

**EXPANDING THE CORE: PREGNANCY  
DISCRIMINATION LAW AS IT APPROACHES  
FULL TERM**

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# EXPANDING THE CORE: PREGNANCY DISCRIMINATION LAW AS IT APPROACHES FULL TERM

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## INTRODUCTION

The advocates behind the Pregnancy Discrimination Act (PDA) of 1978 had one very specific mission: to override the Supreme Court’s 1976 decision in *General Electric v. Gilbert*,<sup>1</sup> in which it had curiously held that pregnancy discrimination had nothing to do with gender and was thus not a form of actionable sex discrimination under Title VII of the Civil Rights Act of 1964. The Court was not acting on a blank slate; it had used the same reasoning two years earlier to hold, in *Geduldig v. Aiello*,<sup>2</sup> that pregnancy discrimination was not sex discrimination for equal protection purposes and therefore was not a classification that merited heightened judicial scrutiny. But the ruling in *Gilbert* was more than insult to injury. It was both surprising—ignoring a contrary interpretation by the EEOC, as well as rulings of several federal appellate courts that had agreed with the EEOC<sup>3</sup>—and devastating—leaving in

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1. 429 U.S. 125, 137–40 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-155, 92 Stat. 2076.

2. 417 U.S. 484, 496–97 (1974).

3. The Court’s ruling in *Gilbert* was described as the “one notable exception” to the Court’s usual “method of interpretation.” See *Sutton v. United Air Lines*, 527 U.S. 471, 506 (1999) (Stevens, J., dissenting). Justice Stevens wrote “[w]hen faced with classes of individuals or types of discrimination that fall outside the core prohibitions of anti-discrimination statutes, we have consistently construed those statutes to include comparable evils within

place the widespread employer policies that kept pregnant women out of some jobs altogether, and out of continuous employment at almost every job.<sup>4</sup>

The response to *Gilbert* was swift and effective. The Campaign to End Discrimination Against Pregnant Workers mobilized support for a new law that would amend Title VII, expressly prohibiting pregnancy discrimination.<sup>5</sup> But the specific mission to obtain a legislative override of the *Gilbert* decision was animated by a more general goal—to ensure pregnant women were not left behind as the tide of employee benefits and accommodations was rising. The fear of being left behind was firmly rooted in reality—workers across the country were benefitting from a rising tide of benefits, while pregnancy was being routinely omitted from comprehensive benefit plans, and pregnant workers found themselves singled out for adverse treatment.<sup>6</sup> Employers refused to hire pregnant women; forced pregnant employees to stop work at a certain point in pregnancy and prevented them from returning to work until a certain point after childbirth; and expressly excluded pregnancy from otherwise comprehensive insurance, disability and leave policies.<sup>7</sup> All told, this meant that pregnant women had little hope of reasonable access to the workforce, and no hope of full integration into it.

The PDA was immediately effective in eliminating most formal employer policies that singled out pregnancy for different (and typically worse) treatment. Congress gave pregnant women the right to be treated like everyone else—allowed to work if they were fully able to work and allowed to take leave if it was otherwise available.<sup>8</sup> But these core rights, while important, even essential, are not enough to bring about true equality for women. Thus, as the PDA approaches forty, we see a sustained effort to expand on those core rights.<sup>9</sup> In some cases, the “expansion” is simply a matter of pushing courts to give the PDA its due, reading in a way that furthers Congress’s intent rather than undermines it. In others, the expansion would go beyond the existing statutory rights, as necessary to bring about not only women’s access to the workplace, but their integration into it. After setting out the core of

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their coverage, even when the particular evil at issue was beyond Congress’ immediate concern in passing the legislation.” *Id.* at 505.

4. See Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 469 (2011).

5. See Dinner, *supra* note 4, at 469–73 (discussing the campaign’s strategy and effort).

6. See Deborah A. Widiss, *Gilbert Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961, 986–89 (2013).

7. This era of workplace policies is explored in detail in Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567 (2010).

8. See *id.* 609–10.

9. See, e.g., Sarah Czypinski, *Pregnant Laborers Should Expect Better: The Broken Pregnancy Discrimination Standard and How the Pregnant Workers Fairness Act Can Repair It*, 76 U. PITT. L. REV. 303 (2014).

pregnancy discrimination law, this essay will develop four expansion themes: (1) from pregnancy alone to the whole reproductive process, including the “maternal wall”; (2) from overt to implicit bias; (3) from status to effects (and thus access to accommodation); and (4) from federal to state and local protections.

### I. Origins of Pregnancy Discrimination Law

At the time the Supreme Court was asked to weigh in on the legality of benefits policies that covered virtually everything but pregnancy, there was no positive law against pregnancy discrimination. No statutes. No binding constitutional interpretations. Nor was there any custom or practice of analogizing pregnancy to conditions with similar effects on work and providing equal treatment. Quite the contrary. Women in the workforce encountered a system that openly and perhaps obviously treated pregnancy as a *sui generis* condition.<sup>10</sup> It was, according to the conventional wisdom at the time, like nothing else that workers experienced.<sup>11</sup> Employers thus did not hesitate to construct and apply special rules to pregnancy—and even to all women because of their potential to become pregnant.<sup>12</sup> This had been a longstanding practice that saw its heyday in the early twentieth century, when the Supreme Court upheld an Oregon law that restricted the number of hours women could work in laundries in order to protect their “maternal functions” (social and biological).<sup>13</sup> This ruling left in place a wide variety of state laws and employer policies that restricted occupations, job duration, and benefits based on sex, pregnancy, childbirth, childrearing, or some combination thereof, and fueled new sex- and pregnancy-based laws and policies to reinforce women’s maternal role.<sup>14</sup>

There was a palpable shift in the early 1970s, when advocates were in the process of first challenging, and ultimately dismantling, the system of sex-segregation that pervaded not only the workforce, but many other facets of society. Although the Supreme Court had been asked many times in the preceding century to invalidate laws that relied on sex-based classifications, it did so for the first time in 1971.<sup>15</sup> And within only five years, the Court solidified its suspicion of those classifications and its intention to invalidate many, if not all, of them.<sup>16</sup> Meanwhile,

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10. See Widiss, *supra* note 6, at 978–79.

11. See *id.* at 991.

12. See SHEILA B. KAMERMAN ET AL., *MATERNITY POLICIES AND WORKING WOMEN* 5 (1983).

13. *Muller v. Oregon*, 208 U.S. 412, 422 (1908).

14. See Grossman, *supra* note 7, at 599–600.

15. See *Reed v. Reed*, 404 U.S. 71 (1971) (requiring that a sex-based classification bear a “fair and substantial relation” to a legitimate governmental purpose).

16. See *Orr v. Orr*, 440 U.S. 268, 283 (1979) (invalidating Alabama law providing that only husbands could be ordered to pay alimony); *Craig v. Boren*, 429 U.S. 190, 210 (1976) (invalidating Oklahoma’s sex-based drinking-age law); *Frontiero v. Richardson*, 411

Title VII was in the process of being put to the test in sex discrimination cases at the same time. Although the statute had been enacted in 1968, it was not until the 1970s that it was applied in any meaningful way to sex discrimination cases.<sup>17</sup> Sex neutrality quickly became the rule rather than the exception, and both legislatures and employers were under pressure to defend any remaining sex-based laws or policies as legitimate and defensible rather than an errant relic of the past.

The proper treatment of pregnancy, however, remained something of a mystery to employers, legislatures, and courts. With no obvious parallel, it wasn't immediately clear whether the newfound right of sex equality—binding states through the Equal Protection Clause and private employers of a certain size through Title VII, in roughly coextensive ways—applied to pregnancy discrimination. Women had begun pursuing pregnancy discrimination claims shortly after the Equal Employment Opportunity Commission (EEOC) was established in 1965, but those claims were met mostly with the same “huh?” that the first sexual harassment claims would be a decade later.<sup>18</sup> This response was rooted more in confusion than resistance and served as an invitation to advocates and academics to provide guidance for developing a theory of pregnancy discrimination. With that guidance—and a fair amount of pressure—the EEOC drafted and issued its first pregnancy discrimination guidelines in 1972, taking the position that pregnancy discrimination is a form of sex discrimination.<sup>19</sup> But despite these guidelines, the Supreme Court concluded, as discussed above, that Title VII did not embrace such a theory (and nor did the Equal Protection Clause).<sup>20</sup> In *Gilbert*, the Court upheld a private employer's disability plan, which facially excluded pregnancy from coverage and covered virtually every-

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U.S. 677, 678–79 (1973) (invalidating federal law presuming wives of servicemen to be dependent, while requiring husbands of servicewomen to prove dependency in order to earn benefits); *Reed v. Reed*, 404 U.S. 71, 76–77 (1971) (striking down Idaho law preferring male to female relatives as estate administrators).

17. See, e.g., *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 200 (1991) (invalidating employer's fetal-protection policy, which prohibited non-sterile women from holding jobs involving lead exposure in a battery manufacturing plant); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239–40 (1989) (interpreting Title VII to prohibit employment decisions motivated by sex-role stereotyping), *superseded on other grounds* by Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2 U.S.C., 16 U.S.C., 29 U.S.C., 42 U.S.C.); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66–67 (1986) (establishing that sexual harassment is an actionable form of intentional sex discrimination); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (establishing the “sex plus” theory of discrimination that can be used to challenge employment policies or decisions based on sex plus a neutral characteristic).

18. Dinner, *supra* note 4, at 424; see also Deborah Dinner, *Strange Bedfellows at Work: Neomaternality in the Making of Sex Discrimination Law*, 91 WASH. U. L. REV. 453, 471–74 (2014).

19. See 29 C.F.R. § 1604.10(a) (2016).

20. 429 U.S. 125, 137–40 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-155, 92 Stat. 2076; *Geduldig v. Aiello*, 417 U.S. 484, 496–97 (1974).

thing else.<sup>21</sup> The Court found no problem with this omission and was unpersuaded by Justice Brennan's point in dissent that it "offends common sense to suggest . . . that a classification revolving around pregnancy is not, at the minimum, strongly 'sex related.'"<sup>22</sup>

The only bright spot in the early treatment of pregnancy was a 1974 decision by the Supreme Court that a mandatory stop-work policy for pregnant schoolteachers violated the Due Process Clause for its failure to offer teachers an individualized assessment of their ability to work while pregnant.<sup>23</sup> In that case, *Cleveland Board of Education v. LaFleur*, decided during the very same term as *Geduldig*, the Court took issue with a policy that forced pregnant teachers on leave early in pregnancy and prevented them from returning until at least three months after childbirth.<sup>24</sup> The Court drew on the then-emerging, but now-defunct, irrebuttable presumption doctrine, as well as emerging protection in the name of "privacy" for decisions related to reproduction.<sup>25</sup> But it set the stage for a right against stereotyping—public employers, whose actions had to comply with the Due Process Clause, could not force women out of jobs based on the unproven assumption that pregnancy and childbirth would disable all women at the same time and for the same length of time.<sup>26</sup>

While *LaFleur* gave public employees protection against at least the most egregious types of pregnancy policies, most women had none at all. Thus, the more important, and broader, development was the passage of the PDA. As mentioned at the outset, the PDA specifically overruled *Gilbert's* interpretation of Title VII by redefining "sex" to include "pregnancy, childbirth, or related medical conditions." In the words of a Senate Committee report, the Act was designed "to reflect the 'commonsense' view and to insure that working women are protected against all forms of employment discrimination based on sex."<sup>27</sup>

In full, the PDA provides:

The terms 'because of sex' or 'on the basis of sex' [in Title VII] 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

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21. 429 U.S. 125 at 127.

22. *Id.* at 149 (Brennan, J., dissenting).

23. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974).

24. *Id.* at 649.

25. *Id.* at 644.

26. *See id.* at 640 (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541). The Court reinforced this principle the following year, when, in *Turner v. Department of Employment Security*, it struck down a one-size-fits-all approach to assessing pregnant women's capacity for purposes of administering the unemployment insurance program in Utah. 423 U.S. 44, 46 (1975) ("It cannot be doubted," according to the per curiam opinion, "that a substantial number of women are fully capable of working well into their last trimester of pregnancy and of resuming employment shortly after childbirth.")

27. S. Rep. No. 95-331(1977).

shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work[. . .]<sup>28</sup>

The PDA has always been understood to consist of two clauses, one on either side of the semi-colon. The first clause is straightforward because it maps onto the existing structure of Title VII, which prohibits discrimination “because of” an enumerated list of protected characteristics. The PDA simply adds “pregnancy, childbirth, or related medical conditions” to the list of those traits on which employment decisions cannot be based. Employers are thus prohibited from making employment decisions on the basis of pregnancy unless they can articulate and prove non-pregnancy is a bona fide occupational qualification.<sup>29</sup> The purpose of this clause was clear—to prohibit employment policies that treated all pregnant women as an undifferentiated group and ignored their individual experience with pregnancy. The casual assumption “that women will become pregnant and leave the labor market,” the Senate Committee observed, “is at the core of the sex stereotyping resulting in unfavorable disparate treatment of women in the workplace.”<sup>30</sup> Moreover, the report continued, those policies rooted on stereotypes about pregnancy “have long-term effects upon the careers of women and account in large part for the fact that women remain today primarily in low-paying, dead-end jobs.”<sup>31</sup> With a more explicit focus on stereotypes, the First Clause invalidated the same types of practices thrown into question by *LaFleur*. But its scope was much broader, reaching employment decisions motivated by animus or hostility to pregnant workers, as well as those neutral practices that had a disparate impact on pregnant workers.

The Second Clause of the PDA has always been more difficult to enforce. One problem is that it is not modeled on any other provision in a federal anti-discrimination law; thus, there are no analogies to be drawn when courts are asked to interpret the clause. The Second Clause provides that women affected by pregnancy, childbirth, or related medical conditions “shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work[.]”<sup>32</sup> The Second Clause provoked one primary battle in courts in its early years: what does it mean to treat pregnant women “the same as” other temporarily disabled workers? More specifically, the query was whether the state could mandate, or employers could choose

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28. 42 U.S.C. § 2000e(k).

29. Deborah R. Brake, *On Not “Having it Both Ways” and Still Losing: Reflecting on Fifty Years of Pregnancy Litigation Under Title VII*, 95 B.U. L. REV. 995, 998-1000 (2015). First-clause claims can be proven using any of the available methods of proof under Title VII—formal policy; mixed-motive or pretext analysis for individual disparate treatment; pattern and practice; or disparate impact. *See id.*

30. S. Rep. No. 95-331, *supra* note 27, at 40.

31. *Id.* at 43.

32. 42 U.S.C. § 2000e(k).

to provide, benefits for pregnancy that were not provided to workers with comparable restrictions from another cause. Even feminists could not agree about the answer to this question, with some arguing for an equal treatment standard that defined the second-wave feminist movement<sup>33</sup> and others for an accommodation standard. The equal treatment advocates preferred an approach that would minimize harmful stereotyping, even at the cost of potentially losing some maternity benefits.<sup>34</sup> The accommodation group pushed for substantive equality—a focus on the outcomes necessary to allow women and men to maintain an equal engagement with work despite their differing roles in the reproductive process.<sup>35</sup> When the dispute reached the Supreme Court, it sided with the accommodation group, holding, in *California Federal Savings & Loan v. Guerra*, that California could require employers to provide sixteen weeks of unpaid pregnancy leave whether or not they provided the same benefit to comparably disabled workers.<sup>36</sup> Although *Guerra* resolved the first dispute about the Second Clause, it had little to say about the one that would come next: whether the woman fully or partially disabled by pregnancy was entitled to the accommodations received by any other worker, by all other workers, or by a sufficient number of other workers? This dispute, explored in section C below, would provoke courts battles spanning almost two decades.<sup>37</sup>

## II. Changing the Dimensions

With the PDA came the immediate invalidation of routine employer policies (and, in some cases, state laws) that had always singled out pregnancy for special treatment—sometimes better, but typically worse. That shift was monumental, opening doors to the workplace for women despite their experiences with pregnancy and childbirth. But, as many disadvantaged groups have found, opening doors is the beginning rather than the end of the battle. In this section, I will discuss four key shifts

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33. For a long list of equal-treatment based victories, see Equal Pay Act of 1963, Pub. L. No. 88-38, 52 Stat. 1062 (1963). (equal pay for equal work); Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, 68A Stat. 165 (1964) (protection from sex-based employment discrimination); Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, Title IX, 86 Stat. 1043 (1972) (protection from sex-based discrimination by educational institutions). Additionally, see cases cited in notes 16 and 17, *supra*.

34. See, e.g., Wendy Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 14 WOMEN'S RTS. L. REP. 151 (1992); Wendy Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. L. REV. L. & SOC. CHANGE 325 (1985).

35. See, e.g., Linda Krieger & Patricia Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U. L. REV. 513, 537-57 (1983); Ann Scales, *Towards a Feminist Jurisprudence*, 56 IND. L. J. 375, 426-30 (1981).

36. 479 U.S. 272 (1987).

37. See *infra* Section C.



in pregnancy discrimination law—successful and unsuccessful, completed and still ongoing—that signal a move from access to integration.

#### A. Expanding the Definition of Pregnancy

Whether pregnancy discrimination law adequately protects women's ability to participate in the workforce on the same terms as men who choose to have children turns in part on the definition of pregnancy—and pregnancy discrimination. The PDA extends to “pregnancy, childbirth, and related medical conditions,”<sup>38</sup> a phrase chosen, according to the Senate Report, to reflect those “physiological occurrences peculiar to women.”<sup>39</sup> But of course being pregnant is just one aspect of the reproductive process that is experienced only by women. Only women use prescription contraceptives; only women utilize surgical impregnation procedures; and only women lactate. Each of these things has physical effects that can, depending on the particular woman and her particular job, pose conflicts with job performance. Cases challenging employment policies that relate to contraception, infertility and lactation have forced courts to consider the entire reproductive process and how much of it is protected by existing law. As some illustrative examples below make clear, the law is often read broadly when it comes to protecting status—preventing employers from punishing a woman for seeking fertility treatment or for pumping breastmilk, for example—but narrowly when the effects of the reproductive process might necessitate some accommodation. What follows is not an exhaustive discussion of the law of contraceptive coverage, infertility, or lactation, but rather some highlights that reveal this tension, as well as the limits of an antidiscrimination lens for protecting the outer edges of the reproductive process.

There were several lawsuits in the 2000s in which women challenged the exclusion of contraceptive coverage from employer-provided health insurance plans. In most of these cases, the employer provided an otherwise comprehensive plan, with coverage for prescription drugs and devices.<sup>40</sup> Is the omission of contraception from coverage sex or pregnancy discrimination? The class of prescription drugs and devices currently available to prevent pregnancy—birth control pills, Depo Provera, intrauterine devices (IUDs), and implantable contraceptives, to name the most common ones—are exclusively used by women.<sup>41</sup> And the lack of insurance coverage thus only hurts women—and poor women, most of

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38. 42 U.S.C. § 2000e(k) (2012).

39. S. REP. NO. 95-331, at 4 (1977).

40. See, e.g., *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001); see also *Mauldin v. Wal-Mart Stores*, 89 Fair Empl. Prac. Cas. (BNA) 1600 (N.D. Ga. 2002); *Glaubach v. Regence Blueshield*, 149 Wash. 2d 827 (Wash. 2003); *Alexander v. Am. Airlines, Inc.*, 2002 U.S. Dist. LEXIS 7089 (N.D. Tex. Apr. 22, 2002).

41. See GUTTMACHER INST., *CONTRACEPTIVE USE IN THE UNITED STATES* (Oct. 2015); KIMBERLY DANIELS ET AL., *U.S. DEP'T HEALTH & HUMAN SERVS., CURRENT CONTRACEPTIVE STATUS AMONG WOMEN AGED 15-44: UNITED STATES, 2011-2013* (Dec. 2014).

all.<sup>42</sup> In addition to incurring costs for contraception, the lack of coverage increases the chance of an unplanned pregnancy, a consequence that imposes disproportionate and unique burdens on women.<sup>43</sup> For these reasons, contraceptive access thus figured prominently on the agenda for women's rights advocacy during the first decade of the millennium.

As a result of many months of pressure from public interest organizations, the EEOC issued a ruling, in 2000, on insurance coverage for contraception.<sup>44</sup> In 1999, a conglomerate of public interest organizations representing those and other interests requested that the EEOC issue a policy guidance taking a position on insurance coverage for contraception.<sup>45</sup> The EEOC declined, but instead expressed its view through the adjudication of an individual case.<sup>46</sup> The EEOC concluded that a contraceptive exclusion constitutes a form of pregnancy discrimination.<sup>47</sup> At the time of this ruling, most women did not have insurance coverage for birth control.<sup>48</sup> Indeed, studies estimated that two-thirds of large group insurance plans did not provide any coverage for oral contraceptives, the most commonly used reversible method of birth control, and nearly half did not cover any prescription contraceptive drug or device.<sup>49</sup> Many plans did (and still do) cover surgical sterilization for both men and women.<sup>50</sup>

Before the EEOC decision, there were no court rulings addressing the legality of such exclusions. There were some federal and state laws governing coverage of prescription contraceptives in insurance plans, however. Since 1998, health plans participating in the Federal Employees Health Benefit Program have been required to provide prescription

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42. See generally GUTTMACHER INSTITUTE, INSURANCE COVERAGE OF CONTRACEPTIVES (Mar. 1, 2016), [http://www.guttmacher.org/statecenter/spibs/spib\\_ICC.pdf](http://www.guttmacher.org/statecenter/spibs/spib_ICC.pdf) (analyzing state contraceptive coverage mandates).

43. See generally INST. OF MEDICINE, THE BEST INTENTIONS: UNINTENDED PREGNANCY AND THE WELL-BEING OF CHILDREN AND FAMILIES 50–80 (Sarah S. Brown et al. eds. 1995).

44. EEOC, Commission Decision on Coverage of Contraception (Dec. 14, 2000), <http://www.eeoc.gov/policy/docs/decision-contraception.html>.

45. Laura Meckler, Women's Groups Ask EEOC to Force Coverage of Birth Control, CHI. TRIB., July 7, 1999, § 8.

46. EEOC Decision on Coverage of Contraception, September 19, 2001, <http://www.eeoc.gov/policy/docs/decision-contraception.html>.

47. See *id.*

48. See Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363, 368–69 (1998); Alissa J. Rubin, *Include Birth Control in Health Plan, EEOC Says*, L.A. TIMES (Dec. 15, 2000) (“Although most health plans now cover prescription drugs, relatively few include comprehensive coverage for birth control pills and other prescription contraceptives.”).

49. Law, *supra* note 48, at 369–70.

50. See *id.*; GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: INSURANCE COVERAGE OF CONTRACEPTIVES (May 1, 2016); GUTTMACHER INSTITUTE, UNEVEN & UNEQUAL: INSURANCE COVERAGE AND REPRODUCTIVE HEALTH SERVICES 9 (1995) (finding that on average, 86% of insurance plans cover all forms of surgical sterilization and 90% of point-of-service networks cover both male and female sterilization).

contraceptive coverage if other prescription drugs are covered.<sup>51</sup> Beginning with Maryland in 1998, twenty-eight states adopted some type of mandated benefit law for prescription contraceptives.<sup>52</sup> These state laws were met with opposition from those who complain that the increase in the cost of insurance (although it is negligible) and those who object to forced participation in an insurance plan that reimburses for contraception or abortion, which they oppose.<sup>53</sup> Even without opposition, mandated benefit laws have inherent limits. First, ERISA, a federal law regulating pensions and other employment benefits, preempts state mandates for self-insured employers.<sup>54</sup> As a result, nearly half of all employees are not protected by any state law requiring that birth control be covered.<sup>55</sup> Second, most state mandates apply only to group plans, not individually purchased policies.<sup>56</sup> That further reduces the number of people protected by the legislation.<sup>57</sup> Federal legislators tried for years to enact The Equity in Prescription Insurance and Contraceptive Coverage Act, but those efforts never succeeded.<sup>58</sup>

Why does the exclusion of contraceptives from an insurance plan constitute pregnancy discrimination? The PDA, as we have seen, defines sex discrimination to include discrimination on the basis of “pregnancy, childbirth, or related medical conditions.”<sup>59</sup> The non-discrimination rule applies to all aspects of employment including, the Supreme Court held in an early case interpreting the PDA, the doling out of benefits like insurance.<sup>60</sup> To reach the result it did, the EEOC had to establish two things: first, that a classification based on contraception is a classification based on pregnancy; and second, that the insurance plans at issue impose unequal (and therefore unlawful) treatment on the basis of pregnancy.

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51. See Treasury and General Government Appropriation Act, S. 2312, 105th Cong. (1998).

52. GUTTMACHER INSTITUTE, INSURANCE COVERAGE OF CONTRACEPTIVES 2–3 (Mar. 1, 2016), [http://www.guttmacher.org/statecenter/spibs/spib\\_ICC.pdf](http://www.guttmacher.org/statecenter/spibs/spib_ICC.pdf) (analyzing state contraceptive coverage mandates); see also NAT'L CONF. OF STATE LEGIS., INSURANCE COVERAGE FOR CONTRACEPTION LAWS (Feb. 2012), <http://www.ncsl.org/research/health/insurance-coverage-for-contraception-state-laws.aspx>.

53. Law, *supra* note 48, at 394–95.

54. Employment Retirement Income Security Act, 29 U.S.C. § 1144(127) (2016).

55. NAT'L ACADEMY FOR STATE HEALTH POL'Y, ERISA PREEMPTION PRIMER 1–2 (Mar. 30, 2009).

56. Stephen F. Befort & Elizabeth C. Borer, *Equitable Prescription Drug Coverage: Preventing Sex Discrimination in Employer-Provided Health Plans*, 70 LA. L. REV 205, 229 (2009).

57. *Id.*

58. See, e.g., Equity in Prescription Insurance and Contraceptive Coverage Act, H.R. 2412, 110th Cong. (2007). *H.R. 2412 (110th): Equity in Prescription Insurance and Contraceptive Coverage Act of 2007*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/110/hr2412#> (last visited May 22, 2016).

59. 42 U.S.C. § 2000e(k) (2012).

60. See *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684–85 (1983).

The first of these hurdles might seem like a stretch, in that it requires one to believe that being pregnant and avoiding being pregnant are both forms of pregnancy discrimination. But the Supreme Court read the PDA broadly in *UAW v. Johnson Controls*, in which it held that the PDA prohibits discrimination not only on the basis of pregnancy itself, but also on the basis of potential pregnancy.<sup>61</sup> In this case, the Court considered a challenge to the validity of an employer's so-called "fetal protection" policy that prohibited fertile women from holding jobs in a battery manufacturing plant that involved exposure to lead.<sup>62</sup> Before the enactment of Title VII in 1964, Johnson Controls had excluded women completely from battery-manufacturing jobs.<sup>63</sup> It then began to hire women into these jobs with, after 1977, a stern warning about the possible dangers of lead exposure to an unborn child.<sup>64</sup> In 1982, however, Johnson Controls shifted its policy again to exclude "women who are pregnant or who are capable of bearing children" from all jobs involving lead exposure, as well as all jobs in which they could bid, bump, transfer, or be promoted into a job with lead exposure.<sup>65</sup> A woman was deemed "capable of bearing children" unless her "inability to bear children [was] medically documented."<sup>66</sup> The policy was challenged by a variety of plaintiffs, including a woman who chose to be sterilized rather than lose her job, a 50-year-old woman who was transferred to a lower-paying job with no lead exposure against her will, and a man whose request to transfer out of a lead-exposure job because he wanted to start a family was denied.<sup>67</sup>

A threshold issue in the case was whether the company's policy constituted facial sex discrimination.<sup>68</sup> If so, it could only be justified under the bona fide occupational qualification (BFOQ) defense, rather than under the more lenient "business" necessity defense to policies with disparate impact or only upon a finding of pretext.<sup>69</sup> The Court had no trouble concluding that the policy was facially discriminatory because it "classifies on the basis of gender and childbearing capacity, rather than fertility alone."<sup>70</sup> Despite evidence of risks to the unborn children of men exposed to dangerous levels of lead, the company "requires only a female employee to produce proof that she is not capable of repro-

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61. EEOC, COMMISSION DECISION ON COVERAGE OF CONTRACEPTION, <http://www.eeoc.gov/policy/docs/decision-contraception.html> (Dec. 14, 2000).

62. *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 190 (1991).

63. *Id.* at 191.

64. *Id.*

65. *Id.* at 191–92.

66. *Id.* at 191–92.

67. *Id.* at 192.

68. *Id.* at 198.

69. *Id.*

70. *Id.* at 198.

ducing.”<sup>71</sup> This type of “sex-plus” policy had been ruled in a prior case to be no better than a policy that distinguished all women from all men.<sup>72</sup>

Johnson Controls further argued that its facially discriminatory policy was nonetheless sex neutral because it did not exclude all women and was not motivated by animus towards women.<sup>73</sup> But the Court dispensed with that argument quickly.<sup>74</sup> The policy “is not neutral because it does not apply to the reproductive capacity of the company’s male employees in the same way as it applies to that of the females.”<sup>75</sup> Moreover, the Court continued, “the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect.”<sup>76</sup> The illegality of facial discrimination “does not depend on why the employer discriminates but rather on the explicit terms of the discrimination.”<sup>77</sup>

The Court’s conclusion that the policy constituted facial sex discrimination was “bolstered” by the PDA, which also disallows classifications on the basis of “pregnancy, childbirth, or related medical conditions.”<sup>78</sup> Discrimination “based on a woman’s pregnancy is, on its face, discrimination because of her sex.”<sup>79</sup> The company’s policy, which explicitly classified “on the basis of potential for pregnancy . . . must be regarded, for Title VII purposes, in the same light as explicit sex discrimination.”<sup>80</sup>

Once the Court concluded that the policy was facially discriminatory, the burden shifted to the company to prove it was justified as a BFOQ—in other words, that sterility in female employees was “reasonably necessary” to the “normal operation” of business.<sup>81</sup> Other cases had recognized a safety exception, under which a class of workers could be deemed unqualified if they created danger to others.<sup>82</sup> The exclusion of female guards from an especially dangerous area of a maximum-security men’s prison was justified in this vein because the presence of female guards might provoke assaults and undermine the general security of the prison.<sup>83</sup> Johnson Controls argued that the “safety exception” was broad enough to encompass risk to the unborn child of a female work-

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71. *Johnson Controls*, 499 U.S. at 198.

72. See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (invalidating hiring policy that excluded women, but not men, with preschool-age children). On the women behind this and the other important cases in which the Supreme Court developed sex discrimination doctrine under Title VII, see GILLIAN THOMAS, *BECAUSE OF SEX: ONE LAW, TEN CASES, AND FIFTY YEARS THAT CHANGED AMERICAN WOMEN’S LIVES AT WORK* (2016).

73. *Johnson Controls*, 499 U.S. at 198.

74. *Id.* at 199.

75. *Id.* at 199.

76. *Id.*

77. *Id.*

78. *Id.* at 198–99.

79. *Johnson Controls*, 499 U.S. at 199.

80. *Id.*

81. *Id.* at 200.

82. See generally *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

83. *Id.* at 336–37.

er.<sup>84</sup> But the Court rejected that argument, holding that it was not even broad enough to include risk to the woman herself.<sup>85</sup> Risk to an employee is something to be weighed by the individual when deciding whether to accept a job.<sup>86</sup> And while the safety exception may be broad enough to protect some third parties, it extends only to those who “were indispensable to the particular business at issue.”<sup>87</sup>

The Court’s reasoning in *Johnson Controls* is protective of women’s workplace equality and further noted that the BFOQ defense operates no differently for pregnancy than it does for sex.<sup>88</sup> It read the Second Clause as “contain[ing] a BFOQ standard of its own: Unless pregnant employees differ from others ‘in their ability or inability to work,’ they must be ‘treated the same’ as other employees ‘for all employment-related purposes.’”<sup>89</sup> And this applies to women who are “either pregnant or potentially pregnant;” “women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job.”<sup>90</sup> The legislative history of the PDA mandates this lens. The congressional reports “indicate that this statutory standard was chosen to protect female workers from being treated differently from other employees simply because of their capacity to bear children.”<sup>91</sup> As the Senate report concludes, “the treatment of pregnant women in covered employment must focus not on their condition alone but on the actual effects of that condition on their ability to work. Pregnant women who are able to work must be permitted to work on the same conditions as other employees. . . .”<sup>92</sup>

Let’s return, then, to the EEOC’s reasoning about the illegality of excluding prescription contraceptives from an otherwise comprehensive insurance plan. The EEOC relied on *Johnson Controls* to conclude that contraception was covered by the PDA.<sup>93</sup> Employers cannot discriminate against women who exercise control over reproduction—and thus cannot omit coverage for contraceptive care while providing coverage for virtually everything else.<sup>94</sup> That is a pregnancy-based classification, under

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84. *Johnson Controls*, 499 U.S. at 202.

85. *Id.*

86. *Id.* at 202. The Court distinguished a bizarre set of lower court cases upholding blanket restrictions on pregnant airline flight attendants on the grounds that their condition put their passengers at greater risk. *See id.*; *see also* *Harriss v. Pan Am. World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980); *Burwell v. Eastern Air Lines, Inc.*, 633 F.2d 361 (4th Cir. 1980); *Condit v. United Air Lines, Inc.*, 558 F.2d 1176 (4th Cir. 1977).

87. *Johnson Controls*, 499 U.S. at 202–03.

88. *Id.* at 204.

89. *Id.*

90. *Id.*

91. *Id.* at 205.

92. *Id.* (quoting Amending Title VII, Civil Rights Act of 1964, S. Rep. No. 95-331, at 4–6 (1977)).

93. EEOC Commission Decision on Coverage of Contraception, *supra* note 61.

94. *Id.*

the *Johnson Controls* interpretation of the PDA.<sup>95</sup> Moreover, it is one that denies equal treatment to women on the basis of pregnancy.<sup>96</sup> In the individual case before it, the EEOC examined the other insurance benefits offered by those two particular employers, to see whether the plans in question singled out pregnancy for disadvantageous treatment.<sup>97</sup> The comparison the EEOC drew was between prescription contraceptives, which were excluded from the plans, and other prescription drugs designed to prevent rather than cure disease, which the plans covered.<sup>98</sup> Because the plans covered vaccinations, preventive dental care, and a variety of drugs to prevent the development of certain medical conditions, the EEOC found that women were being denied equal treatment.<sup>99</sup>

Six months after the EEOC ruled, a federal district court in the State of Washington reached the same conclusion as the EEOC.<sup>100</sup> In *Erickson v. Bartell Drug Co.*, a federal district court held that employer-based insurance plans had to cover prescription contraceptives to comply with Title VII.<sup>101</sup> In *Erickson*, the district court noted that “[a]lthough the plan covers almost all drugs and devices used by men, the exclusion of prescription contraceptives creates a gaping hole in the coverage offered to female employees, leaving a fundamental and immediate healthcare need uncovered . . . Title VII requires employers to recognize the differences between the sexes and provide equally comprehensive coverage, even if that means providing additional benefits to cover women-only expenses.”<sup>102</sup>

As more litigation unfolded, however, the legal landscape became more mixed. Other district courts have split on whether such exclusions constitute unlawful discrimination under Title VII, as amended by the PDA.<sup>103</sup> Only one federal appellate court has considered this issue, but it rejected the EEOC’s conclusion.<sup>104</sup> The Eighth Circuit, in *Standridge v.*

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95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. EEOC Commission Decision on Coverage of Contraception, *supra* note 61.

100. *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1276–77 (W.D. Washington 2001).

101. *Id.*

102. *Id.* at 1277.

103. *Compare* *Stocking v. AT&T Corp.*, 436 F. Supp. 2d 1014 (W.D. Mo. 2006) (PDA requires coverage), *and* *E.E.O.C. v. United Parcel Serv.*, 141 F. Supp. 2d 1216 (D. Minn. 2001) (exclusion constitutes sex discrimination under Title VII), *with* *Cummins v. Illinois*, 2005 U.S. Dist. LEXIS 42634 (S.D. Ill. Aug. 30, 2005) (PDA does not require coverage). For discussion of contraceptive coverage under the PDA, see Befort & Borer, *supra* note 56, at 205; Cheryl A. Beckett, *A Factor by Any Other Name: The Religious Employer’s Defense to Contraceptive Equity Claims Under the Equal Pay Act and Title VII*, 7 RUTGERS J. L. & PUB. POL’Y 1 (2009); Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2 (2015); Mary Ziegler, *Choice at Work: Young v. United Parcel Service, Pregnancy Discrimination, and Reproductive Liberty*, 93 DENV. L. REV. 219 (2015).

104. *In re Union Pacific R.R. Empl. Practices Litig.*, 479 F.3d 936, 942 (8th Cir. 2007).

*Union Pacific Railroad Company*, held that it was neither pregnancy nor sex discrimination for the employer to exclude coverage for all forms of contraception, including sterilization.<sup>105</sup> The court concluded that contraception is not a “related medical condition” under the terms of the PDA, despite the Supreme Court’s ruling in *Johnson Controls* that “potential pregnancy” is covered by that same language.<sup>106</sup> The *Standridge* court focused instead on a line in *Johnson Controls* that the employer’s hiring ban was not based on “fertility alone.”<sup>107</sup> In context, however, that line was distinguishing fertility, which can affect men or women, from potential pregnancy, which affects only women. For prescription contraception, which is used only by women, “potential pregnancy” is the better analogy. The court in *Standridge* found the EEOC’s adjudication “unpersuasive.”<sup>108</sup> It also concluded that the employer’s plan was gender-neutral because it excluded coverage for male contraception (condoms), which are non-prescription, and sterilization.<sup>109</sup>

The impact of these rulings both for and against contraceptive equity has lessened dramatically over the last decade, as the number of employers providing insurance with contraceptive benefits has dramatically increased. By 2010, nine in ten employer-provided insurance plans covered prescription contraceptives, compared with only three in ten a decade earlier.<sup>110</sup> This change came about primarily through state adoption of contraceptive coverage mandates, though with it a change in common employer practices. But the landscape has changed more dramatically still with the passage of the Affordable Care Act (ACA) and the recommendation by the Institute of Medicine that certain preventative services, including contraceptive care, should be provided to insured patients at no cost.<sup>111</sup> The new DHHS regulations contain a narrow exception for certain religious employers, and some plans are at least temporarily “grandfathered” and permitted to maintain existing exclusions.<sup>112</sup> The initial fight over how broadly to draft the exemption pales in comparison to the aftermath. The contraceptive care provision has been subject to repeated attacks, as religious organizations have argued

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105. *Id.*

106. *Id.*

107. *Johnson Controls*, 499 U.S. at 198 (1991).

108. *Union Pacific*, 479 F.3d at 943 (referencing the EEOC Commission Decision on Coverage of Contraception); *see also* EEOC, *supra* note 44.

109. *Union Pacific*, 479 F.3d at 944–45.

110. *See* GUTTMACHER INST., INSURANCE COVERAGE OF CONTRACEPTIVES (Feb. 1, 2016), [http://www.guttmacher.org/statecenter/spibs/spib\\_ICC.pdf](http://www.guttmacher.org/statecenter/spibs/spib_ICC.pdf) (analyzing and describing state contraceptive coverage mandates).

111. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); 45 C.F.R. § 147 (2011); Press Release, DHHS, A Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius (Jan. 20, 2012), <http://www.healthreformgps.org/wp-content/uploads/A-statement-by-U.S.-Department-of-Health-and-Human-Services-Secretary-Kathleen-S.pdf>

112. *See, e.g.*, Robert Pear, *Obama Reaffirms Insurers Must Cover Contraception*, N.Y. TIMES, Jan. 20, 2012, at A17.



that they have a religious freedom interest strong enough to outweigh the government's reason for mandating coverage.<sup>113</sup> In *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court held, surprisingly, that closely-held corporations could not be forced to provide insurance coverage for contraceptives if doing would violate the sincere religious beliefs of their owners.<sup>114</sup> An even greater expansion of the religious-freedom exemption is under review in the October 2015 term of the Supreme Court; several consolidated cases raise the question whether a religiously affiliated non-profit organization is protected under the federal Religious Freedom Restoration Act, even from filling out the form necessary to opt out of the mandate to provide insurance coverage for contraceptive services.<sup>115</sup> Given *Hobby Lobby* and efforts to extend the religious exemption even further, and the Court's utter failure to consider that an expansive interpretation of the religious exemption might hinder women's equality, it remains important to consider access to contraceptive care as a facet of women's workplace equality.<sup>116</sup>

A second challenge to the definition of "pregnancy discrimination" relates to infertility treatment—insurance coverage for the procedures and the treatment of the working women who undergo them. The questions here may prove more important than those about contraceptive access since there is no equivalent federal mandate here.<sup>117</sup> Whether the PDA protects against infertility discrimination has arisen in two contexts: challenges to insurance plans that do not cover infertility treatment, such as in vitro fertilization; and challenges to adverse employment decisions taken against a woman because she is undergoing treatment for infertility.

More than 7 million Americans struggle with infertility (the inability to conceive a child after 12 months of unprotected intercourse) or "impaired fecundity" (the inability to conceive and carry a child to term).<sup>118</sup> Roughly six percent of married women ages 15-44 (the childbearing years, in demographic terms) are affected.<sup>119</sup> With advances in reproductive technology, there are many more options for treating

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113. See Edward Whelan, *The HHS Contraception Mandate vs. The Religious Freedom Restoration Act*, ETHICS & PUB. POL'Y CTR. (Jan.–Feb. 2016), <http://eppc.org/publications/the-hhs-contraception-mandate-vs-the-religious-freedom-restoration-act>.

114. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

115. *Zubik v. Burwell*, 136 S. Ct. 891 (2016) (briefs and case status continually updated at <http://www.scotusblog.com/case-files/cases/zubik-v-burwell>).

116. For an argument that *Hobby Lobby* could have come out differently if the Court had focused on the implications for women's inequality, see Elizabeth Sepper, *Gendering Corporate Conscience*, 38 HARV. J. L. & GENDER 193, 208–09 (2015).

117. See generally Camille M. Davidson, *Octomom and Mutli-Fetal Pregnancies: Why Federal Legislation Should Require Insurers to Cover In Vitro Fertilization*, 17 WM. & MARY J. WOMEN & L. 135 (2010).

118. Anjani Chandra et al., *Infertility and Impaired Fecundity in the United States, 1982-2010: Data from the National Survey of Family Growth*, 67 NAT'L HEALTH STATS. REPS. 1 (Aug. 14, 2013), <http://www.cdc.gov/nchs/data/nhsr/nhsr067.pdf>.

119. *Id.*

infertility or preventing miscarriage. Twelve percent of women of childbearing age have sought medical help for infertility or prevention of miscarriage.<sup>120</sup> Because most treatments for infertility are expensive, prohibitively so for many women, insurance coverage is an important issue. About forty percent of the time, the cause of infertility is attributable to a male factor, forty percent to a female factor, and twenty percent to a “couple factor” (such as an incompatibility between the male and female) or to some unknown factor.<sup>121</sup> Less than half of those who are infertile seek treatment, and cost is a significant factor for those who forego it.<sup>122</sup> The cost of fertility treatments is staggering. For instance, a single round of IVF can cost up to \$12,400, and the procedure may have to be repeated several times before pregnancy is achieved.<sup>123</sup> Insurance coverage for infertility varies tremendously. According to a 1996 survey, about 40 percent of large employers covered some form of advanced fertility treatment, like IVF. But only nineteen percent of HMOs paid for IVF, and some large insurance plans have stopped covering such treatments in recent years because of the cost and increasing demand. About a third of the states require health plans to provide coverage for at least some fertility treatments.<sup>124</sup> New York, for example, requires insurers to cover infertility drug treatments, as long as they cover prescription drugs generally, and surgeries or treatments designed to correct a problem creating infertility. But it does not require coverage of the more expensive procedures like IVF.<sup>125</sup>

The rising demand for reproductive technology and the still-prohibitive costs have led to litigation over whether employers can omit coverage for surgical impregnation procedures from otherwise comprehensive insurance plans without running afoul of Title VII, as amended by the PDA. Litigation over insurance coverage for infertility treatment has been largely unsuccessful. In *Saks v. Franklin Covey Co.*,<sup>126</sup> the Second Circuit held that an employer can deny insurance coverage for infertility procedures done only to women without committing sex or pregnancy discrimination. Doing so, accordingly to the court, constitutes neither pregnancy nor sex discrimination. This decision was the first

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120. Anjani Chandra et al., *Infertility Service Use in the United States: Data From the National Survey of Family Growth, 1982-2010*, 73 NAT'L HEALTH STATS. REPS. 1 (Jan. 22, 2014), <http://www.cdc.gov/nchs/data/nhsr/nhsr073.pdf>.

121. See Holly Eagleson, *How to Conceive When You've Been Infertile*, PARENTS (2013), <http://www.parents.com/getting-pregnant/infertility/how-to-conceive-when-youve-been-infertile>.

122. *Id.* at 5.

123. See *The Costs of Infertility Treatment*, RESOLVE.ORG, <http://www.resolve.org/family-building-options/making-treatment-affordable/the-costs-of-infertility-treatment.html> (last visited Apr. 20, 2016).

124. See generally Jessica L. Hawkins, *Separating Fact from Fiction: Insurance Coverage for Infertility Treatments*, 23 WASH. U. J. L. & POL'Y 203 (2007).

125. N.Y. INS. L. § 3221(k)(6) (McKinney's 2016).

126. 316 F.3d 337 (2d Cir. 2003).

appellate ruling on an issue that had been brewing in lower courts. The court upheld the plan despite the fact that it covered penile implants and surgery to correct conditions causing infertility. Rochelle Saks argued that the plan's failure to reimburse her for IVF violated the PDA. The court rejected her argument, concluding that the PDA does not extend to infertility.<sup>127</sup> Both sexes, it noted, suffer from infertility, in roughly equal proportion, while pregnancy affects only women. Thus discrimination on the basis of infertility, the court held, does not constitute unlawful pregnancy discrimination.<sup>128</sup>

The *Saks* court's ruling on this point is in some tension with the Supreme Court's ruling in *Johnson Controls*. That case said it is pregnancy discrimination to impose an employment rule that turns on a woman's child-bearing capacity.<sup>129</sup> But Saks' insurance plan does that: it excludes coverage to some women based on their child-bearing capacity.<sup>130</sup> Under *Johnson Controls*, that is arguably a form of pregnancy discrimination.<sup>131</sup> Discrimination based on female infertility may be conceptualized as pregnancy discrimination for a simple reason: for the women who must undergo it, the treatment is a necessary part of the process of achieving pregnancy.<sup>132</sup>

In *Krauel v. Iowa Methodist Medical Center*, the Eighth Circuit Court of Appeals also held that infertility is not a "related medical condition" under the PDA because both men and women can suffer from it.<sup>133</sup> It is thus unlike the "potential pregnancy" recognized in *Johnson Controls*, which is unique to women.<sup>134</sup>

Although courts have been reluctant to view infertility treatment as covered by the PDA in insurance coverage cases, some have taken a more expansive view when considering cases in which a woman has been fired for undergoing fertility treatments. As with pregnancy, there is no inherent conflict between undergoing treatment for infertility and engaging in paid work.<sup>135</sup> But infertility treatment can be intermittently time-consuming and physically challenging. For instance, IVF, an increasingly common procedure, requires a difficult series of procedures and injections that will require most, if not all women to take time off from work. Many will also suffer side effects from IVF drugs or the pro-

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127. *Id.* at 345–46.

128. N.Y. INS. LAW § 4303(3)(E) (2015) (stating that "coverage shall not be required to include the diagnosis and treatment of infertility in connection with: (i) in vitro fertilization, gamete intrafallopian tube transfers or zygote intrafallopian tube transfers").

129. *See Saks*, 316 F.3d at 337.

130. *Id.*

131. *Id.* at 345–49.

132. *Id.* at 348.

133. 95 F.3d 674, 679–80 (8th Cir. 1996).

134. *Id.* at 680.

135. *See Grossman, supra* note 7, at 568–74.

cedures that may interfere with a woman's full working capacity on a temporary basis.<sup>136</sup>

Two federal courts have ruled that discriminating against a woman because she is undergoing fertility treatment violates the PDA. As one federal district court explained, in *Pacourek v. Inland Steel*,

The basic theory of the PDA may be simply stated: Only women can become pregnant; stereotypes based on pregnancy and related medical conditions have been a barrier to women's economic advancement; and classifications based on pregnancy and related medical conditions are never gender-neutral. Discrimination against an employee because she intends to, is trying to, or simply has the potential to become pregnant is therefore illegal discrimination. It makes sense to conclude that the PDA was intended to cover a woman's intention or potential to become pregnant, because all that conclusion means is that discrimination against persons who intend to or can potentially become pregnant is discrimination against women, which is the kind of truism the PDA wrote into law. It makes sense to conclude that the PDA was intended to cover a woman's intention or potential to become pregnant, because all that conclusion means is that discrimination against persons who intend to or can potentially become pregnant is discrimination against women, which is the kind of truism the PDA wrote into law.<sup>137</sup>

The court viewed *Johnson Controls* as dispositive on the scope of the PDA—classifications on the basis of either pregnancy or potential pregnancy constitute facial pregnancy discrimination.<sup>138</sup> Moreover, the inability to become pregnant naturally is a “related medical condition” that also qualifies the plaintiff for statutory protection.<sup>139</sup>

The Seventh Circuit reached a similar conclusion in *Hall v. Nalco*, ruling that an employer could not fire an employee for undergoing in vitro fertilization.<sup>140</sup> Cheryl Hall required leave from work while undergoing in vitro fertilization; she took a month-long leave of absence in March 2003.<sup>141</sup> She did not become pregnant through that round of IVF and requested a second leave of absence in August 2003.<sup>142</sup> Before she was scheduled to begin the second leave, however, her supervisor in-

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136. Camille M. Davidson, *Octomom and Mutli-Fetal Pregnancies: Why Federal Legislation Should Require Insurers to Cover In Vitro Fertilization*, 17 WM. & MARY J. WOMEN & L. 135, 194 (2010) (discussing the complications of a pregnancy achieved through reproductive technologies).

137. 858 F. Supp. 1393, 1401 (N.D. Ill.1994).

138. *Id.* at 1401–02.

139. *Id.* at 1402–03.

140. 534 F.3d 644, 649 (7th Cir. 2008).

141. *Id.* at 645.

142. *Id.* at 646.

formed her that the company was reorganizing and retaining only one of the two people with her title, and she was terminated.<sup>143</sup>

Hall alleged that her firing was in violation of the PDA.<sup>144</sup> She alleges that her supervisor told another supervisor that Hall had “missed a lot of work due to health” and wrote “absenteeism-infertility treatments” on her performance review.<sup>145</sup> She also noted that the employee who kept the remaining position of the original two was a woman who is incapable of having children.<sup>146</sup> The district court granted summary judgment to Hall's employer on the ground that “infertile women” are not a protected class under Title VII.<sup>147</sup> Because both men and women can experience infertility, the court reasoned, it is a gender-neutral condition.<sup>148</sup> The Seventh Circuit rejected this reasoning as inconsistent with *Johnson Controls*, which made clear that the PDA is not limited to women who are already pregnant.<sup>149</sup> And even though both men and women can experience infertility, only women will undergo assisted reproductive procedures to become pregnant.<sup>150</sup> Thus, the Seventh Circuit concluded, Hall, if her allegations are true, “was terminated not for the gender-neutral condition of infertility, but rather for the gender-specific quality of childbearing capacity.”<sup>151</sup> On remand, Hall had to prove that she was fired not simply for absenteeism, but because her absenteeism was caused by infertility treatments.<sup>152</sup> The first and second sets of cases are not necessarily inconsistent. Courts can be seen as protecting against status discrimination, but not requiring accommodation of the effects of infertility. As discussed in Part II.c below, this is similar to the tack many courts have taken on pregnancy itself.

The third challenge to the definition of “pregnancy” relates to lactation discrimination. If an employer fires an employee for breastfeeding, is that a violation of the PDA? One recent case is illustrative of the problem of lactation discrimination, as well as the consequences of excluding it from protection under the PDA.<sup>153</sup> In *EEOC v. Houston Funding, Inc.*, a federal district court ruled that lactation discrimination is not actionable under Title VII or the PDA because it does not qualify as a “related medical condition.”<sup>154</sup> The plaintiff, Donnicia Venters, took a leave of absence to give birth.<sup>155</sup> A few days afterwards, she spoke with the com-

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143. *Id.* at 645–46.

144. *Id.* at 646.

145. *Id.*

146. *Hall v. Nalco Co.*, 534 F.3d 644, 646 (7th Cir. 2008).

147. *Id.*

148. *Id.* at 645.

149. *Id.* at 647.

150. *Id.*

151. *Id.* at 649.

152. *Hall*, 534 F.3d at 649.

153. *See EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425,425 (5th Cir. 2013).

154. *Id.*

155. *Id.* at 426.

pany's vice president about her plans for returning to work.<sup>156</sup> She said she didn't know and was waiting for advice from her doctor.<sup>157</sup> Two months after she started her unpaid leave, the company allegedly decided to fire her.<sup>158</sup> But before she was informed of the decision, she called to say she was ready to return to work—and to ask if she could use a back room to pump breastmilk once she returned.<sup>159</sup> She was then told she had been replaced.<sup>160</sup> The EEOC sued on her behalf, claiming that she had been fired because she wanted to pump breastmilk at work.<sup>161</sup> However, the federal district judge who heard Venters's case ruled that even if Venters was right that the company had, indeed, fired her because of her request to pump breast milk, firing her for that reason was not a legally actionable form of discrimination.<sup>162</sup> “The law,” the judge wrote, “does not punish lactation discrimination” because it is not a “related medical condition” of pregnancy.<sup>163</sup> The EEOC also contended, on Venters's behalf, that to fire Venters had constituted sex discrimination.<sup>164</sup> But the judge deemed that argument worthy of but a single, conclusory sentence: “[f]iring someone because of lactation or breast-pumping is not sex discrimination.”<sup>165</sup>

Venters alleged not that she was refused time or space to pump breast milk, but that she was fired for even asking to pump breast milk at work. The judge in that case rejected her pregnancy discrimination claim, offering the following reasoning:

“Discrimination because of pregnancy, childbirth, or a related medical condition is illegal. Related conditions may include cramping, dizziness, and nausea while pregnant. Even if the company's claim that [Venters] was fired for abandonment is meant to hide the real reason – she wanted to pump breast milk – lactation is not pregnancy, childbirth, or a related medical condition. She gave birth on December 11, 2009. “After that day, she was no longer pregnant and her pregnancy-related conditions ended.”<sup>166</sup>

This reasoning is scientifically and logically suspect, and it is illogical to suggest that a woman who suffers any number of childbirth-related complications is not protected by the PDA if those complications happened to occur after, rather than before, the birth. On appeal, the Fifth Circuit acknowledged the fallacies in the lower court's opinion,

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156. *Id.*

157. *Id.* at 427.

158. *Id.* at 426.

159. *Houston Funding II, Ltd.*, 717 F.3d at 426.

160. *Id.*

161. *EEOC v. Houston Funding II, Ltd.*, No. H-11-2442, 2012 WL 739494, 2 (S.D. Tx. Feb. 2, 2012).

162. *Id.* at 4.

163. *Id.* at 2.

164. *Id.* at 3.

165. *Id.* at 1.

166. *Id.*

observing that “lactation is a related medical condition of pregnancy for purposes of the PDA. Lactation is the physiological process of secreting milk from mammary glands and is directly caused by hormonal changes associated with pregnancy and childbirth.”<sup>167</sup> Judge Edith Jones concurred, but wrote separately to emphasize that the PDA did not guarantee the plaintiff any accommodation for lactation.<sup>168</sup> If her complaint was that she was denied “special facilities or down time during work to pump or ‘express’ breast milk,” she would have no protection.<sup>169</sup> As with the cases on infertility, we see the distinction between status (protected) and effects (not protected) and the possibility that discrimination law cannot be marshaled to provide otherwise. As with contraceptive care, the ACA ameliorates this problem to a degree, requiring that hourly workers be provided regular breaks and a space other than a restroom to express breastmilk.<sup>170</sup>

Together, the cases on contraception, infertility, and lactation reveal a legal regime that has expanded to protect the status-based rights associated with reproduction—understanding pregnancy to be the middle of a process with earlier and later points. But even under this expanded definition of pregnancy, courts have remained largely insensitive to the effects of the reproductive process, felt uniquely by women. Part II.c, below, takes up the weak, but recently bolstered, right of comparative accommodation under the PDA, which makes it easier for some women to stay in role throughout the reproductive process.

### B. Expanding the Understanding of Pregnancy Bias

A second shift, reflected more in research and commentary than in case law, revolves around our understanding of pregnancy bias—those attitudes, beliefs, and stereotypes that lead employers to take actions against pregnant workers that punish them or restrict their opportunities unnecessarily.

Our collective attitudes towards pregnancy do not explain the rampant and damaging pregnancy discrimination that workers experience. As Iris Marion Young described pregnancy, it is:

[A] time of quiet waiting. We refer to the woman as ‘expecting,’ as though this new life were flying in from another planet and she sat in her rocking chair by the window, occasionally moving the curtain aside to see wheth-

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167. *Houston Funding II, Ltd.*, 717 F.3d at 428.

168. *Id.* at 430–31.

169. *Id.* at 430 (Jones, J., concurring). For analysis and discussion of lactation discrimination, see Sara M. Matambanadzo, *The Fourth Trimester*, 48 U. MICH. J.L. REFORM 117 (2014); Nancy Ehrenreich & Jamie Siebrase, *Breastfeeding on a Nickel and a Dime: Why the Affordable Care Act’s Nursing Mothers Amendment Won’t Help Low-Wage Workers*, 20 MICH. J. RACE & L. 65 (2014); Marcy Karin & Robin Runge, *Breastfeeding and a New Type of Employment Law*, 63 CATH. U. L. REV. 329 (2014).

170. *See* 29 U.S.C. § 207 (2012).

er the ship is coming . . . [P]regnancy is primarily a time of waiting and watching, when nothing happens.”<sup>171</sup>

But this perception of pregnancy poses an inherent conflict for women who work—watchful waiting is replaced by active, even strenuous, engagement. The gap in expectations for pregnant women and the behavior of the pregnant working woman can be troubling. And what we see in many cases of pregnancy discrimination is not animus towards the pregnant woman per se, but a reflection of cultural ambivalence about pregnant women at work.<sup>172</sup> This ambivalence rears its head in many places, but let’s focus here on the research that objectively supports its existence.

Social science research supports the notion that ambivalent reactions to a woman’s working while pregnant translate into animus and adverse employment actions.<sup>173</sup> One study, for example, found deeply contrasting reactions by retail employees to pregnant customers versus pregnant job applicants.<sup>174</sup> Pregnant customers were greeted with affectionate and benevolent responses, sometimes with affirming (if perhaps annoying) touches and diminutives (“honey” and “sweetie”).<sup>175</sup> Pregnant job applicants, by contrast, faced open hostility.<sup>176</sup> And this hostility increased, according to a follow-up study, for traditionally male-dominated jobs.<sup>177</sup> The results reveal ambivalent reactions to pregnant women and find that these reactions are situational and role-dependent. Other studies have found that pregnant women are routinely rated as less competent and less deserving of promotion than their non-pregnant counterparts; these judgments have tangible effects like fewer recommendations to hire and lower salary recommendations.<sup>178</sup> Pregnant women

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171. IRIS MARION YOUNG, *ON FEMALE BODY EXPERIENCE: ‘THROWING LIKE A GIRL’ AND OTHER ESSAYS* 54 (2005).

172. Cheryl Hanna, *Voices on the New Economy: The Price She Pays*, 10 SEATTLE J. SOC. JUST. 815 (2012).

173. For two early, foundational studies documenting pregnancy-bias in the workplace, see Jane A. Halpert et al., *Pregnancy as a Source of Bias in Performance Appraisals*, 14 J. ORG. BEHAVIOR 649–63 (1993) (finding substantial negative stereotyping against pregnant workers, resulting in significantly more negative performance appraisals of pregnant workers, especially by male reviewers); S.J. Corse, *Pregnant Managers and Their Subordinates: The Effects of Gender Expectations on Hierarchical Relationships*, 26 J. APPLIED BEHAVIORAL SCI. 25–47 (1990) (finding pregnant managers penalized when they acted firmly, in a conflict situation, instead of conforming to expectations that pregnant women are more empathetic and nurturing).

174. Michelle R. Hebl et al., *Hostile and Benevolent Reactions Toward Pregnant Women: Complementary Interpersonal Punishments and Rewards that Maintain Traditional Roles*, 92(6) J. APPLIED PSYCHOL. 1499–1511 (2007).

175. *Id.*

176. *Id.*

177. *Id.*

178. See Bragger et al., *The Effects of the Structured Interview on Reducing Biases Against Pregnant Job Applicants*, 46 SEX ROLES 215–26 (2002); Jennifer Cunningham & Therese Macan, *Effects of Applicant Pregnancy on Hiring Decisions and Interview Ratings*,



perceive these antipathies and try to avoid them through, among other techniques, “pregnant presenteeism,” which drives them to present themselves as healthy and able to work, even when they are sick.<sup>179</sup>

Stepping back from the studies documenting a very tangible type of pregnancy bias, we can explore the robustly documented motherhood penalty for women workers. This penalty, which is both consistently found and widespread, significantly impairs women’s chances for workplace equality. It takes several different forms. Researchers in one study, for example, found that when subjects received a pair of resumes featuring equally qualified applicants of the same gender and race (the pairs were of either white women or African American women, to account for the influence of race on a motherhood bias), that differed only by parental status, they judged the mothers pairs as “significantly less competent and committed than women without children.”<sup>180</sup> The judgments about the women’s competence varied not only by parental status, but also by gender: the study subjects recommended lower starting salaries for mothers, but not for fathers.<sup>181</sup> The mothers were held to higher performance standards, and they were given less leeway with respect to punctuality than was given either to fathers or non-parents of either gender.<sup>182</sup> A companion study, measuring the judgments of actual employers rather than study subjects, found that childless women were twice as likely to be called back for further interviews than mothers, despite nearly identical resumes.<sup>183</sup> The differing perceptions extend beyond assessments of competence. One study found that professional working women who became mothers were perceived as being more warm, but less competent, than women without children and men with children.<sup>184</sup> Professional working fathers, in contrast, were perceived as both warmer and more competent after becoming parents.<sup>185</sup> Subjects in the study were less interested in hiring, promoting or training the professional women who became mothers compared to the fathers and

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57 SEX ROLES 497–508 (2007); Caroline Gatrell, *Managing the Maternal Body: A Comprehensive Review and Transdisciplinary Analysis*, 13 INT’L J. MGMT. REVIEWS 97, 98–100 (2011) (literature review of studies finding pregnancy a trigger for bias against workers); Liisa Mäkelä, *A Narrative Approach to Pregnancy-Related Discrimination and Leader-Follower Relationships*, 19 GENDER, WORK & ORG. 677 (2011) (study on pregnancy discrimination in Finland); Barbara Masser et al., *‘We Like You, But We Don’t Want You’—The Impact of Pregnancy in the Workplace*, 57 SEX ROLES 703 (2007) (discussing similar findings in Australia-based study).

179. Caroline Jane Gatrell, *‘I’m a Bad Mum’: Pregnant Presenteeism and Poor Health at Work*, 72 SOC. SCI. & MED. 478–85 (2011).

180. Shelley J. Correll & Stephen Benard, *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297, 1297 (2007).

181. *Id.*

182. *Id.* at 1316.

183. *Id.* at 1327–30.

184. Amy J. C. Cuddy et al., *When Professionals Become Mothers, Warmth Doesn’t Cut the Ice*, 60(4) J. SOC. ISSUES 701–18 (2004).

185. *Id.* at 711.

childless workers.<sup>186</sup> Researchers in other studies have found similar effects—mothers are evaluated more harshly and treated with less lenience than fathers,<sup>187</sup> and working mothers suffer a per-child wage penalty of about 5%.<sup>188</sup>

This more nuanced understanding of bias is important when asking, as we will in the next section, whether pregnancy should be accommodated in the workplace. Accommodation often turns on an employer's assessment of a worker's—or class of workers'—value, and the findings on animus towards pregnant women and mothers in the workplace might help explain the reticence of employers to make special rules for pregnant women or even to extend otherwise available benefits to them. If they occupy a secondary status as workers, they are likely to be viewed as less worthy to retain—and thus less necessary to accommodate. The nature of pregnancy animus also raises questions relative to Part II.a and the scope of protection under the first clause of the PDA. The unique gender ideology behind pregnancy makes much of antidiscrimination law a potentially bad fit, as it increasingly turns on a plaintiff's ability to prove ill-intent of a bad actor.<sup>189</sup>

### C. Expanding from Preventing Bias to Providing Accommodation

One might describe the last thirty-eight years of pregnancy discrimination law as a slow march from access to integration. As detailed in Part I, the PDA responded to a regime that sometimes literally walled off pregnant women from other workers; the workplace was an array of closed doors. Congress sprung open those doors with its mandate in the first clause of the PDA that employers could not make decisions because of pregnancy.<sup>190</sup> And, as discussed in Part II.a, more doors have opened as courts have extended the definition of pregnancy to include, at least sometimes, contraceptive access, infertility, and lactation. But as we saw in the discussion of those issues, while courts have been relatively quick to hold that employers cannot discriminate against women because they are currently engaged in any aspect of the reproductive process that is unique to women, they have been more reticent to require employers to accommodate the effects of that process. Status-

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186. *Id.* Notably, the sex of the reviewers did not affect the results.

187. See, e.g., Kathleen Fuegen et al., *Mothers and Fathers in the Workplace: How Gender and Parental Status Influence Judgments of Job-Related Competence*, 60(4) J. SOC. ISSUES 737, 748–49 (2004); see also Cecilia L. Ridgeway & Shelley J. Correll, *Motherhood as a Status Characteristic*, 60(4) J. SOC. ISSUES 683 (2004).

188. Correll, *supra* note 180, at 1297, 1299 (explaining that the motherhood penalty holds up in the research even when occupational factors, such as interruptions from work, hours worked, and time out of the labor force, are accounted for).

189. See Deborah L. Brake & Joanna L. Grossman, *Unprotected Sex: The Pregnancy Discrimination Act at 35*, 21 DUKE J. GENDER L. & POL'Y 67 (2013).

190. See Grossman, *supra* note 7, at 569–70.

based protection opens doors, but accommodation of effects helps keep women in the workplace as full participants.

The simplistic beauty of the First Clause of the PDA provides real, meaningful protection for a pregnant woman's right to work, as long as she can perform her job on the same terms as she did when not pregnant or as required by her employer. But the protection breaks down when pregnancy has effects that interfere with job performance. If pregnancy or childbirth is fully incapacitating for a period of time, the woman is thrust into the uncertain world of leave from work. She may have the luxury of working for an employer that provides paid leave or short-term disability insurance. Or she may have access to unpaid leave (with guaranteed job security and the continuation of benefits) under the federal Family and Medical Leave Act (FMLA), a gender-neutral law that provides eligible employees with up to twelve weeks unpaid leave per year for self care, family care, or new parenting.<sup>191</sup> For a pregnant woman, she can use self-care leave if complications of pregnancy amount to a "serious health condition;" this leave can be taken continuously or intermittently.<sup>192</sup> Any remaining leave can be used for childbirth and newborn care.<sup>193</sup> The FMLA has two serious drawbacks: (1) almost half of the workforce is not eligible for leave because they work for an employer with fewer than fifty employees or have not worked sufficient hours to qualify for leave;<sup>194</sup> and (2) the leave is unpaid, and many workers cannot afford to take it.<sup>195</sup> Efforts to expand the FMLA on the federal level have been persistent but unsuccessful, but states have begun to fill the gap with laws that apply to smaller employers, extend the length of available leave, or offer some paid leave.<sup>196</sup>

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191. Family and Medical Leave Act of 1993, Pub. L. No. 103-03, 107 Stat. 6 (codified as amended at 29 U.S.C. §§ 2601–2654). On the legislative history of the FMLA, see Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15 WASH. U. J.L. & POL'Y 17, 36–39 (2004).

192. See 29 C.F.R. § 825.112 (2006) (prenatal care leave); *id.* § 825.114 (work incapacity leave); *id.* § 825.117 (intermittent leave).

193. See *id.* § 825.112(a)(1) (childbirth and newborn care leave).

194. See DAVID CANTOR ET AL., DEPT OF LABOR, BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: FAMILY AND MEDICAL LEAVE SURVEYS 2000 UPDATE at tbl. A2-3.1 (2000), <http://www.webharvest.gov/peth04/20041118135457/http://www.dol.gov/asp/fmla/APPX-A-2-TABLES.htm>.

195. See *id.* at tbl. 2.17, <http://www.webharvest.gov/peth04/20041118135126/http://www.dol.gov/asp/fmla/chapter2.htm#2.2.4> (reporting that 77.6% of leave-needers listed ability to afford as one of the reasons for not taking leave); see also Judith G. Greenberg, *The Pregnancy Discrimination Act: Legitimizing Discrimination Against Pregnant Women in the Workforce*, 50 ME. L. REV. 225, 247–48 (1998) (noting specific limitations of FMLA for pregnant women).

196. See NAT'L PARTNERSHIP FOR WOMEN & FAMILIES, EXPECTING BETTER: A STATE-BY-STATE ANALYSIS OF LAWS THAT HELP NEW PARENTS (June 2014), <http://www.nationalpartnership.org/research-library/work-family/expecting-better-2014.pdf>. On March 31, 2016 the New York State Legislature passed a bill that mandates paid-family-leave time for most employees. Rebecca Traister, *New York Just Created a Revolutionary New Family-Leave Policy*, NEW YORK MAG. (Apr. 1, 2016), <http://nymag.com/thecut/2016/03/new-york-revolutionary-family-leave-paid-time-off.html#>.

What happens to women who are neither fully capable nor fully incapacitated by pregnancy? For many of them, they could continue to work uninterrupted with the benefit of minor accommodations. But this is where the PDA is at its weakest. There is no absolute right to accommodations for the physical effects of pregnancy, even when they pose no hardship or cost to the employer. The PDA guarantees equal treatment, not whatever treatment might facilitate the pregnant woman's ability to remain employed during the reproductive process.<sup>197</sup> Any right to accommodation is defined by comparison to similarly situated groups. If the employer provides no accommodations, it can safely withhold them from pregnant workers who need them. As Judge Richard Posner wrote in a famous PDA case:

The Pregnancy Discrimination Act does not, despite the urgings of feminist scholars . . . require employers to offer maternity leave or take other steps to make it easier for pregnant women to work . . . to make it as easy, say, as it is for their spouses to continue working during pregnancy. Employers can treat pregnant women as badly as they treat similarly affected but non-pregnant employees.<sup>198</sup>

At its best, the comparative right of accommodation is still limited.<sup>199</sup> It can be hard to find appropriate comparators,<sup>200</sup> and disparate impact provides only limited protection against strict and unforgiving employer policies.<sup>201</sup> But a more insidious problem developed over the

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The program mandates up to twelve weeks of paid time off from a job to bond with a new child—doubling California's and New Jersey's allotted time, and triples the four weeks paid leave offered by Rhode Island. *Id.*

197. See, e.g., *Maldonado v. U.S. Bank*, 186 F.3d 759, 762 (7th Cir. 1999) (“[U]nder the PDA, employers are not required to give pregnant women special treatment; they must only treat them the same as all other employees.”).

198. *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994) (citations omitted).

199. See generally Catherine Albiston, *Anti-Essentialism and the Work/Family Dilemma*, 20 BERKELEY J. GENDER L. & JUST. 30, 38 (2005) (discussing *Harvender v. Norton Co.*, 4 Wage & Hour Cas. 2d 560 (N.D.N.Y. 1997) (noting that “[w]omen who, because of pregnancy, are temporarily unable to perform their jobs as those jobs are currently structured continue to find themselves in a difficult position”).

200. See *Troupe*, 20 F.3d at 735–36, 738; For greater exploration of this suggestion, see Jessica Carvey Manners, Note, *The Search for Mr. Troupe: The Need To Eliminate Comparison Groups in Pregnancy Discrimination Act Cases*, 66 OHIO ST. L.J. 209 (2005); see also Greenberg, *supra* note 195, at 240–47 (considering difficulties with finding a comparator).

201. See, e.g., *Stout v. Baxter Healthcare Corp.*, 282 F.3d 856, 861–62 (5th Cir. 2002) (upholding, against a disparate impact challenge, a policy limiting leave within the first ninety days of employment to three days); *Dormeyer v. Comercia Bank-Ill.*, 223 F.3d 579, 581, 583 (7th Cir. 2000) (upholding, against a disparate impact challenge, the discharge of a pregnant employee for absenteeism after she was deemed ineligible for leave under the FMLA). For a thorough discussion of pregnancy and disparate impact law, see L. Camille Hebert, *Disparate Impact and Pregnancy: Title VII's Other Accommodation Requirement*, AM. U. J. GENDER, SOCIAL POLY & L. 108 (2015).

last two decades, during which several federal appellate courts began to curtail even the modest right of comparative right of accommodation. Courts almost unanimously gave the Second Clause of the PDA and unwarranted and narrow reading in order to uphold employer policies that provided accommodations to some employees, but not others, and refused them to employees with pregnancy-related effects. The most common policy upheld is one that grants light-duty assignments to workers injured on the job, but not to workers suffering from temporary disability attributable to any other cause. Such assignments are routinely available in certain lines of work—firefighting, law enforcement, and truck driving, to name just a few. In all but one case, federal courts upheld the on-the-job/off-the-job distinction against PDA challenges.<sup>202</sup> These rulings were surprising, given the language in the Second Clause directing employers to draw comparisons based on capacity.<sup>203</sup>

The battle for greater rights of accommodation piqued in a case in which a pregnant woman challenged a light-duty policy that was extended light-duty assignments widely, but still denied them to pregnant women.<sup>204</sup> Peggy Young's fight for the protection guaranteed by the PDA went all the way to the Supreme Court.<sup>205</sup>

When Peggy Young finally became pregnant after a series of miscarriages, her doctor imposed a restriction on how much she could lift. At the time, she worked as an "air driver" for UPS, a delivery driver who carried lighter letters and packs for United Parcel Service that had arrived by air.<sup>206</sup> UPS decided that it could not continue to allow her to work unless she could lift the amount listed in her job description, even though she rarely if ever was asked to lift things that heavy.<sup>207</sup> She requested a light-duty assignment, but was denied, despite the fact that UPS made such accommodations available to three large groups of employees; those who were injured on the job, those who were eligible for an accommodation under the Americans with Disabilities Act, and those who had lost their commercial driver's licenses due to a medical condition such as a diabetic complication or a legal condition such as the loss of a license after a drunk driving conviction.<sup>208</sup> Young, however, was de-

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202. See, e.g., *Reeves v. Swift Transp. Co.*, 446 F.3d 637, 638–39 (6th Cir. 2006) (upholding light duty policy restricted to on-the-job injuries); *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1312–13 (11th Cir. 1999); *Urbano v. Cont'l Airlines, Inc.*, 138 F.3d 204, 208 (5th Cir. 1998). *But see* *Lochren v. County of Suffolk*, No. 01–3925, 2008 WL 2039458, at \*1 (E.D.N.Y. May 9, 2008) (noting that pregnant police officers were successful in invalidating a policy that did not allow them to be put on light duty status).

203. For an argument on the proper meaning of the Second Clause, see Joanna L. Grossman & Gillian Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model*, 21 *YALE J.L. & FEMINISM* 15, 33–41 (2009).

204. See generally *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338 (2015).

205. See *id.*

206. See *id.* at 1344.

207. See *id.*

208. See *id.*

nied a similar accommodation.<sup>209</sup> She was forced out of her job, lost her health insurance, and was allowed to return to work only after giving birth.<sup>210</sup>

She sued under the PDA, arguing that UPS's willingness to accommodate so many other workers, but not pregnant women, constituted unlawful discrimination.<sup>211</sup> Her case revolved around the meaning of the PDA's Second Clause, which gives pregnant women the right to be treated the same as others who are "similar in their ability or inability to work," but "not so affected" by pregnancy.<sup>212</sup> At best, this clause gives workers only a comparative right of accommodation. But, even setting aside that limitation, courts have struggled for years over what this clause means and how to define the proper comparison group. This disagreement was at the heart of the *Young* case, as well as several other similar cases over the last several years.<sup>213</sup>

Both the trial and appellate courts held that UPS had done nothing wrong because it did not exclude only pregnancy.<sup>214</sup> As long as there were at least some temporarily disabled workers who might need an accommodation but not be entitled to one, UPS had not violated the PDA.<sup>215</sup> The courts, especially the Fourth Circuit, picked up on a specious concept other courts had used in similar light-duty cases: pregnancy-blindness.<sup>216</sup> As long as the policy was not drawn precisely on the basis of pregnancy—and, indeed, appeared to be pregnancy-neutral, it could not violate the PDA.<sup>217</sup> But in echoing this chorus, the Fourth Circuit admitted that the result would be to collapse the first and second clauses into a unified search for animus—employers need only ensure that they do not act "because of" pregnancy in order to avoid liability under the PDA.<sup>218</sup> This reasoning, however, renders the Second Clause redundant, something conventional theories of statutory interpretation do not permit.<sup>219</sup>

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209. *Id.*

210. *Young*, 135 S. Ct. at 1343, 1361.

211. *Id.* at 1344.

212. 42 U.S.C. § 2000e(k) (2012).

213. *See, e.g., Reeves*, 446 F.3d at 638–39 (upholding light duty policy restricted to on-the-job injuries); *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1312–13 (11th Cir. 1999); *Urbano v. Cont'l Airlines, Inc.*, 138 F.3d 204, 208 (5th Cir. 1998).

214. *See Young*, 135 S. Ct. at 1347–48.

215. *See id.*

216. *See id.*

217. *Reeves*, 446 F.3d at 643. "Swift's light-duty policy is indisputably pregnancy-blind. It simply does not grant or deny light work on the basis of pregnancy, childbirth, or related medical conditions. It makes this determination on the nonpregnancy-related basis of whether there has been a work-related injury or condition. Pregnancy-blind policies of course can be tools of discrimination. But challenging them as tools of discrimination requires evidence and inference beyond such policies' express terms." *Id.* at 641.

218. *Young v. United Parcel Service, Inc.*, 707 F.3d 446–47 (4th Cir. 2013).

219. *See Deborah A. Widiss, Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 534 (2009).

Thus the question, as distilled by the Supreme Court, was whether pregnant workers were entitled to accommodations available to any other worker, to all other workers, or on the basis of some other comparison?<sup>220</sup> Peggy Young argued that UPS's policy was discriminatory because it permitted light-duty accommodations to some workers—potentially many—who had similar types of work restrictions, but did not allow the same accommodation for her.<sup>221</sup> Under the Second Clause of the PDA, she argued, UPS must grant her the same accommodations available to other workers with similar restrictions.<sup>222</sup> UPS argued that no policy could violate the PDA if it was pregnancy-neutral—that is, if it did not single out pregnancy as the only condition that did not merit some particular accommodation.<sup>223</sup>

Justice Breyer, who wrote the majority opinion, rejected both of these interpretations. With respect to Young's, he rejected the idea that women were entitled to "most favored nation" status, which might entitle them to demand an accommodation that was offered to any other worker.<sup>224</sup> This, the majority wrote, was too broad a reading of the Second Clause. (At least Justice Alito, who otherwise took a more narrow approach to clause two, avoided the oddly abstract and impersonal "most favored nation" terminology and instead referred to "most favored employees.")<sup>225</sup> But UPS's interpretation was too narrow—it would, as the Fourth Circuit more or less admitted, collapse the Second Clause into the first, in violation of an important principle of statutory construction. And even more damningly, this reading would have allowed the employer's policy in *Gilbert*—which covered all sicknesses and accidents—to be upheld despite the incontrovertible fact that the PDA was enacted expressly to overrule that opinion.<sup>226</sup>

The majority, instead, came up with a new approach to applying the Second Clause of the PDA, one that "minimizes the problems [of the parties' interpretations], responds directly to *Gilbert*, and is consistent with longstanding interpretations of Title VII."<sup>227</sup> The Court's approach relies on the so-called McDonnell-Douglas test, which is used to determine whether an employer's ostensibly neutral reason for an action is actually pretextual, shielding an unlawful, discriminatory act. Under pretext analysis, a plaintiff must first make out a prima facie case by demonstrating that she was treated differently from someone similarly situated but outside the protected class.<sup>228</sup> The district court in Young's case had held that she failed at this stage because none of the proposed

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220. *Young*, 135 S. Ct. at 1348–49.

221. *See id.* at 1349.

222. *See id.*

223. *Id.*

224. *Id.* at 1350, 1362.

225. *Young*, 135 S. Ct. at 1358.

226. *Id.* at 1352–53.

227. *Id.* at 1353.

228. *Id.* at 1353–54.

comparators were “similarly situated”—she hadn’t been injured on the job, she did not qualify for ADA protection, and she hadn’t lost her commercial driver’s license.<sup>229</sup> The court allowed the policy to be used in its own defense—an odd approach to discerning whether it was discriminatory. In its circular reasoning, Peggy Young was not similarly situated to anyone covered by the policy because she was not covered by the policy.

Justice Breyer’s opinion saw through that silliness and provided instead that a plaintiff can establish a prima facie case of pregnancy discrimination simply by showing that “she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others ‘similar in their ability or inability to work.’”<sup>230</sup> This is a simple correction, but one that would have saved many pregnancy discrimination claims in the past. But it is only one of the ways courts had found to prevent claims from reaching the next stage of analysis, let alone a trial.<sup>231</sup>

Upon establishment of the prima facie case, the burden of production then shifts to the employer, who must articulate a legitimate, non-discriminatory reason for its differential treatment.<sup>232</sup> Here, the Court in *Young* added another rule to protect pregnancy discrimination plaintiffs. “[C]onsistent with the Act’s basic objective, that reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those (‘similar in their ability or inability to work’) whom the employer accommodates.”<sup>233</sup> Indeed, the “employer in *Gilbert* could in all likelihood have made such a claim,”<sup>234</sup> and many restrictive, unfair policies could be justified in just those terms.

After the employer articulates a legitimate, non-discriminatory reason for its treatment of the plaintiff, the plaintiff has the opportunity nonetheless to reach a jury by “providing sufficient evidence that the

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229. *Young v. United Parcel Serv., Inc.*, 2011 WL 665321, \*13–14 (D. Md. Feb. 14, 2011).

230. *Young*, 135 S. Ct. at 1354.

231. *Guarino v. Potter*, No. 03-31139, 2004 WL 1448154, \*2–3 (5th Cir. June 28, 2004) (holding that the defendant’s motion for summary judgment was properly granted because plaintiff failed to establish a prima facie case of discrimination); *Garcia v. Women’s Hosp. of Texas*, 143 F.3d 227, 231 (5th Cir. 1998) (holding that the plaintiff failed to make out a prima facie case for facial or pretextual disparate treatment, because she could not show she was treated differently than anyone else); *Urbano v. Cont’l Airlines, Inc.*, 138 F.3d 204, 206 (5th Cir. 1998) (finding that plaintiff failed to establish the second prong of a prima facie discrimination claim); *Horton v. American Railcar Industries, Inc.*, 214 F. Supp. 2d 921 (E.D. Ark. 2002) (holding that the plaintiff proved that she was pregnant and denied a light duty work assignment, she failed the other two elements of a prima facie case under the PDA).

232. See *McDonnell Douglas Corp. v. Green*, 93 S. Ct. 1817 (1973) (setting forth pretext proof structure under Title VII).

233. *Young*, 135 S. Ct. at 1354.

234. *Id.*



employer's policies impose a significant burden on pregnant workers, and that the employer's 'legitimate, nondiscriminatory' reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination.”<sup>235</sup> This is also a new addition to traditional pretext analysis, forcing employers to answer the real question underlying all these cases: why categorically exclude pregnant women from an accommodation that is provided to potentially large numbers of other workers?

Young could have prevailed on remand by showing that UPS does not have a sufficiently strong reason for refusing to accommodate pregnant employees with lifting restrictions while accommodating non-pregnant employees with lifting restrictions—“to the point that a jury could find that its reasons for failing to accommodate pregnant employees give rise to an inference of intentional discrimination.”<sup>236</sup> On remand, Young and UPS settled the case for an undisclosed sum,<sup>237</sup> so we will never know how a factfinder might have balanced those two things. But the *Young* opinion will continue to reverberate strongly in pregnancy discrimination law.

The opinion restored a role for comparative accommodation claims, which had been all but extinguished by a series of lower-court rulings that refused to give the Second Clause its due. But there are several issues to be sorted out in the lower courts. For example, the Court rejected the notion that pregnant women have a right to the accommodations extended to any other worker, but also the notion that the right is only triggered by an accommodation extended to all other workers.<sup>238</sup> How many comparators does it take to support an inference of discrimination? The greater the number covered by the policy, the stronger the inference that the exclusion of pregnancy from the policy is the product of discrimination. (Although the Court did not say so expressly, courts should base this comparison on the number of employees eligible for an accommodation under the policy rather than the number who have actually requested and been given an accommodation, which, in any given workplace, might be a null set).

Perhaps the biggest open question after *Young* is what counts as a “legitimate nondiscriminatory reason” for not allowing pregnant workers to make use of an otherwise available accommodation? The employer must do more than describe an exclusionary policy in pregnancy-neutral terms. That type of formalism, on display in *Gilbert*, is exactly what

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235. *Id.*

236. *Id.* at 1354–55.

237. Press Release, Nat'l Women's Law Ctr., UPS Settles Pregnancy Discrimination Case, Marking the End of Peggy Young's Nine-Year Legal Battle (Oct. 1, 2015), <http://nwlc.org/press-releases/ups-settles-pregnancy-discrimination-case-marking-end-peggy-young-s-nine-year-legal-battle/>.

238. *Young*, 135 S. Ct. 1338, at 1349–50. The author thanks Deborah Brake, also a contributor to this symposium, for collaborative thinking about the implications of *Young*.

Congress was repudiating with the PDA. And if, as the Court decrees, employers cannot excuse the failure to extend the accommodation to pregnant workers on grounds of additional cost or added administrative burdens, it is not entirely clear what will suffice. Even the General Electric policy in *Gilbert*, covering illness and accident, can be stated in pregnancy-neutral terms: the policy covers illness and accidents, and pregnancy does not qualify as either. But after *Young*, an employer will need a reasoned justification of the unfavorable treatment of pregnancy that does not discriminate against pregnancy as the source of the condition causing the work-related effects. The *Young* opinion suggests some cases in which this standard might be met—when accommodations are made available on the basis of age, seniority, or the hazardous nature of the employee’s work.<sup>239</sup> An important question is whether the commonplace policies that grant accommodations only for on-the-job injuries will be upheld or invalidated after *Young*. Not all on-the-job injuries are the result of an ultrahazardous condition; many, in fact, have quite mundane causes like a slip-and-fall in the hallway of an office building. And a blanket distinction between on- and off-the-job injuries seems to discriminate on nothing more than source of condition, which is likely impermissible after *Young*.

*Young*, and its somewhat unconventional use of McDonnell-Douglas pretext analysis, is bound to raise other questions as well. The reason offered by the employer can be rebutted not only with proof that it was not genuine or legitimate, but also with proof that a genuine reason isn’t “sufficiently strong” to justify the consequent burden on pregnant workers.<sup>240</sup> Although unusual, this use of pretext is a good fit with a core lesson of the PDA, which is that the disfavored treatment of pregnancy often rests on the devaluation of pregnant employees as future mothers and unreliable workers, and the view that pregnant employees are not worth the same investments as other workers needing accommodations for other reasons. That devaluation is often expressed in the casual dismissal of the needs of pregnant women and insufficient concern whether they stay in the workforce or not. When employers draw distinctions that result in the accommodation of some workers, but not pregnant workers, courts should force employers to explain the basis for the policy—and should evaluate the explanation carefully.

It is far too soon to evaluate *Young*’s contribution to pregnancy discrimination law. On its face, the *Young* ruling seemed equipped to deal with the worst cases that had preceded it. Many of the cases in which courts upheld the denial of accommodations to pregnant workers would not survive scrutiny under the *Young* standard. But, as with all rulings in the discrimination context, the true scope of *Young* will not be known until enough lower courts have had the opportunity to apply it to differ-

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239. *Young*, 135 S. Ct. at 1350.

240. *Id.* at 1354.

ent sets of facts. The early signs, however, are good. For example, in a recent case, *McQuistion v. City of Clinton*, the Supreme Court of Iowa applied basic PDA principles, as elucidated in *Young*, to vacate a grant of summary judgment to an employer and remand the case for deeper consideration of the facts related to the denial of an accommodation to a pregnant worker.<sup>241</sup> (The claim was brought under the Iowa Civil Rights Act, but the court first decided that, at least on this point, Iowa law was consistent with the PDA as interpreted in *Young*).<sup>242</sup>

Karen McQuistion was employed as an engineer for the City of Clinton's fire department. She requested light-duty assignments during her pregnancy due to medical restrictions, but was denied because the light-duty positions were available only to those injured on the job and eligible for workers' compensation benefits.<sup>243</sup>

Although the employer denied McQuistion a benefit that was available to other workers, the lower court granted summary judgment to the city. The Iowa Supreme Court vacated that ruling and did just what the Supreme Court in *Young* envisioned: it remanded the case for a careful examination of the facts and circumstances. The City's argument, "that the employer need not accommodate disability caused by pregnancy unless it falls within specifically defined categories singled out for accommodation,"<sup>244</sup> could not prevail under *Young*. The policy of exclusion cannot be used to defend the policy of exclusion. The court thus also rejected the City's argument that the proper comparators for McQuistion were only those workers who were also suffering from disability incurred off the job. On remand, she is to be compared with all temporarily disabled workers.<sup>245</sup>

This opinion does not establish any new ground, but it does show that *Young* is doing the work it was intended to do. That is shown in other post-*Young* cases as well, such as *Martin v. Winn-Dixie Louisiana*, a case in which a woman's PDA claim was remanded for trial because of disputed facts about the employer's reasons for denying her an accommodation and about whether two other employees were proper comparators.<sup>246</sup> Together, these cases show that *Young* is forcing courts to slow down, think carefully about the challenged policy in front of them, question employer motives for denying accommodations to pregnant women, and give pregnant workers the full benefit of the protections the law provides. This, alone, is important.

The fight in light-duty cases, culminating in the *Young* opinion, was about something simple—giving the Second Clause of the PDA its due. But even when interpreted correctly, the PDA's scope is limited. It

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241. *McQuistion v. City of Clinton*, 872 N.W.2d 817, 830 (Iowa 2015).

242. *Id.*

243. *Id.* at 820.

244. *Id.* at 830.

245. *Id.*

246. *Martin v. Winn-Dixie Louisiana, Inc.*, No. 3:13-CV-00682-JWD-SCR, 2015 WL 5611646, at \*14–18 (M.D. La. Sept. 23, 2015).

provides, at best, the accommodations that are available to other employees in the same workplace. That gives employers a lot of latitude to deny accommodations, even ones that are minor and costless, simply by denying them to everyone. *Young* did not—and could not—fix this problem.

A recent case, *Sanchez-Estrada v. Mapfre PRAICO*, considered a complicated pregnancy discrimination claim, with many different issues.<sup>247</sup> But one illustrates the limited scope of the PDA. The plaintiff, among other complaints, stated that she had requested a maternity-fit uniform when she reached a certain point in her pregnancy.<sup>248</sup> The employer refused to purchase one because it had exhausted its uniform budget for the year.<sup>249</sup> It did allow her to wear regular clothing after she outgrew her regular uniform, but would not provide the accommodation she sought.<sup>250</sup> A federal court in Puerto Rico held that the employer was under no obligation to provide the accommodation she sought because it had not provided a similar accommodation to anyone else.<sup>251</sup> Now this might not seem like a compelling case, particularly as she was provided a different accommodation, but this same principle would apply in cases in which the failure to accommodate could result in the employee's having to resign or take unpaid leave.

The lack of an absolute right of accommodation necessitates legislative action. Pregnant women should not have to rely on the whim or generosity of employers to gain the accommodations they might need to continue working, particularly when those accommodations can be made with little or no effort by the employer.

Efforts have been made in the past couple of years to lobby for the Pregnant Workers Fairness Act (PWFA), a bill introduced into the House that promised to “eliminate discrimination and promote women’s health and economic security by ensuring reasonable workplace accommodations for workers whose ability to perform the functions of a job are limited by pregnancy, childbirth, or a related medical condition.”<sup>252</sup> Although the ADA is complicated, its core revolves around a guarantee of reasonable accommodations for workers with disabilities as long as the accommodations do not impose an undue hardship on the employer.<sup>253</sup> PWFA makes the same promise—reasonable accommodations for the

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247. See *Sanchez-Estrada v. Mapfre PRAICO*, 126 F. Supp. 3d 220 (D.P.R. 2015).

248. *Id.* at 226.

249. *Id.*

250. *Id.*

251. *Id.* at 231–234.

252. Pregnant Workers Fairness Act, S. 942, 113th Cong. (2013).

253. See Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327; 42 U.S.C. § 12112(a)(5)(A) (disability discrimination includes “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity”).

physical effects of pregnancy, subject to an undue hardship limitation.<sup>254</sup> This would improve upon the PDA by mandating pregnancy accommodations irrespective of whether the employer chooses to accommodate workers for any other reason. By way of feminist theory, PWFA draws on the accommodationist notions at play in *Guerra*, rooted in substantive equality and a goal of ensuring that women who reproduce have the same opportunity to succeed at work as men who reproduce.

PWFA is modeled on the Americans with Disabilities Act, which balances the employee's need for an accommodation against the burden on the employer. If enacted, the PWFA would make it unlawful to: (1) refuse to "make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a job applicant or employee" without demonstrating "undue hardship" to the employer;<sup>255</sup> (2) deny employment opportunities to a woman in order to avoid making required accommodations;<sup>256</sup> (3) force a woman to accept an accommodation she does not want;<sup>257</sup> and (4) force a woman to take leave "under any leave law or policy . . . if another reasonable accommodation can be provided" instead.<sup>258</sup>

*Young* was an important ruling, breaking up a disturbing pattern in which courts were refusing to give the PDA its intended scope. It set the stage for courts to look more closely at denials of accommodation, and the early evidence suggests that they are doing just that. But it didn't, and couldn't, extend the scope of the PDA, which is the obvious next step.

#### D. Expanding the Sources of Pregnancy Discrimination Law

One of the key shifts in pregnancy discrimination law has been from federal to state law. The gaps in federal law, particularly relating to accommodation rights, have been resistant to being filled. As noted above, the federal PWFA has been kicking around Capitol Hill for several years now, but has never made it to the floor for a vote in either house. If passed, this bill would provide important protections, especially because it is modeled on ADA, which has been given new life by Congress with amendments in 2008 designed to restore protections the Supreme Court had slowly destroyed and create new protections.<sup>259</sup>

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254. See Pregnant Workers Fairness Act, S. 942, 113th Cong., 1st Sess. §2(1) (defining pregnancy discrimination to include not making "reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a job applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity").

255. *Id.* § 2(1).

256. *Id.* § 2(2).

257. *Id.* § 2(3).

258. *Id.* § 2(4).

259. See ADA Amendments Act, 42 U.S.C. § 12102 (2012). On the potential interaction between the ADAAA and the PDA, see Deborah A. Widiss, *Gilbert Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*,

The Congressional stalemate that has defined so much of the last decade has made PWFA's passage a remote possibility at best. But states have begun to fill the void. California led the way by amending its Fair Employment and Housing Act in 1999 to respond to three specific gaps in federal pregnancy discrimination law.<sup>260</sup> First, it requires employers to provide "reasonable accommodation for an employee for conditions related to pregnancy, childbirth, or related medical conditions" if requested based on a doctor's advice.<sup>261</sup> This provision allows a pregnant woman who needs frequent bathroom breaks, for example, to obtain them. Second, the law prohibits employers from excluding pregnant women from any policy providing light-duty assignments ("less strenuous or hazardous") to other temporarily disabled employees.<sup>262</sup> Although enacted long before the Supreme Court would consider this issue under the PDA, it goes further than *Young* by allowing pregnant workers with restrictions to access a light-duty assignment that is made available to any other employee.<sup>263</sup> Finally, even in the absence of a light-duty policy, the law prohibits an employer from refusing a pregnant woman's medically supported request for a transfer to light-duty "where that transfer can be reasonably accommodated."<sup>264</sup> There are other states that mandate accommodations for pregnant workers under narrower circumstances.<sup>265</sup> New York is the most recent state to join the parade, adopt-

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46 U.C. DAVIS L. REV. 961 (2013); Joan C. Williams *et al.*, *A Sip of Cool Water: Pregnancy Accommodation After the ADA Amendments Act*, 32 YALE L. & POL'Y REV. 97 (2013).

260. See CAL. GOV'T CODE § 12945 (West 2016). For other state laws that provide rights to pregnancy accommodation, see, for example, CONN. GEN. STAT. § 46a-60(a)(7)(E) (2003) (requiring employers to make reasonable efforts to transfer a pregnant employee if the "employer or pregnant employee reasonably believes that continued employment in the position held by the pregnant employee may cause injury to the employee or fetus"); DEL. CODE ANN. TIT. 19 § 711(A)(3) (2016); 775 ILL. COMP. STAT. 5/2-102(J) (2016); LA. STAT. ANN. § 23:342 (2009); MINN. STAT. § 363A.08(5)-(6) (2008) (requiring employers to make "reasonable accommodations" for pregnancy-related disability).

261. CAL. GOV'T CODE § 12945(b)(1) (West 2016). A woman is "disabled by pregnancy" if, in the opinion of her health care provider, she is unable because of pregnancy to work at all or is unable to perform any one or more of the essential functions of her job or to perform these functions without undue risk to herself, the successful completion of her pregnancy, or to other persons. . . . [A] woman is also considered to be 'disabled by pregnancy' if she is suffering from severe 'morning sickness' or needs to take time off for prenatal care." CAL. CODE REGS., tit. 2, § 7291.2 (g), (f) (1990).

262. CAL. GOV'T CODE § 12945(b)(2) (West 2016). This provision eliminates the policies discussed above, which tend to restrict light-duty assignments to employees with on-the-job injuries.

263. *Id.* § 12945(a)(3)(B); *Young*, 135 S. Ct. at 1350, 1362 (2015).

264. *Id.* § 12945(b)(3). This provision also specifies, though, that "no employer shall be required by this section to create additional employment that the employer would not otherwise have created, nor shall the employer be required to discharge any employee, transfer any employee with more seniority, or promote any employee who is not qualified to perform the job." *Id.*

265. See, e.g., TEX. GOV'T CODE ANN. § 411.0079 (Vernon 2016) (requiring "reasonable efforts to accommodate" a law enforcement officer with partial physical restriction be-

ing a reasonable accommodation law for pregnancy as part of Governor Andrew Cuomo's Women's Equality Act, adopted in 2015.<sup>266</sup> New York City had adopted such a law on the local level, and perhaps that demonstrated the ease with which such a minimal protection could be implemented.<sup>267</sup> And before that law took effect, it was clear that women lacked even the most minimal protections necessary to have equal opportunity in the workplace.

A case before the local law was enacted is a good example of the senseless limitations faced by some pregnant workers. This was a case of exquisitely bad timing. Akema Thompson, an officer with the New York City Police Department, was scheduled to take the sergeant's exam on October 19, 2013.<sup>268</sup> But she had another appointment that day—in the maternity ward, to give birth to her first baby.<sup>269</sup> Since only one of those appointments might be moved by request, Officer Thompson requested an accommodation from the city; she asked to take the exam on the day reserved for other people with conflicts.<sup>270</sup> Her request was denied, even though promotional exams were routinely rescheduled for a long list of other reasons.<sup>271</sup>

Officer Thompson filed a charge of discrimination against the City of New York, alleging that the testing accommodation policy, administered by the Department of Citywide Administrative Services (DCAS), was unlawful as applied to her.<sup>272</sup> Her case was typical in that she was denied a minor and costless accommodation; it was worse than most because the particular accommodation she sought was routinely extended to other workers whose circumstances posed less insurmountable conflicts.<sup>273</sup> She was a victim of disregard, by a system that simply didn't consider women, at least pregnant women, worthy of accommodating. Officer Thompson filed a charge with the EEOC, alleging denial of her requested accommodation constitutes sex, pregnancy, and disability discrimination. In her charge, she detailed the request she made and the various responses she received from DCAS.<sup>274</sup> This agency regulates and

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cause of pregnancy and requiring transfer to a light-duty position upon medical necessity if one is available).

266. *New York Governor Cuomo Signs Women's Equality Agenda*, NAT'L L. REV. (Nov. 20, 2015), <http://www.natlawreview.com/article/new-york-governor-cuomo-signs-women-s-equality-agenda-new-law-strengthens-equal-pay>; see also N.Y. HUMAN RTS. L. §§292(21-e, 21-f), 296(3) (McKinney's 2016).

267. See N.Y.C. ADMIN. CODE § 8-107 (22) (2016) (effective Jan. 2014).

268. Affidavit of AkemaThompson, *Akema Thompson v. City of New York* at 3-15 (filed with EEOC Mar. 17, 2014) (on file with author) (hereinafter Affidavit of Akema Thompson).

269. *Id.* at 5.

270. *Id.* at 9.

271. *Id.* at 13-14.

272. *Id.* at 21.

273. Affidavit of AkemaThompson, *supra* note 268, at 14. Other accommodations were made for military duty, DCAS error, required court attendance, physical disability incurred on the job or absence related to the death of a close relative. *Id.*

274. *Id.* at 3-20.

administers testing for all city jobs – not just those at the NYPD.<sup>275</sup> Thus, the NYPD was not responsible for the denial of Officer Thompson’s request. Although her case was ultimately settled, the EEOC charge appended copies of the written correspondence back and forth between Thompson and DCAS regarding her request for an accommodation.<sup>276</sup>

In January 2013, Officer Thompson learned that the city had scheduled a sergeant’s promotional exam for the following October.<sup>277</sup> Although this might seem like a routine event, these exams are scheduled only “as needed” and can be spaced apart by several years.<sup>278</sup> Officer Thompson immediately paid almost \$800 to a test prep company for a review course.<sup>279</sup> The next month, she became pregnant and informed the NYPD of her condition shortly thereafter.<sup>280</sup> Her due date was, as mentioned above, the exact same day as the exam.<sup>281</sup>

In June 2013, Officer Thompson registered for the exam, paying an additional \$83.<sup>282</sup> Because of the conflict with her due date, she contacted DCAS to request that she be allowed to take the exam on another day.<sup>283</sup> She provided medical documentation of her due date and the number of weeks she would need to recover medically from childbirth.<sup>284</sup> She requested the accommodation numerous times both in writing and over the phone.<sup>285</sup> In one of these communications, Officer Thompson mentioned that the NYPD had told her to request to take the exam on an alternative testing day already set aside for those whose religious observances conflicted with the scheduled date.<sup>286</sup>

The request for accommodation was flatly denied.<sup>287</sup> She was told, in one piece of correspondence, that her “request to postpone this test due to the possibility that you may give birth on, or shortly after the test date, is not approvable.”<sup>288</sup> In another e-mail, she was informed that city policy does allow the promotional exam to be rescheduled, but only for conflicts due to (1) military duty, (2) DCAS error, (3) required court appearance (in any type of proceeding), (4) physical disability incurred on the job, or (5) the death of a close relative.<sup>289</sup> She was also told in other

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275. *Id.* at 9.

276. *Id.* at Exhibits A–F.

277. *Id.* at 4.

278. Affidavit of Akema Thompson, *supra* note 268, at 7.

279. *Id.* at 4.

280. *Id.* at 5.

281. *Id.* at 4–5, 7–9.

282. *Id.* at 6.

283. Affidavit of Akema Thompson, *supra* note 268, at 9.

284. *Id.* at 10.

285. *Id.* at 10–11.

286. *Id.* at 11.

287. *Id.* at 13.

288. Affidavit of Akema Thompson, *supra* note 268, at 13.

289. *Id.* at 14.



correspondence that tests could be rescheduled to accommodate religious observance.<sup>290</sup>

Three days before her due date, Officer Thompson went into labor.<sup>291</sup> She was hospitalized that day, October 16.<sup>292</sup> While in labor, she received a telephone call from a representative at DCAS, who reiterated that she could not postpone the test because of childbirth, but the representative did offer her a cushion to sit on during the exam and two additional hours to complete it.<sup>293</sup> Neither a cushion nor extra time was going to make it possible for Officer Thompson to sit for the sergeant's exam.<sup>294</sup> She had an emergency C-section on October 16 and was not released from the hospital until October 20, the day after the exam was given.<sup>295</sup> And while other candidates may well have taken the October 2013 exam at later dates because of "approvable" conflicts, Officer Thompson was denied the opportunity.

Had her situation occurred a year later, she would have been protected under New York City's Pregnant Workers Fairness Act (PWFA).<sup>296</sup> The local PWFA (distinguished from the proposed, but as-of-yet-unenacted federal bill by the same name) applies to employers with at least four employees.<sup>297</sup> The law requires employers to provide "reasonable accommodation" necessitated by pregnancy or childbirth unless doing so would cause an "undue hardship" on the employer.<sup>298</sup> The types of accommodations contemplated by the law include light-duty assignments (e.g., one without heavy lifting); changes to the work setting (e.g., to avoid toxins); more frequent breaks to eat, drink, or use the bathroom.<sup>299</sup>

Officer Thompson was technically not covered by the law because it was enacted after her accommodation was denied, but the New York City Division of Human Rights, which implements antidiscrimination laws, has taken the position publicly that it considered pregnancy a disability even before this law took effect.<sup>300</sup> Moreover, she should have

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290. *Id.* at 15.

291. *Id.* at 16.

292. *Id.*

293. Affidavit of Akema Thompson, *supra* note 268, at 16–17.

294. *Id.*

295. *Id.* at 18.

296. N.Y.C. ADMIN. CODE § 8-107(22) (2016). The Pregnant Workers Fairness Act was an amendment to the New York City Human Rights Law that became effective on January 30, 2014.

297. *Id.*

298. N.Y.C. ADMIN. CODE § 8-102(5) (2016).

299. *See, e.g.*, NYC Comm'n Human Rts., Pregnancy & Employment Rights Poster, <http://www.nyc.gov/html/cchr/html/publications/pregnancy-employment-poster.shtml> (listing possible accommodations); *see also* A Better Balance, *New York City Pregnant Workers Fairness Act*, <http://www.abetterbalance.org/web/ourissues/fairnessworkplace/286-nycpwfa>.

300. Robert Bernstein et al., *New York City Extends Human Rights Law to Pregnant Women with 'Pregnant Workers Fairness Act,'* NAT'L L. REV. (Oct. 11, 2013), <http://www.natlawreview.com/article/new-york-city-extends-human-rights-law-to-pregnant-women-pregnant-workers-fairness-a>.

been granted the accommodation under the federal and state laws in existence at the time of her request. Even without the protection of local law, however, Thompson should have had a claim under the PDA, as interpreted by the Supreme Court in *Young v. UPS*.<sup>301</sup> This would have been the perfect case to test the court's benefits-versus-burdens analysis. DCAS admits that it provides such accommodations to a wide variety of workers – including some with far less dire conflicts with the test than childbirth on the same day – while withholding them from pregnant officers.<sup>302</sup> For example, it allows candidates to postpone the promotional exam if a close relative has died within a week of the exam date.<sup>303</sup> While this is a humane rule that correctly assumes officers need time to grieve and tend to the burial of a deceased relative, it is not clear that these officers could not or would not show up for the scheduled exam if no alternative were given. But for Officer Thompson, both her predicted due date and her actual delivery date posed a direct and insurmountable conflict with the exam. She could not be in two places at once – a hospital maternity ward and an administrative testing room.

In July 2015, New York City settled Thompson's case for \$50,000 in damages and the opportunity to take a makeup test.<sup>304</sup> The City also promised, as part of the settlement, to pay Thompson's legal fees and, more importantly, to change its policy to allow employees with pregnancy- or childbirth-related disability to take makeup exams along with others eligible to do so.<sup>305</sup> But her case is still instructive. Why did the original DCAS policy insist on the denial of a minor, costless, and broadly available accommodation to pregnant state workers? The answer can only be in the undervaluing of women in the workforce. Although this particular accommodation did not relate to Officer Thompson's ability to perform her existing job, it did prevent her from seeking a promotion. Had she done well on the exam and earned a promotion, wouldn't the city be better off by advancing someone proven qualified for a higher position? And for many pregnant women, the refusal of minor accommodation will affect their ability to carry out some aspects of an existing job. An employer's refusal to accommodate in such a case can mean that the employee is forced to quit or take unpaid leave. (And because DCAS administers testing for all city jobs, its stingy accommodation policy cuts a wide swath.) While the most significant consequences will be borne by the employee, suddenly deprived of income and perhaps health insurance, the employer will suffer as well in the costs of rehiring, retraining, and, perhaps, not replacing with the same quality employee. Employers

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301. *Young v. UPS*, 135 S. Ct. 1338 (2015).

302. City of New York Dep't of Citywide Admin. Serv., General Examination Regulations, at E.11.4, <http://www.nyc.gov/html/dcas/downloads/pdf/misc/dcasgeneralexamreg.pdf>.

303. *Id.*

304. See Rachel L. Swarns, Pregnant Officer Denied Chance to Take Sergeant's Exam Fights Back, *N.Y. TIMES* (Aug. 9, 2015), at A13.

305. *See id.*

should be taken to task for their casual devaluation of women in their ranks. State pregnancy accommodation laws, of which there are now more than a dozen, will help correct this indifference to the needs of women during their reproductive years.<sup>306</sup>

#### CONCLUSION

A decade ago, there was little discussion of pregnancy discrimination law, an issue thought raised and resolved in the 1970s and 1980s, when the contours of Title VII were first hammered out. But as women became a normal and expected part of the workforce, the goals have shifted – from allowing them to be there to making them a full and integrated part of the workforce. As the goals have shifted, efforts on the litigation and legislative fronts have shifted as well. The four key shifts—some realized, some a work in progress—reflects those changing efforts. Perhaps by the PDA’s fortieth year—like a fetus in its fortieth week—it will be fully formed and ready to go.

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306. For current trends and resources, see Marsha Mercer, *States Go Beyond Federal Law to Protect Pregnant Workers*, The Pew Charitable Trusts (Jan. 7, 2015), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/1/07/states-go-beyond-federal-law-to-protect-pregnant-workers>; EXPECTING BETTER, *supra* note 196; U.S. Dep’t of Labor, *Employment Protections for Workers Who are Pregnant or Nursing*, <http://www.dol.gov/wb/maps/> (last visited April 21, 2016); WorkLife Law, *Pregnancy Accommodation*, <http://worklifelaw.org/work-life-issues/pregnancy-accommodation/> (last visited April 21, 2016).