently interpreted the statute to permit benefits be paid for pregnancy complications but not for "normal pregnancy and delivery." *Id.* at 491.

¹³² The Court had not yet settled on a standard of scrutiny for sex-based

that it did not. It reasoned that the policy divided employees into two categories — “pregnant persons” and “nonpregnant persons” — and that although the former consisted entirely of women, the latter included both women and men.¹³³ Characterizing pregnancy as an “objectively identifiable physical condition with unique conditions” (but not explaining the significance this classification held), the Court concluded that lawmakers were free to include or exclude pregnancy from legislation “on any reasonable basis” and that the cost-related concerns enunciated by the State were clearly sufficient.¹³⁴

Two years later, in *General Electric Co. v. Gilbert*, the Court faced the same question under Title VII, this time in a challenge brought to a private employer’s plan that likewise excluded pregnancy benefits from an otherwise comprehensive temporary disability policy.¹³⁵ The Court, again in a 6-3 decision, followed the reasoning in *Geduldig* to hold that the exclusion did not constitute “discrimination . . . because of sex.” The Court primarily relied upon the imperfect fit between the classification and sex, quoting the pregnant/non-pregnant persons section of *Geduldig*, but also opined that pregnancy was “significantly different from the typical covered disease or disability” in that it is “not a ‘disease’ at all.”¹³⁶ This distinction was important because it allowed the Court to conclude that exclusion of pregnancy — a condition experienced exclusively by women — was not grounds to infer “invidious” discrimination against women.¹³⁷ Rather, the Court implicitly held that GE’s stated concern with increased costs was sufficient justification for the policy.¹³⁸ The Court explained its refusal to defer to the EEOC’s contrary guidance on the ground that the

classifications. *Geduldig* post-dated *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (plurality expressed support for strict scrutiny) but predated *Craig v. Boren*, 429 U.S. 190, 197 (1976) (majority endorsed what became known as intermediate scrutiny).

¹³³ *Geduldig*, 417 U.S. at 496 n.20.

¹³⁴ *Id.*

¹³⁵ 429 U.S. 125 (1976), *superseded by statute*, Pub. L. No. 95-555, 92 Stat. 2076 (1978). One year after *Gilbert* was decided, the Supreme Court was a little more receptive to a sex-based claim based on a pregnancy exclusion, holding that a policy that permitted employees on disability leave for conditions other than pregnancy to retain seniority but denied retention of seniority for pregnancy could violate Title VII. *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977).

¹³⁶ *Gilbert*, 429 U.S. at 135, 136.

¹³⁷ *Id.* at 136.

¹³⁸ *Id.* at 130-32 (discussing district court’s findings regarding increased costs that would be incurred if pregnancy were covered). General Electric had argued that these additional (alleged) costs provided a legitimate non-discriminatory justification for the pregnancy exclusion. Brief for Petitioner at 53-61, *Gilbert v. Gen. Elec. Co.*, 429 U.S. 125 (1976) (No. 74-1589, 74-1590).

formal guidance did not accord with the EEOC's first opinion letters on point.¹³⁹

On the day that the decision in *Gilbert* was announced, ACLU attorney Susan Dellar Ross (who had earlier, as an EEOC lawyer, helped formulate the agency's sex and pregnancy guidelines) and International Union of Electrical Workers Association General Counsel Ruth Weyand (who had argued *Gilbert*) took the first steps towards organizing support for amending Title VII to override the decision.¹⁴⁰ Ultimately, this became a broad-based coalition of more than 200 organizations that worked together to draft and lobby for the bill that became the PDA. The coalition was rather unusual. In addition to women's rights groups, the broader civil rights community, and labor unions, it included several pro-life organizations concerned that the discrimination permitted by *Gilbert* would spur women to seek abortions rather than risk loss of income due to pregnancy.¹⁴¹

The coalition established a drafting committee that took the lead in shaping the bill.¹⁴² Kevin Schwartz, who conducted interviews with key players and reviewed a treasure trove of published and unpublished documents, provides a window into the deliberative process. Drafters considered, but quickly rejected, a mandate to provide mandatory leave or other accommodations specifically for pregnancy. The leaders of the coalition argued against the proposal on the grounds that it would increase the likelihood of backlash and "raise questions about whether the government ought affirmatively to 'encourage' childbearing rather than simply requiring neutrality."¹⁴³ They likewise considered and rejected simply codifying the EEOC's pregnancy guidelines.¹⁴⁴ They opted instead to provide a definition of "sex" that addressed Title VII's application to pregnancy. They thought this approach would "establish a governing principle . . . [that] leaves enforcement agencies free to develop interpretations as times change and . . . give courts the opportunity to shape doctrine in light of the general intent of the Congress rather than being limited to

¹³⁹ *Gilbert*, 429 U.S. at 142-43.

¹⁴⁰ Schwartz, *supra* note 16, at 24-28, 58 (discussing Ross's role in crafting EEOC guidelines); *Gilbert*, 429 U.S. at 126 (identifying Weyand as counsel for Gilbert).

¹⁴¹ Schwartz, *supra* note 16, at 63-67.

¹⁴² *Id.* at 69.

¹⁴³ *Id.* at 73 (quoting Susan Dellar Ross, interview with author, Oct. 20, 2004 and Wendy Williams et al., *Memorandum in Support of a General Definition Statute Overruling General Electric v. Gilbert*, Dec. 21, 1976, at 8 n.5).

¹⁴⁴ *Id.* at 70-71.

what the Congress at one time was able to anticipate.”¹⁴⁵ It also had the independent political benefit of limiting the extent to which Title VII was “opened up,” a key factor for maintaining support from the general civil rights community concerned that a broader bill could become a vehicle for other amendments that would weaken Title VII’s core principles.¹⁴⁶

Most debate over the substance of the bill thus predated its actual introduction in Congress. The bill as introduced included, word-for-word, the entire first sentence of what became the PDA. It provides:

That section 701 of the Civil Rights Act of 1964 is amended by adding at the end thereof the following new subsection:

“(k) The terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise. . . .”¹⁴⁷

As discussed more fully in Part III, this first clause supersedes the reasoning in *Gilbert* to make clear that decisions based on “pregnancy, childbirth, or related medical conditions” are “because of sex.” This language, in conjunction with Title VII’s general prohibition on “discrimination because of . . . sex,” should be (and generally has been) understood to prohibit adverse employment actions such as forced leaves or terminations due to pregnancy. The second clause is more directly relevant in challenges to denial of accommodations. It not only supersedes the specific result in *Gilbert* concerning exclusion from temporary disability plans but provides more generally that pregnancy must be treated the same for “all employment-related purposes” as any other condition that causes comparable limitations.

Although various amendments or alternative approaches were floated during Congressional consideration, including proposals to cap the duration of pregnancy disability benefits, none gained traction. The only substantive change made to the bill was the addition of a

¹⁴⁵ *Id.* at 73-74 (quoting Wendy Williams et al., *Memorandum in Support of a General Definition Statute Overruling General Electric v. Gilbert*, Dec. 21, 1976, at 1).

¹⁴⁶ *Id.* at 75-76.

¹⁴⁷ S. 995, 95th Cong., 2d Sess. (1978).

second sentence addressing its application to abortion.¹⁴⁸ The Senate committee also amended the bill to create a transition period and specify, importantly, that benefits could not be reduced as a mechanism for compliance.¹⁴⁹

Review of the legislative history establishes that members of Congress understood — and embraced — the concerns that had been voiced by feminist advocates. First, Congressional leaders were clear that protecting women from pregnancy discrimination was necessary because pregnant women’s earnings were essential for families. For example, the Senate committee report quoted hearing testimony documenting that “[w]orking women have become a major part of this country’s work force . . . [and that] [m]ost of these women work out of hard economic necessity.”¹⁵⁰ The committee cited studies establishing that 70% of working women were divorced, single, or widowed; their families’ sole wage earner; or married to men who made less than \$7,000 per year, approximately \$27,000 in today’s dollars.¹⁵¹ Even then, at least 10% of births were to unmarried women.¹⁵² Numerous floor statements likewise sought to counter the misperception that women typically worked for “pin money” that would be little missed.¹⁵³

Congressional sponsors and supporters also firmly endorsed the principle that pregnancy should be treated (at least) as well as other medical conditions that interfered with an ability to work. As a threshold matter, legislators considered and rejected arguments that pregnancy differed from classic disabilities because it was frequently planned or a cause for celebration, noting that it was sometimes not voluntary and that other “voluntary” health conditions were typically covered.¹⁵⁴ Rather, the Senate committee report emphasized that

¹⁴⁸ Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, § 1, 92 Stat. 2076 (1978); *see also* Schwartz, *supra* note 16, at 104-10 (discussing the addition of the abortion provisions).

¹⁴⁹ Pregnancy Discrimination Act §§ 2, 3.

¹⁵⁰ S. REP. NO. 95-331, at 9 (1977) (quoting the American Nurses’ Association).

¹⁵¹ *Id.* The contemporary dollar valuation is based on the consumer price index. *See* DOLLARTIMES, dollartimes.com (last visited Jan. 27, 2013).

¹⁵² S. REP. NO. 95-331, at 9. The U.S. Department of Health and Human Services reported in 1980 that 18.4% of births were to unmarried women, suggesting that the committee’s figures may well be low. *See supra* note 27 and accompanying text.

¹⁵³ *E.g.*, STAFF OF S. COMM. ON LABOR & HUM. RES., LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978 at 3 (Comm. Print 1980) (statement of Sen. Williams); *id.* at 12 (statement of Sen. Hawkins); *id.* at 166 (statement of Rep. Hawkins).

¹⁵⁴ For example, even Senator Hatch, who proposed several amendments that would have weakened the bill in various respects, *id.* at 56-58, stated he was generally

pregnancy should be assessed in the context of the functional limitations that it caused and their similarity to other limitations employers accommodated:

By defining sex discrimination to include discrimination against pregnant women, the bill rejects the view that employers may treat pregnancy and its incidents as *sui generis*, without regard to its functional comparability with other conditions. . . . Pregnant women who are able to work must be permitted to work on the same conditions as other employees; and *when they are not able to work for medical reasons, they must be accorded the same rights, leave privileges and other benefits, as other workers who are disabled from working.*¹⁵⁵

The House committee report likewise emphasized “[t]he bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work.”¹⁵⁶

That said, members of Congress understood that requiring employers to accommodate pregnancy to the same extent they accommodated other health-related needs could and would impose costs on employers. Indeed, opposition to the bill focused almost entirely on the scope of increased costs and its applicability to abortion.¹⁵⁷ The committees reviewing the bill rejected industry estimations that it would increase employer costs by more than \$1 billion, but they accepted Department of Labor projections that it would impose approximately \$190 million in additional expenses.¹⁵⁸ The Senate committee report even echoes the balancing test already embedded in Title VII’s religious accommodation provisions, stating

supportive because disability policies covered many other conditions that were not involuntary or “diseases.” *Id.* at 109 (“[I]f disability programs can have hair transplants and vasectomies and things of that order that I do not consider to be diseases, then maybe we should do something for the lady who has to work who happens to become pregnant.”).

¹⁵⁵ S. REP. NO. 95-331, at 4 (emphasis added).

¹⁵⁶ H.R. REP. NO. 95-948, at 4 (1978). Such language in the legislative history, often accompanied by statements that employers would not be required to create any new benefits for pregnant employees, has fueled confusion regarding the viability of disparate impact claims challenging no-leave policies and other denials of accommodations. However, since the PDA’s definitional amendment applies to all of the substantive provisions of Title VII, disparate impact claims should be available. For a discussion of these issues, see sources cited *infra* note 264.

¹⁵⁷ Cal. Fed. Savings & Loan Ass’n v. Guerra, 479 U.S. 272, 286 (1987).

¹⁵⁸ S. REP. NO. 95-331, at 11; H.R. REP. NO. 95-948, at 10.

that the costs, “although not negligible, [could] be sustained without any undue burden on employers.”¹⁵⁹

Both reports likewise explained that the structure of the bill — amending Title VII’s definitional provisions — ensured that it would apply to any employment practice that affected the “terms and conditions” of employment, including disability and sick leave benefits, medical benefits, hiring and promotion decisions, accrual of retirement benefits, and seniority structures.¹⁶⁰ The House report explicitly provides that the requirement to treat pregnant employees the “same” as other employees would include employer practices such as “transferring workers to lighter assignments,”¹⁶¹ a practice that was already a common mechanism for reducing workers’ compensation payments. Equally important, at the time the PDA was enacted, several states mandated employers provide temporary disability benefits but permitted pregnancy to be treated less favorably than other disabilities.¹⁶² The reports make clear that employers could no longer make such distinctions — pregnancy would need to be treated like any other disabling condition.¹⁶³

This review of legislative history establishes several key principles that reinforce the plain language mandate that employers must treat pregnancy “the same” as they treat any other health condition that causes similar limitations.¹⁶⁴ First, the PDA was enacted with the understanding that women’s earnings were essential for their own economic security and that of their families; thus, employers should not be able to force pregnant employees onto unpaid leaves if they

¹⁵⁹ S. REP. NO. 95-331, at 9; *cf.* 42 U.S.C. § 2000e(j) (2012) (requiring employers provide reasonable accommodations for religious practice unless it causes an “undue hardship”).

¹⁶⁰ S. REP. NO. 95-331, at 3-6; H.R. REP. NO. 95-948, at 4-7.

¹⁶¹ H.R. REP. NO. 95-948, at 5.

¹⁶² *See* H.R. REP. NO. 95-948, at 11 (discussing variation in the extent to which then-existing state disability plans covered pregnancy); *supra* text accompanying notes 109-112 (same).

¹⁶³ H.R. REP. NO. 95-948, at 5 (“This bill would require that women disabled by pregnancy . . . be provided the same benefits as those provided other disabled workers. This would include temporary and long-term disability insurance, sick leave, and other forms of employee benefit programs.”); S. REP. NO. 95-331, at 4 (similar).

¹⁶⁴ Although some judges, most notably Justice Scalia, generally refuse to consider legislative history, many others will consult legislative history, particularly committee reports. *See, e.g.,* Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 *YALE L.J.* 70, 72 n.1 (2012) (documenting continuing importance of legislative history in recent statutory interpretation cases). In this instance, as I describe more fully in Part III, the legislative history simply bolsters the natural reading of the plain text.

accommodate other health conditions through workplace modifications. Second, the legislation was intended to address the full range of employment policies, not merely the disability insurance at stake in *Gilbert* itself. Third, it required employers to treat pregnancy (at least) as well as other health conditions that similarly affected workers, and it was understood that doing so would impose costs on many employers. And fourth, discriminatory bias was not required. Exclusion of pregnancy from disability policies — even if justified by state statute or cost-based concerns — was identified a clear violation.

D. Pregnancy Preferences?

The PDA's language is easy to apply to adverse actions based on animus or bias regarding pregnancy. These are clearly illegal. But the proper interpretation of the PDA is less clear in two different scenarios. One, which is the focus of my analysis in this Article, is whether employers may treat pregnant employees less well than other disabled employees *if* their actions are *not* motivated by discriminatory bias. The other is the inverse question: Whether an employer may provide accommodations for pregnant employees that it does not provide for other employees with health conditions that cause similar limitations. Although the former question has been considered relatively infrequently by courts or commentators, the latter has been widely litigated and exhaustively discussed. This subpart briefly addresses that second question before turning back to the first, in part because current misconceptions of the accommodation mandate may stem in part from the widespread attention given to the second question.

The “preferential” treatment question erupted almost immediately after the enactment of the PDA. At the same time as the PDA was working its way through Congress, California responded to the *Gilbert* decision in a very different way. It enacted a statute that required most employers to provide up to four months of job-protected disability leave for pregnancy, even if they did not provide comparable leaves for other disabilities. A handful of other states had similar statutes. The California statute was challenged in a case called *California Federal Savings and Loan v. Guerra* (commonly known as *Cal Fed*), which ultimately was decided by the Supreme Court.¹⁶⁵

¹⁶⁵ 479 U.S. 272 (1987); see also Kay, *supra* note 14, at 10-20 (discussing background of *Cal Fed* and similar case, *Miller-Wohl Co. v. Commissioner of Labor & Industry*, challenging a comparable Montana statute).

The case confronted the special treatment/equal treatment debate head-on. The accepted narrative is the feminist leaders were “deeply divided,” as they had earlier been over the ERA and the advisability of maintaining protective labor legislation.¹⁶⁶ There is truth in this assertion. In law review articles written while the case was pending and amicus briefs submitted to the Supreme Court (many authored by the same law professors and advocates), feminists debated the best way to conceptualize equality and pregnancy.¹⁶⁷ But focusing on the strategic disagreement about the advisability of “special treatment” obscures the extent to which there was considerable common ground between the groups.

Broadly speaking, California-based organizations and academics fought to keep their law, contending that mandating a pregnancy leave was the only way to treat men and women “equally” in their ability to work and to reproduce. They sought to distinguish the law from the “protective” labor legislation of the past, arguing that those laws were based on inaccurate stereotypes, but that pregnancy was a “real physical sex-based difference” that must be taken into account.¹⁶⁸ The primary East Coast feminist and progressive organizations, including NOW, the ACLU, and the League of Women Voters, disagreed. They argued that “special treatment” of pregnancy ultimately worked to the

¹⁶⁶ See, e.g., MONA HARRINGTON, *WOMEN LAWYERS: REWRITING THE RULES* 215 (1994) (*Cal Fed* put the feminist legal community into a state of “tension and disarray”); Stephanie M. Wildman, *Pregnant and Working: The Story of California Federal Savings & Loan v. Guerra*, in *WOMEN AND THE LAW STORIES* 253, 254 (Elizabeth M. Schneider & Stephanie M. Wildman eds., 2011) (characterizing the two sides as “warring factions”).

¹⁶⁷ Significant contemporary discussions in law reviews included: Finley, *supra* note 13; Littleton, *supra* note 14; Kay, *supra* note 14; Krieger & Cooney, *supra* note 14; Williams, *Equality's Riddle*, *supra* note 13. Many of these authors also participated in litigating *Cal Fed*. Linda Krieger represented the actual party of interest in her initial proceedings before the state agency. See Wildman, *supra* note 166, at 255. Others took leading roles writing amicus curiae briefs. See Brief for Coalition for Equal Rights Advocates et al. as Amici Curiae, *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (No. 85-494), 1986 WL 728374 (Herma Hill Kay, of counsel); Brief for Coalition for Reproductive Equality in the Workplace et al. as Amici Curiae Supporting Respondents, *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (No. 85-494), 1986 WL 728372 (Christine Littleton, of counsel); Brief for Coalition for National Organization of Women et al. as Amici Curiae, *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (No. 85-494), 1986 WL 728368 (Wendy Williams, of counsel). Susan Deller Ross, who had helped draft the EEOC guidelines and then led the coalition that enacted the PDA, was also “of counsel” on the NOW brief. *Id.*

¹⁶⁸ Brief for Coalition of Equal Rights Advocates, *supra* note 167 at 1, 5-9; Brief for Coalition for California Women Lawyers et al. as Amici Curiae Supporting Respondents at 13-15, *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (No. 85-494) 1986 WL 728370.

disadvantage of women because it spurred *ex ante* discrimination against women and reinforced stereotypes that women are only marginal workers.¹⁶⁹

But both groups of feminists claimed that employees in California should have a job-guaranteed right to leave for pregnancy. They did this by contending that to the extent that California statute conflicted with Title VII, the proper resolution would be to raise the level of protections offered *all disabilities* rather than remove the explicit protections for pregnancy.¹⁷⁰ In other words, the “women-specific” benefit should be expanded to men.¹⁷¹ As a practical matter, this would likely have been easy. Many employers, including Cal Fed, already had temporary disability policies covering conditions other than pregnancy that were similar to the mandated maternity leave.¹⁷² In this respect, the feminist organizations were united in their disagreement with Cal Fed and business-affiliated amici that argued the PDA’s “same treatment” mandate meant that the California statute simply could not be enforced.

The Supreme Court, in a 6-3 decision, ultimately held that Title VII did not preempt the California statute. The majority opinion acknowledged that the plain text of the PDA suggests equal treatment would be required but relied on a (now rather discredited) statutory interpretation principle that sanctioned privileging Congress’s intent

¹⁶⁹ See Brief for American Civil Liberties Union et al. as Amici Curiae at 10, *California Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272 (No. 85-494) 1986 WL 728369 (also includes the League of Women Voters) (“Legislative distinctions drawn on the bases of sex or pregnancy are inherently dangerous even when they purport to confer advantages.”); see also Brief of National Organization for Women et al., *supra* note 167, at 14-20 (arguing that the exceptions that worked to the disadvantage of pregnant employees added to the California statute illustrated the “pitfalls” of viewing pregnancy as *sui generis*).

¹⁷⁰ Brief of American Civil Liberties Union, *supra* note 169, at 48-58; Brief for Coalition of National Organization for Women, *supra* note 167 at 4-10, 20-27.

¹⁷¹ If this case had been a “normal” sex discrimination case brought by a disabled male employee denied leave, this solution would have been the obvious remedy. See Brief of American Civil Liberties Union, *supra* note 169, at 3-4. The case was unusual in that Cal Fed was seeking a declaratory judgment regarding the interaction of the two laws in response to an employee complaint filed under the state law.

¹⁷² *California Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 278 (1987). Cal Fed’s general disability policy provided time off, but with a rehiring preference rather than a job guarantee. Interestingly, California law already required “reasonable accommodations” for disabilities (predating the federal analogue by several years), and job-protected time off might have been required on those grounds. See generally Brief for Lillian Garland as Amici Curiae, *California Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272 (No. 85-494), 1986 WL 728363 (making this argument).

and purpose over the “letter of the statute.”¹⁷³ The Court reasoned that the PDA and the California statute shared a goal of promoting equal employment opportunity by permitting “women, as well as men, to have families without losing their jobs.”¹⁷⁴ The PDA should therefore be understood as establishing “a floor beneath which pregnancy disability benefits may not drop — not a ceiling above which they may not rise.”¹⁷⁵ The dissent, on the other hand, argued that the second clause of the PDA “means exactly what it says” and accordingly “leaves no room for preferential treatment of pregnant workers.”¹⁷⁶

The Court’s decision in *Cal Fed* permitted “special treatment” in the form of pregnancy-specific leaves, and in its wake, a handful of states enacted similar maternity leave mandates.¹⁷⁷ But the leaders of the East Coast feminist establishment (many of whom had helped draft the PDA, as well as the amicus briefs in *Cal Fed*) doubled down on the “equal treatment” approach. As *Cal Fed* was working its way through the courts, Howard Berman, the primary sponsor of the California law and by then a U.S. Representative, sought to introduce an equivalent federal bill guaranteeing maternity leave. Feminist leaders met with him and argued forcefully that it would be much better for Congress to enact a sex-neutral law that provided leave for a broad range of health conditions. They believed this approach would minimize backlash against women employees or reification of assumptions that childcare was exclusively women’s work, and they began working instead on what became the Family and Medical Leave Act (“FMLA”).¹⁷⁸

As initially introduced, the FMLA would have covered virtually all employers and all employees and provided generous separate periods

¹⁷³ *Cal Fed*, 479 U.S. at 284 (quoting *Steelworkers v. Weber*, 443 U.S. 193, 201 (1979), which was itself quoting *Church of Holy Trinity v. United States*, 143 U.S. 457, 459 (1892)).

¹⁷⁴ *Id.* at 289.

¹⁷⁵ *Id.* at 285 (internal quotations omitted). The majority also endorsed the “leveling up” argument put forward by the “East Coast” feminist briefs. *Id.* at 290-92. Justice Scalia argued this analysis alone was sufficient to show the California statute was not preempted and should be the only basis for the decision. *Id.* at 295-96 (Scalia, J., concurring).

¹⁷⁶ *Id.* at 297-98 (White, J., dissenting). The dissent disagreed with the proposition that benefits could simply be extended to those with other disabilities arguing that that would be a “dramatic increase in the scope of state law.” *Id.* at 302-03.

¹⁷⁷ See *infra* text accompanying notes 217-220.

¹⁷⁸ For a detailed account of the discussions between Representative Berman and the feminist leaders, see RONALD D. ELVING, *CONFLICT AND COMPROMISE: HOW CONGRESS MAKES THE LAW* 17-42 (1995).

for caretaking and for medical leaves.¹⁷⁹ But widespread resistance to the bill delayed passage by several years and led to compromises that curtailed the length of leaves and limited coverage to relatively large employers and to employees who have worked significant hours for at least a year.¹⁸⁰ The general consensus at the time was that a maternity-only bill, like the one passed in California, would have been far easier to enact.¹⁸¹ Thus, it might well have required fewer concessions regarding coverage. This is not to say that feminist leaders' concerns regarding discrimination were unreasonable, or that the broader protections provided men and women by the FMLA are insignificant. While limited in key respects, the FMLA is very important. It is simply that, with the benefit of hindsight, it is easy to identify some costs as well as benefits of insisting on equal treatment.

Courts have also failed to develop the robust understanding of "equal opportunity" — that is, the right of "women, as well as men, to have families without losing their jobs" — endorsed in *Cal Fed* as a justification for providing pregnancy-specific benefits. Rather, the Supreme Court has since emphasized the PDA's "same treatment" language. In *UAW v. Johnson Controls*,¹⁸² the Court had to decide whether a battery maker could ban all potentially fertile women from positions with high levels of lead exposure. Faced with an employer policy that relied on an explicit sex-based classification, the Court held that the policy violated Title VII because women were just as able as men to perform the jobs in question; it "bolstered" its analysis with a discussion of the PDA and its commitment to equal treatment.¹⁸³ This may well be the correct result, but the Court's statement of the case makes clear that it was comfortable with leveling down, not up. It began its substantive discussion with the declaration that:

¹⁷⁹ *Id.* at 42.

¹⁸⁰ See *infra* text accompanying notes 191-192.

¹⁸¹ See ELVING, *supra* note 178, at 38-39 (discussing how early in negotiations over the FMLA Representatives Berman, Boxer, and Miler considered "scaling back" to a maternity-only bill because the family and medical leave model was too "ambitious" and therefore unlikely to pass); JOAN WILLIAMS, RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER 118 (2010) ("One prominent feminist confided to me in 2006 that women's groups in Washington could have gotten maternity leave a decade before the passage of the Family and Medical Leave Act in 1993.").

¹⁸² 499 U.S. 187 (1991).

¹⁸³ *Id.* at 204.

The bias in the case is obvious. Fertile men, but not fertile women, are given the choice whether they wish to risk their reproductive health for a particular job.¹⁸⁴

Women thus won the right to work in a potentially harmful workplace.

For women who were not pregnant, this was a valuable victory opening up a class of relatively high paying jobs. But for women or men who seek modifications of their workplace to facilitate healthy reproduction, *Johnson Controls* was a loss. It helped establish a thin understanding of the promise of the PDA. Lower courts rely on the case to deny claims brought by pregnant employees seeking to reduce exposure to potentially toxic chemicals or other accommodations to increase fetal health.¹⁸⁵

That said, *Johnson Controls* has untapped potential. The Court in *Johnson Controls*, like the Court in *Cal Fed* and an earlier decision *Newport News*, drew a distinction between the first and second clauses of the PDA and emphasized that the second clause has its own substantive force.¹⁸⁶ (Tellingly, the *Johnson Controls* majority cites the dissent in *Cal Fed* for this proposition.¹⁸⁷) The Court also deemed it irrelevant that the employer's exclusion of women from positions with exposure to lead was primarily motivated by a desire to reduce potential fetal harm, and with it potential tort liability, rather than an animus against pregnant employees or women more generally.¹⁸⁸ And it held that it was irrelevant that changing the policy might impose costs on the employer, at least in the absence of a showing that costs

¹⁸⁴ *Id.* at 197.

¹⁸⁵ See, e.g., *Armstrong v. Flowers Hosp. Inc.*, 33 F.3d 1308 (11th Cir. 1994) (relying on *Johnson Controls* in holding that terminating pregnant nurse who refused to treat a patient with AIDS because of potential fetal risks did not violate Title VII); *Duncan v. Children's Nat'l Med. Ctr.*, 702 A.2d 207 (D.C. Ct. App. 1997) (relying on *Johnson Controls* to deny wrongful termination claim based on forcing pregnant employee to take unpaid leave because she had sought transfer to reduce radiation exposure to take unpaid leave). *But see Asad v. Cont'l Airlines, Inc.*, 328 F. Supp. 2d 772 (N.D. Oh. 2004) (holding employer could have granted pregnant employee's requests to transfer to avoid exposure to fumes without violating PDA).

¹⁸⁶ *Johnson Controls*, 499 U.S. at 204. The majority characterizes the PDA's comparative language as establishing "a BFOQ [bona fide occupational qualification] standard of its own," and argues that the dissent improperly ignores the "second clause of the Act." *Id.* For the Court's earlier pronouncements on the distinct purposes and import of the PDA's two substantive clauses, see *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 284 (1987); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 n. 14 (1983).

¹⁸⁷ *Johnson Controls*, 499 U.S. at 204-05.

¹⁸⁸ See *id.* at 208-11.

would be “so prohibitive as to threaten survival of the business.”¹⁸⁹ Although the context was quite different, these three propositions — that the first and second clauses of the PDA are each independently important; that the second clause can be violated even if an employer is not motivated by discriminatory animus; and that compliance with the PDA (as well as Title VII generally) can impose costs on employers — offer support for the more robust understanding of the substantive right to accommodation that the PDA, properly interpreted, can require.

III. REALIZING THE PDA’S ACCOMMODATION MANDATE

Cal Fed was a hard case because it required the Court to decide whether, contrary to the natural reading of PDA’s text, pregnancy could be treated more favorably than other disabilities. Cases in which employees with other disabilities are treated more favorably than pregnant employees, on the other hand, *should* be easy. Courts should simply apply the PDA’s plain language: employees affected by pregnancy, childbirth, or related conditions “shall be treated the same” as employees with similar abilities or inabilities to work. This result is bolstered by the historical context discussed in Part II. *Gilbert* was itself a failure to accommodate case where the denial of benefits was premised on concerns regarding costs. The PDA was enacted to overturn it and establish a robust commitment to treating pregnancy at least as well as other conditions that place comparable limitations on employees.

But courts routinely permit employers to treat employees with other health conditions better than they treat pregnant employees. This surprising result stems from courts failing to distinguish between the two clauses of the PDA and inappropriately focusing on the presence or absence of discriminatory intent when considering claims that should be analyzed specifically under the “same treatment” clause. This Part first discusses the (limited) range of legal protections, other than the PDA, that pregnant employees may use when they seek modifications of standard work procedures and then demonstrates how courts misinterpret the PDA’s accommodation provision. It concludes by proposing a reformulation of accommodation claims under the same treatment clause.

¹⁸⁹ *Id.* at 210-11.

A. *Non-PDA Accommodation Rights*

As described in Part I, some pregnant employees do not require any kind of workplace accommodation. But others may seek to have changes made at work or time off from work. Again, some employers readily modify workplace practices for pregnant employees, as well as providing adequate leave for childbirth and recovery. But many others do not. This subpart briefly discusses non-PDA statutory provisions that pregnant employees may use to receive accommodations.

As far as federal law, the most important statute is the FMLA.¹⁹⁰ Employees are eligible for leave under the FMLA if they work for an employer with at least 50 employees within a 75 mile radius, *and* if they have worked for that employer for at least one year and at least 1,250 hours in the year preceding the leave request.¹⁹¹ These requirements exclude almost half of the workforce, including disproportionately low-income workers.¹⁹² The FMLA provides employees who do qualify a right to twelve weeks job-guaranteed leave, with continuation of benefits, for addressing an employee's own "serious health condition," for care of an infant, or for care of a family member with a serious health condition.¹⁹³ Thus, eligible employees who cannot work during a pregnancy can take FMLA leave, and FMLA leave is available for labor, delivery, and the first weeks of infant care.

Even for covered employees, however, the FMLA is often inadequate. First, and very importantly, it is unpaid. Second, if employers refuse to make necessary accommodations that permit an employee to keep working during pregnancy, an employee may feel she must take FMLA leave early in a pregnancy, and she may exhaust it long before the baby is even born. Even more troubling, reported cases suggest that it is common for employers to *force* certain pregnant employees to take FMLA leave. Typically, the scenario unfolds as follows. A pregnant employee requests a modification at work that could make it safer or more comfortable for her to do her job. The employer refuses to make the accommodation *and* places the employee on involuntary FMLA leave, rather than risk potential liability for any

¹⁹⁰ 29 U.S.C. §§ 2601-2653 (2012).

¹⁹¹ *Id.* § 2611(2), (4) (2012).

¹⁹² See Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information, 72 Fed. Reg. 35550, 35622 (2007) (discussing 2005 data showing 76.1 million of 141.7 million total U.S. employees are eligible); O'Leary, *supra* note 55, at 41-45 (noting that FMLA disproportionately excludes low-wage and women workers).

¹⁹³ 29 U.S.C. § 2612(a)(1) (2012).

harm that could occur to the employee or her unborn child. Thus, even if the employee would rather continue to work without the accommodation so that she could “save” her leave, she is forced to use FMLA leave and thus may find herself without a job at all by the time the baby is born.¹⁹⁴

The second federal statute that is sometimes relevant to pregnant employees seeking accommodations is the ADA. The ADA makes it unlawful for employers to discriminate against individuals because of a qualifying disability and requires employers to make “reasonable accommodations” for the individual unless doing so would impose an “undue hardship” on the employer.¹⁹⁵ The ADA defines “disability” as a “physical or mental impairment that substantially limits one or more major life activities of such individual,” as well as having a record of or being regarded as having such an impairment.¹⁹⁶ The Supreme Court initially interpreted the ADA’s definition of discrimination extremely restrictively, making it quite difficult to have a qualifying disability.¹⁹⁷ In 2008, Congress enacted the ADA Amendments Act to override these decisions. The ADA Amendments Act retained the substantive definition of disability, but it instructed that the standard was to be “construed in favor of broad coverage” and explicitly repudiated the Court’s prior interpretations.¹⁹⁸ The ADA Amendments Act also listed (again to supersede more restrictive judicial interpretations) “major life” activities that could qualify, a list that includes “walking, standing, lifting, bending . . . [and] working.”¹⁹⁹ The EEOC’s

¹⁹⁴ See, e.g., *Harvender v. Norton Co.*, No. 96-CV-653 (LEK/RWS), 1997 WL 793085, *1 (N.D.N.Y. Dec. 15, 1997) (pregnant laboratory technician placed on involuntary FMLA leave after requesting light duty position to reduce exposure to chemicals); see also *Cox*, *supra* note 11, at 454-58 (discussing problem of pregnant employees placed on involuntary FMLA leaves).

¹⁹⁵ 42 U.S.C. § 12112(b)(5)(A) (2012). The reasonable accommodation provision is part of the statutory definition of “discriminate,” a recognition that a failure to change existing structures can be a form of discrimination. See *supra* text accompanying notes 59-63.

¹⁹⁶ 42 U.S.C. § 12102(1) (2012).

¹⁹⁷ See *Sutton v. United Airlines*, 527 U.S. 471, 482-84 (1999), *superseded by statute* ADA Amendments Act, Pub. L. 110-325 (2008); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 194-97 (2002), *superseded by statute* ADA Amendments Act, Pub. L. 110-325 (2008).

¹⁹⁸ ADA Amendments Act §§ 2, 4; see also 29 C.F.R. § 1630.2(j)(iii) (2012) (“[T]he threshold issue of whether an impairment ‘substantially limits’ a major life activity should not demand extensive analysis.”).

¹⁹⁹ 42 U.S.C. § 12102(2) (2012). The definition also specifies that substantial limitation of “major bodily function[s], including . . . reproductive functions” may qualify, but this language has generally been limited in its applicability to infertility or significant pregnancy complications, where it is clear that the “reproductive

regulations implementing the new statute emphasize that even relatively temporary disabilities — that is, those expected to last less than six months — can meet this statutory definition.²⁰⁰ An EEOC commissioner has explained that the proper inquiry is whether, in the moment the impairment is experienced, the individual is “substantially limited” in his or her ability to perform a major life activity.²⁰¹ Applying the amended ADA, courts have held, for example, that a relatively vague reference to a “back injury” making it difficult to stand for long periods,²⁰² an ankle injury making it difficult to stand more than an hour or walk more than a half mile,²⁰³ and gastrointestinal problems causing vomiting and diarrhea²⁰⁴ could be qualifying disabilities.

Neither the original ADA nor the ADA Amendments Act speaks directly to whether pregnancy may be a qualifying disability. Courts interpreting the ADA prior to the 2008 amendments consistently held that “normal” pregnancy was not a disability.²⁰⁵ They generally reasoned either that “normal” pregnancy was not an “impairment,” or that, even if it were, it was too transient to qualify.²⁰⁶ Under this case law, employees with very serious complications — e.g., premature labor resulting in early and extended bed rest — could sometimes use the ADA to receive accommodations from their employers.²⁰⁷ But routine pregnancy limitations such as morning sickness or limitations

functions” themselves are impaired.

²⁰⁰ 29 C.F.R. 1630.2(j)(ix) (2013).

²⁰¹ Chai Feldblum, EEOC, ABA Webcast: EEOC Commissioners Explain Final ADAAA Regulations (May 4, 2011).

²⁰² *Josey v. Wal-Mart*, No. 0:11-2993-CMC-SHV, 2012 WL 527532, *11-12 (D. S.C. Feb. 16, 2012).

²⁰³ *Fleck v. WILMAC Corp.*, No. 10-05562, 2011 WL 1899198, *5 (E.D. Pa. May 19, 2011).

²⁰⁴ *Wells v. Cincinnati Children’s Hosp. Med. Ctr.*, 860 F. Supp. 2d 469, 480 (S.D. Ohio 2012) (“The gastrointestinal problems which caused Plaintiff nausea, vomiting, and diarrhea clearly qualify as a physiological disorder.”). Because this case was decided under the “regarded as” prong, the court did not need to determine whether this impairment substantially limited a major life activity, but it seems likely that it would suffice.

²⁰⁵ See, e.g., *Villarreal v. J.E. Merit Constructors, Inc.*, 895 F. Supp. 149, 152 (S.D. Tex. 1995) (stating that absent unusual circumstances, pregnancy is not a physical impairment under the ADA).

²⁰⁶ See, e.g., *Gudenkauf v. Stauffer Commc’ns, Inc.*, 922 F. Supp. 465, 473 (D. Kan. 1996) (“Pregnancy is a physiological condition, but it is not a disorder. Being the natural consequence of a properly functioning reproductive system, pregnancy cannot be called an impairment.”).

²⁰⁷ See, e.g., *Hernandez v. Hartford*, 959 F. Supp. 125, 130 (D. Conn. 1997) (finding premature labor might qualify as an ADA disability).

on lifting were consistently held to be insufficient, as were often more serious complications.²⁰⁸

As Jeannette Cox explains, the ADA Amendments Act provides significant support for reconsidering this line between “normal” pregnancies and pregnancy complications.²⁰⁹ The statutory language provides that “impairments” that cause “substantial” limitations in “walking, standing, lifting, [or] bending” qualify. At least in the later stages of pregnancy, many women experience substantial limitations in their ability to perform such tasks when compared to the general population. If, as the EEOC suggests in an appendix to the regulations, an individual with a back injury who cannot lift heavy weights for a several months qualifies as an individual with a “disability,”²¹⁰ a pregnant employee who is similarly “substantially limited” in the “major life activity” of “lifting” should too, even if the limitation is the result of a “normal” pregnancy rather than a diagnosed pregnancy complication. The textual and normative arguments that Professor Cox makes regarding the ADA are bolstered by the history of the PDA recounted above. Prior to the enactment of PDA, some courts similarly distinguished between “normal” pregnancies and “pregnancy complications” in applying temporary disability statutes or private employers’ policies.²¹¹ The PDA, however, roundly rejected this reasoning, and since its enactment, employers, insurance companies, and courts have routinely accepted that even “normal” pregnancies cause “disabilities” when applying temporary disability policies.

I generally find Professor Cox’s arguments quite persuasive. Courts, however, may be unlikely to follow her approach, especially because the EEOC reaffirmed the distinction between “normal” pregnancies and those with complications. The appendix accompanying the new regulations still flatly states that pregnancy is not an impairment but

²⁰⁸ *Serednyj v. Beverly Healthcare LLC*, No. 2:08-CV-4, 2010 WL 1568606, at *16 (N.D. Ind. Apr. 16, 2010), *aff’d* 656 F.3d 540 (7th Cir. 2011) (finding even pregnancy with complications to be too transient to qualify).

²⁰⁹ See Cox, *supra* note 11, at 444-45. When the ADA was first enacted, some other commentators made similar arguments that pregnancy should be recognized as a disability under the ADA. E.g., Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 668-78 (1999); Colette G. Matzzie, Note, *Substantive Equality and Antidiscrimination: Accommodating Pregnancy under the Americans with Disabilities Act*, 82 GEO. L.J. 193 (1993).

²¹⁰ 29 C.F.R. pt. 1630 app. § 1630.2(j)(1)(viii-ix) (2012).

²¹¹ See *supra* note 130 and accompanying text (discussing California’s interpretation of the statute at issue in *Geduldig*).

that complications of pregnancy may be,²¹² as does the EEOC's "Questions and Answers" on the regulations.²¹³ Even more troubling, at least some courts deciding cases after the effective date of the ADA Amendments Act have denied disability claims in pregnancy cases that include serious complications, relying on pre-ADA amendment case law and not even considering whether the amendments should change the analysis.²¹⁴

The reluctance expressed by courts and the EEOC to classifying "normal" pregnancy as a "disability" may also reflect a deeper reality that there is something unsettling about calling pregnancy a disability. Pregnancy is an integral part of women's role in human reproduction. It is only a "disability" if men are the norm against which ability is considered. But as Professor Cox points out, the same is true of other conditions that are more classically recognized as "disabilities."²¹⁵ The insight of the social model of disability, which underlies the ADA's reasonable accommodation mandate, is that all disabilities are in some sense socially constructed. That is, in a society in which all buildings are no more than one story, individuals in wheelchairs need far fewer accommodations. Similarly, in a society in which all employees have a generous period of job-protected leave from work, pregnant employees need far fewer accommodations.

In fact, pregnancy illustrates this theoretical concept well. A "normal" pregnancy will generally not interfere with the ability of a secretary to do her job, but it might well interfere with the ability of a construction worker to do her job. This realization should help

²¹² 29 C.F.R. pt. 1630 app. § 1630.2(h) (2012).

²¹³ *Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008*, EEOC.GOV, http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm (last visited Dec. 20, 2012) (asking if pregnancy is a disability at Question 23).

²¹⁴ See, e.g., *Sam-Sekur v. Whitmore Grp., Ltd.*, No. 11-CV-4938, 2012 WL 2244325, at *7 (E.D.N.Y. June 15, 2012) (relying exclusively on pre-ADA Amendments Act pregnancy cases to dismiss with leave to replead disability claim by employee who developed chronic cholecystitis following pregnancy); *Selkow v. 7-Eleven, Inc.*, No. 8:11-cv-456-T-33EAJ, 2012 WL 2054872, at *14 (M.D. Fla. June 7, 2012) (denying disability claim by pregnant employee whose doctor had advised that she limit heavy lifting, relying exclusively on pre-ADA Amendments Act cases and failing to mention the amendments). *But see* *Mayorga v. Alorica, Inc.*, No. 12-21578-CIV, 2012 WL 3043021, at *4 (S.D. Fla. July 25, 2012) (finding that woman who suffered from "premature uterine contractions, irritation of the uterus, increased heart rate, severe morning sickness, severe pelvic bone pains, severe back pain, severe lower abdominal pain, extreme headaches and other pregnancy-related conditions" stated a claim under the amended ADA). For discussion of how pregnancy complication cases should be analyzed under the amended ADA, see Williams, *Accommodations for Pregnancy-Related Conditions*, *supra* note 12, at 9-17.

²¹⁵ See Cox, *supra* note 11, at 478-80.

address the discomfort that many express with labeling pregnancy a “disability.” Nonetheless, the analysis of the PDA discussed in the following sections has promise in part precisely because it lets employers, and ultimately courts, sidestep the charged issue of whether a “normal” pregnancy is a “disability” by clarifying that because the limitations pregnancy causes are *like* those caused by ADA-accommodated disabilities, they must be accommodated like ADA-accommodated disabilities.

Beyond the FMLA and the ADA, federal law offers little recourse to pregnant employees seeking workplace support.²¹⁶ Some states, however, offer more robust protections.²¹⁷ Most concern job-guaranteed leave or income protections that go beyond the FMLA. Five states provide temporary disability benefits for all short-term disabilities including pregnancy (as per the PDA); one state requires employers to provide paid sick days for many employees.²¹⁸ Two states provide paid family leave, usable by women or men, for care of a newborn child.²¹⁹ At least eleven states mandate job-guaranteed maternity or sex-neutral parenting leaves that cover smaller employers or provide longer leaves than the FMLA does.²²⁰

²¹⁶ Two other statutes that may potentially be relevant are the Occupational Health and Safety Act, 29 U.S.C. §§ 651-78 (2012), which regulates exposure to workplace toxins and hazards, and the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (2012), which was recently amended to require employers provide many employees reasonable break time for expressing breast milk. 29 U.S.C. § 207(r) (2012).

²¹⁷ For helpful overviews, see NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, EXPECTING BETTER: A STATE-BY-STATE ANALYSIS OF LAWS THAT HELP NEW PARENTS (2d ed. May 2012), available at http://www.nationalpartnership.org/site/DocServer/Expecting_Better_Report.pdf?docID=10301; National Nat'l Conference of State Legislatures, *State Pregnancy, Childbirth, and Adoption Leave Statutes*, NSCL.ORG, available at <http://www.ncsl.org/issues-research/labor/maternity-leave-state-statutes.aspx> (last updated Feb. 2009).

²¹⁸ See CAL. UNEMP. INS. CODE §§ 2625-2630 (West 2012); HAW. REV. STAT. § 392-21 (2012); N.J. STAT. ANN. § 43:21-25 (West 2012); N.Y. WORKERS' COMP. LAW § 201(9)(B) (McKinney 2012); R.I. GEN. LAWS ANN. § 28-39-1 (West 2012); 2012 Conn. Pub. Acts 11-52.

²¹⁹ CAL. UNEMP. INS. CODE § 3301 (West 2012); N.J. STAT. ANN. § 34:11B-1 (West 2013). Washington has also enacted paid family leave legislation but implementation has been delayed until 2015. See S.B. 5091, 2011 Leg., Reg. Sess. (Wash. 2011).

²²⁰ See CAL. GOV'T CODE § 12945 (West 2013); CONN. GEN. STAT. ANN. § 46A-6 (West 2013); IOWA CODE ANN. § 216.6(2)(e) (West 2013); LA. REV. STAT. ANN. § 23:341 (West 2012); MASS. GEN. LAWS ch. 149, § 105D (West 2013); MONT. CODE ANN. § 49-2-310 (West 2013); N.H. REV. STAT. ANN. § 354-A:7(VI)(b) (West 2013); OR. REV. STAT. ANN. § 659A.162 (West 2012); TENN. CODE ANN. § 4-21-408 (West 2012); VT. STAT. ANN. tit. 21, § 472 (West 2012); WASH. ADMIN. CODE § 162-30-020 (West 2013). Several states also provide parenting leaves that far exceed the FMLA for state employees. See, e.g., ALASKA STAT. ANN. § 39.20.305 (West 2013) (eighteen weeks);

A few states require workplace modifications that can help a pregnant employee continue working. California, Connecticut, and Louisiana require employers to transfer pregnant employees to less strenuous or hazardous positions or make other workplace accommodations under certain circumstances.²²¹ Illinois and Texas have more specific provisions relating to law enforcement and firefighting.²²² And many states have enacted language that largely parallels the PDA, and thus provides a similar comparative right to accommodation, but reaches employers that are too small to be covered by the PDA.²²³

B. *Adverse Employment Actions Based on Pregnancy*

Part I illustrates that pregnant employees may face two distinct, though often interrelated or overlapping, challenges: adverse actions based on bias or stereotypes about pregnancy and the failure to make necessary accommodations. This subsection shows that courts handle straightforward claims challenging discriminatory adverse actions reasonably well (or, at least as well as in other Title VII contexts). The next subsections argue that courts err, however, when deciding cases concerning failure to make accommodations by improperly focusing on the existence or absence of discriminatory intent. But before addressing either type of claim, it is essential to parse more carefully the statutory language of the PDA and how it fits into Title VII as a whole.

CAL. GOV'T CODE § 19991.6 (West 2012) (one year). Illinois also provides paid leave to state employees who can prove they received prenatal care. ILL. ADMIN. CODE tit. 80, § 303.130 (West 2013).

²²¹ CAL. GOV'T CODE § 12945(a)(3) (West 2012) (requiring employers to provide “reasonable accommodations” for pregnant employees pursuant to medical advice and to transfer a pregnant employee who requests a transfer to a “less strenuous or hazardous position” if the employer regularly transfers other temporarily disabled employees or, even if not, if it can be “reasonably accommodated”); CONN. GEN. STAT. § 46a-60(a)(7) (West 2013) (employers must “make a reasonable effort to transfer a pregnant employee to a suitable temporary position if continued employment in the employee’s current position may cause injury to the employee or fetus”); LA. REV. STAT. ANN. §§ 23:341-342 (West 2012) (employers must transfer a pregnant employee who requests a transfer to a “less strenuous or hazardous position” if the employer regularly transfers other temporarily disabled employees or, even if not, if it can be “reasonably accommodated”).

²²² 775 ILL. COMP. STAT. 5/2-102(H) (West 2012); TEX. GOV'T CODE ANN. § 411.0079 (West 2011).

²²³ See, e.g., HAW. REV. STAT. § 378-1 (West 2012) (PDA-like language applied to all employers with at least one employee).

Recall that the substantive language of the PDA is as follows:

[S]ection 701 of the Civil Rights Act of 1964 is amended by adding at the end thereof the following new subsection:

“(k) The terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise. . . . [Sentence addressing abortion omitted.]”

As instructed by Congress, all of the language in the quotation marks above is codified as part of Title VII’s definitions.²²⁴

But only the clause before the first semicolon — stating that the terms “because of sex” and “on the basis of sex” include pregnancy, childbirth, or related medical conditions — “reads” like a normal definition, and, like a normal definition, it does not contain its own substantive requirements. The first clause gains force from Title VII’s more general substantive provisions: the prohibition on employers “refus[ing] to hire, discharg[ing], or discriminat[ing] against” an individual “because of . . . sex” and “limiting, segregating, or classifying employees” in a way that would deprive individuals of employment opportunities “because of . . . sex,”²²⁵ as clarified by provisions added to Title VII in 1991 concerning policies with a disparate impact²²⁶ or decisions based on a mix of legitimate or illegitimate practices.²²⁷ The provided definition — “pregnancy, childbirth, and related medical conditions” — can comfortably be “substituted” into any of these substantive prohibitions in place of “sex.”

The second clause is different. It proscribes that “women affected by pregnancy . . . shall be treated the same for all employment-related purposes” as other employees “similar in their ability or inability to work.” This substantive phrase cannot be “substituted” in for sex in the disparate treatment, mixed motive, or disparate impact provisions. That would result in grammatically incoherent directives. Rather, the

²²⁴ 42 U.S.C. § 2000e(k) (2012).

²²⁵ *Id.* § 2000e-2(a) (2012).

²²⁶ *Id.* § 2000e-2(k) (2012).

²²⁷ *Id.* § 2000e-2(m) (2012).

second clause is itself a distinct substantive standard that applies specifically to pregnancy. Moreover, as opposed to a prohibition on discriminatory adverse actions — that is, setting forth what employers may *not* do — the second clause of the PDA places an *affirmative* obligation on employers. They *shall* treat pregnant employees the same as other employees with similar abilities.

The PDA's rather peculiar structure reflects some of the particular challenges implicit in drafting overrides of judicial opinions. First, the political considerations differ from those at play in enacting “new” statutes. For example, in the PDA's case, it was expedient to avoid “opening up” Title VII beyond the addition of a single definition to minimize the risk that legislators hostile to Title VII would seek to use the new bill as a vehicle for amendments that would weaken the overall statute.²²⁸ Second, if the override suggests a plausible interpretation of the preexisting text, as the PDA did, it is in some sense superfluous and can be difficult to “fit” into the statutes.²²⁹ Notably, Title VII's requirement that employers accommodate religious practices, which was also enacted to supersede narrow judicial interpretations, is likewise housed in the statute's definitional provisions.²³⁰ Courts recognize, however, that the religion definition creates a substantive entitlement to accommodations that calls for a different form of analysis than employed in a typical disparate treatment or disparate impact claims.²³¹

Overrides also often try to both supersede a specific decision and to anticipate and address other similar issues that are likely arise (although they frequently fail in this latter objective).²³² In the PDA's case, as the committee reports and floor statements make clear, and as

²²⁸ See *supra* text accompanying note 146.

²²⁹ See Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 562-66 (2009) [hereinafter *Shadow Precedents*] (discussing challenges in drafting overrides); see also Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 929-33 (2012) [hereinafter *Undermining Congressional Overrides*] (discussing the challenge that adding language to statutes to supersede judicial interpretations can cause when interpreting similar language in other statutes).

²³⁰ Equal Opportunities Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103 (codified at 42 U.S.C. § 2000e(j) (2012)); see also *Cooper v. Gen. Dynamics*, 533 F.2d 163, 167-68 & n.9 (5th Cir. 1976) (discussing the impetus for enactment of this amendment).

²³¹ See, e.g., *Abramson v. William Paterson Coll.*, 260 F.3d 265, 281 & n.12 (3d Cir. 2001) (“[E]mployees may assert two theories of religious discrimination: ‘disparate treatment’ . . . and ‘failure to accommodate.’”).

²³² See Widiss, *Shadow Precedents*, *supra* note 229, at 542-56 (providing several examples ongoing reliance on overridden precedents).

the Supreme Court subsequently acknowledged, Congress did not seek to supersede only the specific holding of *Gilbert* that pregnancy could be excluded from temporary disability plans. Rather, Congress sought to express its disapproval of the test of discrimination employed in the case and to ensure that, in any employment-related context, pregnancy was treated at least as favorably as other conditions that caused similar limitations.²³³ Congress's success in achieving these larger goals has been incomplete. As I discuss elsewhere, courts continue to rely on the test of discrimination announced by the Court in *Gilbert* in contexts not directly addressed by the PDA's "pregnancy, childbirth, and related medical conditions" language, such as expressing breast milk.²³⁴ And, as the next section will show, courts have failed to apply consistently the mandate of accommodation in contexts outside the temporary disability context.

That said, the definitional structure Congress employed works well when applied to classic intentional discrimination cases challenging employment decisions based on unwarranted bias or stereotypes about pregnancy. A plaintiff in such a case alleges that an adverse act, such as a termination or denial of a promotion, was motivated by her pregnancy. The PDA's first clause establishes that "because of sex" includes "because of pregnancy." Her case then proceeds like any other Title VII case alleging intentional discrimination, known as a disparate treatment in employment discrimination parlance, with the only difference being that she will present evidence of bias related to pregnancy in lieu of or addition to evidence of bias related to sex. (Note, my focus here is on cases in which the plaintiff alleges she was doing her job adequately. If pregnancy was actually interfering with an employee's ability to meet the standard expectations of her job, the case would be more appropriately analyzed as a failure to accommodate case that led to an adverse action, an issue I discuss in the next sub-part.)

In some instances, rather common when the PDA was enacted but now rather rare, an employer may openly admit that the challenged action was based on the employee's pregnancy, in which case the analysis would focus on whether being non-pregnant is a "bona fide occupational qualification," a defense the statute permits.²³⁵ More commonly, however, the plaintiff must rely on circumstantial evidence that the action at issue was motivated at least in part by her

²³³ See *supra* text accompanying notes 160-163; see also *Newport News Shipbuilding & Dry Dock v. EEOC*, 462 U.S. 669, 678 (1983).

²³⁴ See Widiss, *Shadow Precedents*, *supra* note 229, at 551-56.

²³⁵ 42 U.S.C. § 2000e-2(e) (2012).

pregnancy. In most such cases, courts follow a burden shifting proof structure initially set forth in a race discrimination case, *McDonnell Douglas v. Green*.²³⁶ In the first step, a plaintiff must show that she is a member of a protected class (pregnant women); that she was qualified for the job; that she was subject to an adverse act; and that there is a nexus between the pregnancy and the adverse action.²³⁷ If a plaintiff makes out this *prima facie* case, an employer must articulate a “legitimate nondiscriminatory rationale” for the challenged act. If it is a termination case, the legitimate nondiscriminatory rationale is usually some kind of performance problem. If it is a failure to hire or promote case, the nondiscriminatory rationale is usually that a different candidate was more qualified. Assuming that the employer provides a legitimate rationale, the plaintiff ultimately can prevail only if she persuades the fact-finder that pregnancy was at least a “motivating factor” in the decision.²³⁸ This is most often done through establishing that the employer’s claimed justification was pretextual.²³⁹

The Supreme Court has stated that the burden shifting process of *McDonnell Douglas* and its progeny is helpful because “once the employer’s justification has been eliminated, discrimination may well be the most likely alternative explanation.”²⁴⁰ The lynchpin of the analysis is thus the pretext analysis. If the evidence establishes the employer’s non-discriminatory justification was in fact the prime motivation for the decision at issue, the plaintiff loses (or at least is ineligible for many remedies) because she has not established that the adverse action was “because of” her sex.²⁴¹ The most common way to establish pretext is to provide comparators. For example, consider a pregnant employee who is terminated right before she is due to start maternity leave. The employer claims its legitimate reason for

²³⁶ 411 U.S. 792 (1973).

²³⁷ *E.g.*, *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 658 (6th Cir. 2000). Courts sometimes suggest a plaintiff must identify a similarly situated employee treated more favorably to make out even the *prima facie* case. *E.g.*, *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 552 (7th Cir. 2011).

²³⁸ 42 U.S.C. § 2000e-2(m) (2012).

²³⁹ *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143-48 (2000).

²⁴⁰ *Id.* at 147; *see also Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 580 (1978) (“[I]n the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations.”).

²⁴¹ If the case were analyzed as a “mixed-motive” case, the plaintiff could establish liability by showing that her pregnancy was at least a “motivating factor” in the employer’s decision; however, a showing by the employer that it would have taken the same action regardless would limit damages and injunctive relief. *See* 42 U.S.C. § 2000e-2(m) (2012); *id.* § 2000e-5(g)(2)(B) (2012).

terminating the employee was that she was tardy frequently. The employee claims she was terminated because she was pregnant and her boss did not expect her to return after her leave. Evidence that other employees with similar tardiness records were not terminated would tend to establish that the employer's proffered justification was pretextual and support an inference that the true cause was her pregnancy. Theoretically, a plaintiff should be able to present other kinds of evidence that would suggest bias, such as evidence that a decision-maker believed pregnant employees were generally incompetent or unreliable, and some courts have held that discrimination claims can succeed even in the absence of comparators.²⁴² As a practical matter, however, courts often require comparators and will dismiss a case or grant summary judgment if a plaintiff lacks them.²⁴³

In most cases challenging an adverse employment action allegedly based on bias or stereotypes, courts never even mention the second clause of the PDA. They simply reference the first definitional clause — discrimination because of pregnancy is discrimination because of sex — and then proceed with standard disparate treatment analysis.²⁴⁴ However, to the extent a court were to consider the second clause of the PDA — the mandate that pregnant employees be treated the “same” as other employees “similar in their ability or inability to work” — it would neither add to nor detract from the analysis a court employs under *McDonnell Douglas*. In a case challenging an adverse employment action, the legitimate nondiscriminatory rationale will also almost always relate to work performance.²⁴⁵ (As we will see in

²⁴² See generally Williams, *Accommodations for Pregnancy-Related Conditions*, *supra* note 12 (discussing this issue and gathering case law).

²⁴³ The facts above are based on a Seventh Circuit decision authored by Judge Posner which has been extraordinarily influential. In *Troupe v. May Dep't Stores*, 20 F.3d 734 (7th Cir. 1994), the plaintiff was fired one day before her maternity leave was due to begin, allegedly for tardiness (which she said was related to morning sickness). Even though the timing was very suspicious and there were biased comments made by her supervisor, the court held that in the absence of comparators, she could not succeed. *Id.* at 738-39.

²⁴⁴ See, e.g., *McGuire v. Brinker Fla., Inc.*, No. 8:08-CV-25-T-33EAJ, 2009 WL 860618, *6 (M.D. Fla. Mar. 30, 2009) (“The analysis applied to pregnancy discrimination cases is the same as analysis in other Title VII sex discrimination cases.”).

²⁴⁵ See, e.g., *id.* at *10 (restaurant alleges waitress was fired because of tardiness and customer complaints). The one common exception would be a termination that an employer alleges is a layoff motivated by cost cutting concerns but an employee alleges is motivated by discriminatory animus. Courts typically try to determine whether it was a “real” layoff by looking to see, for example, whether the position was

the next section, this is not true in most accommodation cases. There, the legitimate nondiscriminatory rationale is more often cost concerns or compliance with statutory mandates.) Thus, in an adverse action case, the affirmative obligation in the second clause is simply the converse of the comparator analysis applied under *McDonnell Douglas*. If an employer really does treat the pregnant employee “the same” as other employees with similar performance records, it will have complied with the PDA’s mandate in the second clause and also likely won its case under *McDonnell Douglas*.

Commentators and courts have developed numerous critiques of the dominance of the *McDonnell Douglas* test in employment discrimination doctrine generally.²⁴⁶ As the example above makes clear, it places enormous emphasis on identifying similarly-situated comparators, which can be extraordinarily difficult in many workplaces.²⁴⁷ It does not address structural aspects of employment that tend to exclude certain classes of workers.²⁴⁸ It tends to discount the significance of “stray comments” that are “remote” from the challenged decision, even though these might suggest individual bias, implicit bias, harassment, or a workplace that tolerates discriminatory attitudes.²⁴⁹ There is widespread confusion regarding whether and how it applies if a challenged action may have been based on a mix of legitimate and illegitimate actions.²⁵⁰ All of these criticisms apply to

truly eliminated. This same analysis would be appropriate in a pregnancy case.

²⁴⁶ For a prominent judicial critique, see *Brady v. Office of Sergeant of Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008) (“[T]he prima facie case [aspect of *McDonnell Douglas*] is a largely unnecessary sideshow, . . . spawning enormous confusion and wasting litigant and judicial resources.”); see also *Coleman v. Donahoe*, 667 F.3d 835, 862-63 (7th Cir. 2012) (Wood, J., with Tinder, J., and Hamilton, J., concurring) (similar).

²⁴⁷ See generally, e.g., Suzanne Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728 (2011) (arguing that comparators are too heavily relied upon by courts in assessing alleged discrimination).

²⁴⁸ See, e.g., Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1 (2006) (examining proposals for a structural approach to employment discrimination law); Tristin Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91 (2003) (proposing a conceptual foundation for a structural approach to employment discrimination).

²⁴⁹ See, e.g., Linda H. Krieger, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997 (2006) (arguing for the application of behavioral realism to the problem of defining and identifying discriminatory motivation); Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69 (2011) (arguing for a focus on statutory language rather than frameworks to allow more realistic assessment of various forms that discriminatory actions can take).

²⁵⁰ See generally, e.g., Michael J. Zimmer, *The New Discrimination Law: Price*

pregnancy cases. However, when used in a case challenging an adverse action allegedly based on pregnancy, *McDonnell Douglas* is not particularly *worse* in the pregnancy context than in any other context.

C. PDA Accommodation Claims

Cases challenging the denial of a request for some kind of workplace modification are different from cases challenging an adverse employment action. As noted above, they stem from a denial of a request from an employee that standard workplace procedures be modified *in her favor* — such as that she receive a transfer to a light duty position, relief from a lifting requirement, access to a seat, or excused time off from work. That said, the issue often arises intertwined with an adverse employment action, if, after the denial of the request, the plaintiff is terminated for failure to perform her job adequately²⁵¹ or placed on FMLA-leave or other unpaid leave.²⁵² Notably, in this instance, the adverse employment action may be based on unbiased application of “legitimate,” or at least standard, job expectations, and the preceding denial of accommodations may be based on cost-based concerns or other pregnancy-neutral factors. But the presence or absence of bias should not determine the outcome of a PDA claim. The PDA’s same treatment language requires that courts also conduct a separate — often far more straightforward — inquiry: Has the employer made comparable accommodations for other employees? This sub-part demonstrates that EEOC guidance frames this question properly, but that courts have failed to follow this guidance. The next sub-part discusses in more detail how I contend accommodation claims *should* be analyzed.

Although, as noted above, the EEOC does not consider “normal” pregnancy to be a disability for ADA purposes,²⁵³ the agency has long interpreted the comparative language in the PDA to require a potentially broad range of accommodations, including modification of job responsibilities. Six months after the PDA was enacted, the EEOC reaffirmed its pre-existing guidance indicating that limitations caused

Waterhouse *Is Dead, Whither McDonnell Douglas?*, 53 EMORY L.J. 1887 (2004) (analyzing the potential effect of *Desert Palace* on the *McDonnell Douglas* line of cases).

²⁵¹ See, e.g., *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1312 (11th Cir. 1999) (pregnant certified nursing assistant terminated after request for light duty position denied).

²⁵² See, e.g., *Urbano v. Cont’l Airlines, Inc.*, 138 F.3d 204, 205 (5th Cir. 1998) (pregnant airline worker placed on paid and then unpaid leave after request for light duty position was denied).

²⁵³ See *supra* text accompanying notes 212-213.

by pregnancy generally should be treated as temporary disabilities.²⁵⁴ It also issued an explanatory “Questions and Answers” document that it published as an appendix to the guidance.²⁵⁵ This appendix remains fully in force today. One question is particularly helpful. It asks whether an employer has to provide an “alternative job” if an employee, “for pregnancy-related reasons . . . is unable to perform the functions of her job.”²⁵⁶ The EEOC answer states:

An employer is required to treat an employee temporarily unable to perform the functions of her job because of her pregnancy-related condition in *the same manner* as it treats other temporarily disabled employees, *whether by providing modified tasks, alternative assignments, disability leaves, leaves without pay*, etc. For example, a woman’s primary job function may be the operation of a machine, and, incidental to that function, she may carry materials to and from the machine. *If other employees temporarily unable to lift are relieved of these functions, pregnant employees also unable to lift must be temporarily relieved of the function.*²⁵⁷

Notably, the EEOC’s answer makes no reference to the reason why an employer might relieve another employee of lifting responsibilities — which would often include light duty policies intended to limit workers’ compensation payments²⁵⁸ — suggesting this factor is irrelevant to the analysis. The EEOC confirmed this analysis in guidance issued in 2007, again asserting that if an employer had modified work requirements for an employee with a hernia or an injured arm, it would need to likewise accommodate pregnancy.²⁵⁹

In its original Q&A on the PDA, the EEOC also made clear that employers located in states with laws that mandated temporary disability payments, but permitted pregnancy to be treated less favorably than other temporary disabilities, would need to begin

²⁵⁴ See *supra* text accompanying note 127.

²⁵⁵ 44 Fed. Reg. 23804 (Apr. 20, 1979) (to be codified at 29 C.F.R. pt. 1604.10).

²⁵⁶ 29 C.F.R. pt. 1604 app. Question 5 (2013).

²⁵⁷ *Id.* (emphasis added). Note that since the ADA Amendments Act, the EEOC has been clear that even “temporary” disabilities can qualify for ADA accommodations. See *supra* text accompanying notes 200-201.

²⁵⁸ See *supra* text accompanying note 94.

²⁵⁹ EEOC, No. 915.002, Enforcement Guidance, *Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (2007), available at <http://www.eeoc.gov/policy/docs/caregiving.html> (providing, in Example 12, an illustration of an employer’s unlawful refusal to modify a pregnant employee’s duties).

providing comparable benefits for pregnancy.²⁶⁰ In such instances, many employers would probably have asserted — truthfully — that their failure to cover pregnancy in a temporary disability policy was not due to animus against pregnant employees but rather due to a desire to save money by providing the minimum benefits required by law. The EEOC's answer suggests that the absence of bias *against* pregnant employees would be irrelevant to the analysis. Pregnant employees would need to be treated “the same” as other employees with comparable limitations.

The EEOC's conclusions are not surprising. They accord with the PDA's plain language. Moreover, the Q&A was developed just months after the PDA was enacted. As noted above, the House committee report explicitly indicated that the PDA could require transferring pregnant employees to light duty positions.²⁶¹ It was equally clear that Congress intended to prohibit both states and private employers from treating pregnancy less generously than other disabilities under temporary disability policies.²⁶²

Courts, however, have generally not followed the EEOC's lead on this issue.²⁶³ Rather, they have employed standard disparate treatment or disparate impact analysis.²⁶⁴ The most extensively litigated fact pattern is a pregnant employee seeking a light duty position on the

²⁶⁰ 29 C.F.R. pt. 1604 app. Question 19 (2011).

²⁶¹ See *supra* text accompanying note 161.

²⁶² See *supra* text accompanying note 163.

²⁶³ Even if such materials do not merit full “*Chevron*” deference, see *Chevron v. Nat'l Res. Def. Council*, 467 U.S. 837, 843-44 (1984), they at least deserve careful consideration. See *U.S. v. Mead Corp.*, 533 U.S. 218, 234 (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944).

²⁶⁴ Disparate impact requires showing that the policy disproportionately disadvantages pregnant employees and is not job-related and consistent with “business necessity.” 42 U.S.C. § 2000e-2(k) (2012). Disparate impact should be a powerful tool for challenging any of a variety of employment policies that make it difficult for pregnant employees to work. See, e.g., Reva B. Siegel, Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929 (1984) (explaining generally why disparate impact claims based on pregnancy should be viable as a means of challenging facially neutral policies such as no-leave policies). Siegel explores the putative tension between the first and second clauses of the PDA with respect to disparate impact and argues that disparate impact claims should be cognizable. *Id.* at 937-40. I agree. In line with the Court's holding in *Cal Fed*, the second clause should be interpreted as providing a floor beneath which benefits cannot fall, not a ceiling on disparate impact analysis. See text accompanying note 175. In practice, however, courts have been quite hostile to disparate impact claims in the pregnancy context. See Dinner, *supra* note 16, at 485-90 (discussing and critiquing recent pregnancy disparate impact cases); Grossman, *supra* note 12, at 615-19 (same); Grossman & Thomas, *supra* note 12, at 41-49 (same).

ground that individuals with other health conditions have been granted light duty.²⁶⁵ Courts typically focus their analysis on the employer's rationale for denying the pregnant employee's request. If an employer sometimes offers light duty or other modified work to employees with non-work-related injuries, several circuits (in what are now relatively old cases) have suggested a PDA claim may succeed.²⁶⁶ And two recent district court cases held that a policy of limiting light duty to workplace injuries could state a successful disparate impact claim.²⁶⁷ But most courts have held that if the employer consistently makes light duty positions available *only* to employees injured on the job, no PDA violation exists.²⁶⁸ The rationale embraced in these cases is that a light-duty policy that distinguishes between on-the-job and off-the-job injuries is "pregnancy blind," and thus not direct evidence of discrimination.²⁶⁹ Courts then typically use *McDonnell Douglas* burden shifting to assess whether the policy is a "pretext for discrimination *against pregnant women*."²⁷⁰ So long as the employer regularly limits the policy to on-the-job injuries, courts routinely deny the claim.

²⁶⁵ For a detailed discussion and similar critique of these cases, see Grossman & Thomas, *supra* note 12, at 36-39.

²⁶⁶ See *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1198-99 (10th Cir. 2000); *Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1227 (6th Cir. 1996); *Adams v. Nolan*, 962 F.2d 791, 795-96 (8th Cir. 1992); *EEOC v. Ackerman, Hood & McQueen, Inc.*, 956 F.2d 944, 946 (10th Cir. 1992). *Ensley-Gaines* suggests that it is generally inappropriate to exclude employees injured on-the-job as potential comparators for PDA claims. 100 F.3d at 1226. A more recent Sixth Circuit case, however, seems to reject this analysis, characterizing *Ensley-Gaines* as concerned "primarily" with whether a prima facie case had been established and deeming it to hold no relevance to pretext analysis regarding a light-duty policy limited to on-the-job injuries. *Reeves v. Swift Transp. Co.*, 446 F.3d 637, 641 n.1 (6th Cir. 2006).

²⁶⁷ See *Germain v. Cnty. of Suffolk*, No. 07-CV-2523, 2009 WL 1514513, at *4 (E.D.N.Y. May 29, 2009); *Lochren v. Suffolk*, No. 01CV03925, 2006 WL 6850118 (June 14, 2006) (verdict sheet). Notably, in both cases there was also evidence of discriminatory animus sufficient to support a disparate treatment claim.

²⁶⁸ See *Young v. United Parcel Serv., Inc.*, No. 11-2078, 2013 WL 93132, at *7-9 (4th Cir. Jan. 9, 2013); *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 548-49 (7th Cir. 2011); *Reeves*, 446 F.3d at 642; *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1312-13 (11th Cir. 1999); *Urbano v. Cont'l Airlines, Inc.*, 138 F.3d 204, 206 (5th Cir. 1998).

²⁶⁹ E.g., *Serednyj*, 656 F.3d at 548-49; *Reeves*, 446 F.3d at 641 ("Reeves cannot avoid summary judgment at stage three unless a rational juror could find that 'the employer *intended* to discriminate against the protected group.'") (emphasis added by the *Reeves* court) (internal quotation omitted).

²⁷⁰ *Urbano*, 138 F.3d at 208 (emphasis added); see also *Reeves*, 446 F.3d at 642.

The Fifth Circuit, for example, characterized an employer's refusal to provide a light duty position to a pregnant employee as permissible because it treated her "in exactly the same manner as it would have treated any other worker who was injured off the job."²⁷¹ The Eleventh Circuit similarly held that the employer was "entitled to deny [the pregnant employee] a modified duty assignment as long as it denied modified duty assignments to all employees who were not injured on the job."²⁷² If courts utilize *McDonnell Douglas* to reach this conclusion, they do so in a way that assumes that light-duty policies limited to on-the-job injuries are *per se* permissible. To make out even a *prima facie* case, courts often require employees identify other individuals who have received workplace accommodations for out-of-work injuries or medical conditions.²⁷³ Even if courts employ a more liberal approach to the *prima facie* case, a light duty policy limited to on-the-job injuries is deemed a legitimate "nondiscriminatory" rationale, unless there is evidence suggesting it was adopted as a cover for intentional discrimination against pregnant employees.²⁷⁴

The oft-repeated refrain in these cases is that the PDA "requires" employers "ignore a female employee's pregnancy,"²⁷⁵ and that granting a light duty request would be "preferential treatment" which the PDA does not require.²⁷⁶ It is essential to recognize that these conclusions rest (incorrectly, I contend) on the assumption that the appropriate baseline for consideration is an employer's treatment of non-work-related injuries. As discussed more fully in the following sub-part, nothing in the PDA's text permits circumscribing comparators in this matter. The statute requires that employers' treatment of pregnant employees be compared to their treatment of all employees "similar in their ability to work or not work," not all employees similar in the *cause of* their ability to work or not work. Accordingly, if an employer routinely allows employees injured at work to go on light duty, similarly accommodating pregnancy is not

²⁷¹ *Urbano*, 138 F.3d at 206.

²⁷² *Spivey*, 196 F.3d at 1313.

²⁷³ See, e.g., *Serednyj*, 656 F.3d at 551 (discounting a potential comparator for establishing a *prima facie* case on grounds that she suffered a work-related injury). *But see* *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1195 n.7 (10th Cir. 2000) (permitting comparison to employee injured on-the-job to suffice for the *prima facie* case).

²⁷⁴ *Reeves*, 446 F.3d at 641 n.1; *Horizon/CMS Healthcare*, 220 F.3d at 1195 n.7.

²⁷⁵ E.g., *Serednyj*, 656 F.3d at 548; *Spivey*, 196 F.3d at 1313.

²⁷⁶ E.g., *Reeves*, 446 F.3d at 642 (quoting *Urbano*, 138 F.3d at 208); *Spivey*, 196 F.3d at 1312.

“preferential treatment” — it is simply the “same treatment” mandated by the PDA.²⁷⁷

That said, until recently, courts at least suggested consistently that a claim under the PDA could succeed if a plaintiff showed an employer accommodated *non-work-related* injuries but did not accommodate pregnancy.²⁷⁸ A few recent cases, however, circumscribe the class of potential comparators even more. These cases have suggested that employees accommodated pursuant to the ADA’s statutory mandate — that is, accommodation of medical impairments that usually occur “off-the-job” — are similarly inapposite as comparators for PDA purposes. The most extensive discussion of the issue is a recent Fourth Circuit decision, *Young v. United Parcel Service, Inc.*²⁷⁹ The case was brought by an employee who sought accommodations for a limitation on her ability to lift more than twenty pounds during her pregnancy. UPS refused on the ground that such accommodations were only available to employees who were injured on the job or who had ADA-qualifying disabilities.²⁸⁰ Young claimed this violated the PDA.²⁸¹ Relying heavily on the light duty cases discussed above, the court concluded that granting accommodations to Young would be unfair “preferential treatment,” relative to other individuals with temporary lifting restrictions due to out-of-work activities. (The court provided particularly sympathetic examples of a father injured “picking up his infant child” and a woman injured in her work as a volunteer firefighter.²⁸²)

Although the *Young* decision contains some sweeping language that seems to cast doubt on the viability of using ADA-accommodated employees as comparators in any context, it is essential to understand that the court was applying the ADA as it was interpreted prior to the

²⁷⁷ 42 U.S.C. § 2000e(k) (2012); *see also* Grossman & Thomas, *supra* note at 12, at 37 (“[C]ourts make a clear mistake . . . by assuming the validity of an on-the-job/off-the-job distinction in order to ward off a challenge to it.”)

²⁷⁸ *E.g.*, *Spivey*, 196 F.3d at 1313 (“The correct comparison is between Appellant and other employees who suffer non-occupational disabilities”); *see also* cases cited *supra* note 266.

²⁷⁹ No. 11–2078, 2013 WL 93132 (4th Cir. Jan. 9, 2013).

²⁸⁰ *Id.* at *2. UPS also accommodated drivers who had lost their Department of Transportation certification, but these accommodations apparently did not address physical limitations. *Id.* at *10.

²⁸¹ Young also claimed disability discrimination and race discrimination. *Id.* at *3. Applying pre-ADA amendment law, the court concluded that she was neither disabled nor “regarded as” disabled because her impairment was temporary. *Id.* at *4-5. The district court denied the race claim (which Young had herself sought to have voluntarily dismissed) and it was not pursued on appeal. *Id.* at *3-4.

²⁸² *Id.* at *8.

ADA Amendments Act.²⁸³ The court ultimately concluded that Young was “dissimilar to an employee disabled under the ADA . . . [because] her lifting limitation was temporary and not a significant restriction on her ability to perform major life activities.”²⁸⁴ Thus, the court does not actually answer the question that will now arise with increasing regularity: *if* individuals with *temporary* restrictions are accommodated under the amended ADA — as they should be — can they serve as comparators for PDA purposes?

A recent Seventh Circuit decision likewise concerned an employer with a policy that provided “accommodations to qualified individuals with a disability under the ADA or to those employees who sustain work-related injuries.”²⁸⁵ The court characterized the policy as complying with the PDA “because it does, in fact, treat nonpregnant employees the same as pregnant employees — both are denied an accommodation of light duty work for non-work-related injuries.”²⁸⁶ This was clearly incorrect. The policy by its terms would require accommodation of some non-work-related injuries: impairments that met the ADA’s standard of “substantially limiting a major life activity.” In fact, the plaintiff in the case had proposed as a potential comparator another employee with mobility issues who was permitted to use a rolling walker.²⁸⁷ The circuit court discounted this worker on the ground that she worked for a related entity but not the same corporate employer,²⁸⁸ but the district court discounted the comparator on the ground that she was covered by the ADA.²⁸⁹

The reasoning in these decisions turns the premise and promise of the PDA upside down. Prior to the ADA Amendments Act, if an employer accommodated an individual with a non-work-related back injury who could not lift heavy objects for a period of time, that employer was obligated to accommodate a pregnant employee with similar lifting restrictions. This would be true because under the pre-amendment ADA, it was almost certain that such a limitation would not constitute a “qualifying disability.” Accordingly, the employer in

²⁸³ The case was filed prior to the effective date of the amendments. *Id.* at *4 n.7.

²⁸⁴ *Id.* at *10.

²⁸⁵ *Serednyj*, 656 F.3d at 548.

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 552.

²⁸⁸ *Id.*

²⁸⁹ See *Serednyj v. Beverly Healthcare LLC*, No. 2:08-CV-4RM, 2010 WL 1568606, at *10 (N.D. Ind. Apr. 16, 2010) (holding that obese individual needing “rollator” chair “isn’t a comparator for [plaintiff] under the PDA because [plaintiff] alleges [obese employee] was disabled, and the ADA presumably would apply if she were disabled”).

such a circumstance would have *voluntarily* accommodated a non-work-related health condition and courts consistently (and appropriately) held that this meant they had to accommodate pregnancy equivalently. Since the enactment of the ADA Amendments Act, however, the man with the bad back *would* probably have an ADA-qualifying disability and thus accommodations would be required.²⁹⁰ The reasoning employed by the courts above would hold that he was no longer a potential comparator for PDA purposes. Thus, the fact that the ADA was amended to provide far more robust protections for disabilities generally would have the perverse effect of *decreasing* the support for pregnant employees.

So far there have been only a few reported cases suggesting that ADA-accommodated employees are not proper comparators for PDA analysis. But the question is likely to appear far more frequently as more cases arising under the amended ADA, with its much more expansive understanding of qualifying disabilities, reach the courts. It is thus imperative that courts rethink the mode of analysis used in these cases before the assumption that ADA-accommodated employees are not relevant for PDA cases ossifies into accepted doctrine.

D. *Reconceptualizing Accommodation Claims*

As described above, courts generally hold that so long as an employer's accommodation policy is "pregnancy blind," and applied on an even-handed basis, no PDA violation has occurred; they usually characterize the inquiry required as typical "disparate treatment" analysis, like that which would be applied to a failure to hire or promote case.²⁹¹ This might be appropriate *if* the PDA only included its first clause. If that were the case, the PDA would gain force only from Title VII's general substantive provisions, and a truthful showing by an employer that it was not motivated by discriminatory animus would be an adequate defense to a disparate treatment claim, leaving only the possibility of making a disparate impact claim.²⁹² But this analysis ignores the substantive mandate of the second clause of the

²⁹⁰ See *supra* text accompanying notes 199-202.

²⁹¹ See, e.g., *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1192 (2000) ("The Charging Parties' discrimination claims are based on the Defendant's refusal to place them in modified-duty assignments. This case, therefore, is analogous to those cases presenting failure-to-hire or failure-to-promote claims.").

²⁹² As noted above, two recent district court cases held that limiting a light-duty policy to workplace injuries could state a disparate impact claim, although in both cases there was *also* evidence of discriminatory animus sufficient to support a disparate treatment claim. See *supra* note 267.

PDA — an affirmative obligation that “women affected by pregnancy . . . shall be treated the same . . . as other persons . . . similar in their ability or inability to work.”²⁹³ As the Supreme Court has emphasized in other contexts, these two clauses are distinct and may have separate significance.²⁹⁴

The analysis should therefore focus on the simple question of *whether* the employer has made accommodations for other employees with “similar limitations,” not on *why* it has made such accommodations. The plain text of the PDA provides that a showing of such differential treatment is *itself* sufficient to establish that an employer has discriminated “because of sex.” Intent should be irrelevant when applying the “same treatment” language. Courts therefore err when they classify such claims as standard disparate treatment claims and when they use *McDonnell Douglas* burden shifting to consider whether an exclusion of pregnancy is motivated by discriminatory animus.

The circumstances under which the PDA was enacted may help explain why the PDA includes the “same treatment” mandate. As described in Part II, the PDA was a response to *General Electric Co. v. Gilbert*. A primary defense raised by the company in *Gilbert* was that including pregnancy in its otherwise comprehensive disability policy would raise its costs; the district court credited this factual assertion, although it ultimately held that the practice violated Title VII.²⁹⁵ In Congress, likewise, opposition to the PDA focused on the extent to which including pregnancy in disability policies would increase

²⁹³ 42 U.S.C. § 2000e(k) (2012) (emphasis added).

²⁹⁴ See *Int'l Union, United Auto., Aerospace and Agric. Implement Workers of America, UAW v. Johnson Controls*, 499 U.S. 187, 204 (1991); *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 284 (1987); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 n.14 (1983). In *Young v. UPS*, discussed above, the Fourth Circuit quotes pertinent language from these Supreme Court cases but nonetheless categorically rejects the contention that the comparative clause has its own force. *Young v. United Parcel Service, Inc.*, No. 11–2078, 2013 WL 93132, at *7–8 (4th Cir. Jan. 9, 2013). This is a somewhat surprising move by an inferior court.

²⁹⁵ *Gilbert v. Gen. Elec. Co.*, 375 F. Supp. 367, 378 (E.D. Va. 1974) (discussing company's evidence showing that including maternity benefits would “increase G.E.'s costs” by a “large amount” and concluding that “[i]t is because of these increased costs that G.E. has refused to grant maternity benefits”). The Supreme Court accepted these factual findings and specifically rejected the contention that excluding pregnancy from the disability policy was “pretext for discriminating against women,” *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 136 (1976), although the dissent argued that the policy was part of a more general hostility to women working while pregnant. *Id.* at 150 & n.1 (Brennan, J., dissenting).

costs.²⁹⁶ Moreover, at the time that the PDA was enacted, there were several states that mandated employers provide short-term disability benefits, but that either excluded pregnancy or that permitted pregnancy to be treated less generously than other disabilities.²⁹⁷

In other words, at the time the PDA was drafted and enacted, employers already claimed that ostensibly pregnancy-blind factors such as “cost” or “compliance with statutory mandates” justified excluding pregnancy from disability policies. Thus, it was already clear that structuring the statute to require proof of discriminatory animus would likely fail to end these practices. The same treatment language, properly interpreted, ensures that pregnancy — a health condition only affecting women — is treated as well as other comparable limitations, even if an employer’s failure to do so is not itself based on explicit or even implicit bias against women.²⁹⁸

The PDA’s same treatment language is thus akin to other aspects of employment discrimination law that require modifying employer policies even in the absence of proven discriminatory intent. These include not only disparate impact doctrine and prohibitions on so-called “rational” discrimination, but also the reasonable accommodation mandates contained in the religious discrimination definition of Title VII and in the ADA.²⁹⁹ Notably, both of these other accommodation mandates are, like the PDA, characterized as definitional; courts nonetheless readily acknowledge that they create substantive claims that are distinct from any showing of discriminatory intent.³⁰⁰ Although the PDA does not explicitly require accommodations, it makes clear that *if* other comparable limitations are being accommodated — either because an employer has independently made a business judgment that this is worth doing, or because it has agreed to do so in collective bargaining, or because a statutory mandate requires it — pregnancy must be too. Of course, some accommodations may be too expensive for some employers to take on (for example, creating an entirely new position for an

²⁹⁶ See *supra* text accompanying note 157.

²⁹⁷ See *supra* text accompanying note 163.

²⁹⁸ As a theoretical matter, disparate impact should operate as a vehicle to challenge workplace policies that fail to adequately address pregnancy, but as a practical matter, such claims have usually been unsuccessful. See *supra* note 264.

²⁹⁹ 42 U.S.C. § 2000e(j) (2012); *id.* § 12112(b)(5)(A) (2012).

³⁰⁰ See, e.g., *Brady v. Wal-Mart Stores, Inc.*, 531 F.3d 127, 134-36 (2d Cir. 2008) (analyzing a claim of failure to accommodate a disability as distinct from claim of disability “discrimination”); *Tepper v. Potter*, 505 F.3d 508, 514 (6th Cir. 2007) (analyzing a claim of denial of religious accommodation as distinct from a claim of religious “discrimination”).

employee), but *that* is the determination that must be made in a pregnancy-blind manner. As soon as the employer has offered a given accommodation to an individual for non-pregnancy-related needs, it must offer the same accommodation to an employee with similar limitations caused by pregnancy.

The comparative language thus reduces the tensions that animated the special treatment/equal treatment debate. It avoids singling pregnancy out for “special treatment” and thus prompting discrimination against pregnant or potentially pregnant employees, a category that could include all women under the age of fifty. And, by limiting the accommodation mandate to instances in which an employer has already provided comparable limitations for other disabilities, it diminishes the extent to which providing such accommodations reinforces stereotypes that women are less capable workers than men or that their responsibilities to family take precedence over paid work.

The PDA’s comparative clause provides the benefit of a relatively bright-line rule, while incorporating, in a derivative fashion, employers’ legitimate concerns over costs. That is, the ADA’s statutory directive to provide “reasonable accommodations” is balanced with the limitation that they are only required if they would not impose an “undue hardship.”³⁰¹ In collective bargaining, or in independently fashioning policies such as disability leave, employers likewise weigh the costs and benefits of pre-committing to accommodations. Employers also consider costs if they handle accommodation requests in a more *ad hoc* manner. Although extending comparable accommodations to pregnant employees will obviously increase costs, a rough cost-benefit analysis has already occurred. Moreover, it has been conducted without the overlay of still prevalent stereotypes and bias about the capacity of pregnant employees or the likelihood that pregnant employees return to work after childbirth. The incremental extra costs associated with pregnancy accommodation — applied to an employer that already bears costs with respect to other disabilities or conditions — is precisely what the PDA anticipates.³⁰²

That said, an objection to my argument might be that Congress may have failed to consider the interaction of the PDA with the ADA when it enacted, and later amended, the latter statute. There are at least three responses to this potential concern. The first is that the intent (or in this case, the far more nebulous concept of the absence of clear

³⁰¹ 42 U.S.C. § 12112(b)(5)(A) (2012).

³⁰² See *supra* text accompanying notes 158-159.

evidence of Congressional intent) of the 101st Congress that passed the ADA in 1990, or the 110th Congress that amended it in 2008, is irrelevant to interpretation of the PDA. Some jurists categorically refuse to consider any evidence of Congressional intent or purpose other than the statutory text itself.³⁰³ Many others, who might consider non-textual signals of Congressional intent or purpose in some contexts, would nonetheless focus their attention on the Congress that enacted that PDA, rather than the later Congresses.³⁰⁴ Changing circumstances frequently cause old statutes to have new implications,³⁰⁵ and interpreting the PDA to require accommodations comparable to those provided disabled employees advances the PDA's underlying purpose of ensuring that pregnancy is treated at least as well as other health conditions that similarly impact work.³⁰⁶

³⁰³ Strict textualists, including most prominently Justice Scalia, generally eschew consideration of legislative purpose as expressed in, or inferred from, evidence outside the text of the statute. See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 29-33 (2012) (arguing objective of statutory interpretation should be to give effect to the statutory text, not the drafter's subjective intent); see also *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998) ("It is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.").

³⁰⁴ The premise is that later Congresses should not be able to implicitly circumscribe earlier enactments; it is closely related to the strong disfavor of repeals by implication. See *infra* text accompanying notes 310-313. I have suggested elsewhere that later-enacted statutes overriding earlier judicial interpretations of a statute can be significant to statutory interpretation of other earlier-enacted statutes with similar language, see Widiss, *Undermining Congressional Overrides*, *supra* note 229, at 933-34, but that is in response to specific interpretive challenges not implicated in this question of the interaction of the ADA and the PDA.

³⁰⁵ This basic truth is accepted by those who advocate an "originalist" approach to statutory interpretation and more flexible "dynamic" theorists. See, e.g., SCALIA & GARNER, *supra* note 303, at 78, 80 (observing that courts "routinely apply legal instruments to novel situations over time" and that therefore the "application of a stable meaning to new phenomenon" might cause new outcomes); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1483-84 (1987) (advocating evolution of statutory meaning to respond to new circumstances or political dynamics). To the extent there is disagreement, it occurs when the meaning of relevant language in the older statute has *itself* changed due to linguistic evolution or when applying the natural reading of the older language to a new situation seems contrary to the likely purpose or intent of the Congress that enacted the older statute. Compare SCALIA & GARNER, *supra* note 303, at 80 (advocating that the original meaning must be retained), with Eskridge, *supra*, at 1483 (advocating that interpreters consider the statutory text, the original legislative expectations, and the subsequent evolution of the statute and the present context). Neither of those concerns is implicated here.

³⁰⁶ See *supra* Part II.C. In the context of the *Cal Fed* controversy, Wendy Williams, a primary drafter of the PDA, argued against the "special treatment" approach in part

Second, to the extent that the intent or purpose of the later Congresses is relevant at all, there is a longstanding principle of statutory interpretation that Congress is presumed to enact new legislation with background knowledge of existing legislation.³⁰⁷ The empirical validity of this presumption is often open to question. In this context, however, it may well be reasonable: the ADA was largely modeled on Title VII and both address employment discrimination.³⁰⁸ Thus, Congress should be presumed to understand that the ADA's reasonable accommodation language could implicate employers' responsibilities under the PDA.

Third, and most importantly, the contrary interpretation endorsed by a few courts — that is, that ADA-accommodated employees are not appropriate comparators for PDA analysis — would mean that Congress's expansion of statutory protections for disabilities generally would *decrease* employers' responsibilities to pregnant employees in any case where the employer would have voluntarily accommodated the non-pregnancy condition.³⁰⁹ This result was also not discussed by the Congress that enacted the ADA or its amendments, and it is highly unlikely that either Congress intended this perverse effect. In fact, as discussed above, interpreting the PDA in this manner would functionally erase the PDA's "same treatment" language. Thus, it could be characterized as a repeal by implication, which are highly disfavored. As the Supreme Court has explained:

on the ground that disabilities policies had already been expanded to include pregnancy, demonstrating that "major change is indeed possible" and that accordingly "to settle for special treatment . . . would be to sell equality short." Williams, *Equality's Riddle*, *supra* note 13, at 380. The ADA, like the FMLA, is evidence of her point that "major change" in support of health conditions generally is possible.

³⁰⁷ See, e.g., *Bowen v. Massachusetts*, 487 U.S. 879, 896 (1988) (noting "the well-settled presumption that Congress understands the state of existing law when it legislates"); *United States v. LeCoe*, 936 F.2d 398, 403 (9th Cir. 1991) ("Congress is, of course, presumed to know existing law pertinent to any new legislation it enacts.").

³⁰⁸ The ADA and Title VII are under the jurisdiction of many of the same committees in Congress, the basic structure of the ADA's antidiscrimination language applicable to employers largely parallels Title VII's, and even the reasonable accommodation provision is similar to Title VII's religious discrimination provisions. Compare 42 U.S.C. § 2000e(j) (2012) and *id.* § 2000e-2(a) (2012), with *id.* § 12112 (2012). As William Buzbee argues, the presumption that Congress has background knowledge is more likely to be warranted in instances in which the new bill attacks similar problems as existing legislation and is under the jurisdiction of the same committees. See, e.g., William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 212 (2000).

³⁰⁹ See *supra* text accompanying note 290.

The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.³¹⁰

Thus, the Supreme Court “has not hesitated to give effect to two statutes that overlap, so long as each reaches some distinct cases.”³¹¹ A repeal by implication, by contrast, is permitted only when there is “an irreconcilable conflict between the two statutes at issue.”³¹² The Supreme Court sometimes engages in extremely tortured interpretations to avoid finding a later statute implicitly repealed an earlier one.³¹³ In this case, no such contortions are required. The interpretation I propose is the natural reading of the PDA’s plain text and a reasonable means of harmonizing two statutes with a common purpose: increasing employment opportunities for employees with health conditions that impact their ability to work.

In applying the same treatment language, the PDA’s focus on functional limitations in an individual’s “ability to work,” rather than the nature of the underlying condition, is essential. Pregnancy does not map neatly onto impairments that are more classically recognized as disabilities. For example, although pregnancy may cause limitations in lifting like those caused by a back injury, it is not itself a muscular-

³¹⁰ *Morton v. Mancari*, 417 U.S. 535, 551 (1974). This rule is longstanding. *See, e.g., Posadas v. Nat’l City Bank*, 296 U.S. 497, 503 (1936) (“The cardinal rule is that repeals by implication are not favored.”).

³¹¹ *J.E.M. Ag Supply v. Pioneer Hi-Bred Int’l*, 534 U.S. 124, 144 (2001).

³¹² *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 381 (1996) (internal quotation marks omitted).

³¹³ *See, e.g., Branch v. Smith*, 538 U.S. 254, 273 (2003) (plurality opinion) (acknowledging a later amendment is unquestionably “in tension” with an earlier provision, and that much of the older provision is unconstitutional, but nonetheless declining to find a repeal by implication). In one recent high-profile case, the Supreme Court held that later legislation implicitly narrowed the reach of earlier legislation. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 155-59 (2000). The Court justified that decision by referencing a canon of statutory interpretation that suggests the meaning of a general statute can be affected by more specific statutes. *Id.* at 133. The canon generally is used only where there is a conflict between the earlier and later statutes. *See SCALIA & GARNER, supra* note 303, at 183. (Its application in *Brown Williamson*, a case in which the conflict was less-than-apparent, likely reflects the sui generis nature of tobacco politics.) As explained in the text, the ADA and the PDA may be readily harmonized to give effect to each statute, so the canon is wholly inapplicable. Moreover, to the extent there were deemed to be any conflict between the statutes, the more general ADA should not be interpreted to limit the PDA’s scope with respect to pregnancy, since the PDA is the more specific statute.

skeletal impairment, and although pregnancy may require frequent snacks similar to those required by some diabetics, it is not itself an impairment of the pancreas. Courts should focus on the extent to which employers have accommodated *limitations* like those imposed by pregnancy, including a need for time off or a modified schedule, not whether the impairments themselves are like pregnancy. In one recent case, a pregnant security guard sought to be assigned to a visitors' center rather than the entry gate because it required less physical activity.³¹⁴ A diabetic security guard had been assigned to the visitor center so that he could have regularly scheduled breaks and meals. In this instance, the employees were similar in "their ability or inability to work": each could work as a security guard at the visitor center but not at the outside gate. The fact the employer had accommodated the diabetic employee by assigning him to the visitor center established that it was not unduly difficult for the employer to do so. This is the key factor a court should consider, not that diabetes and pregnancy are quite different or even that the *reason* why each employee needed to be assigned to the visitor center differed.

When an employer has already provided accommodations, the analysis should be straightforward. The PDA requires that the employer "shall" provide a comparable accommodation to an individual with similar limitations caused by pregnancy. This conclusion may seem more intuitive when applied to individuals with (non-work-related) conditions accommodated pursuant to the ADA than when applied to individuals with job-related injuries who receive light duty positions. Employers might argue that other areas of employment law distinguish between work and non-work injuries or that employers naturally bear greater responsibility for accommodating workplace injuries. These claims are unconvincing. First, it is important to recognize that light duty positions are widely available because they reduce employer liability under workers' compensation statutes; like ADA-required accommodations, they are also (at least often) a response to statutory mandates.³¹⁵ Second, and more importantly, the plain language of the PDA provides for no such distinctions. The EEOC seems to understand this. The EEOC guidance discussed above regarding job modifications for pregnancy does not

³¹⁴ Denton v. CSC Applied Tech., No. 1:07CV115-D-D, 2008 WL 4821332, at *3 (N.D. Miss. Oct. 28, 2008). The position actually listed the same physical requirements as the entry gates so the plaintiff apparently conceded during litigation that she did not meet these requirements; in practice, however, the physical requirements of the position were apparently less demanding. *Id.*

³¹⁵ See *supra* text accompanying note 94.

differentiate between on-the-job and off-the-job injuries.³¹⁶ Similarly, in the ADA context, the EEOC has asserted that even if an employer generally reserves light duty positions for employees with workplace injuries, the ADA may require assigning an individual with a (non-work-related) disability to a vacant light duty position as a reasonable accommodation.³¹⁷

That said, courts in circuits with decisions holding employees accommodated pursuant to a light duty policy are not appropriate comparators for PDA purposes might feel compelled to follow that precedent when deciding claims concerning such light duty policies. Crucially important, however, courts should recognize that applying the reasoning in those light duty cases to similarly exclude ADA-accommodated employees as potential comparators would be a significant — and unwarranted — expansion of the doctrine. Rather, courts should recognize that the light duty decisions consistently and correctly opined that *if* an employer had accommodated employees with out-of-work injuries or health conditions, it would also be required to accommodate pregnant employees.³¹⁸ As explained above, the enactment of the ADA Amendments Act, which increases the number of out-of-work injuries and health conditions that must be accommodated, should not change this analysis in any respect.³¹⁹ The reason *why* an employer accommodates the out-of-work injury should be irrelevant under the PDA.

Harder questions arise if the specific employer has not already provided accommodations like those requested by a pregnant employee. In this scenario, if the ADA would require an employer to make comparable accommodations, pregnancy should be accommodated even in the absence of a specific “comparator” because

³¹⁶ See *supra* text accompanying note 257.

³¹⁷ EEOC, NOTICE NUMBER 915.002, EEOC ENFORCEMENT GUIDANCE: *Workers Compensation and the ADA* (2000) (question 28), available at <http://www.eeoc.gov/policy/docs/workcomp.html>.

³¹⁸ See, e.g., *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1313 (11th Cir. 1999) (“The correct comparison is between Appellant and other employees who suffer non-occupational disabilities.”); *Urbano v. Cont’l Airlines, Inc.*, 138 F.3d 204, 206 (5th Cir. 1998) (denying PDA claim on ground “Continental treated Urbano in exactly the same manner as it would have treated any other worker who was injured off the job”).

³¹⁹ See *supra* text accompanying notes 309-313. The ADA Amendments Act contained a provision explicitly prohibiting individuals without a disability from making claims under the ADA itself. See ADA Amendments Act, Pub. L. No. 110-335, § 6(a)(1), 122 Stat. 3553 (2008) (codified at 42 U.S.C. § 12201(g) (2009)). This provision, designed to preclude so-called “reverse discrimination” claims under the ADA, see H.R. REP. No. 110-730, at 21 (2008), should have no relevance to claims brought under the PDA.

courts should presume that employers would comply with the ADA.³²⁰ Pregnancy accommodations would not be required if the court determined that the ADA would not require the accommodation. To see this distinction, consider the following example. A recent PDA case was brought by a director of activities at a nursing center who was able to do almost all of her job. However, her doctor had instructed that she should refrain from moving heavy objects, tasks that she estimated occupied about five to ten minutes of typical days, and from climbing on a table to fill in the top week on a wall-sized calendar, a task that she was required to do just once a month.³²¹ (These facts illustrate well the picayune level of details these cases often include.) She also stated that her coworkers routinely helped her with these tasks, even prior to her pregnancy.³²² Even if the employer had not accommodated an individual with similar limitations caused by a different health condition, it should be required to accommodate her pregnancy.

The analysis would be as follows. A back injury that made it inadvisable to move heavy objects or climb on a table would be considered an “impairment” that causes a “substantial limitation” in the “major life activity” of “lifting.”³²³ Under the amended ADA, the employer would be required to provide a reasonable accommodation for the limitation, unless doing so would be an undue hardship. Ensuring an employee has assistance for 5-10 minutes of the day, particularly where coworkers routinely provided such assistance anyway, would not be an undue hardship. Accordingly, under the PDA, the pregnant employee should be treated “the same” as the hypothetical employee with the ADA-qualifying back injury and thus receive the accommodation. If, by contrast, the employee’s primary responsibility at work, throughout the day, was lifting heavy objects, any potential accommodation would be more likely to constitute an undue hardship. In such a scenario, a court could reasonably conclude that an accommodation would not be required under the ADA, and accordingly the PDA would not require that the employer accommodate the pregnant employee.

The doctrinal analysis set forth in this subpart is well grounded in the plain text of the PDA and its underlying commitment to treating

³²⁰ Cf. Goldberg, *supra* note 247, at 805 (describing use of “hypothetical comparators” in European antidiscrimination law).

³²¹ See *Serednyj v. Beverly Healthcare LLC*, No. 2:08-CV-4, 2010 WL 1568606, at *1-2 (N.D. Ind. Apr. 16, 2010).

³²² *Id.* at *1.

³²³ See *supra* text accompanying notes 198-201.

pregnancy like other health conditions that can interfere with work. The ADA Amendments Act raises the floor regarding employers' responsibilities for addressing physical limitations of employees; pregnancy should not be left once again in the basement.

CONCLUSION

Part III established that, properly interpreted, the PDA requires that employers that accommodate employees pursuant to the ADA or a light duty policy provide comparable accommodations for pregnant employees. This should provide recourse for a significant number of women who would otherwise lose their jobs, be placed on unpaid leave, or risk their health to continue working without any recommended modifications. Relying on the PDA's same treatment language, however, has limitations.

Most obviously, it is comparative, not absolute.³²⁴ Finding a comparator could be a very serious hurdle for many employees. Recognizing pregnancy as a disability under the ADA or affirmatively mandating pregnancy accommodations would remove this problem. Towards this end, the Pregnant Workers Fairness Act was introduced in 112th Congress and likely will be reintroduced in the current Congress. This bill would explicitly require employers covered by Title VII and the ADA to make "reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions" of an employee, unless doing so would impose an "undue hardship" on the employer.³²⁵ The bill is unlikely to advance at this time, but if it were to pass in the future, it would be an important step forward because it would remove the need to engage in comparative analysis entirely.

That said, the architects of the PDA were right to worry that "special treatment" can breed resentment or backlash.³²⁶ This is already a

³²⁴ Moreover, even if courts accept the general contours of the argument, they might be unwilling to apply it in the absence of a specific identified comparator who has actually received an accommodation, rather than the more speculative understanding that the ADA *would* require a comparable accommodation.

³²⁵ Pregnant Workers Fairness Act, S. 3565, 112th Cong. (2012); Pregnant Workers Fairness Act, H.R. 5647, 112th Cong. (2012). At the time of this writing, the bill has not yet been reintroduced in the 113th Congress that began sitting in January 2013.

³²⁶ A rich body of empirical work attempts to assess whether the ADA, with its reasonable accommodation mandate, has increased hiring discrimination against individuals with disabilities or backlash against employees at work. See, e.g., Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 20 (2004) (collecting and discussing studies). See generally also Adrienne Colella et al., *Factors Affecting*

concern under the comparative approach adopted in the PDA; explicitly mandating accommodations for pregnancy would heighten the risk. In fact, introduction of the Pregnant Workers Fairness Act was reported in the *New York Times's* parenting blog. The comments posted by readers are striking, even recognizing that the forum tends to breed hyper-opinionated responses. Many readers applauded the bill as long overdue, often sharing stories of being denied accommodations.³²⁷ But others expressed vitriolic anger that women with “lousy low paying” jobs “impregnated by the smoothest-talking guy on the block”³²⁸ would be able to “shift the burdens” of their “lifestyle choice” to others,³²⁹ as well as concern that women would regularly abuse the policy,³³⁰ or that “this kind of garbage” would make employers reluctant to hire women at all.³³¹ This is a danger that accommodation mandates pose within a legal structure that posits “color-blindness” and “sex-blindness” as the general marker of

Coworkers' Procedural Justice Inferences of the Workplace Accommodations of Employees with Disabilities, 57 PERS. PSYCHOL. 1 (2004) (suggesting procedures that can increase coworker acceptance of accommodations for employees with disabilities). Although results are inconclusive, it is fair to say that anecdotal evidence demonstrates that this occurs in some workplaces.

³²⁷ See, e.g., Jane, Comment to *Protection for Pregnant Workers*, MOTHERLODE: ADVENTURES IN PARENTING, N.Y. TIMES (May 8, 2012, 1:47 PM), <http://parenting.blogs.nytimes.com/2012/05/08/protection-for-pregnant-workers/> (“As an ob/gyn I see countless episodes where employees are harassed, shamed, and made to feel guilty solely for being pregnant.”); HRM, Comment to *id.* (May 8, 2012, 3:56 PM) (“When I was pregnant with twins . . . , my ‘feminist’ dissertation advisor tried to have me kicked out of the program.”).

³²⁸ See Chris, Comment to *id.* (May 11, 2012, 8:52 AM) (“If a woman has a lousy low paying job that will not offer the needed accommodation, . . . she should get more education and save more money before having children. And/or select a husband who will stick around and support the child rather than becoming impregnated by the smoothest-talking guy on the block.”)

³²⁹ See Skeptical, Comment to *id.* (May 10, 2012, 9:41 AM) (“I . . . would like to make childbearing harder on working women so that perhaps they will put more thought in their decisions to procreate, and will take more personal responsibility for their lifestyle choice rather than trying the shift the burdens to others.”); D.mutchler, Comment to *id.* (May 10, 2012, 1:53 PM) (“[It] does smack a bit of unfairness Entitlement is an ugly thing.”).

³³⁰ See Abby, Comment to *id.* (May 9, 2012, 10:15 AM) (“I practice employment law. . . . Some employees abuse these policies. It is really easy to get a doctor to recommend that a pregnant employee be given a reduced schedule, . . . [which is] hard on the other employees who must should extra responsibilities.”)

³³¹ See Jane, Comment to *id.* (May 9, 2012, 8:03 PM) (“This kind of garbage in employment law [will mean] NO employer wants to take a chance on women of child bearing age ever again.”)

equality. An accommodation framework may respond to the fact that baselines are discriminatory, but it does not change them.

The pregnancy accommodation story hints at a different approach. Recall that Part I identified several typical accommodations that pregnant women might need at work: limitations on weights required to be lifted; regular breaks; access to seating; day shifts; and limits on excessive overtime. In the current political landscape, a guaranteed right to such “accommodations” seems unlikely. Not so for women working in the first half of the twentieth century. These were all standard provisions in the sex-specific “protective” labor legislation then common. Of course, as discussed in Part II, there were serious problems with this legal regime. Undoubtedly the lifting restrictions, seats, and breaks were helpful for some women in some pregnancies, or for women who faced other physical limitations. But they were grossly overbroad in that they applied to all women (and underinclusive in that they did not help men with physical limitations). The laws that established a cap on women’s hours were more generally useful, in that they protected time for family responsibilities and other non-work interests.³³² But they also helped reify the assumption that caregiving was solely the responsibility of women, meant women could not receive premium pay under FLSA, and made women less attractive candidates for a range of jobs, including professional and managerial positions.³³³ Notwithstanding these real costs, many advocates supported the laws in part because they believed they could be used as an “opening wedge” to establish more humane workplace standards for *all* workers.³³⁴ They were right.

As Justice Ginsburg recently observed, *Muller v. Oregon*, the case that upheld a ten-hour-per-day cap on women’s work in certain industries, has two different legacies.³³⁵ One is as evidence of the discriminatory attitudes towards women that the Supreme Court once held. In this respect, it is usually cited as a kind of “negative” precedent, often lumped together with *Bradwell v. Illinois* (1872) and *Goesaert v. Cleary* (1948), which each upheld bars on women working in certain occupations.³³⁶ But *Muller* was also the first step in

³³² See, e.g., COBBLE, *supra* note 36, at 139-44 (discussing women’s interest in limiting daily work hours); PCSW, AMERICAN WOMAN, *supra* note 76, at 132-33 (similar).

³³³ See COBBLE, *supra* note 36, at 142; PCSW, AMERICAN WOMAN, *supra* note 76, at 55-57.

³³⁴ KESSLER-HARRIS, *supra* note 72, at 184.

³³⁵ Ginsburg, *supra* note 77, at 368-70.

³³⁶ See, e.g., *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 729 (2003) (citing

dismantling the restrictive understanding of government's powers announced by *Lochner v. United States*,³³⁷ a case now also almost universally acknowledged as “wrong.”³³⁸ Albeit relying on overbroad and deeply stereotyped assumptions of women's need for protection, *Muller* began the doctrinal path towards recognition that Congress's authority to promote the general welfare and regulate interstate commerce may be properly expressed in labor legislation — and that many workers of both sexes can benefit from government action to set decent labor standards.

The *Lochner* rule was effectively abandoned in *West Coast Hotel Co. v. Parrish*, a case that upheld a women's-only minimum wage law on a broader rationale than earlier cases.³³⁹ Recognizing that the constitutional ground had shifted, advocates understood that they could now press for a sex-neutral minimum wage. The federal Fair Labor Standards Act was passed the next year.³⁴⁰ It was a sex-neutral law that set minimum wages, established the forty-hour workweek as standard, and required premium pay for overtime hours. Although originally it excluded numerous industries, it has gradually been expanded and now covers most workplaces.³⁴¹ State labor laws were enacted or amended so that they parallel or expand upon FLSA, covering smaller enterprises, imposing a higher minimum wage, or mandating other basic labor standards such as mandatory break times within shifts.³⁴² These are vestiges of statutes that were once a form of

all three cases as evidence of “the many state laws limiting women's employment opportunities . . . [once] sanctioned by this Court”). I develop and discuss the concept of negative precedent in Deborah A. Widiss, Note, *Re-Viewing History: The Use of Negative Precedent in United States v. Virginia*, 108 YALE L.J. 237 (1998).

³³⁷ 198 U.S. 45 (1905).

³³⁸ See, e.g., BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 23 (1980) (stating that *Lochner* is “one of the most condemned cases in United States history and has been used to symbolize judicial dereliction and abuse”).

³³⁹ 300 U.S. 379, 393 (1937) (“In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety.”).

³⁴⁰ Fair Labor Standards Act, Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201-19 (2012)).

³⁴¹ The minimum wage provisions apply to almost all employees whose work is connected in various ways to interstate commerce. 29 U.S.C. § 206 (2012). Executive, professional, and administrative positions, as well as some specific industries, are exempted from the overtime requirements. *Id.* § 207. There are a few key exceptions. For example, agricultural workers and domestic workers receive less robust or no protection under FLSA. See *id.* § 206(a)(4), (f).

³⁴² See, e.g., Wage and Hour Division, *Minimum Wage Laws in States-January 1, 2012* (2012), U.S. DEP'T OF LABOR, available at <http://www.dol.gov/whd/minwage/america.htm> (last visited January 28, 2013) (showing many states have set minimum

“special treatment” for women. They are not perceived that way any more. They are “accommodations” that have been successfully universalized.

As discussed above, when Title VII was enacted, feminist leaders were divided over the advisability of dismantling the “protective” labor laws, particularly the cap on hours. A similar debate occurred during and after the *Cal Fed* case regarding the advisability of mandating maternity leaves. In each instance, an “equal treatment” approach prevailed, rather than competing arguments for preserving or enacting women-specific rights that could — perhaps — have later been expanded. Laws prohibiting mandatory overtime for women were repealed, and the only federal statute that seeks to accommodate family caretaking is the sex-neutral FMLA. Its limitations, the result of multiple compromises over several years of efforts to enact it, are well recognized. The FMLA was an important step forward compared to a baseline of no protection. But in today’s world, where women and men both struggle to balance work and family responsibilities, one wonders what our workplaces would look like if we had continued farther down that other path.³⁴³

wages above the federal level).

³⁴³ International comparisons may be illuminating here. In many other countries, women have long had a right to paid maternity leaves, and legislative bodies responded to calls for gender equity by enacting parental leaves that are available to mothers and to fathers or (much shorter) separate paternal leaves. See, e.g., Christopher J. Ruhm, *Policies to Assist Parents with Young Children*, 21 *THE FUTURE CHILD* 37, 40-43 (2011). Although mothers remain more likely to take parental leave than fathers, a growing number of countries have enacted provisions that incentivize paternal leave-taking. See *id.* Several countries have also enacted flexible working statutes that make it easier for employees to receive adjusted work schedules; in at least five countries, this has been structured as a universal employee right rather than a limited benefit for specific needs such as parenting or education. See ARIANE HEGEWISCH & JANET C. GORNICK, *STATUTORY ROUTES TO WORKPLACE FLEXIBILITY IN CROSS-NATIONAL PERSPECTIVE* 19-20 (2008).