

The Politics of Pregnancy Accommodation

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How can antidiscrimination law treat men and women “equally” when it comes to the issue of pregnancy? The development of U.S. law on pregnancy accommodation in the workplace tells a story of both legal disagreements about the meaning of “equality” and political disagreements about how best to achieve “equality” at work for women. Federal law has prohibited sex discrimination in the workplace for over five decades. Yet, due to long held gender stereotypes separating work and motherhood, the idea that prohibiting sex discrimination requires a duty to accommodate pregnant workers is a relatively recent phenomenon—and still only partially required by federal law.

This Article documents how decades of internal political conflict about what was best for working women resulted in tortured Supreme Court precedent on, and divergent legislative approaches to, accommodating pregnancy at work. While a diverse feminist movement took a variety of strategies to support pregnant workers, this Article focuses on one core debate in antidiscrimination law: the struggle between a formal or “sameness” and a substantive or “difference” approach to gender equality around pregnancy. It then documents how a third, “reconstructive” approach helped modern advocates move beyond comparing women to men as workers and toward critiquing gendered workplace structures. Striking a hopeful tone, the Article proposes that gender advocates’ legal and political gains have now set the stage for U.S. law to close the remaining gaps in pregnancy accommodation—to fully reflect the fact that pregnant women work and that a significant portion of workers become pregnant.

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INTRODUCTION

Prohibiting sex discrimination in the workplace seems like a simple proposition: treat men and women equally. Do not assume that whether an employee is a man, a woman, or gender non-binary relates to their ability to perform the job. Then keep any gender biases in check and behave similarly toward all employees.¹

But how do you treat men and women “equally” when one actual, biological difference between men and women—pregnancy—impacts their work? While all employees have the potential to become parents, only female employees² may become pregnant for nine months, during which most will continue to work as long as possible.³ This creates a Catch-22 for those seeking gender equality at work. Acknowledge this biological difference, and it may be used against women in employment decisions—for example, when an employer passes an employee over for promotion based on the assumption that she may become pregnant and need leave.⁴ Ignore this difference, and women are left unprotected—for example, when an employee is forced out of work because her pregnancy requires her to sit or take more frequent bathroom breaks than an employer normally allows.⁵

And then there is reality: nearly half of the U.S. workforce is now female,⁶ and 86% of American women have children by age forty-four.⁷ Two-thirds of mothers work during their pregnancies, more than four-fifths of

¹ There are no differences in people’s inherent abilities that relate to their gender; gender, alone, makes no difference in job performance. Some women can succeed at even the most “masculine” jobs and some men at even the most “feminine.” See Stephanie Bornstein, *Equal Work*, 77 MD. L. REV. 581, 583 (citing Emily Liner, *A Dollar Short: What’s Holding Women Back from Equal Pay*, THIRD WAY (Mar. 18, 2016), <https://www.thirdway.org/report/a-dollar-short-whats-holding-women-back-from-equal-pay> [<http://perma.cc/NGJ8-ZCQ9>]).

² Predominantly female employees, that is: intersex individuals or transgender men who have female reproductive organs may also choose to become pregnant. See, e.g., Juno Obedin-Maliver & Harvey J. Makadon, *Transgender Men and Pregnancy*, 9(1) OBSTETRIC MED. 4, 4–8 (2016) (assuming that pregnancy accommodations would be related to and “because of” pregnancy regardless of the gender identity of the birth parent).

³ See George Gao & Gretchen Livingston, *Working While Pregnant is Much More Common Than It Used to be*, PEW RES. CTR. (Mar. 31, 2015), <https://www.pewresearch.org/fact-tank/2015/03/31/working-while-pregnant-is-much-more-common-than-it-used-to-be/> [<http://perma.cc/42J3-7QA7>] (citing Census Bureau data that, for those giving birth between 2006 and 2008, 66% of mothers worked during their pregnancy, and 82% of those 66% worked until within one month of their due date).

⁴ See, e.g., Natalie Kitroeff & Jessica Silver-Greenberg, *Pregnancy Discrimination Is Rampant Inside America’s Biggest Companies*, N.Y. TIMES (Feb. 8, 2019), <https://www.nytimes.com/interactive/2018/06/15/business/pregnancy-discrimination.html> (collecting and describing workers’ stories); Stephanie Bornstein, *Work, Family, and Discrimination at the Bottom of the Ladder*, 19 GEO. J. ON POVERTY L. & POL’Y 1, 16–24 (collecting and describing cases).

⁵ See, e.g., Kitroeff & Jessica Silver-Greenberg, *supra* note 4 (collecting and describing workers’ stories); Bornstein, *supra* note 4, at 16–24 (collecting and describing cases).

⁶ 46.9% in 2018. *Women in the Workforce - United States: Quick Take*, CATALYST (June 5, 2019), <https://www.catalyst.org/research/women-in-the-workforce-united-states> [<https://perma.cc/L4CF-AGUC>] (citing BUREAU OF LAB. STAT. LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY, tbl.3 (2019)).

⁷ Gretchen Livingston, *They’re Waiting Longer, but U.S. Women Today More Likely to Have Children Than a Decade ago*, PEW RES. CTR. (Jan. 18, 2018), <https://>

whom work until within one month of their due date.⁸ Among households with children under age eighteen, half have a “breadwinner” mother who contributes 40 to 100% of household income.⁹ As compared to the proportion of white mothers who are breadwinners (20.6%), nearly three times as many black mothers (60.9%), over twice as many Native American mothers (44.2%), and one-and-a-half times as many Latina mothers (31.2%) are breadwinner mothers—making the financial pressure to work through pregnancy disproportionately higher for women of color.¹⁰ There is simply no denying that pregnancy is a real biological difference between men and women, and that, at some point during or at the end of a pregnancy, it will affect most women who work.

The story of how U.S. law has responded to the issue of pregnancy accommodation in the workplace provides an illuminating example of both legal disagreements about the meaning of “equality” under the law and political disagreements about how best to achieve “equality” at work for women. Although the law has prohibited sex discrimination in the workplace for over fifty years,¹¹ the idea that this prohibition includes a duty to accommodate pregnant workers is a relatively recent phenomenon¹²—and still not (entirely) required by federal law.¹³ From the 1960s to the 1990s, as advocates across the nation worked to advance gender equality, the issue of pregnancy created a point of fracture. While a diverse feminist movement took a variety of strategies to support pregnant workers,¹⁴ one core debate emerged in antidiscrimination law. Some advocates favored a “sameness” approach seeking “formal equality,” in which the law treats men and women exactly the same, so that women cannot be disadvantaged by claims that they need “special treatment” at work.¹⁵ Others pursued a “difference” approach seeking “substantive equality,” in which the law accounts for the biological difference of pregnancy, by providing additional protections (such as accommodation and leave) to level the playing field for women at work.¹⁶ It was not until the

www.pewsocialtrends.org/2018/01/18/theyre-waiting-longer-but-u-s-women-today-more-likely-to-have-children-than-a-decade-ago/ [<https://perma.cc/P6TW-DQWA>].

⁸ See Gao & Livingston, *supra* note 3.

⁹ Julie Anderson, *Quick Figures: Breadwinner Mothers by Race/Ethnicity and State*, INST. FOR WOMEN'S POL'Y RES. 1 (Sep. 2016), <https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/Q054.pdf> [<https://perma.cc/6S25-29WU>].

¹⁰ *Id.* at 1–2.

¹¹ See *supra* Section I.C.; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (2012).

¹² See *infra* Section III.B; See, e.g., A Better Balance, *Pregnancy Accommodation Laws in States & Cities* (March 9, 2020), <https://www.abetterbalance.org/resources/fact-sheet-state-and-local-pregnant-worker-fairness-laws> [<https://perma.cc/4LAL-C5GA>] (noting that, in state law, 23 of the 28 state laws requiring pregnancy accommodations have been passed since 2013).

¹³ See *infra* Part III.

¹⁴ For a full discussion of the diverse feminist strategies around pregnancy at work—which is beyond this Article's focus on one key distinction in antidiscrimination law—see DEBORAH DINNER, *THE SEX EQUALITY DILEMMA: WORK, FAMILY, AND LEGAL CHANGE IN NEOLIBERAL AMERICA* (forthcoming 2021).

¹⁵ See *infra* Section II.A.

¹⁶ See *infra* Section II.B.

2000s when advocates began to move away from the “sameness/difference debate,” comparing women and men as *workers*, and toward a “reconstructive” approach, critiquing the design of the *workplace*.¹⁷

This Article documents how decades of internal political conflict about what was best for working women resulted in tortured Supreme Court precedent on, and divergent legislative approaches to, accommodating pregnancy at work. It then argues that current advocacy efforts around a unified approach reflect success in moving beyond sameness and difference, to a focus on unequal workplace structures. Part I of this Article provides a brief history of early notions of domesticity and sex role stereotypes that created a hostility to women’s market participation and set the tone for how pregnancy has been treated at work ever since. Because of the rigid persistence of these stereotypes, the workplace has failed to adapt: working women were, and remain today, largely left to their own individual devices to navigate working while pregnant. Part II tells the story of how gender equality advocates struggled to develop a political and legal strategy that could best serve working women who became pregnant without creating laws that could backfire to their detriment. It traces competing sameness and difference visions of equality that led to disparate legal approaches, followed by the emergence of a third, reconstructive approach that created a path to unify the two.

Part III brings the political and legal stories up to date, focusing on case law and legislative advocacy in the most recent five years. It suggests that the Supreme Court’s confusing decision in the 2015 case *Young v. UPS*¹⁸ reflects the Court’s own attempt to bridge the sameness/difference divide. It also argues that, by mirroring advocates’ strategic turmoil, the Court’s decision may have had a unifying effect. In a hopeful vein, the Article concludes that the tipping point may have, at long last, been reached. Since the *Young* decision, women’s political power has surged to a new high point, both in representation in courts and legislatures and as a powerful voting bloc. This political breathing room, combined with a modern theory of how to approach pregnancy discrimination at work, has set the stage for federal law to move beyond trying to fit women into workplaces designed around men, to fully accept and reflect that pregnant women work and that workers get pregnant.

I. A BRIEF HISTORY OF PREGNANCY AND WORK LAW: EVERY WOMAN FOR HERSELF

Despite a dramatic increase in women’s labor force participation over time, workplace law’s treatment of pregnancy was largely shaped by the

¹⁷ See, e.g., *infra* Section II.C; JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 4, 40-63, 178-80, 213-26 (2000) [hereinafter UNBENDING GENDER]; Joan C. Williams, *Reconstructive Feminism: Changing the Way We Talk About Gender and Work Thirty Years After the PDA*, 21 YALE J.L. & FEMINISM 79, 82, 89-90, 98-102 (2009) [hereinafter *Reconstructive Feminism*].

¹⁸ 135 S. Ct. 1338 (2015).

Nineteenth Century cult of domesticity that cast women as mothers first, outsiders to the market sphere.¹⁹ This Part traces the development of the law of pregnancy discrimination at work over the past century, showing that, despite great improvements in gender equality at work, “separate spheres”²⁰ ideology continues to undermine legal protections for pregnant workers today.

A. Protectionism & Exclusion (1800s–1964)

Modern attitudes toward pregnancy in the workplace have their earliest roots in ideas about sex roles that gained popularity in the Nineteenth Century. Though women have always worked, the shift from an agricultural, home-based economy to an industrialized economy that separated work and home spheres sparked powerful beliefs about sex roles that have persisted over time.²¹ In the late 1800s, Victorian notions of “domesticity” and “separate spheres” took hold in the middle and upper classes of England and the United States, dictating that men, but not women should work outside the home.²² When work and home were separated into workplace and home place, domesticity instructed that women were ill-suited to the market sphere because of their primary roles as mothers.²³ Even poor women and women of color who, in contrast to affluent white women, were expected or required to work primarily held domestic positions, helping with housework or child care in other people’s homes.²⁴

Notions of domesticity made their way into the law in the first lawsuits related to regulation of the workplace in the industrial age. At the turn of the Twentieth Century, state legislatures began to address the working conditions of industrialized workplaces, seeking to provide basic protections against dangers for exploited workers. Then, in 1905, in the landmark case *Lochner v. New York*,²⁵ the U.S. Supreme Court weighed in to strike down such regulation as unconstitutional.²⁶ According to the Court, a state statute that limited the work hours of bakery employees to 10 hours per day, sixty hours per week “necessarily interfere[d] with the right of contract between the employer and employees”—a “right to make a contract in relation to his business [that] is part of the liberty of the individual protected by the Fourteenth Amendment.”²⁷ While a state legislature could act to enforce its po-

¹⁹ See UNBENDING GENDER, *supra* note 17, at 1–9, 14–39.

²⁰ See UNBENDING GENDER, *supra* note 17, at 1–9, 14–39. See also Cary Franklin, *Separate Spheres*, 123 YALE L.J. 2878, 2889–94 (2014).

²¹ See UNBENDING GENDER, *supra* note 17, at 1–9, 14–39. See also Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 92–97 (2010); Stephanie Bornstein, *The Law of Gender Stereotyping and the Work-Family Conflicts of Men*, 63 HASTINGS L. J. 1297, 1299–1302 (2012).

²² See UNBENDING GENDER, *supra* note 17, at 1–4, 20–27, 31–33.

²³ See *id.*

²⁴ See *id.* at 162–163.

²⁵ 198 U.S. 45 (1905).

²⁶ *Id.* at 74.

²⁷ *Id.* at 53.

lice powers to protect public health and safety, the Court held, “there [was] no reasonable ground for interfering with the liberty [to contract] of. . . a baker.”²⁸ Because bakers were male, able-bodied workers who could protect themselves and not “wards of the state,” the law was paternalism that unfairly limited their ability to earn as much as they wished.²⁹

While *Lochner* famously enshrined a laissez-faire approach to the regulation of employment contracts of men, the Court took a different approach for women. Three years after *Lochner*, in the 1908 case *Muller v. Oregon*,³⁰ the Court upheld a state law that limited the maximum working hours of women, due to the state’s concern for their “maternal functions.”³¹ The Court was largely influenced by what is now known as the “Brandeis Brief”—the first brief submitted to the Supreme Court that compiled and relied on scientific evidence to make its legal argument.³² Authored by attorney Louis Brandeis and Josephine Goldmark of the National Consumers League, the brief aimed to limit the impact of *Lochner* and create protections for all workers by, strategically, starting with women.³³ Yet to do so, the brief conflated biology and social ideas of domesticity, presenting “scientific evidence” that women’s roles as mothers made their health a “matter of public concern.”³⁴ The brief did its job—perhaps too well. As the Court reasoned:

That woman’s physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity[,] continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body. . . [A]s healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care. . . to preserve the strength and vigor of the race.³⁵

The *Muller* decision was followed by a series of similar holdings for nearly two decades, in which courts justified state interference in the liberty of contract of women only, based on their primary role in society as mothers.³⁶ By the mid-1920s, almost all states limited women’s, but not

²⁸ *Id.* at 57.

²⁹ *Id.* at 57–58.

³⁰ 208 U.S. 412 (1908).

³¹ *Id.* at 421.

³² See Louis D. Brandeis School of Law Library, *The Brandeis Brief—In Its Entirety*, <https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/the-brandeis-brief-in-its-entirety> [<https://perma.cc/Y96D-9NVK>]; Ann Corinne Hill, *Protection of Women Workers and the Courts: A Legal Case History*, 5 FEMINIST STUD. 246, 250–57 (1979).

³³ See Hill, *supra* note 32, at 250–57.

³⁴ See *id.* at 252–53.

³⁵ *Muller*, 208 U.S. at 421.

³⁶ See, e.g., *Bosley v McLaughlin*, 236 U.S. 385 (1915); *Miller v Wilson*, 236 U.S. 373 (1915).

men's, working hours to between eight and twelve hours per day.³⁷ One-third of states prohibited women from working at night, and a handful of states prohibited women from working in particular jobs for which they were deemed unsuited—including taxi driver, smelter or miner, baggage handler, or working in bowling alleys, pool rooms, or “public drinking places catering exclusively to males.”³⁸

In the wake of *Muller* and its progeny, some advocates and economists argued that protective laws hurt women economically.³⁹ Fifteen years after *Muller*, in *Adkins v. Children's Hosp.*,⁴⁰ Goldmark and attorney Felix Frankfurter authored a second brief using similar scientific evidence to argue that dangerous working conditions hurt men, too.⁴¹ The second brief backfired: instead of extending minimum labor protections to men, the Court in *Adkins* ruled that women (who had recently gained the right to vote) no longer needed special treatment, struck down sex-specific protective labor laws, and reified *Lochner*.⁴² While this meant that women now enjoyed formal equality at work, it also left U.S. workplaces largely unregulated until the New Deal's Fair Labor Standards Act of 1938 put the same limitations on the working hours and minimum wages of all workers, men and women alike.⁴³

Yet domesticity's notion of separate spheres had made its mark on the workplace and the law in two ways. First, caselaw established women's primary role as mothers and homemakers; that they became pregnant, bore children, and breastfed was proof that they did not belong in any non-domestic workplace once they were of childbearing age. They were outsiders to the market sphere, which was designed around men.⁴⁴ Second, if differences between men and women were acknowledged in the workplace, they could end up hurting women economically. Acknowledging that women gave birth had unleashed special protective legislation that limited the hours women could work and the types of jobs they could have.⁴⁵ Because the market sphere was meant for men, to be treated fairly at work, women needed to assert that they were no different from men. They could do the same work for the same hours, and they should be treated exactly the same as men.⁴⁶ As a result, in the 1940s and 50s, while all employees could now enjoy the same

³⁷ Richard Boeckel, *Sex Equality and Protective Laws* 533-54 (July 13, 1926), in NATIONAL WOMAN'S PARTY PAPERS, PART I: 1913-1974 <http://library.cqpress.com/cqresearcher/cqresrre1926071300> [<https://perma.cc/R6QV-FG2F>].

³⁸ *Id.* at 540.

³⁹ See *id.* at 549-50. (citing, e.g., ELIZABETH FAULKNER BAKER, COLUMBIA UNIVERSITY, PROTECTIVE LABOR LEGISLATION: STUDIES IN HISTORY, ECONOMICS AND PUBLIC LAW (1924)).

⁴⁰ 261 U.S. 525 (1923).

⁴¹ See Hill, *supra* note 32, at 254-57. Brandeis had become a Supreme Court Justice by then and recused himself from the case. *Adkins*, 261 U.S. at 562; MELVIN UROFSKY, LOUIS D. BRANDEIS: A LIFE 504 (2012).

⁴² See Hill, *supra* note 32, at 254-57; *Adkins*, 261 U.S. at 552-53.

⁴³ See Fair Labor Standards Act of 1938, 29 U.S.C. § 203 et. seq. (2012).

⁴⁴ See UNBENDING GENDER, *supra* note 17, at 1-9, 14-39.

⁴⁵ See *supra* notes 30-38 and accompanying text.

⁴⁶ See Boeckel, *supra* note 37.

protection against exploitative hours and wages, no other laws protected women at work or considered that workers might become pregnant.

Women's workforce participation continued to grow as female workers replaced the millions of U.S. men deployed during World War II,⁴⁷ such that, by 1948, nearly one-third of all women worked⁴⁸ and women composed 28.6% of the civilian labor force.⁴⁹ Despite their significant presence in the workforce, however, the fact that most women became pregnant was largely ignored. When women became pregnant, particularly white women, they were expected or forced to stop working altogether, regardless of whether they wanted to continue working.⁵⁰ Some women left voluntarily; others were terminated by employers upon learning of their pregnancies.⁵¹ Women of color often experienced the opposite assumption: even if they wanted to stop working, they were expected to continue, ignoring their pregnancy and any temporarily disabling conditions it may have caused.⁵² Regardless, the common understanding at the time was that pregnancy existed entirely outside of the market sphere. Workplaces were designed for men, women who wanted to work should expect to be treated like men, and once a woman became pregnant, she was no longer a worker—she was a mother.⁵³

B. *Hostile Inclusion (1964-1978)*

It was more than a decade before Congress enacted the first federal legal prohibition against sex discrimination at work, Title VII of the Civil Rights Act of 1964 ("Title VII").⁵⁴ For the first time, Title VII prohibited employers from "discriminat[ing]" against employees in hiring, firing, or "compensation, terms, conditions, or privileges of employment," based on their race, sex, or other protected characteristic.⁵⁵ As the crowning achievement of the Civil Rights movement, the legislative impetus behind Title VII

⁴⁷ U.S. DEP'T OF VETERANS AFF., AMERICA'S WARS (2017), https://www.va.gov/opa/publications/factsheets/fs_americas_wars.pdf [<https://perma.cc/63PH-NK7Z>].

⁴⁸ U.S. DEP'T OF LAB. WOMEN'S BUREAU, LABOR FORCE PARTICIPATION RATE BY SEX, RACE AND HISPANIC ETHNICITY 1948-2016 ANNUAL AVERAGES, https://www.dol.gov/wb/stats/NEWSTATS/facts/women_if.htm#CivilianLFSex. [<https://perma.cc/7B7A-6NKY>]. Note that statistics for this year do not disaggregate the labor force participation rates of women of color. It is likely that an even greater proportion of black women worked at this time. In 1972, the first year for which race-specific data is available, 48.7% of black women and 43.2% of white women worked.

⁴⁹ U.S. DEP'T OF LAB. WOMEN'S BUREAU, CIVILIAN LABOR FORCE BY SEX, 1948-2016 ANNUAL AVERAGES https://www.dol.gov/wb/stats/NEWSTATS/facts/women_if.htm#CivilianLFSex [<https://perma.cc/7B7A-6NKY>].

⁵⁰ Courtni E. Molnar, "Has the Millennium Yet Dawned?: A History of Attitudes Toward Pregnant Workers in America," 12 MICH. J. GENDER & L. 163, 170-79 (2005).

⁵¹ *Id.*

⁵² *Id.*

⁵³ See UNBENDING GENDER, *supra* note 17, at 1-9, 14-39.

⁵⁴ Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. (2012).

⁵⁵ *Id.* at § 2000e-2(a)(1). Title VII also makes it unlawful "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." *Id.*

was to outlaw race discrimination and end Jim Crow laws. During the legislative process, however, legislators added “sex” as a protected characteristic to the text of the bill, with little legislative guidance.⁵⁶ The statute provided no definition for what the category “sex” did or did not include.⁵⁷ Thus, while the prohibition was understood to mean that an employer could no longer refuse to hire an applicant, pay her less, or fire her simply because she was a woman and not a man, little else was clear.

For the first decade after Title VII was passed, the Act was largely interpreted to include prohibitions against pregnancy discrimination. In 1972, the Equal Employment Opportunity Commission (“EEOC”)—the federal agency responsible for enforcing Title VII—issued guidelines clarifying that classifying workers differently based on pregnancy violated Title VII.⁵⁸ In the wake of these guidelines, six different U.S. Circuit Courts of Appeal agreed, holding that discrimination based on pregnancy constituted prohibited sex discrimination.⁵⁹

But in the 1976 case *General Electric Company v. Gilbert*,⁶⁰ the U.S. Supreme Court disagreed. In *Gilbert*, female employees sued their employer for sex discrimination in its benefits provisions.⁶¹ The employer provided all employees with short-term disability benefits when they could not work due to a non-work related illness or accident, but excluded coverage for pregnancy.⁶² The District Court held that excluding only pregnancy-related illnesses was sex discrimination, and the Court of Appeals affirmed.⁶³ Surprisingly, the Supreme Court reversed, holding that GE’s disability benefits program did not discriminate based on sex but rather based on pregnancy, and that the two were different.⁶⁴ The Court explained that “[t]he program divides potential recipients into two groups—pregnant women and nonpregnant persons,” and that, “[w]hile the first group is exclusively female, the second includes members of both sexes.”⁶⁵ Because not all women were affected by a policy that penalized pregnancy, the Court reasoned, there was no sex discrimination.⁶⁶ In separating pregnancy from “sex,” the Court ignored that all employees harmed by the policy would be women, meaning that the policy would have a disproportionately negative impact on employ-

⁵⁶ There is some debate over the origins of the inclusion of “sex” in Title VII, and the various political motivations behind it—a topic beyond the scope of this article. For more on this, see generally, Jo Freeman, *How Sex Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163 (1991); Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137 (1997).

⁵⁷ See *AT&T v. Hulteen*, 556 U.S. 701, 717 (2009) (Ginsburg, J., dissenting).

⁵⁸ *Id.* at 717 & n.2 (2009) (Ginsburg, J., dissenting) (citing 37 Fed. Reg. § 6837, April 5, 1972 (codified as amended at 29 C.F.R. § 1604.10 (2019))).

⁵⁹ *Id.* (citing cases in the 2nd, 3rd, 4th, 6th, 8th, and 9th Circuits).

⁶⁰ 429 U.S. 125 (1976).

⁶¹ See *id.* at 127–29.

⁶² See *id.* at 128–29.

⁶³ See *id.* at 130–32.

⁶⁴ See *id.* at 135.

⁶⁵ *Id.* at 135 (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1976)).

⁶⁶ See *id.* at 135.

ees by sex—also prohibited by Title VII.⁶⁷ And by focusing narrowly on “pregnant persons,” the Court reinforced the idea that pregnancy was something that happened to others, not to employees, entirely outside of the market sphere of work.

Thankfully, the impact of *Gilbert* was short-lived. Within days of the decision, women’s rights advocates formed the “Coalition to End Discrimination Against Pregnant Workers” and galvanized legislators to hold hearings on a legislative fix within a year.⁶⁸ Congress acted swiftly to correct what it viewed as the Court’s misinterpretation of Title VII by passing the Pregnancy Discrimination Act of 1978 (PDA).⁶⁹ The resulting PDA statute’s simple approach directly amended Title VII, to include a new subsection stating:

The terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.⁷⁰

With this amendment, Congress abrogated the holding in *Gilbert* and established that treating an employee differently because of her pregnancy was treating her differently because of her sex.⁷¹ The PDA also specified that, if employers provided disability benefits, pregnant employees should be treated “the same as” other employees with regard to their temporary disabilities.⁷² Thus the plaintiffs in *Gilbert* were entitled to receive disability benefits under the facts of their case.

But while the PDA required equal treatment for pregnancy and other disabilities, neither the PDA nor Title VII nor any other federal law at the time created a baseline requirement for how employers had to respond to temporarily disabling conditions.⁷³ That meant that, if all employees got nothing—no accommodations, no benefits, no leave for temporary disabilities—pregnant employees were equally entitled to nothing.

⁶⁷ 42 U.S.C. § 2000e-2(a)(1) (2012).

⁶⁸ Nicholas Pedriana, *Discrimination by Definition: The Historical and Legal Paths to the Pregnancy Discrimination Act of 1978*, 21 YALE J.L. & FEMINISM 1, 11–13 (2009).

⁶⁹ See Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)).

⁷⁰ 42 U.S.C. § 2000e(k).

⁷¹ See *Newport News Shipbuilding Co. v. EEOC*, 462 U.S. 669, 684–85 (1983).

⁷² 42 U.S.C. § 2000e(k) (2012) (“women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work”).

⁷³ See *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 729–36 (2003).

C. *Every Woman for Herself* (1979–2015)

There is no doubt that, since the passage of the PDA, pregnant employees have gained significant protections at work. For example, because pregnancy discrimination is sex discrimination, courts have held that female workers cannot be denied hire or fired or passed over for promotion because they are pregnant,⁷⁴ and that harassment on the basis of pregnancy is illegal sex discrimination.⁷⁵ Women can no longer be excluded from certain jobs based on their potential to become pregnant,⁷⁶ or forced to stop working when they get pregnant,⁷⁷ allowing them to work much longer into their pregnancies.⁷⁸ And because pregnant employees must be treated “the same as” all other employees temporarily disabled for reasons other than pregnancy,⁷⁹ some pregnant workers have been able to receive both temporary accommodations and short-term disability benefits if their employers choose to provide them for other temporary disabilities.⁸⁰

Yet for nearly four decades since the enactment of the PDA, federal law has embraced a formal equality approach that has left unaddressed much of the real impact of pregnancy on women at work. Because the law only requires equal treatment between men and women, whether a pregnant worker has access to accommodations or any job-protected leave from work depends entirely on the specifics of the job and the employer. When a working woman becomes pregnant, she cannot be fired for that reason.⁸¹ But if, during her pregnancy, she needs even small, temporary accommodations to be able to continue working, she must negotiate it individually with her employer, who is required to provide nothing unless it does so voluntarily for other temporarily disabled employees.⁸² Of course, the most common form of tem-

⁷⁴ See, e.g., *E.E.O.C. v. High Speed Enterprise, Inc.*, 833 F.Supp.2d 1153 (D. Ariz. 2011) (hiring); *Speight v. Sonic Restaurants, Inc.*, 983 F.Supp.2d 1324 (D.Kan. 2013) (firing); *McElroy v. Fidelity Investments Institutional Services Co., Inc.*, 298 F.Supp.3d 357 (D.R.I. 2008) (promotion).

⁷⁵ See, e.g., *Pearl v. Latham & Watkins LLP*, 985 F. Supp. 2d 72 (D.D.C. 2013); *Green v. Board of Educ. of Worcester County*, 783 F. Supp. 2d 782 (D. Md. 2011).

⁷⁶ See *UAW v. Johnson Controls, Inc.* 499 U.S. 187, 211 (1991).

⁷⁷ See, e.g., *U.S. EEOC v. Bob Evans Farms, LLC*, 275 F.Supp.3d 635 (W.D. Penn. 2017).

⁷⁸ See Gao & Livingston, *supra* note 3.

⁷⁹ 42 U.S.C. § 2000e (k) (2012) (“women affected by pregnancy, childbirth, or related medical conditions shall be treated *the same* for all employment-related purposes, including receipt of benefits under fringe benefit programs, as *other persons not so affected but similar in their ability or inability to work*”) (emphasis added).

⁸⁰ See, e.g., *Newport News Shipbuilding Co.*, 462 U.S. at 684–85.

⁸¹ See *supra* note 70 and accompanying text.

⁸² See *supra* note 73 and accompanying text. While pregnancy itself is not a “disability,” conditions caused by pregnancy may qualify as “disabilities” under the American with Disabilities Act (“ADA”) as amended by the ADA Amendments Act of 2008, 42 U.S.C. § 12101 et. seq., providing pregnant workers additional rights to accommodations. For a discussion of pregnancy accommodations under the ADA—which is beyond this Article’s scope—see generally Joan C. Williams, et. al., *A Sip of Cool Water: Pregnancy Accommodation After the ADA Amendments Act*, 32 YALE L. & POL’Y REV. 98 (2013). For cases applying this approach, see CENTER FOR WORKLIFE LAW, U.C. HASTINGS COLLEGE OF LAW, PREGNANCY ACCOMMODATION: SELECTED PREGNANCY ACCOMMODATION CASES, (Sept. 18, 2017), available

porary disability for women is pregnancy,⁸³ which means that, when an employer chooses to accommodate no one, pregnant employees always lose.

Likewise, as discussed in Part II, the Family and Medical Leave Act is the only federal law that provides any job-protected short-term leave for childbirth, and its coverage is surprisingly limited.⁸⁴ The Act fails to cover 40% of the U.S. workforce, and it provides only unpaid leave to those it does cover—with the result that many fail to use some or all of their available leave because they cannot afford to do so.⁸⁵ Again, while pregnant workers cannot be fired for being pregnant, far too many employers are not required to hold jobs open for them, meaning the workers can simply be replaced while out of work giving birth.⁸⁶

Women in lower-paid jobs, who are disproportionately women of color, are both the most likely to need and the least likely to have access to pregnancy accommodations or pregnancy leave at work.⁸⁷ Pregnant women in physically demanding jobs may, at some point, need temporary relief from or assistance with certain tasks, like regular heavy lifting.⁸⁸ Yet, so long as the employer treats all temporary disabilities consistently, under the PDA, the employer may refuse to alter any job tasks and even fire an employee who cannot perform the job.⁸⁹ And many pregnant women may need minor adjustments—for example the ability to take more frequent bathroom breaks, to be able to carry a water bottle, or to be allowed to sit on a stool rather than standing all day.⁹⁰ But women in service and retail sector jobs often lack even the slightest amount of control over their work, and have been refused, and even fired over, any slight variation in the rules that apply to all employees.⁹¹

Despite the passage of the PDA, then, federal pregnancy protections at work depend significantly on the workplace. Each individual pregnant worker is left to navigate anything beyond formal equal treatment herself. Most importantly, equal treatment in this context is defined by being treated “the same as” non-pregnant employees, reflecting a workforce that, after

at <https://www.pregantatwork.org/wp-content/uploads/2017.09.18-Pregnancy-Accommodation-Case-List-FINAL.pdf> [<https://perma.cc/NK6R-MUDN>].

⁸³ Compare Livingston, *supra* note 7 (citing Census Bureau data that 86% of women become pregnant by age 44) to Kristina A.Theis, et. al., *Which One? What Kind? How Many? Types, Causes, and Prevalence of Disability Among U.S. Adults*, 12 DISABILITY & HEALTH J. 411, 416 tbl.3 (2019) (citing Census Bureau data 21.8% of all adults experience a non-pregnancy disability, the most common being arthritis (in 14% of men, 23% of women) and back/spine problems (in 16.8% men, 20% women)).

⁸⁴ See *infra* Section II.A.

⁸⁵ See e.g., JACOB KLIERMAN, KELLY DALEY & ALYSSA POZNIAK, ABT. ASSOC., FAMILY AND MEDICAL LEAVE IN 2012: EXECUTIVE SUMMARY i–ii (2012), <https://www.dol.gov/sites/dolgov/files/OASP/legacy/files/FMLA-2012-Executive-Summary.pdf> [<https://perma.cc/952Z-8VX4>].

⁸⁶ See 29 U.S.C. §§ 2601–54 (2012).

⁸⁷ See Bornstein, *supra* note 4, at 16–24.

⁸⁸ See *id.* at 23.

⁸⁹ See *id.* Note that pregnant employees may be entitled to additional accommodations under the ADA, as amended by the ADAAA of 2008. See text and citations at note 82, *supra*.

⁹⁰ See *id.* at 22.

⁹¹ See *id.* at 21–22.

more than a century of robust female participation, continues to be designed around men.⁹²

II. DEFINING THE MOVEMENT FOR PREGNANCY ACCOMMODATION: “THE SAME AS” WHAT?

While advocates worked consistently toward improving gender equality in the workplace, they were divided on how to deal with the issue of pregnancy at work. The PDA ensured basic equal treatment for pregnant workers, but how best to expand available job protections remained unclear. Should advocates seek to expand rights for both men and women as parents, to maintain the formal equality women had been able to achieve, or should they pursue specific additional protections for women, to level the playing field with substantive equality? This Part documents how different political strategies around this “sameness/difference debate” in antidiscrimination protections for pregnant workers resulted in divergent legal solutions.⁹³

A. Sameness Feminism, Formal Equality, and the Federal Law Approach

When workers become pregnant, they have two main needs. First, they need the ability to take time off to give birth and recover, and to bond with their new child, without fear of losing their jobs. Having no ability to take job-protected time off of work for childbirth means that every woman who gives birth can be forced out of the workforce. Meanwhile, fathers of those children continue to pursue their careers. Second, if a woman becomes temporarily disabled during pregnancy—if she experiences any disabling side effects (for example, extreme nausea) or medical complications (for example, preeclampsia)—she needs temporary accommodations at work, also without the risk of losing her job. Over the course of a career, a pregnancy is a temporary condition. Yet gaps in U.S. law that fail to require job-protected leave or accommodation to all workers mean that women are always at a disadvantage.

In the wake of the PDA’s passage, gender equality advocates turned to moving beyond mere non-discrimination, toward expanding protections for pregnant workers. Requiring equal access to temporary disability benefits and accommodations was a start, but no federal law required any employer to provide any such benefits. Without an affirmative requirement, employers were free to “treat pregnant women as badly as they treat similarly affected but nonpregnant employees.”⁹⁴

At the federal level, led by the Women’s Legal Defense Fund (now the National Partnership for Women and Families), advocates pursued legislation that took a formal equality approach to provide gender-neutral leave.

⁹² UNBENDING GENDER, *supra* note 17, at 1–9, 14–39.

⁹³ See also *Reconstructive Feminism*, *supra* note 17, at 82, 89–90, 98–102.

⁹⁴ *Troupe v. May Dep’t. Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994).

Beginning in 1984, this broad coalition of advocates worked for nearly a decade to enact what became the Family and Medical Leave Act of 1993 (FMLA).⁹⁵ Under the Act, which remains largely the same twenty-five years later,⁹⁶ eligible employees, both women and men, receive twelve weeks of job-protected, unpaid leave per year, plus continuation of their health care benefits, under three circumstances: for the birth or adoption of a new child; for their own serious health condition including pregnancy; or to care for a child, parent, or spouse with a serious health condition.⁹⁷ Notably, both birth mothers and fathers or adoptive parents who do not give birth are entitled to the same twelve weeks of leave total.⁹⁸ Most doctors consider women disabled for four to six weeks immediately at and after their deliveries, and up to ten weeks for Cesarean deliveries.⁹⁹ Regardless, the law does not provide additional leave to birth mothers for their own period of delivery-related disability.¹⁰⁰ And, should a birth mother be disabled by pregnancy-related conditions during the rest of her pregnancy, the same twelve weeks of FMLA is intended to cover any disabling periods while pregnant.¹⁰¹

Strategically, advocates who pursued a formal equality approach to leave believed it offered several advantages.¹⁰² It maintained consistency with the

⁹⁵ NAT'L P'SHIP FOR WOMEN & FAMILIES, A STORY OF PASSION, PATIENCE, AND PERSISTENCE: THE NINE-YEAR FIGHT TO MAKE THE FMLA THE LAW OF THE LAND, <http://www.nationalpartnership.org/our-work/economic-justice/history-of-the-fmla.html> [<https://perma.cc/G3VY-X74L>].

⁹⁶ Since 1993, only one significant change has been made to the FMLA: an expansion of unpaid leave for caregivers of members of the military related to active duty. See U.S. Dep't of Labor, Wage & Hour Div., *Family and Medical Leave Act - National Defense Authorization Act for FY 2010 Amendments*, <https://www.dol.gov/agencies/whd/fmla/military-families> [<https://perma.cc/95VK-95LJ>]; U.S. Dep't of Labor, Wage & Hour Div., *Fact Sheet #28M(b): Military Caregiver Leave for a Veteran under the Family and Medical Leave Act*, <http://www.dol.gov/whd/regs/compliance/whdfs28mb.pdf> [<https://perma.cc/4LHR-3L3E>]. In addition, the U.S. Department of Labor clarified the definition of "in loco parentis" for child-parent care provisions, see U.S. Dep't of Labor, Wage & Hour Div., *Administrator's Interpretation No. 2010-3*, http://www.dol.gov/WHD/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.pdf [<https://perma.cc/7DPY-Y6DK>]; U.S. Dep't of Labor, Wage & Hour Div., *Fact Sheet #28C: FMLA leave to care for a parent with a serious health condition on the basis of an in loco parentis relationship*, <http://www.dol.gov/whd/regs/compliance/whdfs28C.pdf> [<https://perma.cc/M898-TVBW>], and that "child" includes adult children unable to care for themselves due to disabilities, see U.S. Dep't of Lab., Wage & Hour Div., *Administrator's Interpretation No. 2013-1*, http://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2013/FMLAAI2013_1.pdf [<https://perma.cc/7KS8-SL5H>].

⁹⁷ Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. §§ 2601-54 (2012).

⁹⁸ 29 U.S.C. §§ 2612; 29 CFR § 825.120.

⁹⁹ See, e.g., State of California Employment Development Department, FAQ - Pregnancy, I'm pregnant. Can I file a claim for State Disability Insurance benefits? If so, for how long?, https://www.edd.ca.gov/Disability/FAQ_DI_Pregnancy.htm#collapseOne [<https://perma.cc/8KQ3-4ZWW>].

¹⁰⁰ 29 U.S.C. §§ 2612; 29 CFR § 825.120.

¹⁰¹ 29 U.S.C. §§ 2612; 29 CFR § 825.120. If the employer provides additional leave for other disabilities, then the employee may be entitled to additional leave for her periods of pregnancy-related disability under the PDA, see 42 U.S.C. § 2000e(k), or the ADA, see Williams et. al., *supra* note 82, at 136-141, but not under the FMLA.

¹⁰² See Wendy Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 325-27, 352-70 (1985) (describing various advocates' positions); Linda J. Krieger and Patricia N. Cooney, *The Miller-Wohl*

PDA, which required that all employees be treated “the same.”¹⁰³ It steered clear of any protectivism or paternalism that could make women seem like they were lesser than men or less suited for work, avoiding echoes of early Twentieth Century hours caps for women only.¹⁰⁴ It sought no “special treatment” for women, which avoided the charge that it discriminated against men and any related backfire effects—for example, employers avoiding hiring women altogether because they were perceived as more costly.¹⁰⁵ It also encouraged counter-stereotypic thinking by separating childbirth from child-rearing and allowing men to share in newborn child care, thus reducing the sole burden on women.¹⁰⁶

Yet critics of the sameness approach feared it left women at an overall disadvantage. By treating men and women “the same,” it ignored that only women get pregnant, which meant they started from an unequal position. To such critics, formal equality was not enough; to truly level the playing field for women at work required more.¹⁰⁷

B. *Difference Feminism, Substantive Equality, and the California Law Approach*

Across the country, working at the state level, advocates in California took a different approach. Shortly after the passage of the federal PDA, legislators in California passed the California Pregnancy Disability Leave Act, which amended their state version of Title VII to add an affirmative requirement for pregnancy disability leave.¹⁰⁸ The statute allowed workers to take leave for any periods they were disabled by pregnancy-related conditions, including but not limited to the time around their birth, for a total of up to

Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality, 13 GOLDEN GATE U. L. REV. 513, 531-537 (1983) (same).

¹⁰³ See Williams, *supra* note 103, at 367-70; Krieger & Cooney, *supra* note 103, at 531-537.

¹⁰⁴ See Williams, *supra* note 103 at 367-70; Krieger & Cooney, *supra* note 103, at 531 (“The protective legislation issue provoked heated debate within the feminist legal community. Equal treatment proponents argued that [a pregnancy-only disability] statute is indistinguishable from laws which until very recently ‘protected’ women out of their jobs. Supporting such a statute, they argued, could lend implicit justification to future ‘protective’ laws which would do more harm than good.”); see also *supra* notes 30-38 and accompanying text.

¹⁰⁵ See Williams, *supra* note 103, at 367-70.

¹⁰⁶ See *id.*, at 353-55.

¹⁰⁷ See, e.g., Krieger & Cooney, *supra* note 103, at 537 (arguing that “the equal treatment approach to equality cannot, in and of itself, effectuate equality between the sexes” because it fails to “solv[e] the equality problems presented by inherent differences between men and women in the areas of pregnancy and childbirth, so it “must be expanded to permit, indeed to require, positive action accounting for inherent sex differences, and facilitating equality of effect”); Ann C. Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 375, 375-77, 435-42 (1981) (describing—as her response to “liberal,” “assimilationist,” and “bivalent” views of sex equality—an “incorporationist approach” that “recognize[s] women) have rights different from men only insofar as pregnancy and breastfeeding, the only aspects of childbearing and child-rearing completely unique to women, are directly concerned.”).

¹⁰⁸ 1978 Cal. Stats., ch. 1321, § 1; 1980 Cal. Stats., ch. 992, § 4; codified at CAL. GOV'T CODE § 12945 (West 2018).

four months.¹⁰⁹ The first law in the nation to require any job-protected leave for pregnancy, the law took a “difference” approach, seeking substantive equality. Because only women could be disadvantaged by pregnancy at work, including losing their jobs, the state law provided leave to only women to remove the disadvantage.¹¹⁰

Shortly after the law took effect, an employer who refused to reinstate a pregnant worker under the law sought a declaratory judgment in federal court that, because the state statute treated men and women differently, the state had engaged in sex discrimination against *men*, in violation of the Equal Protection Clause of the Constitution’s 14th Amendment.¹¹¹ In 1987, the employer’s challenge made it to the U.S. Supreme Court in the case *California Federal Savings and Loan Ass’n v. Guerra*.¹¹² The case exposed the divide among women’s rights advocates over how best to achieve equality for pregnant workers. On the one hand, several national women’s rights organizations—including the Women’s Legal Defense Fund, who was pursuing a formal equality approach to leave under federal law—filed an amicus brief suggesting that, to both protect women and steer clear of Equal Protection concerns, the California benefits be extended to all workers in a gender-neutral fashion.¹¹³ In their view, “[i]n the long run,” the California statute requiring temporary disability leave for only pregnancy “will hurt women because it reinstates the view that pregnancy is different from other disabilities.”¹¹⁴ Meanwhile, California women’s rights groups—including Equal Rights Advocates, who favored a substantive equality approach—filed an amicus brief supporting the state.¹¹⁵ As they saw it, “men never lose their jobs due to pregnancy disability, [so] the state statute does not grant preferential treatment to women, [but] simply guarantees equality for all workers.”¹¹⁶

In a holding that signaled just how far it had come from its pre-PDA decision in *Gilbert*, the Supreme Court sided with California, holding that Title VII and the PDA did not pre-empt the California statute, and that both “share[d] a common goal” of “remov[ing] barriers” to women’s equal

¹⁰⁹ CAL. GOV’T CODE § 12945(a)(1).

¹¹⁰ Brief of Respondents, Cal. Fed. Sav. and Loan Ass’n. v. Guerra, 479 U.S. 272 (1987), 1986 WL 728377, at *5-*6 (1986) (“California’s pregnancy disability leave statute eliminates a burden uniquely faced by working women: loss of job due to pregnancy disability. . . This guarantee of continued employment protects pregnant employees from being adversely affected due to a gender-specific characteristic. Since men never lose their jobs due to pregnancy disability, the state statute does not grant preferential treatment to women. It simply guarantees equality fo all workers.”)

¹¹¹ Cal. Fed. Sav. and Loan Ass’n v. Guerra, 479 U.S. 272 (1987).

¹¹² See *id.*

¹¹³ Brief for Nat’l Org. for Women, Now Legal Defense and Education Fund et al. as Amici Curiae Supporting Neither Party, Cal. Fed. Sav. and Loan Ass’n. v. Guerra, 479 U.S. 272 (1987).

¹¹⁴ David G. Savage, *What Is Equal?: Pregnancy on the Job Tests Law*, L.A. TIMES (Sep. 24, 1986); see also *id.*

¹¹⁵ Brief for Equal Rights Advocates et al. as Amici Curiae Supporting Respondents, Cal. Fed. Sav. and Loan Ass’n. v. Guerra, 479 U.S. 272 (1987).

¹¹⁶ Savage, *supra* note 115; see also Brief of Respondents, *supra* note 111.

employment opportunity.¹¹⁷ In the Court's view, Title VII was a floor, not a ceiling, to efforts to achieve gender equality at work, and the California statute was not impermissible "special treatment."¹¹⁸ Importantly, the Court noted,

The statute is narrowly drawn to cover only the period of *actual physical disability* on account of pregnancy, childbirth, or related medical conditions. Accordingly, unlike the protective labor legislation prevalent earlier in this century, [the statute] does not reflect archaic or stereotypical notions about pregnancy and the abilities of pregnant workers. A statute based on such stereotypical assumptions would, of course, be inconsistent with Title VII's goal of equal employment opportunity.¹¹⁹

As the Court saw it, treating men and women differently by removing a barrier tied to women's actual biological differences, not to stereotypes about men's and women's sex roles, was consistent with Title VII's prohibition on sex discrimination.

Several years later, California continued to pursue a substantive equality approach to pregnancy discrimination when it passed legislation requiring employers to provide temporary accommodations to workers for their pregnancy disabilities, regardless of whether employers do so for other temporary disabilities.¹²⁰ First enacted in 1990 and later expanded, the statute requires an employer to "provide reasonable accommodation for an employee for a condition related to pregnancy, childbirth, or a related medical condition," which can include "temporarily transfer[ing] a pregnant employee to a less strenuous or hazardous position for the duration of the pregnancy" if one is available.¹²¹ Short of transfer, the statute requires employers to provide anything else deemed "reasonable," including "temporarily modifying [] work duties, providing [] a stool or chair, or allowing more frequent breaks."¹²²

California's disability leave law protected women from losing their jobs when temporarily unable to work due to childbirth or pregnancy. But its accommodation law recognized that many pregnant women can remain attached to the workplace with more minor temporary adjustments—that valuable workers become pregnant and workplaces can usually adapt without great cost or inconvenience. The law has served as a model for other states seeking to ensure equality for pregnant workers, and, as described in Part III, for a federal legislative model nearly two decades later.¹²³

¹¹⁷ Cal. Fed. Sav. and Loan Ass'n v. Guerra, 479 U.S. 272, 288 (1987).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 290.

¹²⁰ 1990 Cal. Stats., ch. 15 (S.B.1027), § 2, codified at CAL. GOV'T CODE § 12945(a)(3) (West 2018).

¹²¹ CAL. GOV'T CODE § 12945(a)(3).

¹²² CAL. CODE REGS. tit. 2, § 11051 (2015).

¹²³ See Section III.B., *infra*.

C. *Reconstructing Feminism: Degendering Workplace Structures*

For over thirty years since the passage of Title VII, advocates, and the laws that resulted from their advocacy efforts, diverged. Federal law enacted formal equality, limited to the PDA's requirement of treating pregnancy "the same as" other temporarily disabling conditions and the FMLA's requirement of gender-neutral family and medical leave.¹²⁴ California and a handful of other state laws enacted substantive equality, offering additional leave or accommodation solely for pregnancy disabilities.¹²⁵ Both approaches were subject to criticism for failing to achieve gender "equality": women were either treated like men, leaving them unaccommodated, or treated differently from men, requiring costly "special treatment."

In 2000, legal scholar Joan C. Williams broadened the lens from considering discrimination based on pregnancy to that based on motherhood and, in doing so, conceived of a way to bridge the sameness/difference divide.¹²⁶ While pregnancy discrimination and the need for pregnancy disability leave was an acute problem for all working women, the stereotypes of domesticity that made workplaces hostile to pregnancy did not stop after women gave birth.¹²⁷ Regardless of her desire and ability to continue working, once a woman had a child, she was forever perceived at work as a mother, and being a good mother was incompatible with being a competent worker.¹²⁸ Williams articulated that, because the U.S. workplace was designed around a male "ideal worker" who never had to miss work for childbirth and had no domestic responsibilities, it was inherently designed around a masculine norm that would always disadvantage women.¹²⁹

Rather than focusing on whether female workers should be treated the same as or different from male workers, Williams' approach—which she described as one of "reconstructive feminism"—focused on the design of the workplace itself.¹³⁰ This reconstructive approach put workplace structures and norms at the center of questions about how to achieve gender equality at work, asking "the same as" or "different from" *what?*¹³¹ It posited that the law should focus on degendering the unexamined masculine norms at work, so that, for example, taking a pregnancy leave or getting a temporary preg-

¹²⁴ See *supra* Section II.A.

¹²⁵ See *supra* Section II.B; Section III.B., *infra* (describing state laws).

¹²⁶ See UNBENDING GENDER, *supra* note 17, at 1–9, 64–113.

¹²⁷ See *id.*

¹²⁸ See *id.*

¹²⁹ See *id.* at 2–3.

¹³⁰ See UNBENDING GENDER, *supra* note 17, at 4, 40–63, 178–80, 213–26; *Reconstructive Feminism*, *supra* note 17, at 82, 89–90, 98–102.

¹³¹ See UNBENDING GENDER, *supra* note 17, at 55 ("Instead of simply allowing women to work on the same terms traditionally available to men, we need to change the conditions under which both men and women work. . . [It does] not go far enough [to] shift[] women into the workforce without changing the rules of the game, . . . that employers were entitled to ideal workers and . . . men. . . entitled to be them. Reconstructive feminism aims to go much further, deconstructing domesticity by eliminating the ideal-worker norm"); *Reconstructive Feminism*, *supra* note 17, at 82, 89–90, 98–102.

nancy accommodation is not perceived as “special,” but rather a regular practice in a non-gendered workplace.¹³² Williams and her colleagues developed a legal theory that recognized discrimination based on family responsibilities or caregiver status, including pregnancy, as a sub-species of sex discrimination, driven by sex-role stereotypes about work and family.¹³³ In 2007, the EEOC issued formal guidance recognizing the theory.¹³⁴

As Williams’ approach gained prominence in legal scholarship, the political power and leadership of women—and particularly mothers—also grew,¹³⁵ creating a critical mass pushing back on long-held stereotypes about the incompatibility of work and motherhood. By the 2010s, criticism of the persistence of pregnancy discrimination and the prevalence of pregnancy-hostile workplaces reached a high-point, inspiring an interest in revisiting federal law on pregnancy accommodation.¹³⁶

III. FILLING IN THE PATCHWORK OF PREGNANCY ACCOMMODATION REQUIREMENTS

Recent legal developments around the law of pregnancy accommodation reflect both the political and legal history of the sameness/difference debate and the emergence of a reconstructive approach. This Part documents how both the U.S. Supreme Court, in its most recent holding on pregnancy accommodation under Title VII, and advocates, in a newly unified legislative agenda on the issue, reflect attempts to move beyond merely comparing workers, toward unearthing and changing biased workplace structures.

A. Current Case Law: *Young v. United Parcel Service*

In 2015, the Supreme Court revisited pregnancy accommodation requirements under federal law and provided a new interpretation of the PDA in the case *Young v. United Parcel Service*.¹³⁷ The case was brought by UPS

¹³² See *Reconstructive Feminism*, *supra* note 17, at 82, 89–90, 98–102.

¹³³ See CYNTHIA THOMAS CALVERT ET AL., FAMILY RESPONSIBILITIES DISCRIMINATION 4 (2014); see generally Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN’S L.J. 77 (2003) (describing legal theory); Joan C. Williams & Stephanie Bornstein, *The Evolution of “FRd”: Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311 (2008) (same).

¹³⁴ See U.S. EQUAL EMP. OPPORTUNITY COMM’N, NOTICE NO. 915.002, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES (2007), <https://www.eeoc.gov/policy/docs/caregiving.html> [https://perma.cc/ERZ5-WDY].

¹³⁵ See, e.g., *About MomsRising*, MOMSRISING, <https://www.momsrising.org/about> (describing founding in 2006 and growth to today); Kara Jesella, *Mom’s Mad. And She’s Organized*, N.Y. TIMES (Feb. 22, 2007), <https://www.nytimes.com/2007/02/22/fashion/22mothers.html> [https://perma.cc/45EU-HKGW]; Joan Blades and Kristin Rowe-Finkbeiner, *The Motherhood Manifesto*, THE NATION (May 4, 2006), <https://www.thenation.com/article/archive/motherhood-manifesto/> [https://perma.cc/JEE4-KZPZ].

¹³⁶ See *infra* Part III.

¹³⁷ See generally *Young v. United Parcel Serv.*, 135 S. Ct. 1338 (2015).

driver Peggy Young, who alleged that UPS' failure to accommodate her request for a temporary assignment to "light duty" to avoid heavy lifting while pregnant when it provided light duty for other temporary disabilities constituted sex discrimination in violation of the PDA.¹³⁸ At the heart of Young's case was the question of what was included in the PDA's requirement that pregnant workers be treated "the same as" others with temporary disabilities: Did the statute require pregnancy accommodation if *any* other temporary disability was accommodated or only if *all* other temporary disabilities were accommodated?¹³⁹

Prior to *Young*, case law and administrative guidance from the EEOC on pregnancy discrimination¹⁴⁰ had made several things clear. If an employer provided light duty to workers for non-work-related temporary disabilities, it had to do so for pregnancy disabilities.¹⁴¹ If an employer had a policy to only cover work-related disabilities but, in practice, actually covered any non-work-related disability—for example an employee's heart attack or back injury unrelated to the job—it had to do so for pregnancy disabilities.¹⁴² And at least two federal courts allowed employees to argue that an employer's policy of providing light duty to accommodate only those with on-the-job injuries could create an unlawful disparate impact on female workers.¹⁴³ Yet the question remained open: did an employer engage in intentional, unlawful disparate treatment based on pregnancy when it limited its light duty to or accommodated only work-related temporary disabilities?

Taking a formal equality approach that the Fourth Circuit had described as "pregnancy-blind," UPS argued that, because it limited who could access light duties only to workers injured on the job, it was treating pregnancy "the same as" all other disabilities.¹⁴⁴ A worker who broke their leg while skiing outside of work would not be covered, so a woman disabled by pregnancy unrelated to work could not be covered either. Taking a textual approach that sought substantive equality, Young argued that the PDA did

¹³⁸ See *Young*, 135 S. Ct. at 1344.

¹³⁹ See *id.* at 1349.

¹⁴⁰ U.S. EQUAL EMP. OPPORTUNITY COMM'N, NOTICE NO. 915.003, EEOC ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES (2015), https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm [<https://perma.cc/44M8-HSYZ>] [hereinafter ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION]. Note, the Guidance was initially issued July 14, 2014, prior to the Supreme Court's decision in *Young v. UPS*, but later updated and amended to be consistent with *Young*. See *id.* (noting that it "supersedes the Enforcement Guidance. . .dated July 14, 2014," but largely "remains the same as the prior version," with changes and deletions in certain sections "in response to the Supreme Court's decision in *Young*").

¹⁴¹ See *Young*, 135 S. Ct. at 1351–53; ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION, *supra* note 142. Also see Deborah L. Brake & Joanna L. Grossman, *Unprotected Sex: The Pregnancy Discrimination Act at 35*, 21 DUKE J. GENDER L. & POL'Y 67, 87–90 (2013).

¹⁴² See *Young*, 135 S. Ct. at 1351–53; ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION, *supra* note 142.

¹⁴³ See ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION, *supra* note 142 (citing *Germain v. County of Suffolk*, 2009 WL 1514513, at *4 (E.D.N.Y. May 29, 2009) and *Woodard v. Rest Haven Christian Servs.*, 2009 WL 703270, at *7 (N.D. Ill. Mar. 16, 2009)).

¹⁴⁴ See *Young*, 135 S. Ct. at 1344.

not allow for a distinction between work and non-work-related injuries. Under the text of the statute, if any employee received an accommodation for a temporary disability, the employer had to provide the same for a pregnant worker; to fail to do so constituted sex discrimination.¹⁴⁵

In a reflection of the confusion sown by the sameness/difference debate, the Court sided with neither party, instead creating a new test under the PDA that blurred lines between classic patterns of proof under Title VII. An employee could make out a prima facie case of pregnancy discrimination by showing that, while she was denied an accommodation due to pregnancy, “the employer did accommodate others ‘similar in their ability or inability to work.’”¹⁴⁶ The employer could argue this was justified by a legitimate non-discriminatory reason—here, that it only accommodated temporary disabilities that were work related.¹⁴⁷ The employee could then show this reason was pretextual by “providing sufficient evidence that the employer’s policies impose a significant burden on pregnant workers, and that the employer’s . . . 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.”¹⁴⁸ The Court explained that sufficient evidence might be “that the employer accommodates a large percentage of non-pregnant workers while failing to accommodate a large percentage of pregnant workers,” for example, allowing many workers lifting restrictions but “categorically failing to accommodate pregnant employees” with the same.¹⁴⁹ The goal of Plaintiff’s proof would be such that “a jury could find that [the employer’s] reasons for failing to accommodate pregnant employees give rise to an inference of intentional discrimination.”¹⁵⁰

With this middle-ground approach, the Court attempted to walk the line between unearthing hidden stereotypes about why an employer may refuse to provide pregnancy accommodations without going so far as to require expensive “special treatment” for only pregnant workers. Indeed, the decision took a step toward a reconstructive approach by questioning the process and structures in the workplace and the stereotypes that may lie beneath an employer’s decisions. But it did not fully achieve this end. As a result, the split decision muddied the waters,¹⁵¹ and both parties in the lawsuit claimed victory.¹⁵²

¹⁴⁵ See *id.* at 1349.

¹⁴⁶ *Id.* at 1354.

¹⁴⁷ See *id.*

¹⁴⁸ See *id.*

¹⁴⁹ See *id.*

¹⁵⁰ See *id.*

¹⁵¹ See Deborah Brake, *The Shifting Sands of Employment Discrimination: From Unjustified Impact to Disparate Treatment in Pregnancy and Pay*, 105 GEO. L.J. 559, 590 (2017).

¹⁵² See, e.g., Robert Barnes & Brigid Schulte, *Justices Revive Case Claiming UPS Discriminated Against Pregnant Worker*, WASH. POST (Mar. 25, 2015), https://www.washingtonpost.com/national/justices-revive-case-claiming-ups-discriminated-against-pregnant-worker/2015/03/25/217223aa-d317-11e4-a62f-ee745911a4ff_story.html (quoting plaintiff Young as “ecstatic” (“This is nowhere close to being over, but it’s very positive not just for me, but for all women”) and defendant UPS as “pleased” (“that the court did not find its policy at the time

Writing in dissent, Justice Scalia explained that he would have sided with UPS, holding that different treatment based on whether a temporary disability was work-related was nondiscriminatory because, to hold otherwise, “would elevate pregnant workers to most favored employees.”¹⁵³ Scalia’s framing of pregnant workers who are accommodated so they can continue working as receiving special treatment reflects the invisibility of the masculine ideal-worker norm: the assumption that Title VII does not require removing obstacles to equal opportunity if only women face them. Yet the Court majority also adopted and used Scalia’s frame, without questioning its underlying premise, holding:

We doubt that Congress intended to grant pregnant workers an unconditional most-favored-nation status. The language of the statute does not require that unqualified reading. The [text], when referring to nonpregnant persons with similar disabilities, uses the open-ended term “other persons.” It does not say that the employer must treat pregnant employees the “same” as “any other persons”. . . nor does it otherwise specify which other persons Congress had in mind.¹⁵⁴

The Court failed to recognize that, under a formally equal reading of Title VII, workers who get pregnant always start from a *least* favored nation status, such that any accommodation to remove this barrier is simply putting them on a level playing field with men who will never be disabled by pregnancy at work.

B. Current Statutory Law: Toward Pregnant Worker Fairness

As the *Young* case was making its way through the courts, gender equality advocates turned to pursuing state and federal legislation. After several advocacy organizations called attention to the failure of many employers to provide even minor accommodations to pregnant women, particularly those in lower-paid positions,¹⁵⁵ the EEOC issued new Enforcement Guidance on

was inherently discriminatory. . .[and] ‘confident that [lower] courts will find that UPS did not discriminate against Ms. Young under this newly announced standard’”)) [<https://perma.cc/FUR8-MG2F>].

¹⁵³ See *Young v. United Parcel Serv.*, 135 S. Ct. 1338, 1362 (2015) (Scalia, J., dissenting).

¹⁵⁴ *Young*, 135 S. Ct. at 1349–50.

¹⁵⁵ See generally STEPHANIE BORNSTEIN, CTR. FOR WORKLIFE LAW, U.C. HASTINGS COLLEGE OF LAW, POOR, PREGNANT, AND FIRED: CAREGIVER DISCRIMINATION AGAINST LOW-WAGE WORKERS (2011), <https://worklifelaw.org/publications/PoorPregnantAndFired.pdf> [<https://perma.cc/V43G-BXWH>]; NOREEN FARRELL ET. AL., EQUAL RIGHTS ADVOCATES, EXPECTING A BABY, NOT A LAY-OFF: WHY FEDERAL LAW SHOULD REQUIRE THE REASONABLE ACCOMMODATION OF PREGNANT WORKERS (2012), http://www.ncdsv.org/images/ERA_ExpectingABabyNotALay-off_2012.pdf [<https://perma.cc/QS8V-48CM>]; NATL. WOMEN’S LAW CTR & A BETTER BALANCE, IT SHOULDN’T BE A HEAVY LIFT: FAIR TREATMENT FOR PREGNANT WORKERS (2013), <https://www.abetterbalance.org/wp-content/uploads/2017/03/ItShouldntBeAHeavyLift.pdf> [<https://perma.cc/5DCK-JDMM>].

pregnancy discrimination.¹⁵⁶ The Guidance explained the full reach of pregnancy accommodations under the PDA and the ADA and recommended, as a “best practice,” that employers “[h]ave a process in place for expeditiously considering reasonable accommodation requests made by employees with pregnancy-related disabilities, and for granting accommodations where appropriate.”¹⁵⁷

State and federal legislators also began to act, proposing a flurry of new legislation to address gaps in federal law.¹⁵⁸ As of March 2020, over half of states (twenty-eight) and a handful of localities, including New York City, have now enacted laws that require at least some level of affirmative pregnancy accommodation, beyond federal law’s equal treatment approach.¹⁵⁹ The laws vary as to the type and size of employer they cover—for example, three apply to public sector employers only, sixteen apply to employers with six or fewer employees, and the remaining nine to employers ranging in size from at least twelve to twenty-five employees.¹⁶⁰ Likewise, their coverage varies, from requiring transfer to a “less strenuous or hazardous position” to requiring modified work schedules to requiring all reasonable accommodations, including allowing food and drink on the job or the ability to sit or use the bathroom more frequently.¹⁶¹ Notably, twenty-three of the twenty-eight laws were enacted since 2013¹⁶²—a signal of how the politics behind the popularity of such measures has changed dramatically in the most recent decade.

Popular opinion has also started to swing toward passing a pregnancy accommodation law at the federal level. After being introduced in each legislative session since 2012, the most recent version of the federal Pregnant Worker’s Fairness Act was introduced in the House of Representatives in May 2019 with bipartisan support,¹⁶³ and has even been endorsed by the U.S. Chamber of Commerce.¹⁶⁴ In line with the California model, the bill would require all employers covered by Title VII to “make 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

¹⁵⁶ See ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION, *supra* note 142.

¹⁵⁷ See *id.* at Part IV.

¹⁵⁸ See *A Better Balance*, *supra* note 12, at 1.

¹⁵⁹ See *id.* at 1.

¹⁶⁰ See *generally id.*

¹⁶¹ See *generally id.*

¹⁶² *Id.* at 1.

¹⁶³ Pregnant Workers Fairness Act, H.R. 2694, 116th Cong. § 2(1) (2019) (listed with 214 Democratic and 15 Republican co-sponsors as of March 4, 2020);

¹⁶⁴ See *A Better Balance*, *Fact Sheet: The Pregnant Workers Fairness Act* (Feb. 3, 2020), <https://www.abetterbalance.org/resources/fairness-for-pregnant-workers-bill-factsheet> [<https://perma.cc/Y9FK-W9VH>] (citing U.S. Chamber of Commerce, *U.S. Chamber of Commerce Applauds Committee Approval of Pregnant Workers Fairness Act* (Jan. 14, 2020), <https://www.uschamber.com/press-release/us-chamber-of-commerce-applauds-committee-approval-of-pregnant-workers-fairness-act> [<https://perma.cc/44V7-H5RM>]).

undue hardship on the operation of the business.”¹⁶⁵ As such, it would create a uniform, federal requirement that makes clear that the workplace must adapt to the worker, who may be a pregnant woman.

The bill has yet to pass and faces the same major challenges as any piece of federal legislation proposed in Congress. But that it has bipartisan and popular support shows a marked shift in the politics of the issue of pregnancy accommodation at work. Women now not only compose nearly half of the U.S. labor market, but they play a nearly equal role in family breadwinning, they are a powerful voting bloc in popular elections, and they have greater representation in the legislature and on the Supreme Court.¹⁶⁶ While sex role stereotypes about men and women’s relative duties toward childrearing may remain, the idea that the workplace can simply ignore the issue of pregnancy has, at long last, begun to change.

CONCLUSION

For over a century, women have participated in the industrialized workforce; for decades, they have composed a major segment of the U.S. labor market. Yet long outdated notions of sex-role stereotypes maintain a powerful grip on U.S. workplace law and policy. Stemming from separate spheres concepts that men belong in the market sphere and women in the domestic, U.S. workplaces were—and largely remain—designed around a male worker norm, free from family, domestic, and childbearing responsibilities.

Since Title VII of the Civil Rights Act of 1964 first prohibited sex discrimination at work, legislators, courts, and even gender equality advocates themselves have struggled to define what it means to treat workers “equally” when only half of them may become pregnant. At the federal level, advocates took a politically expedient equal treatment approach, expanding options for pregnant workers by expanding gender-neutral leave and accommodations for both men and women. Yet such efforts still left women, who bear a much greater need for pregnancy-related benefits, at a disadvantage. At the state level, some advocates pursued a substantive equality approach, seeking additional benefits for pregnancy-related disabilities for women only, to counteract their disadvantage. Ultimately both “sameness” and “difference” approaches to antidiscrimination law brought gains, but both maintained a focus on comparing female to male workers, leaving underlying assumptions of workplace design unchallenged.

In the most recent decade, however, both feminist theory and the politics around pregnancy discrimination have evolved. Reconstructive feminism has exposed the masculine “ideal-worker norm,” that, left unaddressed, will

¹⁶⁵ Pregnant Workers Fairness Act, H.R. 2694, 116th Cong. § 2(1) (2019).

¹⁶⁶ See *supra* notes 6-9, 137, and accompanying text.

always disadvantage women at work.¹⁶⁷ Women have gained political power and representation in the courts and legislatures, able to act to remedy the pregnancy discrimination they have seen and experienced. With over half of states now requiring affirmative accommodations for pregnant workers and bipartisan support for a federal bill,¹⁶⁸ the tide is beginning to turn. Someday, hopefully soon, asking for minor accommodations to be able to continue working through a pregnancy will be routine—and entirely apolitical.

¹⁶⁷ See UNBENDING GENDER, *supra* note 17, at 4, 40–63, 178–80, 213–26; *Reconstructive Feminism*, *supra* note 17, at 82, 89–90, 98–102.

¹⁶⁸ See *supra* Section III.B.

