

Unprotected Sex: The Pregnancy Discrimination Act at 35

DEBORAH L. BRAKE* & JOANNA L. GROSSMAN**

INTRODUCTION

Congress passed the Pregnancy Discrimination Act of 1978 (PDA) with a specific purpose in mind—to override the Supreme Court’s refusal in a 1976 case to see pregnancy discrimination as a form of sex discrimination under Title VII.¹ The Act consists of two clauses. The first defines sex discrimination to include discrimination on the basis of “pregnancy, childbirth, and related medical conditions.”² A second clause directs employers to treat pregnant workers the same as other employees with a similar “ability or inability to work.”³ The PDA brought about some immediate and significant changes in employer policies relating to hiring, firing, and benefits.⁴ In a series of decisions interpreting the PDA, the Supreme Court has bolstered the Act’s force with broad interpretations tailored to its underlying purposes.⁵ But the PDA turns thirty-five this year, and with its advancing age have come complications. Judicial complications.

Over time, as interpreted by the lower courts, the PDA has withered in scope and come to embody the same narrow view of pregnancy discrimination that drove the notorious Supreme Court decisions that led to its enactment in the first place. In recent decisions, lower federal courts have taken a stilted view of the definition of pregnancy and the meaning of discrimination, to the detriment of women generally, but especially working class and lower-income women. In so doing, the courts have misread the statute and reinforced the very gender ideology surrounding work and maternity that the Act was intended to dislodge.

The PDA case law has been burdened by some of the same pitfalls that have

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* Professor of Law & Distinguished Faculty Scholar, University of Pittsburgh School of Law. We appreciate the opportunity to present this article, in an earlier form, at the Social Justice Feminism conference held at the University of Cincinnati College of Law in October of 2012, and at the Law and Society annual conference in May of 2012, and for the helpful feedback and commentary we received at both of these events. Many thanks also to Lea Lach (University of Pittsburgh School of Law, J.D. expected 2014) for her valuable research assistance.

** Sidney and Walter Siben Distinguished Professor of Family Law, Maurice A. Deane School of Law at Hofstra University.

1. The Supreme Court took this position on Title VII in *General Electric Co. v. Gilbert*, 429 U.S. 125, 140 (1976), which adopted the reasoning of its earlier decision taking a similar position on the relationship between pregnancy discrimination and sex discrimination under the equal protection clause. See *Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974).

2. Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2012).

3. *Id.*

4. On the effects of the PDA, see generally Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567 (2010).

5. See text accompanying notes 64-94 *infra*.

cut short the reach of discrimination law generally: a resistance to “bootstrapping,” a hostility toward accommodation mandates, and a narrow view of discrimination as conscious animus against the protected group. While not limited to the PDA, the emergence of these themes in PDA cases is jarring given the distinctive language of the Act. Running counter to the plain text of the Act, the restrictive lower court decisions are animated by stereotypical gender ideologies about pregnancy and maternity in relation to paid work.

This article takes a comprehensive look at recent case law under the PDA, while offering a critical commentary on the gender ideology that lies behind these decisions and charting the stakes for women in a reinvigorated Act. The survey of PDA decisions is an important undertaking in its own right, since it is not widely appreciated just how much courts have narrowed the PDA’s protections. The PDA cases are an increasingly sorry lot, including cases like the recent Fourth Circuit ruling in *Young v. UPS*, in which the court held that a pregnant woman could lawfully be denied a light-duty assignment necessitated by a medical restriction on lifting even though the company made such accommodations for on-the-job injuries, for disabilities entitled to accommodation under the Americans with Disabilities Act (ADA), and for conditions, medical or otherwise, leading to the loss of driving certification.⁶ As this article explains, the recent expansion of the ADA, which should redound to the benefit of PDA plaintiffs by increasing the pool of comparators, has ironically made matters worse.⁷

From recent successes confronting the “maternal wall,” one might get the impression that pregnancy discrimination is a thing of the past or that the law adequately responds to it.⁸ But the maternal wall—the barriers to employment equality faced by mothers—begins with pregnancy.⁹ Indeed, pregnancy discrimination makes up a significant chunk of the maternal wall. According to one author, reviewing the literature on pregnancy discrimination, “[a]lmost half of all working women in western countries have experienced tangible discrimination on this basis, such as being denied training opportunities, changes to job descriptions, criticism of their performance or appearance, reduced working hours and dismissal without good reason after the announcement of pregnancy.”¹⁰ The number of charges alleging pregnancy discrimination filed with the Equal Employment Opportunity Commission (EEOC) increased by

6. 707 F.3d 437 (4th Cir. 2013), *petition for cert. filed*, No. 12-1226, 2013 WL 1462041 (U.S. Apr. 8, 2013).

7. See Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, 2008 U.S.C.A.N. (122 Stat.) 3553 (codified at 42 U.S.C. § 12102).

8. For example, the EEOC has issued guidance on discrimination related to caregivers in the workplace. EEOC, Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities (May 23, 2007), available at <http://www.eeoc.gov/policy/docs/caregiving.html>. See also 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).

9. See Kathleen Fuegen et al., *Mothers and Fathers in the Workplace: How Gender and Parental Status Influence Judgments of Job-Related Competence*, 60 J. SOCIAL ISSUES 737, 751 (2004) (suggesting that pregnancy is the trigger for discrimination against mothers, and that discrimination against working mothers can begin even before the birth of a child).

10. Liisa Mäkelä, *A Narrative Approach to Pregnancy-related Discrimination and Leader-follower Relationships*, 19 GENDER, WORK AND ORG. 677, 680 (2012).

41.1% between 2000 and 2010, on top of almost as large an increase in the decade prior.¹¹ In the past five years, the EEOC has pursued and obtained significant damages in pregnancy discrimination cases.¹² In 2012, it released a draft strategic plan that included “accommodating pregnancy when women have been forced onto unpaid leave after being denied accommodations routinely provided to similarly situated employees” among the “emerging issues” it plans to target.¹³ Media outlets have started to note the rise in claims and the apparent persistence of pregnancy discrimination.¹⁴ Although pregnancy takes up a relatively short time in the average woman’s participation in the labor force, the effects of discrimination against pregnant workers continue long after pregnancies end.¹⁵

In contrast to the tilt of popular narratives about mothers’ “choices” to reduce their attachment to the workforce—narratives that implicitly reference the experiences of a select group of women—the women who lose the most under the courts’ cramped readings of the PDA are the least privileged and most economically vulnerable women. The PDA is failing the women who need it most—those who work inflexible hours or in rigidly structured work settings or who perform physically demanding tasks. Cases like the one brought by a pregnant fitting room attendant at Wal-Mart who claimed that she was fired for carrying a water bottle at work (per doctor’s orders) illustrate the problem.¹⁶ Professional women in more flexible work settings may still lose their cases, but they have a better chance of finding at least some protection under the Act, if they can prove that their opportunities were limited based on stereotyped and

11. Equal Employment Opportunity Commission, *Pregnancy Discrimination Charges EEOC & FEPAs Combined: FY 1997-FY 2011* (2011), available at <http://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy.cfm>; see NAT’L P’SHP FOR WOMEN & FAMILIES, *THE PREGNANCY DISCRIMINATION ACT: WHERE WE STAND 30 YEARS LATER* 12 (2008) (noting, among other trends, a dramatic increase in claims filed by women of color). See also N. Woodward, *Pregnancy Discrimination Grows*, 50(7) HR MAG. 78-83 (2005) (noting the growth of pregnancy discrimination cases filed with the EEOC).

12. See NAT’L P’SHP FOR WOMEN & FAMILIES, *supra* note 11, at 11 (noting an increase in the percentage of EEOC-instigated lawsuits that include a pregnancy discrimination claim from 1.3% in 1997 to 8.6% in 2006). See also EEOC, *supra* note 11 (showing that monetary benefits paid out annually through EEOC conciliations, not including subsequent litigation, more than doubled in the last decade, rising from \$5.6 million in 1997 to \$12.2 million in 2008, with an all-time high of \$30 million collected in 2007 alone).

13. EEOC, *Strategic Enforcement Plan* (Sept. 4, 2012), http://www.eeoc.gov/eeoc/plan/sep_public_draft.cfm.

14. See, e.g., Lesley Alderman, *When the Stork Carries a Pink Slip*, N.Y. TIMES, Mar. 28, 2009, at B6 (reporting suspicion among lawyers that “some employers are now using the law’s laxity and the dismal economy to tacitly discriminate against new or expectant mothers”); Stephanie Armour, *Pregnant Workers Report Growing Discrimination*, USA TODAY, Feb. 17, 2005, at B1 (noting a “soaring” number of pregnancy discrimination claims); Tresa Baldas, *Pregnancy Discrimination Suits on the Rise*, NAT’L L.J., April 14, 2006, at 4 (noting increase in pregnancy discrimination lawsuits, “particularly among high-level female executives who claim that they are being knocked off the corporate ladder because of maternity issues”).

15. See D.M. Houston & G. Marks, *The Role of Planning and Workplace Support in Returning to Work after Maternity Leave*, 41(2) BRITISH J. OF INDUS. REL. 197,(2003) (discussing research showing that an employee’s experiences in the workplace while pregnant influence her decisions about whether and when to return to work after childbirth).

16. See *Wiseman v. Wal-Mart Stores, Inc.*, No. 08-1244-EFM, 2009 WL 2168911 at *2 (D. Kan. July 21, 2009).

untrue assumptions about how pregnancy affects their work capacity or commitment. And they have a greater chance of reconciling the effects of pregnancy with work obligations without needing to resort to litigation. In short, while the PDA still offers some protection from animus-based discrimination, it has become increasingly unhelpful to those women whose pregnancies are most likely to harm their economic security.

Recent scholarship on pregnancy discrimination has pressed for treating pregnancy as a disability under the ADA. This work raises the question of whether the ADA might better address the issues facing pregnant workers, and if so, whether there remains any real need for a reinvigorated PDA. We consider this question and conclude that there is still value in addressing the harm of pregnancy discrimination specifically as a sex equality right, even if (indeed, even though) we agree with those scholars making the case for recognizing pregnancy as a disability under the ADA. There is a distinctive history of framing challenges to pregnancy discrimination as a sex equality right that is worth preserving, and strengthening the sex equality foundations of the right may potentially strengthen the broader social and legal movements for gender equality and reproductive justice.

Part I of this Article sketches the origins of the PDA, the backdrop of Supreme Court decisions leading to its enactment, and the Supreme Court's cases interpreting the Act. The Act purported to herald a new era in which pregnant women could obtain, perform, and retain jobs despite becoming pregnant. The PDA was crucial in dismantling widespread employer practices that stereotyped pregnant women as unsuitable for paid work and summarily dismissed them from jobs or barred their entry in the first place. School district policies barring pregnant women from teaching once they "showed" were emblematic of such practices.¹⁷ The law reflected more "enlightened" views about pregnancy and its compatibility with paid work, and the Supreme Court cases interpreting the Act have largely remained true to these purposes. Despite these auspicious beginnings, an increasingly hostile judiciary has narrowed the definition of pregnancy discrimination and the categories of workers deemed useable as comparators, creating significant gaps in the statute's protections.

Part II explores these gaps and the doctrinal questions that have befuddled lower courts in recent years. It focuses on two primary problems. First, courts have come to understand the first clause of the PDA to prohibit only those actions that penalize the status of pregnancy rather than its actual effects. Second, and even more importantly, courts have stripped clause two of the PDA of its substantive content. In a disturbing new trend, courts have allowed employers to grant accommodations to other workers but withhold them from pregnant employees as long as the employer can point to some pregnancy-neutral basis for distinguishing them. Courts are doing this despite clear statutory language directing employers to treat pregnant workers the same as others "similar in their ability or inability to work."¹⁸ This approach collapses

17. *See, e.g., Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (challenging the constitutionality of mandatory maternity leave rules requiring a pregnant school teacher to take unpaid leave for five months before expected childbirth until three months after giving birth).

18. Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2012). 42 U.S.C. § 2000e(k)

the first and second clauses of the PDA and reinvigorates the kind of *sui generis* treatment of pregnancy in the *Gilbert* ruling that Congress sought to override.

Part III discusses some common themes that these recent developments in pregnancy discrimination law share with discrimination law generally, including courts' resistance to perceived "bootstrapping," hostility to accommodation requirements, and an increasing emphasis on conscious animus as the only legitimate target of discrimination law. This Part then discusses why these themes, while not wholly unexpected in the PDA, are particularly striking in light of the text of the statute. We then sketch the gender ideology underlying these rifts in the PDA case law. At bottom, ideologies about pregnancy, maternity and work are interfering with the courts' ability to recognize discrimination on the basis of pregnancy despite the clear text of the PDA.

Part IV considers the implications of the PDA from the perspective of social justice feminism. Social justice feminism responds to calls for attention to intersectionality, anti-essentialism, and class by examining the multivariate dimensions of gender injustices.¹⁹ The PDA's shortcomings are troublesome for all women, but especially for women in lower-wage jobs, traditionally male occupations, and highly structured workplaces. These women are disproportionately poor or working class, and disproportionately women of color. The work-life "balance" issues of more privileged women most often set the terms of the cultural debate about combining paid work and maternity.²⁰ But the conflicts between pregnancy and work, and the law's inadequate response to them, play out most severely among the most economically vulnerable women—those for whom choice is minimal or absent.

Finally, Part V acknowledges the call of disability law scholars to include pregnancy as a protected disability under the Americans with Disabilities Act and considers the implications of that argument for the PDA. While our position is in no way antithetical to those calls—indeed, we find persuasive the "social model" of disability that should encompass pregnancy—we believe that the ADA should not be viewed as a replacement for the PDA. While pregnant workers should pursue all viable legal claims for addressing discrimination, the PDA has a distinctive role in anchoring the women's legal movement for gender equality. It should be reinvigorated rather than abandoned. Chronicling the flaws in current interpretations of the PDA, and elaborating the troubling gender ideologies behind them, is a first step in that process.

I. THE EARLY PROMISE OF THE PREGNANCY DISCRIMINATION ACT

The PDA responds to a long history of state laws and employer practices purportedly protecting women from the rigors of work and its incompatibility with motherhood. State laws often relied on pregnancy-based classifications

(2012).

19. See, e.g., Kristen Kalsem & Verna L. Williams, *Social Justice Feminism*, 18 UCLA WOMEN'S L.J. 131 (2010).

20. See, for example, the high profile and controversial discussions triggered by Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES MAG., Oct. 26, 2003, and Anne-Marie Slaughter, *Why Women Still Can't Have it All*, THE ATLANTIC, July/Aug. 2012, available at <http://www.theatlantic.com/magazine/archive/2012/07/why-women-still-cant-have-it-all/309020>.

when regulating employment generally or setting policies for public employees. In *Muller v. Oregon*, for example, decided in 1908, the Supreme Court upheld a law restricting the number of hours women could work in laundries on the theory that the state was justified in acting to protect the “maternal functions” of women.²¹ Such laws ostensibly accommodated the domestic and reproductive obligations of women to protect them from exploitation by employers. As Deborah Dinner explains, female-only minimum wage laws attempted to “shift[] the social costs of substandard wages back onto employers,” while maximum-hours laws “alleviated the burden placed upon women by the unequal division of childrearing labor within the home, without challenging its normative correctness.”²² But this “protection” was often a pretext for preserving better jobs for men and did not affect all women equally.²³ Working-class women and women of color “spearheaded the campaign against the laws” because they “faced the greatest economic need to access the higher-paying blue-collar jobs that protective laws placed beyond their reach.”²⁴ And while they suffered the most from the costs of protection, these women received relatively few of the benefits. They “worked disproportionately in occupations excluded from the Fair Labor Standards Act as well as from state protective-labor laws.”²⁵ Vestiges of this regime lingered long into the twentieth century, as a wide variety of state laws and employer policies restricted occupations, job duration, and benefits based on sex, pregnancy, childbirth, childrearing, or a combination thereof, all designed to reinforce (white) women’s prescribed maternal roles.²⁶

A. The Pre-PDA Legal Landscape

The landscape began to shift in the early 1970s, when women’s rights advocates succeeded in establishing a constitutional right of sex equality and the statutory ban on sex discrimination in Title VII began to take shape.²⁷ Whether these rights protected against pregnancy discrimination was initially unclear. Women began bringing claims alleging “pregnancy discrimination” shortly after the EEOC was established in 1965, only to find that little thought had been given to whether that was a cognizable claim.²⁸ Responding to pressure from

21. 208 U.S. 412, 422 (1908).

22. Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 444-45 (2011).

23. See, e.g., Mary E. Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219, 1237-38, 1239 (1986) (observing that “[f]etal vulnerability policies excluding all fertile women have been adopted only in male-dominated industries,” while “women are generally allowed to work in women’s jobs without restrictions based on fetal safety”); David L. Kirp, *Fetal Hazards, Gender Justice, and the Justices: The Limits of Equality*, 34 WM. & MARY L. REV. 101, 115 (1992) (“Expressions of corporate concern for the plight of fetuses . . . have been highly selective. Businesses that depend heavily on women workers have been much less scrupulous about the dangers they impose on the unborn . . .”).

24. Dinner, *supra* note 22, at 446.

25. *Id.* at 445.

26. This era of workplace policies is explored in detail in Grossman, *supra* note 4.

27. See *Reed v. Reed*, 404 U.S. 71 (1971) (invalidating a sex-based classification in an Idaho intestacy statute on grounds that it did not bear a sufficient relation to the government’s purpose); *Craig v. Boren*, 429 U.S. 190 (1976) (adopting intermediate scrutiny for sex-based classifications).

28. Dinner, *supra* note 22, at 455-57.

advocates, the EEOC issued its first guidelines on pregnancy discrimination in 1972, concluding that Title VII extended to discrimination based on pregnancy.²⁹ But the law developed unevenly. Despite the EEOC guidelines, the Supreme Court ruled twice in the 1970s that pregnancy discrimination is not sex discrimination. In *Geduldig v. Aiello*, the Court upheld, against an equal protection challenge, California's disability insurance program, which expressly excluded normal pregnancy from the list of covered disabilities.³⁰ The Court rejected the argument that pregnancy-based classifications should receive the heightened scrutiny it had implicitly, albeit without express acknowledgement, already applied to sex-based classifications.³¹ Relegating the bulk of its analysis to a footnote, the Court explained, infamously: "There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not. . . . The program divides potential recipients into two groups—pregnant women and nonpregnant persons."³² The Court thought it obvious that there was no connection between the "excluded disability and gender."³³

Two years later, the Court upheld a similar plan by a private employer against a Title VII challenge. In *General Electric Co. v. Gilbert*,³⁴ the Court tracked its equal protection reasoning from *Geduldig* and applied it to Title VII, holding that excluding normal pregnancy from a disability benefit plan did not discriminate based on sex.³⁵ The Court rejected the contrary interpretations of the EEOC and the seven federal courts of appeals that had followed the EEOC's lead.³⁶ Justice Brennan, joined by Justice Marshall, filed a dissenting opinion.³⁷

As bad as these decisions were for pregnant working women, the Supreme Court's pregnancy jurisprudence did not foreclose all challenges to pregnancy-based employment policies. The treatment of pregnant workers could still be successfully challenged if it punished women for the status of being pregnant, without regard to pregnancy's actual effect on women as workers. In *Nashville Gas Co. v. Satty*,³⁸ decided only one year after *Gilbert*, the Court invalidated an employer policy forcing pregnant women to take leave from work and then denying them their previously accumulated seniority when bidding for new positions thereafter. As the Court reconciled this position with *Gilbert*, employers were not required to provide benefits to "one sex or the other 'because

29. See 29 C.F.R. § 1604.10 (1972); 37 FED. REG. 6836 (1972). On the advocacy before and after the EEOC guidelines were issued, see Dinner, *supra* note 22, at 423-24.

30. 417 U.S. 484, 496-97 (1974).

31. *Reed* purported to invalidate the Idaho statute on rational basis review, but, with hindsight, the case is understood as having taken the first step towards intermediate scrutiny.

32. *Geduldig v. Aiello*, 417 U.S. 484, 496-97 & n.20 (1974).

33. *Id.* at 497 n.20.

34. 429 U.S. 125 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076.

35. *Id.* at 133-40.

36. *Id.* at 140-46.

37. *Id.* at 146-60 (Brennan, J., dissenting). See also *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 506 n.3 (1999) (Stevens, J., dissenting) (describing the ruling in *Gilbert* as a "notable exception" to the Court's usual "method of interpretation").

38. 434 U.S. 136, 142 (1977).

of their differing roles in the scheme of human existence,” but neither could they “burden female employees in such a way as to deprive them of employment opportunities.”³⁹

Two other cases from this era illustrate the same theme. In *Cleveland Board of Education v. LaFleur*,⁴⁰ decided the same term as *Geduldig*, the Court used the due process clause to invalidate several school district policies forcing pregnant teachers to leave work early in their pregnancies and allowing them to return only three months after childbirth.⁴¹ To do so, the Court applied the now-defunct irrebuttable presumption doctrine in conjunction with the emerging right to privacy surrounding decisions related to reproduction.⁴² Public employers could not arbitrarily assume that pregnancy and childbirth would disable all women at fixed times and for a fixed duration.⁴³ The following year, the Court again struck down a one-size-fits-all approach to assessing pregnant women’s capacity in *Turner v. Department of Employment Security*.⁴⁴ There, the Court struck down a Utah law prohibiting a pregnant woman from collecting unemployment benefits from twelve weeks prior to her due date until six weeks after she actually gave birth based on a conclusive presumption that she would be unable to work during that period.⁴⁵ The fatal error of the law was in using a fixed marker of incapacity for all pregnant women despite the fact 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.”⁴⁶ A woman who is able to work through pregnancy without missing a beat is entitled to be judged on that basis, rather than on the experiences of pregnant women generally.

Together, the Court’s pre-PDA precedents from the 1970s drew a line in the sand: pregnant women were not entitled to any “special” benefits or treatment based on their pregnancy; but neither could employers penalize those women who were able to work while pregnant, with all the attendant benefits that continued employment entails. To put it in the starkest terms, a pregnant worker who could work like a man (or, to use the Court’s *Geduldig* nomenclature, a nonpregnant person) had the right to continue to do so.

B. The Enactment of the Pregnancy Discrimination Act

The Court’s ruling in *Gilbert* spurred momentum in Congress to expand

39. *Id.*

40. 414 U.S. 632 (1974).

41. *Id.* at 647-48. For an excellent discussion of the feminist litigation strategy in *LaFleur*, in which women’s rights lawyers sought to integrate sex equality and reproductive liberty rights, and their partial vindication in the Court’s decision, see generally Deborah Dinner, *Recovering the LaFleur Doctrine*, 22 YALE J. L. & FEMINISM 343 (2010).

42. 414 U.S. at 643-48. On the subsequent fall of the irrebuttable presumption doctrine, see John C. Jeffries, Jr. & Daryl L. Levinson, *The Non-Retrogression Principle in Constitutional Law*, 86 CAL. L. REV. 1211, 1237-38 (1998) (noting that the Court “threw in the towel” on this doctrine, which was awkwardly used to remedy “substantive concerns” with “procedural restrictions”).

43. 414 U.S. at 640.

44. 423 U.S. 44 (1975).

45. *Id.* at 46. See UTAH CODE ANN. § 35-4-5(h)(1) (1974).

46. 423 U.S. at 46.

protections to pregnant workers beyond the limited set of rights recognized by the Court.⁴⁷ The Campaign to End Discrimination Against Pregnant Workers proposed, and ultimately gained, a new law amending Title VII to ban pregnancy discrimination as a species of sex discrimination.⁴⁸ By March of 1977, there was bipartisan support for the bill, which aimed to override the Court's decision in *Gilbert*.⁴⁹ The bill heralded 86 bi-partisan co-sponsors when it was introduced in March of 1977, and was enacted into law 19 months later on October 31, 1978.⁵⁰ The bill passed both houses of Congress by wide margins: 75-11 in the Senate and 376-43 in the House.⁵¹ The limited opposition was "half-hearted and perfunctory."⁵² Objections centered mostly on the law's implications for employer reimbursement for abortion and on the costs to employers of compliance.⁵³

The PDA was a swift rejection of the Court's philosophy on pregnancy: the idea that ignoring the status of pregnancy fully met an employer's obligation to pregnant workers. Instead, the Act was designed to "enable women to maintain labor-force attachments throughout pregnancy and childbirth."⁵⁴ Toward that end, it insisted that employers abandon express rules and policies that classified on the basis of pregnancy, as well as stereotyped ways of thinking about pregnant women as workers.⁵⁵ Congress did not hide its disdain for the *Gilbert* decision and its intent to override it.⁵⁶ The Act amends the definition section of Title VII by adding a new provision, as follows:

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 shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or

47. See Nicholas Pedriana, *Discrimination by Definition: The Historical and Legal Paths to the Pregnancy Discrimination Act of 1978*, 21 YALE J.L. & FEMINISM 1 (2009) (chronicling the passage of the PDA).

48. Dinner, *supra* note 22, at 469-73.

49. 123 Cong. Rec. 6645 (1977); H.R. Res. 4357, 95th Cong. (1977).

50. Act of Oct. 31, 1978, Pub. L. No. 95-555, 92 Stat. 2076.

51. 123 Cong. Rec. 29635, 29640-65 (1977); 124 Cong. Rec. H6862-70; 124 Cong. Rec. H6878, 124 Cong. Rec. 21421 (1978).

52. Pedriana, *supra* note 47, at 12.

53. Ruth Colker, *The Mythic 43 Million Americans with Disabilities*, 49 WM. & MARY L. REV. 1, 15 n. 52 (2007). The final version of the Act contains an abortion neutrality provision relieving employers of any obligation to provide health insurance coverage for abortion, with exceptions for medical complications arising from abortion or where the life of the woman is at stake. Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k).

54. Dinner, *supra* note 22, at 484.

55. See 42 U.S.C. § 2000e(k). See also H.R. Rep. No. 95-948, at 3 (1978), reprinted in 1978 U.S.C.C.A.N. 4749, 4751 (Senate Committee report explaining that 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").

56. See *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 277 (1987) (observing that the PDA unambiguously overturned *Gilbert*); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 (1983) (observing that the PDA unambiguously overturned *Gilbert*).

inability to work.⁵⁷

The Act contains two distinct clauses. The first clause marks a wholesale rejection of the Court's failure to recognize pregnancy discrimination as a form of sex discrimination, declaring discrimination "because of or on the basis of pregnancy. . ." to be a form of sex discrimination under Title VII.⁵⁸ The structure of the PDA is as an amendment to the definition section of the statute, defining the terms "because of sex" and "on the basis of sex" "[f]or purposes of [Title VII]."⁵⁹ Notably, these two terms are not found, in this precise form, anywhere else in the statute. They do appear, however, in the *Gilbert* decision. There, the Court stated that the exclusion of pregnancy does not discriminate "on the basis of sex"⁶⁰ and found the pregnancy exclusion to be compatible with Congress' command to prohibit discrimination "because of. . .sex. . ."⁶¹ Congress' drafting of the PDA—while odd in purporting to define statutory terms that do not appear anywhere else in the statute—makes sense in light of the role the *Gilbert* decision played in the enactment of the PDA. The Act was a response to that decision, and the drafting choice reflects Congress' intention to repudiate the *Gilbert* approach to pregnancy discrimination.

The first clause of the PDA ensures that Title VII's tool kit, with all of its theories for challenging sex discrimination, is fully applicable to pregnancy discrimination. Accordingly, a facial policy that discriminates on the basis of pregnancy is invalid unless the employer proves that not being pregnant is a bona fide occupational qualification (BFOQ). Intentional, but unadmitted, acts of pregnancy discrimination can be challenged under either the pretext or mixed motive model of disparate treatment. In theory, pregnancy discrimination may also be challenged as systemic disparate treatment, although the small numbers of pregnant women in the workplace may make this theory unavailable in practice.⁶² The disparate impact theory is also applicable for pregnancy discrimination, although, as we discuss below, it rarely succeeds in such claims.

Because clause one simply added pregnancy to Title VII's existing structure, its meaning has posed fewer interpretive problems than clause two. Clause two has proven to be especially challenging because it is not modeled on any other anti-discrimination provision in federal law. It 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."⁶³ The relationship between clause one and clause two might be viewed in a number of different ways. Clause two

57. 42 U.S.C. § 2000e(k) (2012).

58. *Id.*

59. *Id.*

60. *Gen. Elec. v. Gilbert*, 429 U.S. 125, 135 (1976).

61. *Id.* at 145 (ellipses in original).

62. The EEOC unsuccessfully attempted to bring such a suit in a high-profile pregnancy discrimination case. *See EEOC v. Bloomberg*, 778 F. Supp. 2d 458 (S.D.N.Y. 2011) (finding that the EEOC failed to provide sufficient statistical proof of a pattern and practice of pregnancy-based discrimination). The Supreme Court added to the hurdles for litigants bringing a private class action challenge in all systemic disparate treatment cases in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

63. 42 U.S.C. § 2000e(k).

might be described as: (1) setting the limits of what amounts to pregnancy discrimination in clause one (e.g., defining what it means to discriminate on the basis of pregnancy); (2) describing the remedy to a violation of clause one (e.g., once a plaintiff proves pregnancy discrimination, the remedy is to treat pregnant women the same as others similar in their ability to work); (3) creating a defense to a pregnancy discrimination claim (what might otherwise be pregnancy discrimination is not unlawful if pregnant women are treated the same as others similar in ability to work); or (4) establishing an independent violation of the PDA if pregnant workers are treated worse than other workers similar in their ability to work. The fourth approach best matches the text and legislative history of the Act, as a response to *Gilbert* and an override of that decision. Although the Supreme Court's PDA decisions are most compatible with this interpretation, lower federal courts have increasingly gravitated towards the first and second approaches, tying the reach of the second clause to the scope of the first, instead of treating clause two as sufficient to establish a violation of the Act. Properly understood, the second clause creates a comparative right to accommodation. Because clause one provides no absolute protection for pregnancy, clause two has become an important source of PDA rights and the main game in litigation under the PDA.

C. The PDA in the Supreme Court

Since the PDA's enactment, only a handful of cases involving pregnancy discrimination claims have reached the Supreme Court. Despite the Court's earlier track record on pregnancy discrimination, the Court's PDA rulings have taken a relatively strong reading of the Act. Perhaps ironically, but in keeping with the Court's trend of developing sex discrimination law through claims brought by men, the Court's first PDA case was a claim alleging pregnancy discrimination against male employees. In *Newport News Shipbuilding & Dry Dock Co. v. EEOC*,⁶⁴ male employees challenged the employer's policy of providing health insurance coverage for pregnancy and childbirth to its female employees, but not to the wives of its male employees. The Court ruled that the exclusion violated the PDA, since other health conditions of employees' spouses were covered.⁶⁵

Although this decision is usually treated as inconsequential (apart from illustrating the lengths to which the Court would go to conceptualize sex discrimination as discrimination against men, even when it comes to pregnancy), it establishes two important principles for our purposes. First, the Court followed the broad wording of the Act, requiring pregnancy to be treated as well as other medical conditions, despite the likelihood of a narrower intent of Congress, since nothing in the legislative history suggested a concern for the treatment of workers' wives. Second, the ruling implicitly rejects a reading of the second clause that would require proof of pregnancy-based animus to establish a violation. After all, the employer did cover employees' pregnancies—it was only the pregnancies of the wives of male workers that were excluded. Rather than a

64. 462 U.S. 669 (1983)

65. *Id.* at 683-84.

general animus toward pregnancy, the employer's motivation was based on cost. True to Congress' rejection of *Gilbert* (where the policy was also defended based on cost), the employer's motivation could not salvage the policy.

A separate and more controversial issue in the early PDA litigation was whether clause two foreclosed treating pregnant workers more generously than other workers. This issue sparked a divisive tactical battle among women's rights advocates in the years soon after the PDA's enactment. In a number of cases, employers—either voluntarily or as required by state laws—provided benefits and/or leave policies that were more generous for pregnancy than for other conditions. The question was whether clause two of the PDA foreclosed such different treatment. Feminist litigators and scholars differed on the answer to this question. Although equal treatment—treating women and men alike for work-related purposes—had generally been the rallying cry of second-wave feminists, reflected in multiple legislative and judicial sex equality successes,⁶⁶ cases of physical difference like pregnancy provoked profound disagreement. One group argued for equal treatment—pregnant women would sink or swim together with other similarly affected workers, but would avoid the harms of marking pregnancy for special treatment.⁶⁷ Others argued for a more substantive approach to equality that would specifically accommodate pregnancy, regardless of how other workers were treated, in order to attain equal workplace outcomes for men and women who reproduce.⁶⁸

This dispute played out in two high-profile cases in the 1980s, testing the meaning of the PDA's second clause. In *Miller-Wohl Co. v. Comm'r of Labor and Industry*,⁶⁹ an employer challenged a Montana law requiring maternity leave, alleging that it was inconsistent with the PDA's guarantee that pregnant workers be treated "the same as" other comparably disabled workers. The same question was decided three years later in *California Federal Savings v. Guerra*,⁷⁰ a case in which the U.S. Supreme Court considered whether the PDA preempted a California law requiring employers to provide up to four months unpaid leave for pregnancy- or childbirth-related disability. In *Miller-Wohl*, the Montana Supreme Court endorsed an accommodation approach that permitted the state to require maternity leave regardless of whether leave was provided for comparably disabled workers.⁷¹ The U.S. Supreme Court adopted this same interpretation of the PDA in *Guerra*, concluding that, "Congress intended the PDA to be 'a floor beneath which pregnancy disability benefits may not drop-not

66. See generally MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 34-49 (3rd ed. 2013) (describing the era of liberal feminism and the movement for equal treatment).

67. See, e.g., Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1982) [hereinafter Williams, *The Equality Crisis*]; Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1985).

68. See, e.g., Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U. L. REV. 513, 537-57 (1983); Ann C. Scales, *Towards a Feminist Jurisprudence*, 56 IND. L. J. 375, 426-30 (1981); see also CHAMALLAS, *supra* note 66, at 55 (noting that the feminist divide in the pregnancy cases was "as much about strategy as fundamental theory").

69. 214 Mont. 238 (1984).

70. 479 U.S. 272 (1987).

71. 214 Mont. at 259-60.

a ceiling above which they may not rise.”⁷² Thus, under clause two, employers may treat pregnancy better than other disabling conditions, but may not treat it any worse.⁷³ The Court’s ruling effectively reads clause two as a vehicle for protecting pregnant workers’ job security and benefits; not as a restraint on measures taken by employers to make the workplace more hospitable to pregnant women. The decision embodies a substantive equality approach to pregnancy discrimination, prioritizing actual workplace security for pregnant workers over formal neutrality.

In an alternative holding, the Court upheld the California law on the additional grounds that it did not actually conflict with the PDA, even if it had read the PDA to insist on formal neutrality between pregnancy and other conditions.⁷⁴ In the Court’s view, this was not a case in which “compliance with both federal and state regulations is a physical impossibility,” nor an “inevitable collision between the two schemes of regulation.”⁷⁵ Rather, employers could satisfy the California law by offering maternity leave, and are “free to give comparable benefits to other disabled employees” if that were required by the PDA.⁷⁶ The alternative holding further strengthens the reading of clause two as a mandate for the comparable treatment of pregnancy, without regard to the employer’s reason for treating pregnancy less favorably than other conditions.

The following decade, the Court added to its robust PDA precedents. *International Union v. Johnson Controls* involved a challenge to the validity of an employer’s so-called “fetal protection” policy barring fertile women from holding jobs in a battery manufacturing plant that involved exposure to lead.⁷⁷ Before the enactment of Title VII in 1964, Johnson Controls had excluded women completely from battery-manufacturing jobs.⁷⁸ It then began to hire women into these jobs; after 1977, it did so with a stern warning about the possible dangers of lead exposure to an unborn child.⁷⁹ In 1982, 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.⁸⁰ This change was prompted by tests showing elevated levels of lead in the blood of a few women who became pregnant, although there was no proof that the high

72. 479 U.S. at 285. The appendix to the federal regulations on pregnancy discrimination reinforces the Court’s view of the PDA as setting a floor for the treatment of pregnancy. A question-and-answer section following the substantive regulations states: “If, for example, a State law requires an employer to pay a maximum of 26 weeks benefits for disabilities other than pregnancy-related ones but only six weeks for pregnancy-related disabilities, the employer must provide benefits for the additional weeks to an employee disabled by pregnancy-related conditions, up to the maximum provided other disabled employees.” 29 C.F.R. § 1604 app., Q. 19 (2012).

73. The Court’s reasoning restricted an employer’s more favorable treatment of pregnancy to the actual physically disabling period of pregnancy and recovery; it foreclosed differences in treatment based on stereotypes about caretaking, apart from any actual impairment.

74. *Guerra*, 479 U.S. at 291.

75. *Id.*

76. *Id.*

77. 499 U.S. 187, 191 (1991).

78. *Id.* at 191.

79. *Id.*

80. *Id.* at 192.

levels led to any injury or birth defect.⁸¹ Under the new policy, a woman was deemed “capable of bearing children” unless her “inability to bear children [was] medically documented.”⁸²

The policy was challenged by several plaintiffs, including: a woman who chose to be sterilized rather than lose her job; a 50-year-old woman who was involuntarily transferred to a lower-paying job with no lead exposure; and a man who asked to transfer out of a lead-exposure job because he wanted to start a family, but was denied.⁸³

A threshold issue in the case was whether the company’s policy constituted facial sex discrimination. Johnson Controls had argued that the policy was sex neutral because it did not exclude all women and was not motivated by animus towards women, but a benevolent interest in protecting children.⁸⁴ Remarkably, the lower court agreed, treating the policy as unintentional discrimination subject only to disparate impact challenge.⁸⁵ Accordingly, the court applied the more lenient business necessity defense instead of the tougher bona fide occupational qualification (BFOQ) defense.⁸⁶

The Supreme Court disagreed, explaining that the policy was facially discriminatory because it “classifies on the basis of gender and childbearing capacity, rather than fertility alone.”⁸⁷ The Court’s conclusion that the policy constituted facial sex discrimination was “bolstered” by the PDA, which makes clear that discrimination “based on a woman’s pregnancy is, on its face, discrimination because of her sex.”⁸⁸ 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.”⁸⁹ The illegality of facial discrimination “does not depend on why the employer discriminates but rather on the explicit terms of the discrimination.”⁹⁰

Having found facial discrimination, the Court considered and rejected the employer’s BFOQ defense, finding that female sterility was not “reasonably necessary” to the “normal operation” of the business, since it was not necessary to perform the job of making batteries.⁹¹ The Court explained that the BFOQ defense operates no differently for pregnancy than it does for sex, seeing in the PDA’s second clause “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.’”⁹² The Court cautioned against an interpretation that would “read the second clause out of the

81. *Id.* at 191-92.

82. *Id.* at 192.

83. *Id.*

84. *Id.* at 195-97.

85. *Id.* at 193.

86. *Id.*

87. *Id.* at 198.

88. *Id.* at 199.

89. *Id.*

90. *Id.*

91. *Id.* at 202-04 (distinguishing the present case from *Dothard v. Rawlinson*, 433 U.S. 321 (1977) and *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985)).

92. *Id.* at 204.

Act.”⁹³

The decision necessarily rejects an approach that would limit pregnancy discrimination to cases where the disfavored treatment of pregnancy is traceable to animus. Under the *Johnson Controls* ruling, treating pregnancy worse than other conditions with a similar effect on work violates the PDA even if the employer has a “benign” reason for doing so.⁹⁴

After a long hiatus from pregnancy discrimination cases, the Court decided another one in 2009. In that case, *AT&T v. Hulteen*,⁹⁵ the issue was whether AT&T violated the PDA by paying retired female employees lower pensions because they took unpaid pregnancy-related leaves between 1968 and 1974, before passage of the PDA. These women lost service credit for the duration of their leaves, while other workers who took disability leave during that time period were given full service credit.⁹⁶ Today, such a practice would violate the PDA; back then, it was perfectly lawful. Because pensions are based on years of service, women retiring long after the PDA’s enactment were still getting less money every month because of AT&T’s past treatment of their pregnancy leaves. The plaintiffs argued that the company’s reliance on differential service credits to calculate pensions for their present retirement was an unlawful employment practice.⁹⁷

The majority sided with AT&T, ruling that the service credit system was not the product of intent to discriminate, since the system was not unlawful at the time and therefore was a “bona fide seniority system,” a defense to Title VII claims.⁹⁸ As Justice Ginsburg points out in her dissent, however, this ruling extends the effects of *Gilbert* into another millennium, despite the clear intent of Congress to repudiate it.⁹⁹

It is too soon to say whether *Hulteen* is a blip on the screen—an anomalous decision limited to its facts and best explained by the Court’s special solicitude for employee reliance interests in seniority systems—or if it marks a backdoor return to the pre-PDA, *Gilbert* approach to pregnancy discrimination. But apart from that single case, and despite its inauspicious beginning in the early 1970s, the Supreme Court in its post-PDA opinions has read and applied the statute consistently with its plain meaning and purpose: to override *Gilbert* and secure for pregnant workers at least the same kinds of treatment and adjustments made for other conditions with a similar effect on work.

Cases outside the pregnancy context also reveal an appreciation for the gender stereotyping and discrimination that working women face in relation to pregnancy. While not a PDA case *per se*, *Nevada Department of Human Resources v. Hibbs* upheld the caretaking leave authorized by the Family Medical Leave Act as a valid exercise of Congress’ power to remedy violations of the Fourteenth

93. *Id.* at 205.

94. *Id.* at 198-99.

95. 556 U.S. 701 (2009).

96. *Id.* at 706.

97. *Id.* at 707.

98. *Id.* at 707-715.

99. *Id.* at 719 (Ginsburg, J., dissenting).

Amendment's Equal Protection Clause.¹⁰⁰ The Court's reasoning, which treats mandatory gender-neutral caretaking leave as an appropriate remedy in light of widespread discrimination and stereotyping against mothers as lacking a full commitment to the workforce, shows sensitivity to the harmful and lasting effects of stereotypes about pregnant women and mothers in the workplace.

II. THE PDA IN THE LOWER COURTS: FLASHBACKS TO *GEDULDIG* AND *GILBERT*

While the Supreme Court has paved the path for a robust interpretation of the PDA, lower courts have not lived up to that promise. This section briefly discusses the lower courts' narrow readings of the PDA's protections under clause one, and then turns to their increasingly problematic interpretation of clause two.

A. Clause One: Protecting the Status of Pregnancy, Not its Effects

What does it mean to discriminate because of pregnancy and conditions related to it? This question is at the core of the first clause of the PDA, which adds "pregnancy, childbirth, and related medical conditions" to the list of bases on which employers may not discriminate. Like the other forms of discrimination covered by Title VII, pregnancy discrimination that is not embodied in a formal policy can be challenged under the first clause using either the pretext model (it is more likely than not that the employer's action would not have been taken but for the employee's pregnancy) or the mixed motive proof structure (pregnancy was a "motivating factor" in the employer's decision). But pregnancy is a more complicated characteristic than sex or race in that it is both a status and a physical condition with real (though variable) effects on work. Courts understand the PDA's first clause to disallow discrimination based on status, but to allow it based on the effects of the condition itself. So while "pregnancy" as status cannot be the reason (or a motivating factor) for the employer's action, the physical effects of pregnancy that interfere with work capacity can be. Two classic cases illustrate this point.

In *Troupe v. May Department Stores*, the Seventh Circuit ruled that a department store did not commit pregnancy discrimination when it fired a retail sales clerk for excessive tardiness caused by morning sickness.¹⁰¹ The plaintiff had no tardiness problems prior to experiencing pregnancy-related morning sickness, but the store claimed that it would have fired any employee who had similar tardiness problems and was about to take an extended medical leave.¹⁰² In affirming summary judgment for the employer, Judge Posner refused to see the firing as pregnancy discrimination, absent proof that an otherwise similarly situated, non-pregnant employee received better treatment:

100. 538 U.S. 721 (2003) (upholding care-taking leave provision of FMLA against Eleventh Amendment challenge on grounds that it was a congruent and proportional response under Section Five of the Fourteenth Amendment to a state-sponsored history of discrimination against pregnant women and mothers in the workplace); see also Reva B. Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871 (2006).

101. 20 F.3d 734 (7th Cir. 1994).

102. *Id.* at 738.

We must imagine a hypothetical Mr. Troupe, who is as tardy as Ms. Troupe was, also because of health problems, and who is about to take a protracted sick leave growing out of those problems at an expense to Lord & Taylor equal to that of Ms. Troupe's maternity leave. If [the employer] would have fired our hypothetical Mr. Troupe, this implies that it fired Ms. Troupe not because she was pregnant but because she cost the company more than she was worth to it.¹⁰³

Although the PDA did not permit the store to fire Troupe simply for being pregnant, it could fire her if her pregnancy interfered with her job performance, as long as it would have done the same for other impaired workers with similar job performance. The court saw its job as teasing out whether the employer is responding to the work-related aspects of pregnancy or to the status of pregnancy itself.¹⁰⁴ Putting aside that courts have not been very skilled at sussing out the difference, even this theoretical protection goes no further than status.¹⁰⁵

A second case, *Maldonado v. U.S. Bank*, further highlights the difficulty of separating the status of pregnancy from its effects.¹⁰⁶ The plaintiff was hired as a part-time bank teller with the understanding that her job would entail heavy seasonal work in the summer.¹⁰⁷ After being hired, she learned she was pregnant and disclosed both the fact of the pregnancy and her due date to her employer. The employer fired her the next day. The plaintiff won her PDA case. But the grounds on which she prevailed reveal the narrowness of the law's protection.¹⁰⁸ As the court saw it, the employer's mistake was not in firing a pregnant employee because childbirth interfered with requirements of the job – showing up at work during the peak season – but in jumping to the conclusion that the plaintiff would not show up for work around the time when she was expected to give birth.¹⁰⁹ The plaintiff had a right, the court explained, to an individualized assessment of her capacity to work, and the employer's assumption that she would require a leave for childbirth reflected unlawful stereotypes about the abilities of pregnant women generally.¹¹⁰ While the PDA permits employers to “project the normal inconveniences of pregnancy and their secondary effects into the future and take actions in accordance with and in proportion to those predictions,” it cannot “take anticipatory action unless it has a good faith basis, supported by sufficiently strong evidence, that the normal inconveniences of an employee's pregnancy will require special treatment.”¹¹¹ Maldonado was thus entitled to keep her job unless and until the employer had reason to know she

103. *Id.* at 738.

104. *Id.* at 736.

105. Scholars have been largely critical of Posner's ruling. See, e.g., Ruth Colker, *Pregnancy, Parenting, and Capitalism*, 58 OHIO ST. L.J. 61, 79-81 (1997); Joan C. Williams et al., *I Just Need Water: Pregnancy Accommodation after the ADA Amendments Act of 2008*, 32 YALE L. & POL'Y REV. (forthcoming 2014)

106. 186 F.3d 759 (7th Cir. 1999).

107. *Id.* at 764.

108. *Id.*

109. *Id.* at 766-68.

110. *Id.*

111. *Id.* at 767.

would require a leave during the peak season—at which point it could have permissibly fired her if it would have fired a non-pregnant worker in that position who needed a leave. It strengthened Maldonado’s case that she had mentioned the possibility of not carrying the pregnancy to term, and that, given the early stage of the pregnancy, she might have lost the pregnancy involuntarily.¹¹² Most importantly, she had not yet asked for a maternity leave when she was fired. The employer’s preemptive action therefore struck at “the core of the Pregnancy Discrimination Act,” which provides that “an employer cannot discriminate against a pregnant employee simply because it believes pregnancy *might* prevent the employee from doing her job.”¹¹³

Together, the two cases illustrate the limits of clause one of the PDA: pregnancy discrimination, while a form of sex discrimination under Title VII, occurs when an employer acts based on the status of pregnancy, as opposed to its actual effects. Since employers may act based on pregnancy’s effects on work in spite of its status, the Act’s prohibition on pregnancy discrimination leaves much room for employers to take actions every bit as harmful to the ability of pregnant women to maintain employment.

This status/effects dichotomy also plays out in the case law defining the scope of protection for pregnancy-related conditions. According to the Senate Report accompanying the PDA, the language, “related medical conditions” was selected to encompass the full range of “physiological occurrences peculiar to women.”¹¹⁴ However, the status/effects dichotomy has meant that workers with pregnancy-related conditions have little help from the PDA when their conditions impose costs or otherwise clash with workplace rules and structures.

For example, while employers may not punish a woman for being infertile or undergoing treatment for it,¹¹⁵ courts have not interpreted the PDA to require employers to pay the costs of medical procedures to facilitate pregnancy. Challenges to insurance plans under the PDA for not covering infertility treatments such as *in vitro* fertilization, a procedure only performed on women, have not succeeded.¹¹⁶ In the same vein, although provisions in the Patient Protection and Affordable Care Act have now largely rendered this problem obsolete,¹¹⁷ while the PDA forbids penalizing women for being fertile (*Johnson*

112. *Id.* at 767-68.

113. *Id.* at 761.

114. S. Rep. No. 95-331, at 3-4 (1977).

115. *See, e.g., Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1401 (N.D.Ill.1994) (finding that the inability to become pregnant is a “related medical condition” to pregnancy, such that the PDA forbids firing an employee for undergoing fertility treatments that are only performed on women seeking to become pregnant); *Hall v. Nalco*, 534 F.3d 644 (7th Cir. 2008) (holding that the PDA protects against discrimination for undergoing fertility treatments to become pregnant, but requiring plaintiff to prove that she was fired not simply for the resulting absenteeism, but because her absenteeism was caused by infertility treatments).

116. *See, e.g., Saks v. Franklin Covey Co.*, 316 F.3d 337 (2d Cir. 2003) (holding that employer health insurance policy denying insurance coverage for infertility procedures done only to women did not violate the PDA); *Krauel v. Iowa Methodist Medical Center*, 95 F.3d 674, 679-80 (8th Cir. 1996).

117. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); 45 C.F.R. § 147 (2011); US Dep’t of Health & Human Servs., News Release of Jan. 20, 2012, <http://www.hhs.gov/news/press/2012pres/01/20120120a.html> (requiring new and renewed

Controls),¹¹⁸ it has been interpreted to permit employer health plans to deny coverage of prescription contraceptives, used only by women, to avoid pregnancy.¹¹⁹ Likewise, courts have interpreted the PDA to forbid employers from penalizing a woman for lactating, but to permit employers to deny requested accommodations to enable women to breastfeed or pump breast milk during work hours.¹²⁰ This problem too is now eased by the Affordable Care Act, which requires reasonable accommodations for breastfeeding workers.¹²¹ But the courts' treatment of discrimination claims by lactating mothers reveals their limited vision of the PDA's protections. Some courts have even interpreted the PDA to allow women to be fired for requesting accommodations for lactation, restricting the PDA's protection to those lactating women who suffer in silence.¹²²

The cases on pregnancy and its related conditions read the PDA as drawing a line between pregnancy's status and effects. But in many instances, it is the effects of pregnancy and related conditions that interfere with women's equality in the workplace. The lower courts' narrow conception of pregnancy discrimination harkens back to a view of pregnancy that the PDA purported to reject: a refusal to see a reproductive process unique to women as equivalent to a sex-based classification. The courts' reasoning in these cases echoes the implicit rationale from *Gilbert*: that pregnancy is a voluntary condition and women bear the burdens of that choice if becoming a mother is not compatible with the rigors of the workplace. These cases do not live up to the PDA's original promise—to

health plans to cover FDA-approved prescription contraceptive methods and counseling at no cost to patients). See also *Barrash v. Bowen*, 846 F.2d 927 (4th Cir. 1988) (holding that the PDA does not require employers to provide accommodations for breastfeeding/lactating mothers); *McNeill v. N.Y.C. Dep't of Corr.*, 950 F. Supp. 564 (S.D.N.Y. 1996) (deciding that the PDA does not require employers to provide accommodations for breastfeeding/lactating mothers); *Wallace v. Pyro Mining Co.*, 789 F. Supp. 867 (W.D. Ky. 1990) (finding that the PDA does not require employers to provide accommodations for breastfeeding/lactating mothers). Courts have also denied accommodations to breastfeeding workers under the Americans with Disabilities Act. See, e.g., *Martinez v. N.B.C. Inc.*, 49 F. Supp. 2d 305 (S.D.N.Y. 1999).

118. *Int'l Union v. Johnson Controls*, 499 U.S. 187 (1991).

119. *In re Union Pac. R.R. Emp't Practices Litig.*, 479 F.3d 936, 942 (8th Cir. 2007). District court cases decided before *Standridge*, the only federal appellate ruling on the issue, are split. Compare *Stocking v. AT&T Corp.*, 436 F. Supp. 2d 1014 (W.D. Mo. 2006) (holding that the PDA requires coverage), *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001) (holding that the PDA requires coverage), and *EEOC v. UPS*, 141 F. Supp. 2d 1216 (D. Minn. 2001) (finding that exclusion violates Title VII ban on sex discrimination) with *Cummins v. State*, No. 2002-cv-4201-JPG, 2005 U.S. Dist. LEXIS 42634 (S.D. Ill. Aug. 30, 2005) (holding that the PDA does not require coverage).

120. See, e.g., *EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425 (5th Cir. 2013) (holding that an employer may not punish employee for lactating, a medical condition related to pregnancy under the PDA, but is not required to provide special accommodations to pump breast milk during the work day).

121. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

122. See, e.g., *Fortier v. U.S. Steel Grp.*, No. 01-2029, 2002 U.S. Dist. LEXIS 11788 (W.D. Pa. June 4, 2002) (rejecting PDA claim based on allegation that she was fired because of her intent to breastfeed); *Puente v. Ridge*, 324 F. App'x 423 (5th Cir. 2009). On the challenges of bringing breastfeeding discrimination claims, see generally Heather M. Kolinsky, *Respecting Working Mothers with Infant Children: The Need for Increased Federal Intervention to Develop, Protect, and Support a Breastfeeding Culture in the United States*, 17 DUKE J. GENDER L. & POL'Y 333 (2010); Shana M. Christrup, *Breastfeeding in the American Workplace*, 9 AM. U. J. GENDER SOC. POL'Y & L. 471 (2001).

secure women's equality in the workplace while protecting their reproductive rights to become mothers.

In theory, the availability of disparate impact challenges under the PDA might reach employment policies and practices that make it difficult for pregnant women to continue working, making up for the failure of intentional discrimination theories under clause one to reach beyond penalizing pregnancy as a status.¹²³ Disparate impact claims might expose the "latent exclusionary bias" against pregnant workers and force employers to redesign workplace policies to be more inclusive for a diverse work force.¹²⁴ But precedent has shown disparate impact's promise to be more theoretical than real in pregnancy-based claims.

While the PDA's definition of discrimination based on sex, amended to encompass discrimination based on pregnancy, should make disparate impact claims available to challenge workplace practices with a disparate impact on pregnant women,¹²⁵ plaintiffs have very rarely succeeded in bringing such claims.¹²⁶ The reasons for this range from judicial hostility to such claims as a demand for preferential treatment,¹²⁷ to restrictions on the type of practice subject to challenge,¹²⁸ to difficulty identifying the appropriate comparison group and insufficient data to prove disparate impact at a particular workplace.¹²⁹ The federal government, litigating as an employer, has even argued that disparate

123. Disparate impact theory was first judicially recognized in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and later codified in the 1991 amendments to Title VII. See 42 U.S.C. § 2000e-2(k).

124. Reva B. Siegel, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929, 939 (1985); see also Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 660-65 (2001).

125. See *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994) ("disparate impact is a permissible theory of liability under the Pregnancy Discrimination Act, as it is under other provisions of Title VII."). Clause two, entitling pregnant workers to be treated as well as workers with other conditions similarly affecting, should not in any way foreclose disparate impact challenges to pregnancy-neutral rules. Cf. *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 285 (1987) (describing the PDA's second clause as a floor but not a ceiling for the treatment of pregnant workers).

126. See Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 U.C.L.A. L. REV. 701, 751 (2006) (noting that "pregnancy cases typically fail under the disparate impact approach").

127. See, e.g., *Troupe*, 20 F.3d at 738 (characterizing disparate impact as a "permissible theory" under the PDA as long as it is not used as a "warrant for favoritism" that might prevent employers from treating pregnant workers "as badly as they treat similarly affected but nonpregnant employees").

128. See, e.g., *Barrash v. Bowen*, 846 F.2d 927, 931 (4th Cir. 1988) (holding that plaintiffs did not identify a particular practice susceptible to disparate impact analysis); *Ilhardt v. Sara Lee Corp.*, 118 F.3d 1151, 1156 (7th Cir. 1997) (holding that a lack of a part-time option is not an "employment practice" subject to disparate impact challenge); *Dormeyer v. Comerica Bank-Illinois*, 223 F.3d 579, 583-84 (7th Cir. 2000) (holding that disparate impact theory cannot be used to challenge legitimate job requirements like attendance).

129. See, e.g., *Maganuco v. Layden Cmty. High Sch. Dist.*, 212, 939 F.2d 440 (7th Cir. 1991); *Lang v. Star Herald*, 107 F.3d 1308 (8th Cir. 1997) (treating employee's claim that the employer was too small for statistical analysis as a concession that "there is no evidence . . . of a disproportionately adverse impact on pregnant women"); *Ilhart v. Sara Lee Corp.*, 118 F.3d 1151, 1156-57 (refusing, in disparate impact case challenging the elimination of a part-time position, to take notice of studies showing that the majority of part-time workers are women with child-care responsibilities).

impact theory cannot be used at all in pregnancy discrimination cases.¹³⁰ While courts have not gone so far as banning such claims outright, they have been far from receptive to them. For example, the Fifth Circuit, in *Stout v. Baxter Healthcare Corp.*, refused to apply disparate impact theory to claims “in which the plaintiff’s only challenge is that the amount of sick leave granted to employees is insufficient to accommodate the time off required in a typical pregnancy.”¹³¹ “To hold otherwise would be to transform the PDA into a guarantee of medical leave for pregnant employees, something we have specifically held that the PDA does not do.”¹³² Recent attacks on disparate impact theory in general, even outside of the pregnancy context,¹³³ make it even less likely that this doctrine will fill in the gaps created by courts’ narrow approaches to proving discrimination because of pregnancy under the PDA.

With clause one of the PDA mostly relegated to protection for pregnant workers from being penalized for the status of pregnancy, workers seeking to reconcile the demands of paid work with the effects of pregnancy have turned to clause two of the PDA for recourse. On its terms, clause two should extend to workers affected by pregnancy the most favorable treatment given other workers with conditions having a similar effect on work. Here too, however, courts have turned the PDA into a weak rule against animus targeting the status of pregnancy *per se*.

B. Trouble in Clause Two: A Return to the *Sui Generis* Treatment of Pregnancy

While the courts have not done particularly well with clause one, the biggest problems in the PDA case law in recent years have come by way of clause two. In what appears to be a growing trend, courts have undercut pregnant workers’ rights under clause two by carving out exceptions from the classes of workers to which pregnant women may compare themselves.

A major focus in recent PDA litigation has been the validity of workplace policies that provide for light-duty assignments for some workers, but not for women with pregnancy-related limitations. These policies do not expressly exclude pregnancy, but use criteria that render pregnancy ineligible. For example, a typical light-duty policy offers light-duty assignments only for workers with injuries sustained on-the-job. For the most part, women challenging light-duty policies have been unsuccessful unless they are able to

130. *See, e.g., Scherr v. Woodland Sch. Cmty. Consol. Dist.*, 867 F.2d 974 (7th Cir. 1988). In an amicus brief, the United States argued that the PDA’s mandate of equal treatment was intended to “eliminate the need for employees to rely on disparate impact analysis to support their Title VII claims,” but also to preclude such reliance where it might be helpful. *Id.* at 978.

131. 282 F.3d 856, 861 (5th Cir. 2002).

132. *Id.* *See also Sussman v. Salem*, 153 F.R.D. 689, 692 (M.D. Fla. 1994) (“This Court recognizes the Supreme Court’s opinion that the Pregnancy Discrimination Act was not intended to provide accommodations to pregnant employees when such accommodations rise to the level of preferential treatment.”).

133. *See, e.g., Ricci v. DeStefano*, 557 U.S. 557 (2009) (holding that an employer who rejected results of an employment test because it feared disparate impact litigation was liable for unlawful disparate treatment); *See also id.* at 594-97 (Scalia, J., concurring) (suggesting that disparate impact doctrine itself might be subject to constitutional challenge for denying the equal protection rights of non-beneficiaries).

show discriminatory intent. Instead of following the plain language of clause two, requiring pregnant workers to be treated as well as other workers “similar in their ability to work,” lower courts are increasingly applying the *McDonnell Douglas* framework to search for discriminatory intent behind the policy.¹³⁴

The decision to apply the pretext framework in these cases, instead of a straightforward comparative right to accommodation for pregnant workers, is compounded by additional hurdles courts set up for plaintiffs. For example, courts have held that light-duty plaintiffs have failed to make out a prima facie case of discrimination because a woman with an off-the-job injury was not “qualified” for light-duty policy that only applied to on-the-job injuries.¹³⁵ This reasoning effectively bars pregnant workers from challenging light-duty policies under the PDA. Courts have also cut short light-duty challenges on the grounds that the pregnant plaintiff could not identify a similarly situated worker who received the benefit she was denied—the fourth prong of the prima facie case under *McDonnell Douglas*—since no other off-duty injuries were treated better.¹³⁶ Even if plaintiffs survive the prima facie stage, courts accept the policy itself as the employer’s legitimate non-discriminatory reason for denying the light-duty request. When courts allow the rule to defend itself, as they have done in these cases, they deny the plaintiff the opportunity even to offer evidence of discriminatory intent—which, we contend, courts should not have been looking for in the first place. This approach is especially damning when it insulates a formal policy that will continue to have an impact on other pregnant women, rather than an isolated instance of disparate treatment.

A typical light-duty case is *Reeves v. Swift Transportation Co.* Amanda Reeves was an over-the-road truck driver for Swift Transportation.¹³⁷ When Reeves applied for the job, she represented that she could lift seventy-five pounds (sixty

134. The Supreme Court in *McDonnell Douglas Corp. v. Green* laid out a proof structure to be used in cases when the plaintiff seeks to prove discrimination primarily through circumstantial evidence. See 411 U.S. 792 (1973). Courts could also undertake mixed-motive analysis, first recognized by the Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and later codified with modifications by the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m) & 2000e-5(g)(2)(B) (2012), in which case plaintiffs would have to prove that pregnancy was “a motivating factor” in adoption of the policy or its application.

135. See, e.g., *Spivey v. Beverly Enterprises, Inc.*, 196 F.3d 1309, 1312 (11th Cir. 1999) (noting that with respect to the second prong of the *McDonnell Douglas* test: “There is no dispute that Appellant was no longer qualified to work as a nurse’s assistant. The lifting restriction imposed on Appellant clearly prevented her from performing the responsibilities required of this position.”) See also *Dormeyer v. Comerica Bank-Illinois*, 223 F.3d 579 (7th Cir. 2000); *Urbano v. Cont’l Airlines, Inc.*, 138 F.3d 204, 206 (5th Cir. 1998) (agreeing with the district court’s finding that the plaintiff failed to show she was “qualified for transfer into a light-duty position, i.e., that she sustained a work related injury” (internal quotation marks omitted)).

136. See *Urbano*, 138 F.3d at 208; see also *Spivey*, 196 F.3d at 1313 (noting, with respect to the fourth prong of *McDonnell Douglas*, that the “correct comparison is between Appellant and other employees who suffer non-occupational disabilities, not between Appellant and employees who are injured on the job”). But see *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1195 n.7 (10th Cir. 2000) (“If a plaintiff is compared only to non-pregnant employees injured off the job, her case would be ‘short circuited’ at the prima facie stage. . . . The better approach would be to hold that a plaintiff has satisfied the fourth element of her prima facie case by showing that she was treated differently than a non-pregnant, temporarily-disabled employee.”).

137. 446 F.3d 637 (6th Cir. 2006).

over her head) and carry it for fifty-six feet.¹³⁸ After three months on the job, Reeves discovered she was pregnant. She had never, up to that point, had to unload a truck herself or carry anything heavy.¹³⁹ Her doctor wrote a note restricting her to light work, which included lifting no more than twenty pounds.¹⁴⁰ Her supervisor reviewed the note, declared they had no “light work” for her to do, and sent her home.¹⁴¹ She requested light work daily – and was repeatedly denied based on the company’s policy that light work could only be assigned to those disabled by on-the-job injuries.¹⁴² The company eventually fired her for failing to work at full capacity.¹⁴³

In her PDA lawsuit, Reeves argued that the light-duty policy was *per se* discriminatory because no pregnant woman could qualify for light work regardless of whether her level of incapacity was the same as workers who did qualify.¹⁴⁴ The court rejected this theory and turned, instead, to the *McDonnell Douglas* framework, which asks first for proof by the plaintiff of a *prima facie* case of discrimination, then for the production of evidence by the employer pointing to a legitimate non-discriminatory reason for the adverse action.¹⁴⁵ It assumed that Reeves had met her *prima facie* burden, and then considered whether Swift’s ostensibly legitimate explanation—its “pregnancy blind” light-duty policy—was a pretext for discrimination.¹⁴⁶ The court granted summary judgment to Swift because Reeves could not prove that Swift adopted the policy in order to disadvantage pregnant women.¹⁴⁷

Pregnant plaintiffs have managed to prevail in two light-duty cases. In *Lochren v. Suffolk County*, female police officers won a jury trial in their challenge to a light-duty policy with an on-the-job restriction.¹⁴⁸ But here, the plaintiffs had evidence of longstanding and persistent animus against female officers and the inconsistent application of the ostensibly neutral light-duty policy.¹⁴⁹ The same county was sued again a few years later by female park police officers, challenging an identical policy, resulting in a favorable settlement for the plaintiffs.¹⁵⁰

138. *Id.* at 638.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 639.

143. *Id.*

144. Reeves had only worked for the employer for three months and thus did not meet the eligibility requirements for FMLA leave. *Id.*

145. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

146. *Reeves*, 446 F.3d at 641-42. The court did not take *Ensley-Gaines v. Runyon*, 100 F.3d 1220 (6th Cir.1996), head on because it limited its comparison-group analysis to the *pretext* stage of the case. *Id.* at 641 n.1.

147. *Id.* at 641-43.

148. See *Lochren v. Cnty. of Suffolk*, No. CV 01-3925(ARL), 2008 WL 2039458 (E.D.N.Y. May 9, 2008); see also Joanna Grossman, *A Big Win for Pregnant Police Officers: A Jury Finds a New York County’s Police Department Liable for Failing To Accommodate Pregnancy-Related Disability*, FINDLAW’S WRIT (June 27, 2006), <http://writ.news.findlaw.com/grossman/20060627.html> (describing the jury verdict in *Lochren v. Cnty. of Suffolk*).

149. See Grossman, *supra* note 148.

150. *Germain v. Cnty. of Suffolk*, 672 F. Supp. 2d 319 (2009).

Even when plaintiffs prevail, as they did in *Lochren*, the winning theory has been based on an unduly narrow reading of clause two. The *Lochren* plaintiffs prevailed only because they mustered strong evidence of longstanding and clear animus against female police officers generally, and pregnant police officers in particular.¹⁵¹ But the second clause of the PDA is meant to guarantee equal treatment regardless of an employer's motive.

By defining the comparison pool for pregnant workers to exclude a favored class of workers (such as those injured on the job), courts construe pregnant workers' requests for light-duty work as a demand for "special treatment."¹⁵² While there is some earlier authority rejecting this kind of approach to PDA claims challenging pregnant workers' exclusion from light-duty work,¹⁵³ in *Reeves* and like cases from other circuits, the plaintiff's claim is characterized as a demand for "preferential treatment."¹⁵⁴ Under this approach, the employer can select any comparison group by which to establish that the pregnant woman has received equal treatment as long as the choice does not reflect a discriminatory motive. By permitting the employer to pick and choose among comparably disabled workers, the court fundamentally misconstrues clause two of the PDA, which by its terms entitles pregnant women to work on the same terms as more favorably-treated workers similarly restricted in their capacity to work.

Two recent cases, *Young v. United Parcel Service, Inc.*¹⁵⁵ and *Serednyj v. Beverly Healthcare, LLC*,¹⁵⁶ illustrate how this approach is now effectively nullifying the second clause of the PDA.

Peggy Young was hired by UPS in 1999.¹⁵⁷ She began driving a delivery truck for the company in 2002. As an "air driver," charged with delivering

151. See Grossman, *supra* note 148.

152. See, e.g., *Urbano v. Cont'l Airlines, Inc.*, 138 F.3d 204, 208 (5th Cir. 1998); *Reeves v. Swift Transp. Co.*, 446 F.3d 637, 642 (6th Cir. 2006).

153. The leading case rejecting this kind of parsing of comparators under clause two of the PDA is *Ensley-Gaines v. Runyon*, 100 F.3d 1220 (6th Cir. 1996) (reversing summary judgment for employer because district court had incorrectly limited the class of "similarly-situated" employees to those also injured off-the-job); *accord Villanueva v. Christiana Care Health Servs., Inc.*, No. Civ.A. 04-258-JJF., 2007 U.S. Dist. WL 188111, at *5 n.4 (D. Del. Jan. 23, 2007) (holding that pregnant patient care technician who was denied light duty established a prima facie case even though her medical restrictions differed from those of employees granted light duty); *Sumner v. Wayne Cnty.*, 94 F. Supp. 2d 822, 826 (E.D. Mich. 2000) (finding that a police officer fired for violating department's no-leave policy for probationary employees after taking time off to give birth was "similarly situated" to male officer granted longer probationary period after sick leave for on-the-job injury; both were "temporarily disabled while on probation"). See also Jamie L. Clanton, *Toward Eradicating Pregnancy Discrimination at Work: Interpreting the PDA To "Mean What It Says,"* 86 IOWA L. REV. 703, 724-33 (2001) (defending the reasoning of *Ensley-Gaines* as grounded in the text and legislative history of the PDA). However, the same Circuit that decided *Ensley-Gaines* later indirectly critiqued its reasoning in *Reeves*. See *Reeves v. Swift Transp. Co.*, 446 F.3d 637 (6th Cir. 2006).

154. See, e.g., *Spivey v. Beverly Enters.*, 196 F.3d 1309, 1312 (11th Cir. 1999) ("Appellee, however, was under no obligation to extend this accommodation to pregnant employees. The PDA does not require that employers give preferential treatment to pregnant employees.") (emphasis added); *Urbano v. Cont'l Airlines*, 138 F.3d at 208 (5th Cir. 1998) ("Urbano's claim is thus not a request for relief from discrimination, but rather a demand for preferential treatment; it is a demand not satisfied by the PDA.") (emphasis added).

155. 707 F.3d 437 (4th Cir. 2013).

156. 656 F.3d 540 (7th Cir. 2011).

157. 707 F.3d at 440.

packages that came via air rather than ground delivery, Young typically carried lighter letters and packs. Young's job description, however, required her to be able to lift and maneuver packages weighing up to 70 pounds, and assist with movement of packages up to 150 pounds.¹⁵⁸ Young was covered by a collective bargaining agreement (CBA), which required UPS to provide temporary, light-duty work assignments to employees who could not perform their regular jobs due to an on-the-job injury.¹⁵⁹ The CBA also extended light-duty work to drivers who are legally prohibited from driving because they either failed a required medical exam or lost their driver's license.¹⁶⁰ Beyond the requirements of the CBA, UPS had a policy to permit light-duty assignments when "an employee has a qualifying disability within the meaning of the ADA which prevents him/her from being able to perform some aspects of his/her job."¹⁶¹ Because women with pregnancy-related disability do not fall into any of these categories,¹⁶² they are "permitted to continue working as long as they wanted to during their pregnancies, unless and until the employee presented a doctor's note or other medical certification that she had a restriction that rendered her unable to perform the essential aspects of the job."¹⁶³

Young sought and received several short-term leaves of absence as she went through three rounds of *in vitro* fertilization.¹⁶⁴ When she finally became pregnant during the third round, her doctor wrote a note recommending that she lift no more than 20 pounds during the first half of her pregnancy and no more than 10 pounds thereafter.¹⁶⁵ The company decided that it could not allow her to continue working since she was not capable of performing the lifting described in the list of essential job functions for her position.¹⁶⁶ Young had already used up all available medical leave, so she was put on a leave of absence with no pay and no medical coverage.¹⁶⁷ She returned to work two months after giving birth in 2007.¹⁶⁸

Young filed a lawsuit with claims for sex and pregnancy discrimination. The court rejected Young's argument that it facially discriminated against pregnant employees by excluding pregnancy from eligibility for light-duty assignments.¹⁶⁹ Because the policy is "pregnancy-blind" and offers accommodations on the basis of "gender-neutral criteria," the court refused to

158. *Id.* at 439.

159. *Id.* at 439-40.

160. *Id.* at 440.

161. *Young v. U.P.S.*, No. DKC 08-2586, 2011 U.S. Dist. LEXIS 14266, at *5-6 (D. MD Feb. 14, 2011).

162. Courts have consistently interpreted the ADA to exclude normal pregnancy as a covered disability. *See, e.g., Gorman v. Wells Mfg. Corp.*, 209 F. Supp. 2d 970, 976 (S.D. Iowa 2002) (noting that "the majority of federal courts hold that pregnancy-related complications do not constitute a disability under the ADA"); *Gudenkauf v. Stauffer Commc'ns, Inc.*, 922 F. Supp. 465, 474 (D. Kan. 1996).

163. *Young*, 2011 U.S. Dist. LEXIS at *7.

164. *Young*, 707 F.3d at 440.

165. *Id.*

166. *Id.* at 441.

167. *Id.*

168. *Id.* at 442.

169. *Id.* at 446-47.

treat the policy as facially discriminatory or as raising an inference of pregnancy discrimination.¹⁷⁰

The district court applied the *McDonnell Douglas* analysis and concluded that Young did not establish that she met the fourth element of the *prima facie* case – that a “similarly situated employee” was treated differently.¹⁷¹ Although the company’s policies accommodated a wide range of conditions, from high blood pressure and diabetes to drunk driving convictions, the court ruled that Young could not use anyone who was eligible for ADA accommodation or had lost their legal ability to drive as a comparator in the PDA claim.¹⁷² There is no similarity, the court explained, between a driver who suffers “from a legal obstacle to their operation of a vehicle” and a woman whose pregnancy poses “a physical impairment that stymied her ability to lift.”¹⁷³ The court dismissed without discussing the possibility that an employee entitled to accommodation under the ADA could be an appropriate comparator for Young.¹⁷⁴ The court effectively read a requirement of pregnancy-based animus into clause two:

It is important here to recall the objective of this element of the *prima facie* case: to discern whether a reasonable inference can be drawn that the employer has animus directed *specifically* at pregnant women. When an employer grants pregnant employees and some class of non-pregnant employees equally harsh terms, it undermines such an inference. In such circumstances, an employer might have some form of animus that is not to be applauded, but the animus is not directed towards a protected trait and, consequently, is not actionable.¹⁷⁵

On appeal, the Fourth Circuit affirmed the district court’s ruling as well as its reasoning.¹⁷⁶ Despite acknowledging that the second clause of the PDA “can be read broadly,” it chose not to give it such effect.¹⁷⁷ The court expressly rejected the idea that the second clause of the PDA creates “a distinct and independent cause of action.”¹⁷⁸ The court rejected what it saw as the transformation of “an antidiscrimination statute into a requirement to provide accommodation to pregnant employees, perhaps even at the expense of other, nonpregnant employees.”¹⁷⁹

Another recent case, *Serednyj v. Beverly Healthcare, LLC*, adds to the trend to effectively nullify clause two.¹⁸⁰ Victoria Serednyj was employed as an activity director in a nursing home beginning in August 2006.¹⁸¹ As with many jobs in long-term care facilities, Serednyj’s stated job duties included “some physically

170. *Id.* at 450.

171. *Young v. U.P.S.*, No. DKC 08-2586, 2011 U.S. Dist. LEXIS 14266, at *37-42 (D. Md. Feb. 14, 2011).

172. *Id.* at *38-42.

173. *Id.* at *40.

174. *Id.* at *38-40.

175. *Id.* at *41.

176. *Young v. U.P.S.*, 707 F.3d 437 (4th Cir. 2012).

177. *Id.* at 447.

178. *Id.*

179. *Id.* at 448. *Young* filed a petition for certiorari, which has not yet been ruled upon.

180. 656 F.3d 540 (7th Cir. 2011).

181. *Id.* at 545.

strenuous functions” — such as walking, climbing, bending, and lifting — related to transporting residents to their activities, rearranging furniture, and shopping for supplies.¹⁸² Her typical workday, however, involved only miniscule amounts of time on such tasks, and coworkers often helped her with them.¹⁸³ Serechnyj learned she was pregnant in January, 2007, and began to experience pregnancy-related complications soon thereafter.¹⁸⁴ After a two-week stint on bed rest, Serechnyj’s doctor restricted her to light duty work.¹⁸⁵ The company’s policy was to provide light-duty accommodations only to individuals with a disability under the ADA or an on-the-job injury.¹⁸⁶ Beverly Healthcare denied her request for light duty, notwithstanding the proclaimed willingness of her coworkers to help out.¹⁸⁷ Because she had not worked for the company long enough to qualify for leave under the federal Family and Medical Leave Act, she was fired.¹⁸⁸

The court considered both the mixed-motive and pretext models for proving discrimination in denying the PDA claim.¹⁸⁹ Rejecting the argument that the light-duty policy was itself direct evidence of pregnancy discrimination, the court ruled that the policy “complies with the PDA because it does, in fact, treat nonpregnant employees the same as pregnant employees—both are denied an accommodation of light duty work for non-work-related injuries.”¹⁹⁰

The reasoning in these cases, legitimizing any differential accommodation of workers that can be explained on a pregnancy-neutral basis, effectively collapses clause two of the PDA into clause one. The result is to make it virtually impossible for pregnant workers to challenge the more favorable treatment of other groups of workers with conditions that have a similar effect on work. The effect on pregnant workers’ PDA rights has become even more draconian as a result of recent amendments to the ADA, which have expanded the pool of workers entitled to accommodations under the ADA.

C. The Expanded ADA and the Contracting PDA

In an odd confluence of poorly-reasoned PDA cases and a well-intentioned congressional override of restrictive judicial interpretations of the ADA, recent developments in disability law are now exacerbating the problems created by the PDA cases discussed above. The ADA provides that individuals with a “disability” who are “otherwise qualified” have the right to reasonable accommodations that do not impose an undue hardship on the employer.¹⁹¹ A

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 545-46.

186. *Id.* at 546.

187. *Id.* at 545-46.

188. *Id.* at 546-47.

189. *Id.* at 547-52.

190. *Id.* at 548. The court’s implicit assumption that a mixed-motive challenge requires “direct evidence” of discrimination is itself bizarre, since the Supreme Court rejected any direct evidence requirement for proof of a discriminatory “motivating factor” under the 1991 Amendments to Title VII. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 91, 102 (2003).

191. Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(b)(5)(A).

disability is defined as “a physical or mental impairment that substantially limits one or more major life activities.”¹⁹² While this directive might itself seem like a good fit for pregnant workers whose pregnancies or related conditions require reasonable accommodations in order for them to continue to work, courts and the EEOC have consistently refused to regard normal pregnancy as an “impairment” under the Act.¹⁹³ The more troubling development for pregnant workers, however, is that the recent expansion of ADA rights combined with the trend in the PDA cases is now adding to the hurdles facing pregnant workers seeking to secure accommodation rights through the PDA.

In 2008, Congress enacted the Americans with Disabilities Act Amendments Act (ADAAA), in response to a number of Supreme Court decisions taking a restrictive view of the scope of the ADA.¹⁹⁴ The Amendments expand the definition of “impairment” to include not only conditions that interfere with “activities that are of central importance to most people’s daily lives,” but also more routine, work-related tasks such as standing, lifting, or bending.¹⁹⁵ The EEOC regulations interpreting the Act state that an impairment “need not prevent, or significantly or severely restrict, the individual from performing a major life activity,” and that the “substantially limits” requirement is “not meant to be a demanding standard.”¹⁹⁶ As an example of an impairment that would qualify for reasonable accommodations under the Act, the EEOC’s interpretive guidance describes someone with a “20-pound lifting restriction that lasts or is expected to last for several months.”¹⁹⁷

The ADAAA, as interpreted by the EEOC, should also lift the duration requirements many courts had imposed on the definition of disability. Although the statute never specified a minimum period of disability, nor required it to be permanent or indefinite, many courts had imposed a requirement of permanence or long-term impact under the ADA.¹⁹⁸ The ADAAA, like the original ADA, does not explicitly address duration, but the EEOC has interpreted its mandate for “broad coverage” to mean that short-term disabilities may be covered. In one

192. *Id.* at § 12102(2)(A).

193. EEOC, Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630 app. § 1630.2(h), (j) (1991); *see also* Serednyj v. Beverly Healthcare, LLC, 656 F.3d 540, 553 (7th Cir. 2011) (collecting cases where the court has refused to acknowledge pregnancy as a physical impairment).

194. Among the decisions overruled are *Sutton v. United States Air Lines, Inc.*, 527 U.S. 471 (1999); *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).

195. 42 U.S.C. § 12102(2)(A).

196. 29 C.F.R. § 1630.2(j)(1)(i), (ii) (1991).

197. EEOC, Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630 app. § 1630 (2012).

198. Courts considered duration of the disability as a factor in determining whether it *substantially* limited a major life activity. *See, e.g.*, *Stevens v. Stubbs*, 576 F. Supp. 1409 (N.D. Ga. 1983); *Evans v. City of Dallas*, 861 F.2d 846 (5th Cir. 1988); *see also* Jonathan R. Mook, AMERICANS WITH DISABILITIES ACT: EMPLOYEE RIGHTS & EMPLOYER OBLIGATIONS § 902.4(d) (2013) (“Although short-term, temporary restrictions generally are not substantially limiting, an impairment does not necessarily have to be permanent to rise to the level of a disability. Some conditions may be long-term, or potentially long-term, in that their duration is indefinite and unknowable or is expected to be at least several months. Such conditions, if severe, may constitute disabilities . . . despite the prognosis for full recovery at some indeterminable point in the future.”).

“rule of construction,” the regulations provide that the “effects of an impairment lasting or expected to last fewer than six months can be substantially limiting,” and therefore may qualify as an “impairment.”¹⁹⁹ The ADAAA also modified other aspects of the standard to enlarge the class of individuals covered.²⁰⁰

One thing that has not changed with the ADAAA, so far at least, is the exclusion of normal pregnancy under the Act, despite its even more comfortable fit with the expanded coverage to encompass short-term disabilities, even those which only manifest as a lifting restriction. Nevertheless, the EEOC, in an interpretive guidance of the ADAAA, continues to adhere to the position that normal pregnancy is not a disability and need not be accommodated under the ADA.²⁰¹

In addition to perpetuating the exclusion of workers impaired by pregnancy and related conditions from any right to accommodation directly under the ADA, the amendments are also (unintentionally) interfering with pregnant workers’ accommodation rights under the PDA. Although the ADAAA should help pregnant women by creating an expanded class of persons entitled to workplace accommodations to whom pregnant workers could compare themselves, cases like *Reeves*,²⁰² *Young*,²⁰³ and *Serednyj*²⁰⁴ instead make pregnant women worse off by eliminating an even broader class of comparators.

The reasoning of these courts, that ADA accommodations are not comparable since they are required by law, defies the Supreme Court’s reasoning in *Guerra*.²⁰⁵ The Court’s alternative ruling in that case forbade employers from hiding behind another statutory mandate as an excuse to treat one group of comparably disabled workers better than another in violation of the PDA.²⁰⁶ As the Court explained, California employers who were forced to provide maternity leave by state law still could have complied with the PDA, had the Court interpreted it to require non-pregnancy disabilities to be treated as well as pregnancy, by extending leave and reinstatement rights to both groups.²⁰⁷ Likewise, employers should not be able to hide behind the ADA to excuse a refusal to give pregnant women the same accommodations if they are similar in their ability to work. The employer’s motive for offering accommodations to one group but not another has no proper place in courts’ analysis under clause two,

199. 29 C.F.R. § 1630.2(j)(1)(ix) (2012).

200. For detailed discussion of the changes, see Jeannette Cox, *Pregnancy as “Disability” and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. 443, 460-66 (2012) (addressing the expanded scope of the ADA). See also 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, 964-65 (2013); Williams et al., *supra* note 105, at 20-30.

201. See 29 C.F.R. § 1630.2(h) app. at 378 (2011) (failing to include pregnancy as an impairment in the ADA).

202. *Reeves v. Swift Transp. Co.*, 446 F.3d 637 (6th Cir. 2006).

203. *Young v. U.P.S., Inc.*, 707 F.3d 437 (4th Cir. 2013).

204. *Serednyj v. Beverly Health Care, LLC*, 656 F.3d 540 (7th Cir. 2011).

205. *Cal. Fed. Savings v. Guerra*, 479 U.S. 272 (1987).

206. See *id.* at 291 (explaining that compliance with both federal and state law is possible and thus one law does not trump the other).

207. *Id.* at 290-91.

which makes similarity in ability to work the only relevant factor.²⁰⁸

Part of the resistance to comparing pregnant workers to workers accommodated under the ADA may be an implicit, but unwarranted, distinction in the presumed duration of ADA-qualified disabilities compared to pregnancy, a temporary condition. Courts have generally construed the ADA to exclude temporary disabilities, at least prior to the changes brought about by the 2008 Amendments. Although the text of the PDA does not impose any kind of duration requirement on a worker's inability to work in extending similar treatment to pregnant women, terminology analogizing pregnancy and related conditions to temporary disabilities has crept into the PDA lexicon. The early EEOC regulations, some of the legislative history behind the PDA, and some court opinions describing the PDA have all explained the Act as extending to pregnancy the same level of benefits and accommodations as are available for other temporary disabilities.²⁰⁹ In viewing ADA-accommodated disabilities as not comparable to pregnancy, courts may be surreptitiously limiting the scope of the PDA's clause two, making pregnancy comparable only to temporary conditions. This kind of slicing and dicing of the class of comparators whom courts will analogize to pregnant workers—e.g., limiting the class of comparable workers to those with only temporary conditions—is part and parcel of the overly restrictive reading courts are giving clause two of the PDA.

The PDA itself, however, does not tie pregnant workers' treatment to that of workers with only temporary disabilities, but rather, to workers who are similar in their ability to work. A natural reading of that language would focus on present work capacity, and would include workers with similar capacity at the time accommodations/benefits are given, regardless of the expected duration of their impairment. For example, a person with multiple sclerosis and a person with a temporarily strained back might both be proper comparators, if similar to a pregnant worker in ability to work.

In our view, the legislative history's comparison of pregnancy to other temporary disabilities should not, and never was intended to, exclude comparisons to disabilities of permanent or indefinite duration. Rather, references to temporary disabilities were made because, at the time the PDA was enacted, temporary disabilities were the kinds of conditions employers were accommodating.²¹⁰ Until passage of the ADA, workplaces generally made few if

208. Pregnancy Discrimination Act, 42 U.S.C. §2000e(k) (“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”).

209. See 29 C.F.R. § 1604.10(b) (1972) (“Disabilities caused or contributed to by pregnancy for all job-related purposes, temporary disabilities and should be treated as such. . . .”); H.R. Rep. No. 948(1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4750 (“The EEOC Guidelines . . . require employers to treat disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth and recovery therefrom as all other temporary disabilities.”); 29 C.F.R. 1604 app. Question 5 at 200 (2013) (Questions and Answers on the Pregnancy Discrimination Act) (“An employer is required to treat an employee temporarily unable to perform the functions of her job because of her pregnancy-related condition in the same manner as it treats other temporarily disabled employees, whether by providing modified tasks, alternative assignments, disability leaves, leaves without pay, etc.”); see *Gen. Elec. v. Gilbert*, 429 U.S. 125, 140-41 (1976) (quoting temporary disability language from EEOC Guidelines).

210. See Widiss, *supra* note 200, at 986-88 (discussing the expansion of employer benefits for

any provisions for workers with lasting disabilities who required accommodations to continue work.²¹¹ When the PDA was conceived, to the extent employers were doing anything for disabilities, so as to enable pregnant workers to use them as a benchmark for comparison, it was through policies on temporary disabilities, such as the plans at issue in both *Geduldig* and *Gilbert*.²¹² Those plans, which excluded pregnancy, gave leaves of a limited duration, and accompanying reinstatement rights, designed to accommodate workers with temporary disabilities. In drafting and enacting the PDA to overturn these decisions, the primary focus was on the kind of fact pattern at issue in these cases, as evidenced by Congress' choice of language.²¹³ The PDA came to be described as a mandate to treat pregnancy as well as other temporary disabilities because those were the kinds of conditions at the time that employers were treating more favorably. Just like *Gilbert* drove the terminology used in the PDA, the *Gilbert* fact pattern shaped descriptions of the PDA's impact in highlighting the analogy to temporary disabilities.

But the text of the PDA is not so limited. The plain language of the PDA makes an employee's ability to work the only reference point for drawing comparisons. And of course, saying that the Act mandates treating pregnancy as well as temporary disabilities in no way implies that pregnancy may be treated worse than disabilities that are not temporary. Now that employers must, by law, make reasonable accommodations for disabilities of greater duration, the PDA, by design, should extend equal benefits and accommodations to pregnant workers with a similar work capacity. The courts that are now refusing to allow pregnant workers to compare themselves to ADA-accommodated workers may be, incorrectly, locked into a default categorization of pregnancy as *only* analogous to temporary disabilities, unduly narrowing the class of appropriate comparators.

To the extent that the default restriction of comparators to *only* temporary disabilities has been limiting courts' views of the proper scope of PDA rights, and blocking comparisons to ADA-accommodated disabilities, that particular set of blinders should be lifted now that the 2008 Amendments have clarified that ADA accommodations are required for temporary as well as more lasting impairments.²¹⁴ So far, however, the extension of the ADA to temporary disabilities has not made a difference in how courts view the PDA in relation to the ADA. In the cases discussed above, courts have refused, with little or no analysis, to use ADA-mandated accommodations as a baseline for pregnant workers similar in ability to work, despite the 2008 Amendments. Instead, they insist on characterizing policies to accommodate ADA-qualified disabilities and on-the-job injuries, but not pregnancy, as "pregnancy neutral," since not based

workers with temporary disabilities, except for pregnancy, which was often excluded, during the years leading up to enactment of the PDA).

211. See, e.g., Miranda Oshige McGowan, *Reconsidering the Americans with Disabilities Act*, 35 Ga. L. Rev. 27, 42-63 (2000) (detailing the history of discrimination against disabled persons, to which the ADA was responding).

212. *Geduldig*, 417 U.S. at 486-89; *Gilbert*, 429 U.S. at 128.

213. See text accompanying notes 59-61 *supra* (pointing out that the terms defined in the PDA do not appear elsewhere in Title VII, but do appear in the *Gilbert* decision).

214. See text accompanying notes 198-200 *supra*.

on animus against pregnant workers.

The upshot is that courts are effectively draining clause two of any content, and failing to see that in continuing to separate pregnancy from a class of other conditions, even broader since 2008, similarly affecting work, they are resuscitating the very gender ideology about pregnancy and work at the heart of the *Gilbert* decision that the PDA sought to override. The next section takes a step back to explore how the PDA cases fit into broader trends in employment discrimination law, and delves into the gender ideology behind the developments in the PDA case law.

III. PUTTING THE PDA'S FAILURES INTO A BROADER LEGAL AND SOCIAL CONTEXT

Taking a step back, the problems courts have created in the PDA case law resonate with the troubles of discrimination law more generally. The doctrinal failures of the PDA share some common themes with the rest of discrimination law. And yet, while the PDA's fault-lines have antecedents in the broader law of discrimination, the PDA's failings nevertheless stand out, in light of the statute's text and history. Their emergence in the PDA case law reflects a distinctive gender ideology about pregnancy and work, and by extension, motherhood and work.

A. Amplifying the Anti-Plaintiff Trends in Employment Discrimination Law

One point of overlap between the PDA and other areas of employment discrimination law is a resistance to so-called "bootstrapping" – using logic and principled reasoning to apply the law to an area that the legislature had specifically intended to exclude. The anti-bootstrapping flag gets raised often in discrimination law – perhaps most prominently in cutting short the reach of gender stereotyping theory to ensure that sexual orientation discrimination remains outside the boundaries of a claim for sex-based discrimination. While acknowledging that the logic of *Price Waterhouse v. Hopkins*,²¹⁵ which recognized gender stereotyping as a form of sex discrimination, may encompass negative reactions to a gay or lesbian employee for failing to conform to the expectations for how a "real" man or woman should conduct their sex life, courts have insisted that Congress did not intend to address sexual orientation discrimination when it enacted Title VII.²¹⁶ Accordingly, they reason, it is necessary to preserve a line between sex and sexual orientation bias in order to prevent this kind of bootstrapping of claims. A similar fate has befallen pay discrimination claims under Title VII's disparate impact claim. Because Congress never intended to mandate comparable worth, courts have cut short employees' ability to use disparate impact claims to challenge pay disparities, seeing these claims as heading down a slippery path that might end in comparable worth.²¹⁷

215. 490 U.S. 228, 239-40 (1989).

216. See, e.g., *Simonton v. Runyon*, 225 F.3d 122 (2d Cir. 2000); *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 328 (9th Cir. 1979) (holding Title VII's prohibition of sex discrimination applies only to gender discrimination and does not include discrimination of homosexuality).

217. See, e.g., *Am. Nurses' Ass'n v. Ill.*, 783 F.2d 716 (7th Cir. 1986) (holding that the association had no cause of action based solely on comparable worth, but that intentional discrimination sufficient to state a sex discrimination cause of action had been alleged).

Similarly, the recent PDA decisions, discussed above, reject what the courts see as bootstrapping accommodations for pregnant workers onto the legs of the ADA. Under this reasoning, since Congress never intended the PDA to affirmatively guarantee any set level of benefits or accommodations, such as paid maternity leave or sick leave to pregnant workers, and since Congress intended to exclude normal pregnancy from the disabilities covered by the ADA, using the expanded ADA to achieve equivalent results would be tantamount to bootstrapping the claims of pregnant women onto the framework of the ADA. This interpretation of the PDA, as a blank slate that does not in itself guarantee substantive benefits for pregnancy, reflects an over-simplified, reductionist view of the feminist movement behind the PDA. As Deborah Dinner has shown, feminists actually pursued a more substantive and progressive agenda in pushing for the Act than the more hollow “formal equality” commonly attributed to the law’s supporters.²¹⁸

By invoking the bootstrapping label, courts can halt the reach and logic of discrimination law without acknowledging the ideology or policy choices behind their decisions.²¹⁹ The invocation of bootstrapping saddles the plaintiff with an activist, sleight-of-hand litigation tactic while the judge plays the role of neutral guardian of legislative intent. Closer inspection of the anti-bootstrapping move, however, reveals that it is itself a substantive choice. The logic of statutory language often extends beyond the specific intentions of the legislature, as Justice Scalia recognized in the *Oncale* decision,²²⁰ when that Court held that Title VII reaches male-male sexual harassment despite Congress’s lack of intent to regulate such conduct when it enacted Title VII. The bootstrapping flag is raised selectively, masking interpretive choices. A similarly false fidelity to legislative intent was espoused in *Gilbert* itself, wherein the Court purported to be constrained by Congress’ traditional understanding of sex discrimination.²²¹ A recent article by Cary Franklin shows how that “traditional” understanding was itself an invention, masking normative choices in interpreting the meaning and scope of the statute’s prohibition.²²²

The question of which substantive values and policy choices underlie the bootstrapping objection merges into a second shared theme in the PDA and the rest of discrimination law: judicial resistance to using discrimination law in a way that appears to enforce accommodation mandates. The liberal equal treatment model that dominates discrimination law in the U.S. aspires to deliver only the same treatment for similarly situated persons, stopping short of

218. On this history, see generally Dinner, *supra* note 22 (unearthing the more complicated feminist history behind the PDA than the liberal feminist agenda of minimizing the significance of pregnancy in relation to work and rejecting “special” treatment for women).

219. See Zachary A. Kramer, *Heterosexuality and Title VII*, 103 NW. U. L. REV. 205 (2009) (exposing how courts’ resistance to bootstrapping masks a double standard that selectively raises sexual orientation—gay/lesbian orientation, but not heterosexual orientation—as a bar to recognizing a claim of gender stereotyping).

220. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

221. See *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 137-40 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076.

222. Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307, 1358-66 (2012).

requiring any structural changes that would enable the members of protected groups to thrive. In specifying discrete protected classes, discrimination law identifies certain status-based identity characteristics that may not be used to deny equal treatment. Clause one of the PDA recognizes pregnancy as such a status. The judicial tilt towards formal equality is so strong in U.S. law that clause two's express accommodation mandate—requiring pregnancy to be accommodated to the same extent as other disabilities with a similar effect on work—is effectively being read out of the statute.²²³

Judicial hostility to accommodation mandates runs deep and pervades U.S. discrimination law.²²⁴ It underlies the stinginess of the disparate impact claim, the courts' minimalist approaches to religious accommodation under Title VII, and most notably, the courts' narrow interpretations of what counts as a disability under the ADA.²²⁵ Indeed, it was the Supreme Court's strict interpretation of the ADA, including its narrow view of what counts as a qualified disability, which led Congress to amend the statute in 2008.²²⁶ The recent PDA decisions, refusing to allow employees entitled to accommodations under the ADA to be used as comparators for pregnant women under the PDA, reflect the same kind of resistance to accommodation norms that precipitated the ADAAA in the first place.

A third theme evident in the PDA case law, and shared by discrimination law generally, is that "discrimination" is equated with a conscious intent to disadvantage the protected group. As discussed above, recent court decisions have turned the PDA, including clause two, into a search for animus. The clause two cases are especially notorious for this. By rejecting comparisons to ADA-qualified disabilities in applying clause two, courts have made the reason for denying accommodations to pregnant workers the key to winning the claim. Our review of PDA cases decided between January 1, 2009 and June 29, 2012, found that the cases in which the plaintiff survived summary judgment and/or motions to dismiss were, overwhelmingly, cases that fit an animus model.²²⁷ We

223. See text accompanying notes 135-90 *supra*.

224. A number of commentators have acknowledged this hostility in the courts, but made convincing arguments that the traditionally-conceived dichotomy separating accommodation claims from the rest of discrimination law is a false one. See Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642 (2001) (critiquing the sharp doctrinal distinction between antidiscrimination and accommodation, and arguing that the costs imposed by each are equivalent); Mary Crossley, *Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project*, 35 RUTGERS L.J. 861 (2004) (discussing similarities between the ADA's reasonable accommodation requirements and other discrimination laws); Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1386-1404 (2009) (discussing the third-party harasser claim as an unacknowledged form of a failure to accommodate claim, and criticizing the artificial distinction between nonaccommodation and other recognized discrimination claims).

225. See SAMUEL R. BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* 55 (2009) (discussing views of ADA critics claiming a strong distinction between the ADA's accommodation mandate and other discrimination laws); Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317, 357-406 (1997) (discussing judicial resistance to Title VII's requirement that employers reasonably accommodate religious practices).

226. See Cox, *supra* note 200, at 461-62 (outlining the amendments to the ADA coverage).

227. See Memorandum from RA (on file with authors). Our research searched for PDA claims

found 59 cases in which plaintiffs prevailed. Almost all of these involved claims under clause one, where plaintiffs alleged adverse actions taken on the basis of pregnancy, despite the plaintiff's continuing ability to do the job. In more than half of these winning cases, the plaintiff had what might be called "direct" evidence of animus, such as an admission that pregnancy was the reason for the adverse treatment or disparaging comments from a supervisor or manager referencing the pregnancy.

Much has been written about the conflation of discrimination with animus, and the PDA is by no means unique in trending toward an "insular individualism" as the prototype for what amounts to actionable discrimination.²²⁸ The Supreme Court's recent employment discrimination cases – *Ricci v. DeStefano*,²²⁹ *Ledbetter v. Goodyear Tire & Rubber Co.*,²³⁰ and *Wal-Mart Stores, Inc. v. Dukes*²³¹ – conceive of unlawful discrimination as stemming from a conscious intent to treat persons worse because of their status as members of a protected class. In these and other cases, institutional bias in the structure of the workplace that disadvantages women or persons of color does not register as discrimination.

Against this backdrop, the appearance of these themes in the PDA case law might be viewed as predictable, if not inevitable. However, when considered in light of the text and history of the PDA, the infiltration of these crosscurrents into the PDA case law is rather stunning. That these tensions have cropped up in the PDA cases says something about the resilience of the gender ideology behind pregnancy discrimination.

While common to discrimination law generally, these three themes—resistance to bootstrapping, hostility to accommodation mandates, and requiring proof of animus—are rebuked by a plain-meaning reading of the PDA itself. Clause two of the PDA explicitly ties the treatment of pregnant workers to the treatment of non-pregnant workers similar in their ability to work. There is no room in this language for exempting ADA-covered disabilities, or any other conditions with a similar effect on work, from this comparison. There is no bootstrapping needed to put pregnant workers on an equal footing with other workers, receiving accommodations, who have a similar capacity to work; it is done in one step, through the statute's text. Judicial hostility to mandating accommodations must be strong enough to overcome the literal language of clause two. Likewise, reducing PDA violations to a search for animus is also incompatible with the language of that clause. Clause two makes the different treatment of pregnancy, compared to other conditions similarly affecting work, a violation of the Act. The violation does not hinge on the *reason* for denying that treatment to pregnant workers. Unlike the arguably more ambiguous "because of" pregnancy language in the first clause, which is parallel to the entry point for

using Lexis, Westlaw, and Bloomberg Law databases, decided between January 1, 2009 and June 29, 2012.

228. See Tristin K. Green, *Insular Individualism: Employment Discrimination Law After Ledbetter v. Goodyear*, 43 HARV. C.R.-C.L. L. REV. 353 (2008) (discussing the insular individualism in *Ledbetter v. Goodyear* and the potential consequences on antidiscrimination law).

229. 557 U.S. 557 (2009).

230. 550 U.S. 618 (2007).

231. 131 S. Ct. 2541 (2011).

an animus approach in the rest of discrimination law, clause two defines discrimination as the unequal treatment of pregnancy and other conditions similarly affecting work, regardless of the reason. The fact that lower courts have nevertheless gravitated toward an animus approach to the PDA is therefore striking, and reveals the staying power of the ideology embedded in *Gilbert*.

B. The Gender Ideology in the PDA Case Law

The spreading of these three themes into the PDA case law despite the text of clause two reflects a deep-seated ambivalence about the regulation of pregnancy in the workplace.²³² U.S. culture is marked by a long and continuing history of ambivalence about working mothers. Pregnancy marks the beginning of that ambivalence, and brings with it its own set of projected associations. Iris Marion Young eloquently captured the way cultural depictions of idealized pregnancy erase the agency of pregnant women, characterizing the dominant image of pregnancy as “a time of quiet waiting” in which the woman is “expecting,” “a time of waiting and watching, when nothing happens.”²³³ In this account, the presumptive incompatibility between the woman’s pregnancy—a passive and objectified state—and her active engagement with work is implicit.

In recent years, ambivalence about working mothers has taken the form of hyped-up stories that amplify and glorify trends of women leaving the labor force to devote more time to mothering.²³⁴ The gender ideology underlying these stories is in synch with the gender ideology behind the refusal to accommodate pregnancy in the workplace. Asking the question of whether pregnancy should be accommodated implicitly assumes non-pregnant workers as the norm. Pregnancy is cast as a special liability, an impediment to work, which foregrounds the reproductive role of the pregnant subject. The question of whether and how to accommodate pregnancy at work triggers descriptive and prescriptive stereotypes about how pregnancy and motherhood do and should affect women’s attachment to the labor force.

The gender ideologies behind pregnancy discrimination, though loaded with stereotypes, make for a bad fit with the animus model of discrimination. Cultural ambivalence about working mothers is masked by an overlay of reverence for pregnancy and motherhood, with an idealized white motherhood occupying a central place in popular consciousness. Carol Sanger highlighted the complicated meaning of motherhood when she pointed out that motherhood

232. See, e.g., Cheryl Hanna, *The Price She Pays*, 10 SEATTLE J. SOC. JUST. 815 (2012) (discussing cultural ambivalence toward working mothers).

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

234. For a summary of recent pieces in the popular press on this theme, see A. Joan Saab, *Creating a Life or Opting Out: Antifeminism and the Popular Media*, 8 J. ASSOC. FOR RES. ON MOTHERHOOD 233 (2006). For a counterpoint to the so-called “opt-out” trend, see LINDA R. HIRSHMAN, GET TO WORK: A MANIFESTO FOR WOMEN OF THE WORLD (2006). Anne-Marie Slaughter wrote a controversial essay in which she proclaimed it virtually impossible for women to really “have it all.” See Anne-Marie Slaughter, *Why Women Still Can’t Have it All*, ATLANTIC, July/Aug. 2012, <http://www.theatlantic.com/magazine/archive/2012/07/why-women-still-cant-have-it-all/309020/>.

is simultaneously “both revered and regulated.”²³⁵ It is also pegged as “normal” for women—both descriptively, in that the vast majority of women do become mothers, and prescriptively, in the stigma and questioning that surrounds women who remain childless throughout their lives.²³⁶ As Katherine Franke observes, maternity is so normalized for women that women who do not become mothers are seen as cultural anomalies, and even “unnatural” women.²³⁷ In this complicated stew, it is not obvious what animus toward pregnancy looks like. Ambivalence about working mothers is clothed with reverence toward pregnancy, at least for women whose reproduction is highly valued. For these women, there is no animus towards pregnancy *per se*, but a glorification of pregnancy, along with an anticipated elevation of the maternal role over other (and presumably competing) roles.

Indeed, much cultural discourse glorifies motherhood, depicting it as an empowered state showcasing women’s fierceness and determination to protect and nurture their young. The “mama grizzly” is a newly resurgent iconic ideal, in which women are lionesses protecting, developing, and hovering over their young.²³⁸ In this narrative, women are the superior parents, sharply contrasting with the ineptitude of men in domestic realms. The mama grizzly role is portrayed as one chosen by women, and so outside the structures of the separate-spheres ideology of old.²³⁹ The constraints that shape this “choice,” however, are left unexplored.

Gender ideologies lionizing mothers in the maternal sphere may complicate the search for animus against pregnant workers, but they do not actually enhance the appeal of women as workers or protect them from discrimination. Quite the contrary. Implicit in this duality of parenting (the ultra-competent mama grizzly versus the caring but bumbling dad) is that the woman’s maternal zeal is reserved for the children, with little leftover for other endeavors. Women’s fierceness and determination in this ideal is located firmly within separate spheres ideology; it does not give women added competence in the workplace or make them more valuable as employees.²⁴⁰

Social science research suggests that ambivalent reactions to combining work and motherhood translate into pregnancy-based bias in the workplace. Although there is not as much empirical research on pregnancy discrimination as one might expect, the research that has been done finds pregnancy to be a likely

235. Carol Sanger, *M is for the Many Things*, 1 S. CAL. REV. L. & WOMEN’S STUD. 15, 17 (1992).

236. See CHAMALLAS, *supra* note 66, at 372 n.28 (citing census data showing that only 18% of women will not have given birth by their 44th birthday).

237. Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law and Desire*, 101 COLUM. L. REV. 181, 185 (2001) (“Reproduction has been so taken for granted that only women who are not parents are regarded as having made a choice—a choice that is constructed as nontraditional, nonconventional, and for some, non-natural.”).

238. See Naomi Mezey & Cornelia T. Pillard, *Against the New Maternalism*, 18 MICH. J. GENDER & L. 229, 250-53 (2010) (describing mothers as protectors).

239. See *id.*

240. See, e.g., Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297, 1306 (2007) (discussing research showing conflict between intensive mothering norms and perceptions of competence at work).

trigger for bias.²⁴¹ One study contrasted the reactions of retail store employees to pregnant customers with their reactions to pregnant job applicants.²⁴² Store workers were more likely to respond benevolently to pregnant customers (with overly-friendly responses, affirming touches and affectionate but diminutive references like “honey” and “sweetie”), but hostilely to pregnant applicants.²⁴³ A follow-up study found that reactions to pregnant applicants were especially hostile when women applied for masculine-typed jobs.²⁴⁴ Other studies have found that pregnant women are rated as less competent and less suited for promotion than non-pregnant workers performing the same work, are less likely to be recommended for hire, and receive lower salary recommendations.²⁴⁵ One researcher has coined the term “pregnant presenteeism” for the phenomenon of pregnant workers seeking to compensate for employer bias by presenting themselves as healthy and remaining at work even when they are unwell.²⁴⁶ This literature finds that, rather than presenting in the form of animus or dislike, reactions to pregnant women are ambivalent, situational and role-dependent.

While not specific to pregnancy *per se*, an even more robust body of research documents a motherhood penalty in the workplace, which suggests that impending maternity is also likely to trigger stereotyping and bias. In one study, for example, subjects received a pair of resumes featuring equally qualified applicants of the same gender and race, differing only by parental status.²⁴⁷ Subjects in the study judged the mothers in the pairs as “significantly less competent and committed than women without children.”²⁴⁸ Not only did the subjects’ views of women’s competence vary by maternal status, they also recommended lower starting salaries for the women, but not men, who were

241. 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. BEHAV. 649 (1993) (finding substantial negative stereotyping against pregnant workers, resulting in significantly more negative performance appraisals of pregnant workers, especially by male reviewers) and Sara J. Corse, *Pregnant Managers and their Subordinates: The Effects of Gender Expectations on Hierarchical Relationships*, 26 J. APPLIED BEHAV. SCI. 25 (1990) (finding pregnant managers were penalized when they acted firmly, in a conflict situation, instead of conforming to expectations that pregnant women are more empathetic and nurturing).

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

243. *Id.*

244. *Id.* at 1508-09.

245. See Jennifer Cunningham & Therese Macan, *Effects of Applicant Pregnancy on Hiring Decisions and Interview Ratings*, 57 SEX ROLES 497 (2007); Bragger et al., *The Effects of the Structured Interview on Reducing Biases Against Pregnant Job Applicants*, 46 SEX ROLES 215 (2002); Caroline Gatrell, *Managing the Maternal Body: A Comprehensive Review and Transdisciplinary Analysis*, 13 INT’L J. MGMT. REVS. 97, 98-100 (2011); 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 an Australia-based study); Liisa Mäkelä, *A Narrative Approach to Pregnancy-related Discrimination and Leader-follower Relationships*, 19 GENDER, WORK & ORG. 677 (2011) (discussing similar findings in a Finnish study).

246. Caroline Jane Gatrell, *‘I’m a bad mum’: Pregnant presenteeism and poor health at work*, 72 SOC. SCI. & MED. 478 (2011).

247. Correll, *supra* note 240, at 1308 (the pairs were of either white women or African American women, to account for the possible influence of race on a motherhood bias).

248. *Id.* at 1316.

parents.²⁴⁹ The subjects held mothers to higher performance standards and punctuality requirements and actually gave them *less* leeway for being late to work than they gave fathers and non-parents.²⁵⁰ A follow-up, companion study of actual employers, in which equally qualified mothers and non-mothers applied for jobs, found that childless women received twice as many callbacks as mothers, despite having equally strong resumes.²⁵¹ Another study found that professional working women who became mothers were perceived as more warm, but less competent, than women without children and men with children.²⁵² Professional working fathers, in contrast, were perceived as warmer and more competent after becoming parents.²⁵³ Subjects in this study had less interest in hiring, promoting or training mothers compared to fathers and childless workers.²⁵⁴ Other research confirms these findings, showing mothers evaluated more harshly and treated less leniently than fathers.²⁵⁵ These findings are consistent with research documenting a per-child wage penalty of about five percent for employed mothers in the U.S.²⁵⁶

So far, we have been discussing biases surrounding pregnancy and maternity as if they were monolithic and applied the same to all women. But gender ideologies surrounding work and motherhood have always been implicitly (and sometimes explicitly) racialized.²⁵⁷ Young's depiction of pregnancy as a passive, waiting state, for example, represents an implicitly white ideal of pregnancy. Women of color historically have been both less revered while pregnant and presumed to be less in need of protection from the rigors of work. Tales lionizing mothers and celebrating their supposed "opt-out" rights map onto an unarticulated but racially and economically specific ideal mother. As A. Joan Saab explains in describing the assumptions underlying Danielle Crittenden's discourse blaming "feminism" for misleading women into thinking they can have both motherhood and a career, Crittenden's "average woman is white, middle class, and for the most part a fiction."²⁵⁸ As Saab explains, the "feminism" in the opt-out literature is oblivious to "the important issues of race, class, gender, and sexual identity that feminist theorists and activists have spent the past '30-odd years' addressing."²⁵⁹

The narratives about motherhood and work, including those about

249. *Id.*

250. *Id.*

251. *Id.* at 1327-30.

252. Amy J. C. Cuddy *et al.*, *When Professionals Become Mothers, Warmth Doesn't Cut the Ice*, 60 J. SOC. ISSUES 701, 701 (2004).

253. *Id.*

254. *Id.* at 711-12.

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

256. Correll, *supra* note 240, at 1297.

257. See generally Adrien Katherine Wing & Laura Weselmann, *Transcending Traditional Notions of Mothering: The Need for Critical Race Feminist Praxis*, 3 J. GENDER RACE & JUST. 257 (1999) (discussing race and the ideal mother).

258. Saab, *supra* note 234, at 236.

259. *Id.* at 238.

pregnancy and work, do not apply alike to all mothers. For mothers whose reproduction is tagged as socially valuable, pregnancy marks a revered state that precedes a socially prized role for women. Women of color, unmarried women, and economically vulnerable women have often triggered different reactions when they become pregnant.²⁶⁰ They are more likely to be viewed as irresponsible reproducers, and are expected to work, while at the same time are predicted to be less reliable workers. In the study discussed above, in which reviewers evaluated same-race, same-gender pairs, African American mothers were rated as less likely to be promoted than their equally qualified white maternal counterparts.²⁶¹ Consistent with this ideology, researchers investigating how gender stereotypes affect working mothers have found that white mothers are viewed more positively if they stay home with their children, while African American mothers are viewed more positively if they work.²⁶² At the same time, however, African American women are more likely to be stereotyped as unreliable workers after becoming mothers.²⁶³

Women of color, single women, and economically vulnerable women who must navigate the cultural fault-lines for working mothers are susceptible to charges of being bad mothers, irresponsible for having children at all, or for having too many children.²⁶⁴ At the same time, they are expected to continue working without “special” accommodation, a sentiment reflected in the harsh judgments reserved for “welfare mothers” who are dependent on state support.²⁶⁵ These mothers are burdened not by a stereotypically protective chivalry ushering them out of the workplace as much as an insistence that they work unimpaired and unaffected by pregnancy and motherhood. And yet, here too, the gender ideology behind the refusal to accommodate pregnancy in the workplace does not easily map onto a conscious animus seeking to keep women out of the workplace upon becoming pregnant. The gender ideology here insists that they stay in the workforce, even as it suspects that they may not be able to meet employer expectations.

While there is no single, universal gender ideology targeting pregnancy and maternity at work, the animus model is a poor fit for everyone—for women who approximate the maternal ideal as well as the many who do not. For the pregnant woman who fits the idealized portrayal of passive waiting in Iris Marion Young’s account, there is not animus towards pregnancy as much as a prioritization of her maternal role. But the flip-side of this is the diminished

260. Linda C. McClain, “Irresponsible” Reproduction, 47 HASTINGS L.J. 339, 379-81 (1996).

261. Correll et al., *supra* note 240, at 1324. The researchers noted that the other motherhood penalties studied—recommendations to hire and salary recommendations—were not significantly affected by maternal race, and emphasized that both groups of women studied, white and African American, experienced the motherhood penalty. *Id.*

262. See Stephanie Bornstein, *Work, Family, and Discrimination at the Bottom of the Ladder*, 19 GEO. J. POVERTY LAW & POL’Y 1, 39-40 (2012) (discussing studies) [hereinafter Bornstein, *Bottom of the Ladder*].

263. *Id.*

264. For an insightful discussion of African American women’s history of having their relationships with their children devalued and severed, see generally PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* 216 (1991) (presenting stories of African American women’s vulnerability to having their children taken away from them); see also McClain, *Irresponsible Reproduction*, *supra* note 260 (critiquing the rhetoric of irresponsible reproduction).

265. CHAMALLAS, *supra* note 66, at 378-79.

value placed on her paid work. For women who do not fit Young's ideal, who are expected to work without complaint throughout their pregnancies, there is not (usually) animus against their staying in the workplace. Rather, they are expected to stay without "special" treatment, but likely to confront assumptions that having children will interfere with their work ethic and performance. Neither combination (valuing motherhood while devaluing work, or devaluing motherhood while valuing work) presents itself neatly as the kind of pregnancy-based antipathy that the courts are searching for in applying the PDA. As a result, ideologies about gender, race and maternity continue to deprive pregnant women of the accommodations many will need to perform their jobs throughout pregnancy.

The gender ideology behind pregnancy discrimination, including the denial of accommodations for pregnant workers, is largely an ideology about women, but there is a gender ideology about men here too. As masculinities scholars remind us, no examination of gender injustice is complete without asking "the man question": what masculinity is behind this?²⁶⁶ The flip-side of resistance to accommodating pregnant women at work is an assumption that pregnant women are (or should be) partnered with a male breadwinner. While mothers bear a wage-penalty, fathers as a group benefit from a wage bonus—reflecting a conception (again, implicitly raced) of fatherhood as entitling (privileged) men to a family-wage.²⁶⁷ This idealized, race/class-specific masculinity is implicit, though unarticulated, in the devaluation of pregnant workers compared to other workers with similar restrictions on work ability.

Indeed, the very terminology surrounding work and motherhood presupposes a male breadwinner in the background. Martha Chamallas has unpacked the cultural meaning of the word "mother" in explaining that the unmodified "mother" evokes a married woman who is partnered with a male earner and whose primary identity is her maternal role.²⁶⁸ She explains how the modifiers tell a revealing story: "unmarried mothers" and "single mothers" are common objects of conversation, usually with the suggestion of a social problem in the making.²⁶⁹ One very rarely hears the term "married mother"—because left unmodified, the mother's marital status is presumed.²⁷⁰ Likewise, there is no male counterpart to the "working mother"; the "working father" is not often found in the work-family lexicon.²⁷¹ It is assumed that men combine work and parenthood; a "father" is presumed to engage in paid work and needs no modifier to signal his status as a worker.²⁷² The masculinity that supports the

266. See generally NANCY E. DOWD, *THE MAN QUESTION: MALE SUBORDINATION AND PRIVILEGE* (2010) (exploring masculinities scholarship and how it can better feminist legal theory). For a discussion of the need to engage men and masculinity to rebalance caretaking responsibilities, see generally JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* (2010).

267. Correll et al., *supra* note 240, at 1307-08.

268. CHAMALLAS, *supra* note 66, at 367.

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

unmodified mother is the privileged masculinity of the male breadwinner.²⁷³

Likewise, the masculinity that supports the narrow scope of the PDA is the ideal male wage-earner who can support a family on his salary and pick up the slack if his pregnant wife has to stop working. This traditional masculinity has historically been restricted to white men from the middle- to upper- classes.²⁷⁴ In this ideal, the man's reproductive and parenting roles not only present no conflict with work, his work is secure enough for him to become the sole provider, at least for a while.²⁷⁵ His labor force attachment is not expected to wane with parenthood—unlike the mother's, which is expected to do so (a presumption likely to become self-fulfilling if she loses her job while pregnant).²⁷⁶

But as is often the case, this idealized masculinity is just that—it does not fit most peoples' reality.²⁷⁷ There are fewer than ever two-parent households that can support a family with only one working parent. Lower-income families are especially far from this ideal. Among households in the bottom third of family incomes, over 25% of married fathers are unemployed or work only part-time.²⁷⁸ Even a full-time employee working forty hours a week all year long, with no time off, earning minimum wage will have an annual income of only \$15,080.²⁷⁹ At this rate, even families with two full-time workers earning minimum wage will struggle to make ends meet. For many families, whether a woman is able to work through pregnancy can make the difference between continuing to survive economically and falling off the deep end. And of course, many families do not have two parents in the household. A large proportion of low-income families are headed by single mothers.²⁸⁰ The ideal masculinity that is constructed by employer refusals to accommodate pregnancy in the workplace is based on a fictional account of prescriptive gender roles, not the reality of most workers' lives.

The increasingly hostile PDA case law reflects not so much a problem with

273. *Id.* at 367-68.

274. See Joan C. Williams, *Toward a Reconstructive Feminism: Reconstructing the Relationship of Market Work and Family Work*, 19 N. Ill. U. L. Rev. 89, 122-23 (1998) (noting the difficulties of men of color, especially African American men, to meet the standard of masculinity defined by the income); see also Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 Wisc. J. L. Gender & Soc'y 201 239-40 (2008) (on the elusiveness of breadwinner masculinity for black men).

275. This ideal has become an increasingly poor fit with most men's lives. See Ann C. McGinley, *Crowdsourcing the Work-Family Debate: A Colloquy: I; Work, Caregiving, and Masculinities*, 34 Seattle Univ. L. Rev. 703, 709, 714 (2011).

276. Cf. Stephanie Bornstein, *The Law of Gender Stereotyping and the Work-Family Conflicts of Men*, 63 HASTINGS L. J. 1297 (2012) (discussing gender stereotypes about ideal fatherhood and masculinity that penalize men who seek to modify their work lives to accommodate caretaking obligations as fathers).

277. For example, Joan Williams has pointed out that men in blue collar jobs actually do much more child care and housework than men in professional, white collar jobs, even though they are often reticent about it. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE*, *supra* note 266, at 59.

278. Joan C. Williams & Heather Boushey, *The Three Faces of Work-Family Conflict: The Poor, the Professionals, and the Missing Middle* (Jan. 2010), at 13, available at <http://www.americanprogress.org/wp-content/uploads/issues/2010/01/pdf/threefaces.pdf>.

279. Bornstein, *Bottom of the Ladder*, *supra* note 262, at 6 (citing economic data).

280. *Id.* at 16. See also TIMOTHY S. GRALL, *Custodial Mothers and Fathers and Their Child Support: 2007*, U.S. CENSUS BUREAU, Nov. 2009, at 2, available at www.census.gov/prod/2009pubs/p60-237.pdf (stating that four-fifths of all single parents living with children are women).

the statute itself as the resilience of gender ideologies surrounding maternity, work, and (implicitly) masculinity. A court's answer to the question of whether discrimination occurred depends in part on its baseline expectations about what a nondiscriminatory world would look like.²⁸¹ Presumptions and prescriptions about women's attachment to the workforce, the comparative value of women's maternal roles and work roles, and women's attachment to male breadwinners infuse judicial understandings of what pregnancy discrimination looks like, and accordingly, when and why courts recognize it.

IV. WHICH WOMEN LOSE THE MOST? LOOKING AT THE PDA THROUGH THE LENS OF SOCIAL JUSTICE FEMINISM

The PDA's failure to accommodate pregnant women and new mothers leaves many working women with stark and unappealing choices: live up to unrealistic work expectations for as long as possible, often with significant risk to maternal or fetal health, or be forced out of a job.²⁸² Despite the popularity of stories foregrounding the work-life "balance" struggles of mostly privileged, professional women, the women most vulnerable to work-pregnancy conflicts are the least privileged workers. This has always been a downfall of the PDA, with its failure to mandate paid leave or affirmatively guarantee any substantive protections for pregnant women.²⁸³ While the scope of the PDA was limited from the outset, the law's failings have come into sharper relief as courts have found new ways to undermine analogies to workers with other kinds of conditions that employers are accommodating.

The PDA has always held the most promise for women working for generous employers, those that have flexible leave and benefits. These women have the most to gain from the PDA's prohibition on treating pregnant women worse than other workers with conditions similarly affecting work. Lower-wage workers are more likely to work for stingier employers, who do little to nothing

281. Cf. Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L. J. 279 (1997) (arguing that it is not the intent standard itself as much as judges' worldviews about the ongoing existence of discrimination that drives the results in discrimination cases); Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Discrimination Law*, 96 MINN. L. REV. 1275 (2012) (discussing social psychology research finding that beliefs about meritocracy and the prevalence or rarity of discrimination greatly influence peoples' perceptions of discrimination).

282. See, e.g., Gatrell, *supra* note 245 (challenging the belief that pregnant employees are prone to take sick leave).

283. Low-wage workers are much less likely than higher-paid workers to work for employers that offer maternity leave, sick leave, vacation leave, or any kind of personal leave that would give employees paid time off for pregnancy and childbirth. See Bornstein, *Bottom of the Ladder*, *supra* note 262, at 10 (noting that, of workers in the bottom wage quartile, only 23% have any paid sick days, and that "[a]lmost 70% of all lower-income workers have two weeks or less of sick and vacation days combined"); see also Ann O'Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 6-8 (2007) (citing disparities between professional employees and lower-wage workers in access to leave); see also NAT'L P'SHIP FOR WOMEN & FAMILIES, WORKING WOMEN NEED PAID SICK DAYS 1, 1 (Oct. 2012) ("[e]ighty-two percent of workers making \$8.25 per hour or less don't have access to paid sick days."). Cf. Patricia A. Shiu & Stephanie M. Wildman, *Pregnancy Discrimination and Social Change: Evolving Consciousness About a Worker's Right to Job-Protected, Paid Leave*, 21 YALE J.L. & FEMINISM 119, 126-27, n. 33 (2009) (discussing California's bolder approach to protecting pregnant workers, in which proponents of mandating leave made their case by focusing on the needs of the most economically vulnerable women).

for any worker, thus giving pregnant workers the right to only the same poor treatment under the PDA.²⁸⁴ However, as employers have extended more generous treatment to certain classes of workers—as required by law for disabled workers under the ADA, or through collective bargaining agreements or voluntarily for workers with on-the-job injuries—pregnant workers should benefit under a proper reading of the PDA. The trends discussed above in the PDA case law are particularly harmful to lower-wage and economically vulnerable women. These are the women whose pregnancies are most likely to come into conflict with their work environments.²⁸⁵ They are also the women who need the law the most, and who are now faring the worst under the PDA case law. And they can least afford the lost pay that results when such conflicts force them out of a job.

A recent case from the Seventh Circuit, *Arizanovska v. Wal-Mart Stores, Inc.*,²⁸⁶ illustrates just how badly the PDA is failing economically vulnerable workers. Svetlana Arizanovska worked three days a week for Wal-Mart as a stocker on the overnight shift.²⁸⁷ Her duties included “finding items for her assigned areas and placing the items on the shelves.”²⁸⁸ Because stocking may involve lifting heavy items, Wal-Mart requires its stockers to be able to lift 50 pounds.²⁸⁹ Arizanovska’s first pregnancy while working at Wal-Mart ended in miscarriage.²⁹⁰ When she became pregnant a second time, her doctor restricted her from lifting more than ten pounds.²⁹¹ Arizanovska informed Wal-Mart of the restriction and asked to be assigned job duties that would accommodate this restriction, such as folding clothes.²⁹² Wal-Mart replied that no such position existed, since persons folding clothes also had stocking duties, and placed her on

284. See National Women’s Law Center, *It Shouldn’t Be a Heavy Lift: Fair Treatment for Pregnant Workers* (2013), at 6-7, at http://www.nwlc.org/sites/default/files/pdfs/pregnant_workers.pdf (noting the inflexibility of employers in low-wage jobs).

285. *Id.* at 1, 3, 5-7 Cf. Amy Armenia & Naomi Gerstel, *Family leaves, the FMLA and Gender neutrality: The Intersection of Race and Gender*, 35 SOC. SCI. RES. 871, 874 (2005) (discussing research finding that “relatively privileged workers—especially those working in large organizations, with salaried rather than waged jobs, or union members—are in a better position to negotiate” with their employers to get their needs met).

286. *Arizanovska v. Wal-Mart Stores, Inc.*, 682 F.3d 698 (7th Cir. 2012). Since the court’s decision was a ruling on the employer’s motion for summary judgment, the description of the facts in this article is based on the plaintiff’s version of facts.

287. In addition to working the overnight shift at Wal-Mart on Friday, Saturday and Sunday nights, the plaintiff also worked for another company from 10:30 am - 7:00 pm, Mondays through Fridays, packing and shipping medicines. *Arizanovska v. Wal-Mart Stores, Inc.*, 2011 U.S. Dist. LEXIS 107405, at *2 n.1 (S.D. Ind. Sept. 22, 2011). The plaintiff’s relentless work schedule itself speaks volumes about lower-wage workers’ need to work through pregnancy as a matter of economic security.

288. *Id.* at *2.

289. *Id.* at *4.

290. The plaintiff experienced conflicts at work during her first pregnancy too. While under medical supervision for spotting and bleeding, Arizanovska informed her supervisor at Wal-Mart that her doctor had told her not to lift more than 20 pounds. While her supervisor initially accommodated this restriction by assigning her to the baby food and toothbrush aisles, the plaintiff alleged that her supervisor soon assigned her back to an aisle that required heavier lifting. Arizanovska miscarried shortly thereafter. *Id.* at *4-5.

291. *Id.* at *5.

292. *Id.*

an involuntary leave of absence.²⁹³ Once again, Arizanovska's pregnancy ended in miscarriage.²⁹⁴ This time, she sued Wal-Mart under the PDA.²⁹⁵

Importantly, the court emphasized that Wal-Mart's response was consistent with its policy on employee accommodations—a policy that on its face treats pregnancy on a different footing than disabilities that must be accommodated under the ADA.²⁹⁶ The court's opinion includes the following excerpt from Wal-Mart's Accommodation in Employment Policy:

If you have a medical condition that is not a disability, but which prevents you from performing your job, including pregnancy, you may be eligible for a job aid or environmental adjustment under this policy, a leave of absence under the Leave of Absence Policy, or you also may request transfer to another open position under the Associate Transfer Policy. . . .²⁹⁷

The policy goes on to tightly restrict the circumstances under which a worker covered under the policy is eligible for an accommodation:

Job aid or environmental adjustment means a change in practices or the work environment which is both easily achievable and which will have no negative impact on the business. This type of accommodation does not include creating a job, light duty or temporary alternative duty, or reassignment.²⁹⁸

In contrast, accommodations required by the ADA may, in some cases, include light duty, temporary alternative duties and/or reassignment.²⁹⁹

Yet despite the divergence between accommodations for pregnancy and ADA-qualified disabilities under the policy, the court found Wal-Mart's policy unproblematic under the PDA.³⁰⁰ The court began by faulting the plaintiff for failing to identify a non-pregnant, similarly situated employee who was treated more favorably.³⁰¹ While this requirement is not necessarily objectionable, much depends on the determination of who counts as similarly situated. The court's implicit acceptance of Wal-Mart's policy suggests that only "non-disabled" workers seeking accommodation are similarly situated to pregnant workers for purposes of the PDA. The court described the sought-after comparators as

293. *Id.* at *5-6.

294. *Id.* at *7.

295. 682 F.3d 698 (7th Cir. 2012).

296. *Id.* at 702-03.

297. *Arizanovska*, 682 F.3d at 701.

298. *Id.*

299. *See, e.g., Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999) (en banc) (holding that the ADA requires reasonable accommodation of an employee with a disability to a vacant position to which he seeks to transfer).

300. In theory, the court left room for challenging the policy in some other case, pointing out that the plaintiff's claim proceeded "only under the indirect proof method," as opposed to using the "direct" method. *Arizanovska*, 682 F.3d at 702. Accordingly, the court apparently viewed the plaintiff as having foregone a direct challenge to the policy itself as facially discriminatory on the basis of pregnancy. *Id.* at 703 (dismissing plaintiff's argument as "really a challenge to the policy itself," and "not applicable when proving a discrimination case under the indirect method"). However, for the reasons discussed below, the court's reasoning nevertheless implicitly rejects such a challenge. Moreover, the court's sharp divide between "direct" and "indirect" methods of proof serves only to limit the scope of clause two, which makes no such distinction.

301. *Id.* at 702.

having “temporary medical restrictions that prevented them from doing their job duties.”³⁰² As discussed above, the reflexive and unwarranted limitation of comparators to those with only *temporary* disabilities led the court to implicitly exclude comparators with more lasting disabilities. In expressly differentiating pregnant workers from disabled workers in the policy, the company may have been operating under (again, unwarranted) implicit associations of pregnancy with only temporary conditions and ADA-disabilities with more permanent ones. As discussed above, this kind of parsing defies both the 2008 Amendments (which reject durational limits on disabilities) and the text of the PDA (which speaks only of similarity in work capacity, not duration of disability).

Having so narrowed the class of proper comparators, and without proof of a more favorably-treated “similarly situated” comparator, the court regarded Wal-Mart’s refusal to accommodate Arizanovska as an even-handed, non-animus based application of the store’s accommodation policy, which it described as “consistent with Title VII’s requirements.”³⁰³ On that point, the court cited *Serednyj*, one of the PDA decisions previously discussed. The *Arizanovska* decision thus further entrenches the obliteration of clause two in the recent PDA case law.

So construed, the PDA allows employers to deny workers such as Arizanovska—those in highly structured workplaces with broadly applicable and inflexible rules—even modest accommodations as long as the employer’s reason for doing so does not appear as pregnancy-based animus. As a class, the workers most affected by this are the most economically vulnerable.

Workers in physically demanding jobs, including police work, firefighting, construction jobs and factory work (especially if it involves exposure to chemicals or other safety hazards), will likely face conflicts with work at some point during pregnancy. Many employers for such jobs do not voluntarily do much to accommodate pregnancy. Police departments, for example, have been criticized for routinely denying requests for maternity uniforms and off-street or otherwise modified duties, and for lacking maternity leave policies.³⁰⁴ Many jobs, such as Arizanovska’s stocking job, have lifting requirements that create conflicts with pregnancy. Workers in these jobs may require alternative, light-duty assignments to be able to work through pregnancy.

Other jobs may not be physically demanding, but take place in highly regulated, inflexible work environments. For example, Stephanie Bornstein, discussing the conflicts facing mothers at the lower end of the wage scale, notes that one-third of lower-wage workers cannot choose their break times.³⁰⁵ Pregnant workers needing breaks to go to the restroom or drink water would need minor accommodations in such work environments in order to do so. In

302. *Id.* (emphasis added).

303. *Id.* at 703.

304. See Corina Schulze, *Institutionalized Masculinity in U.S. Police Departments: How Maternity Leave Policies (or Lack Thereof) Affect Women in Policing*, 23(2) CRIM. J. STUD. 177 (2010).

305. Bornstein, *Bottom of the Ladder*, *supra* note 262, at 9; see also Liz Watson & Jennifer Swanberg, *Flexible Workplace Solutions for Low-Wage Hourly Workers: A Framework for a National Conversation*, WORKPLACE FLEXIBILITY, May 2011, at 19 (“between 40% and 50% of low-wage hourly workers report . . . being unable to determine when to take breaks while at work.”).

one lawsuit against Wal-Mart seeking such an accommodation, a woman who monitored fitting rooms alleged that she was fired for insubordination for carrying a water bottle in accordance with her doctor's orders to drink water throughout the day.³⁰⁶ As it is now being interpreted, the PDA fails to provide pregnant workers with even such minor accommodations as permission to drink water on a shift and extra restroom breaks. These kinds of conflicts between pregnancy and work are especially pronounced in lower-wage jobs.³⁰⁷

Pregnant workers in low-wage jobs are especially vulnerable to refusals for accommodations, even as some of their co-workers (such as those with on-the-job injuries or ADA-qualified disabilities) are extended accommodations. In denying accommodations for pregnancy (while extending them to others), employers treat pregnant workers as fungible and not worth even the (often) minimal costs it would take to keep them. This itself reflects an ideology that devalues pregnant workers and new mothers in lower-wage jobs. In Bornstein's survey of cases compiled in a database by the Center for WorkLife Law at the U.C.-Hastings College of Law, she found that "the cases reveal an extreme hostility to pregnancy in low-wage workplaces, including workers fired on the spot or immediately after announcing a pregnancy, pregnant employees banned from certain positions no matter what their individual capabilities to do the job, and workers refused even small, cost-effective adjustments that would allow them to continue to work throughout their pregnancies," and even some instances where pregnant workers were told by their supervisors to get abortions.³⁰⁸ Bornstein also found a harsher pattern of treatment for pregnant women of color, who were denied accommodations routinely granted to other pregnant workers.³⁰⁹

Courts' restricted interpretation of what counts as a condition "related" to pregnancy, and what it means to "discriminate" against such conditions under clause one, also harms economically vulnerable workers. Breastfeeding, for example, is more likely to conflict with work in more rigidly structured workplaces. Lack of time to express milk, lack of a private place to do so, lack of storage facilities, and lack of support from supervisors and/or coworkers are common obstacles to continuing to breastfeed while working. Research on the economic effects of breastfeeding has found that mothers who breastfeed for six months or longer suffer more severe and more prolonged earnings losses than

306. *Wiseman v. Wal-Mart Stores, Inc.*, No. 08-1244-EFM, 2009 WL 2168911, at *2 (D. Kan. July 21, 2009) (dismissing plaintiff's FMLA claim, where plaintiff alleged that under store policy, only cashiers could have access to a water bottle while they worked, and that she was fired for violating the policy).

307. Cf. Paula McDonald et al., *Expecting the worst: circumstances surrounding pregnancy discrimination at work and progress to formal redress*, 39 INDUS. REL. J. 229, 237 (2008) [hereinafter McDonald, *Expecting The Worst*] (discussing results of a study of 318 cases of pregnancy discrimination in Australia, finding that most cases occurred in occupations lower on the occupational ladder, such as sales/personal service work and lower-skilled administrative workers, and that "far fewer women who reported pregnancy-related problems in their workplaces worked in relatively more privileged jobs such as managers/administrators. . . or professionals. . .").

308. Bornstein, *Bottom of the Ladder*, *supra* note 262, at 5. See also Gatrell, *supra* note 245, at 104-05 (reviewing literature on pregnancy discrimination and class indicating that working class mothers are as likely to experience unfair treatment while pregnant as managers).

309. Bornstein, *Bottom of the Ladder*, *supra* note 262, at 5.

mothers who formula feed.³¹⁰ Lower-income workers are less able to bear these costs. There is also a racial dimension to how the law allocates the costs of breastfeeding. Researchers have long known that white women are more likely than Black women to breastfeed.³¹¹ Although little is known about why, it may well be that Black women are less able to bear the economic costs of breastfeeding and more likely to work in jobs that are less amenable to accommodating it. What limited research there is on work and breastfeeding suggests that women in lower-paid jobs, who are disproportionately women of color, have less access to the kinds of privacy and flexibility that it takes to sustain breastfeeding while working.³¹² Lower-earning women also face disproportionately greater burdens when dealing with other aspects of reproduction, such as infertility and the treatment of it, as well.³¹³

For many workers, pregnancy discrimination is the first block in the maternal wall. It is difficult for women's careers to recover from not working through pregnancy. Gaps in the labor force during pregnancy lead to longer absences from the workforce, which may become self-reinforcing.³¹⁴ When women are forced out of a job due to conflicts with pregnancy and related conditions, along with reduced labor force attachment comes increased parenting and domestic responsibilities – and a growing competence gap in domestic responsibilities between women who have given birth and their partners, a gap that also becomes self-reinforcing.³¹⁵ Especially for the most economically vulnerable workers, conflicts between maternity and work are not just a quality-of-life issue of "balance," but a core issue of economic security.³¹⁶

V. WITHER THE PDA(?): DISABILITY AND SEX EQUALITY

Recently, voices from within the legal academy have charted a path to address pregnancy discrimination under the ADA, particularly in light of the more expansive definition of disability codified in the 2008 Amendments. Law professor Jeannette Cox has argued that the social model of disability, which focuses on the relationship between the body and the work environment (as opposed to a more narrow medical view that locates disability in bodily abnormality), encompasses pregnancy.³¹⁷ She criticizes what she sees as the

310. Phyllis L.F. Rippeyoung & Mary C. Noonan, *Is Breastfeeding Truly Cost Free? Income Consequences of Breastfeeding for Women*, 77 AM. SOC. REV. 244, 244 (2012).

311. *Id.* at 246, 254; Gattrell, *supra* note 245, at 106.

312. Gattrell, *supra* note 245, at 106 (reviewing literature on the race and class dimensions of accommodating breastfeeding at work).

313. See Mary Lyndon Shanley, *Infertility, Social Justice, and Equal Citizenship*, in GENDER EQUALITY: DIMENSIONS OF WOMEN'S EQUAL CITIZENSHIP 327, 333-43 (2009).

314. MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEAL* 41 (2007) (noting that even brief absences from the work force have longer-term negative effects on women's economic prospects).

315. Darren Rosenblum, *Unsex Mothering: Toward a New Culture of Parenting*, 35 HARV. J. L. & GENDER 57, 75 (2012) (describing how the market reinforces men's diminished caretaking role).

316. See Bornstein, *Bottom of the Ladder*, *supra* note 262 (outlining the struggle between the necessity of employment and the need to support a household).

317. Jeannette Cox, *Pregnancy as "Disability" and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. 443 (2012).

feminist movement's distancing of pregnancy from disability and urges feminist legal scholars to embrace the social model of disability and its applicability to pregnancy.³¹⁸ Sounding a similar theme, law professor Sheerine Alemzadeh also makes a case for applying the ADA to pregnancy.³¹⁹ She too questions the feminist legal community's historic reticence about the ADA's exclusion of pregnancy and criticizes the current distinction the ADA attempts to draw between "normal" and "abnormal" pregnancy.³²⁰ Like Professor Cox, her focus is on how pregnancy interacts with the work environment, regardless of the appropriate medical terms.

These promising arguments for using the ADA to seek accommodations for pregnant workers raise questions about the ongoing need for the PDA and whether it may have outlived its usefulness, at least in those cases where accommodations are sought. This question has echoes of earlier debates about whether a gender-specific or a more universal approach is the best model for addressing pregnancy and the conflicts pregnant women face in the current social structure. In the 1980s and into the 90s, this controversy consumed reams of paper in the legal journals and split the feminist legal community.³²¹ The premise of the controversy, at least in the beginning, was that a choice between the two strategies was necessary.³²² At this point in history, however, that premise should not be taken for granted. Of course, the particular question about whether to require "special treatment" (a pejorative and contested label) for pregnancy through the PDA was settled in favor of the law's equal treatment approach, even though the Supreme Court interpreted the law in *Guerra* to permit (but not require) state laws mandating pregnancy-specific protections.³²³ The question feminists might ask now is the distinctly different one of whether the PDA, an explicitly feminist legal strategy that uses a sex discrimination framework, or the ADA, a gender-neutral disability model, is *the* way to go to seek legal redress for pregnant workers. But that question too presents a false choice. Instead of an either/or choice, the question that should be asked in light of the new disability/pregnancy scholarship is a more modest one: is there anything to be gained by continuing to fight these battles under the PDA, or should all energies from this point forward be channeled into theorizing and interpreting the ADA? In our view, we should not give up on the PDA, even as we applaud those scholars pressing forward with new arguments for covering pregnancy under the ADA.

318. *Id.* at 448-50 (arguing that feminists' objections to treating pregnancy as a disability because "it represents heightened rather than diminished biological functioning" is "startlingly similar to the *Gilbert* Court's rationale for distinguishing pregnancy and disability").

319. Sheerine Alemzadeh, *Claiming Disability, Reclaiming Pregnancy: A Critical Analysis of the ADA's Pregnancy Exclusion*, 27 WIS. J. L. GENDER & SOC'Y 1 (2012) (examining why pregnancy has been excluded from coverage as a disability under the ADA).

320. *Id.* at 9-12.

321. For background on the split in the feminist movement, and argument on how to resolve it, see generally Krieger & Cooney, *supra* note 68.

322. See Williams, *The Equality Crisis*, *supra* note 67, at 170 ("If we can't have it both ways, we need to think carefully about which way we want to have it.") Over time, the "if" in that sentence has been treated as "because."

323. See *California Federal Savings v. Guerra*, 479 U.S. 272 (1987).

The new scholarship on pregnancy as disability is persuasive in showing how the social model of disability responds to feminist concerns that analogizing pregnancy to disability fails to recognize the distinctly positive and healthy aspects of pregnancy. The social model of disability refuses to see the body as either inherently able or disabled, and instead focuses on how the body interacts with the work environment, as currently structured, and the effect on job capacity. This reframing of disability away from a medical, pathological approach is in synch with feminist desires to recognize pregnancy as something that is often (although not always) experienced as a positive in women's lives, and as a distinctive *ability* of women's bodies, even as pregnancy (sometimes, but not always) affects a woman's work capacity.

However, situating pregnancy *only* under the social model of disability, without attention to sex equality, would miss something fundamental to pregnancy and its relationship to work that is distinctively gendered. First, even insofar as pregnancy discrimination is a reaction to the pregnant *body*, such negative reactions are specific to the gendered female body. The pregnant body can trigger a range of reactions, both positive and negative. The negative ones include fear and disgust at women's reproductive processes that are viewed as messy, leaky, intrusive, repulsive, unpredictable and out of control.³²⁴ Negative reactions to the pregnant body are not necessarily analogous to negative reactions to other disabling conditions that can affect both men and women.³²⁵ The negative reaction to pregnant bodies in the workplace is a reaction to the distinctively female reproductive process and the accompanying changes that are specific to women's bodies.³²⁶

More importantly, pregnancy discrimination is not just, or even primarily, a reaction to the pregnant body or the body's interaction with the work environment: there is an ideology about gender roles that is specific to pregnancy and work. As discussed above, like other gender ideologies, the gender ideology behind pregnancy discrimination is race- and class- specific and affects women in different ways.

For women whose fertility is highly socially valued—especially married, white, professional women—the gender ideology behind pregnancy discrimination marginalizes women's work contributions in relation to their maternal roles. Such women risk being seen as less valuable workers because they presumptively are (or should be) more attached to their maternal roles, and hence are seen as at greater risk of stepping off of the career ladder.

324. See Caroline Gattrell, *Policy and the Pregnant Body at Work: Strategies of Secrecy, Silence and Supra-Performance*, 18 GENDER, WORK AND ORG. 158, 174-77 (2011).

325. Cf. Halpert, *supra* note 241, at 658 ("it is unknown whether the voluntary nature of most pregnancies results in perceptions of and behaviors toward pregnant women that differ from attitudes about employees with involuntary disabilities").

326. See Gattrell, *supra* note 245, at 97, 107 (citing research "observ[ing] how, in the context of management and organization, women's maternal 'bodies...their ability to procreate, their pregnancy, breastfeeding and childcare...are [treated as] suspect, stigmatized and used as grounds for control and exclusion'" and citing literature contending that "organizational antipathy to breastfeeding is due to employers' deep-seated fears about women's bodies, which they regard as unreliable and unpredictable in a way which does not apply to the bodies of men or to non-mothers").

For women whose fertility is less socially valued—especially women of color, unmarried women, and lower- and working-class women—it is not a chivalrous gender ideology that prioritizes motherhood over work, but one casting them as unreliable, fungible workers undeserving of accommodations. Women of color have never fit into the cult of motherhood that pampers pregnant women and values them as mothers-to-be. The many African American women slaves who worked in the fields until they gave birth, only to return to forced labor the next day, provide a stark historic illustration of the racial specificity of the gender ideologies that animate refusals to accommodate pregnant women workers.

Although the gender ideologies of pregnancy discrimination are plural rather than monolithic, there is nonetheless a distinctively gendered (both prescriptive and descriptive) stereotyping involved in pregnancy discrimination. Pregnancy does not just involve the body, even when taking a broad view of the social body; it is also a condition that triggers gender role-typing, replete with presumed and prescribed notions about women's proper roles at work and in the family. To make this point is not at all to deny that there is also an ideology about disabled workers that underlies disability discrimination—one that devalues the contributions and worth of people who are labeled disabled and sorts them into roles defined by this construction. Certain aspects of these ideologies—about both pregnancy and disability—surely overlap, in that a condition of the body is used to define a person's worth and proper roles. Nevertheless, it is not primarily the bodily condition of pregnancy that defines and limits women's roles, but the gendered future that it signals for women when that bodily condition ceases. Every pregnancy has an endpoint, whether by miscarriage, termination, or childbirth. Even with that endpoint in sight, pregnancy is a marker of a woman's future. Assumptions about the pregnant woman's future—assumptions relating to her presumed and prescribed maternal roles vis-à-vis work—have historically shaped the treatment of pregnant women at work and continue to do so today.³²⁷ When that treatment forces pregnant women out of jobs, it reinforces gendered expectations about women's work and reproductive lives.³²⁸

To be clear, the point here is not that pregnancy should *not* be seen as a disability that is covered under the ADA. We are persuaded both by the social model of disability and by the argument that this model encompasses pregnancy. Rather, our point is a more nuanced one: in addition to pushing back against the exclusion of pregnancy from the ADA, it is also important to reclaim the PDA as a viable remedy for pregnancy-based discrimination at work. Pregnancy discrimination is a distinctively gendered phenomenon—not just because of the

327. See McDonald, *Expecting the Worst*, *supra* note 310 at 230 (discussing psychological literature from the 1950's pathologizing maternal employment); see also NAT'L P'SHIP OF WOMEN & FAMILIES, *Expecting Better: A State-by-State Analysis of Laws that Help New Parents* (May 2012) (discussing workers' rights under current state laws and the strides states have made in promoting economic security of new parents).

328. Cf. Rosenblum, *supra* note 315, at 66 ("The market is also sexed: the perception that 'mothers' are primarily responsible for children persists in part because of the continued domination of men in the market context."); STEPHANIE COONTZ, MYTH OF THE OPT-OUT MOM, *in* RACE, CLASS, AND GENDER IN THE UNITED STATES; AN INTEGRATED STUDY 473, 473-75. (7th ed. 2006).

biological reality that only women's bodies become pregnant, but also because of the gender ideologies about women, work, and maternity that underlie it. Pregnancy discrimination is an integral block in the edifice of women's subordination, and we would lose something important by giving up on the promise of sex equality law to adequately account for pregnancy. And yet, specifying what that "something important" is is the part of our argument that is the most difficult to articulate. If litigating under the ADA works for pregnant plaintiffs, why keep up the fight under the PDA? We believe that there is something valuable in making a sex equality challenge to the barriers confronting pregnant women at work, even if it is not so easy to articulate what that something is. We sketch out below our (still developing) thoughts about what, exactly, this might be.

Various voices in the academy have questioned the value of continuing to work with feminism and feminist legal strategies as a vehicle for addressing the problems in women's lives. Janet Halley has famously urged taking a "break" from feminism.³²⁹ More recently, Marc Spindelman has asked whether the substantive tenets of feminist legal theory might be brought to bear on legal problems without specifically using feminism, *per se*, to get there.³³⁰ Professor Spindelman's thesis is specific to the continuing viability of feminist legal theory, which is not the same thing as the question of whether to reinvigorate a feminist-inspired sex discrimination law like the PDA, or abandon it in favor of a non-gender specific law. Nevertheless, a decision to use the ADA as the vehicle for accommodating pregnancy at work, rather than the PDA, might be a practical application of proposals like Professor Spindelman's for moving away from explicitly feminist legal strategies. As Professor Spindelman points out, disability feminists have been "doing" feminism in substance if not in name for some time now.³³¹ We are intrigued by this possibility, but not fully persuaded, at least with respect to the practical question of whether we can completely "get there" under the ADA while giving up on the PDA.

The seeds of a response are found in Professor Spindelman's essay. Law is indeed "both a repository and an important site in the construction of culture and cultural values."³³² Framing the treatment of pregnant workers as an issue of women's equality brings with it a specific history of struggle that occupies a central place within the broader movement for women's equality. As the American Civil Liberties Union put it, in a 1985 policy statement: "Pregnancy, or the capacity to become pregnant, is the single most pervasive factor in the history of sex discrimination."³³³ If this at all overstates the importance of pregnancy discrimination to the history of the women's rights movement, it is not by much. The history behind the PDA, specifically, reflects a broad-based movement for women's equality that has transformative implications for how work is structured in relation to women's lives. Deborah Dinner has shown that the

329. JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006).

330. Marc Spindelman, *Feminism Without Feminism*, 9 *LEGAL FEMINISM NOW* 1 (2011) (urging feminists to consider the benefits of doing feminism without feminism).

331. *Id.* at 17-18.

332. *Id.* at 9.

333. Halpert, *supra* note 241, at 660 (quoting the ACLU).

history behind the PDA involves a much broader-based feminist agenda for sex equality than has been commonly appreciated.³³⁴ More than a push for similar treatment for pregnant workers, the grass-roots feminist movement behind the PDA sought to redistribute the social costs of motherhood and unravel the male breadwinner/family wage structure of work and family.³³⁵ Decades of litigation under the PDA have helped deepen public understanding of the gender stereotyping behind the treatment of pregnancy.³³⁶ The struggle for sex equality rights for pregnant workers continues to mobilize the movement for women's equality. For example, Patricia Shiu and Stephanie Wildman detail how the passage of the PDA and the struggles within the feminist movement over its proper construction galvanized the social movement that ultimately succeeded in getting California to enact the first state law to require paid leave in the U.S.³³⁷ Continuing to highlight the problems facing pregnant workers, and linking them to the broader agenda for women's equality, can help resist de-politicized narratives of a purportedly post-feminist, post-sexist era.

Conversely, completely submerging pregnancy in the gender-neutral frame of disability risks obscuring the sex inequality that comes from the refusal to accommodate pregnant workers. A recent article by Jessica Clarke describes the risks of universalizing sex equality claims in the guise of gender-neutrality.³³⁸ These risks include promoting "the myth of neutrality" by assimilating sex inequality into gender-neutral injustices and draining support for more targeted approaches to remedying gender inequality.³³⁹ As feminist scholars have long taught, gender-neutral baselines often mask deep structures of gender inequality.³⁴⁰ We should not lose sight of the fact that refusing to accommodate pregnant workers further entrenches gender inequality in the workplace.

Despite the, at times, one-step forward, two-steps backward agony of working in sex equality law, and the perpetual risk of backlash, we are not ready to "close up shop" or "go entirely out of business"³⁴¹ in the search for specifically *feminist* legal theories to restructure work to accommodate pregnant workers. There is an emotional and cultural resonance to labeling the unjust treatment of pregnant women in the workplace as a *gendered* inequality, a form of sex discrimination, even while recognizing that it may also be regarded as disability discrimination. Labeling and defining the poor treatment of pregnant workers as sex-based discrimination can build solidarity among women and illuminate connections with other, related ways that women are subordinated at work, even

334. Dinner, *supra* note 22.

335. *See id.* at 463.

336. Neil S. Siegel & Reva B. Siegel, *Pregnancy and Sex Role Stereotyping: From Struck to Carhart*, 70 OHIO ST. L.J. 1095, 1112 (2009).

337. Shiu & Wildman, *supra* note 283, at 119.

338. Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219 (2011).

339. *Id.* at 1246. *See also* Julie C. Suk, *Discrimination at Will: Job Security Protections and Equal Employment Opportunity in Conflict*, 60 STAN. L. REV. 73, 112 (2007) (discussing the limits of universally-designed solutions to racial inequality in the workplace, such as a just-cause employment law rule).

340. *See* Chamallas, *supra* note 66, at 8-10.

341. Spindelman, *supra* note 330, at 10.

while simultaneously acknowledging it as disability discrimination can build bridges and coalitions between social movements for gender justice and justice for persons with disabilities.³⁴²

Sidestepping the PDA and putting all our litigation eggs in the ADA basket is not likely to avoid a backlash to efforts to protect the rights of pregnant workers.³⁴³ Certainly, the ADA has been targeted for more than its share of backlash.³⁴⁴ Bringing the rights of pregnant workers into the broader fold of the ADA will not defuse the clash of gender ideologies at the heart of these disputes.³⁴⁵ To cite just one example, dressing the new mandate for insurance coverage of prescription contraceptives in the gender-neutral clothes of the Patient Protection and Affordable Care Act did not mitigate the clash of gender ideologies behind opposition to that expansion.³⁴⁶ Without a doubt, advocates for pregnant workers' rights will still need effective strategies for dealing with backlash in the gender culture wars, regardless of whether legal claims are asserted under the ADA, the PDA or both.

Pressing forward with rights under the PDA may help promote a broader agenda for sex discrimination law. There are doctrinal connections between the PDA's current stingy approach to pregnancy discrimination and discrimination law's inadequate treatment of sex discrimination generally. If pregnancy is farmed out entirely to the ADA without fighting these battles under the PDA, the problematic rifts in Title VII doctrine that have cut short the statute's promise may become more solidified. For example, Michael Selmi has pointed out that courts' vision of what a nondiscriminatory world looks like, and of what discrimination looks like, shapes how courts apply the intent requirement when searching for intentional discrimination.³⁴⁷ The stereotype that pregnancy is a trigger point that reduces women's attachment to the labor force sets the stage

342. Cf. Dinner, *supra* note 22, at 477-48 ("[U]tilizing antidiscrimination law to redress sex equality is important as a means to connect present-day structural disadvantage to history. Naming the workplace structures that exclude childbearing women from the workplace as 'discrimination' insists on recalling how workplace policies and norms derived from the family-wage system.")

343. See Clarke, *supra* note 338, at 1243-45 (proposing a framework for evaluating universalist approaches over equality-based claims that, in part, considers the prospects for mitigating backlash).

344. See generally Linda Hamilton Krieger, *Backlash Against the Americans with Disabilities Act: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1 (2000).

345. Cf. Reva B. Siegel, *Dignity and the Politics of Procreation: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694 (2008) (arguing that reframing abortion as a human right or universal right to dignity will not avoid the centrality of clashes over women's roles and the need to engage sex equality concerns in the conflict over abortion rights).

346. See generally Sarah Kiff, *Meet Sandra Fluke: The Woman You Didn't Hear at Congress' Contraceptives Hearing*, Washington Post, (Feb. 16, 2012), http://www.washingtonpost.com/blogs/ezra-klein/post/meet-sandra-fluke-the-woman-you-didnt-hear-at-congress-contraceptives-hearing/2012/02/16/gIQAJh57HR_blog.html (discussing controversy over refusal to allow Georgetown law student opportunity to testify in opposition to denial of health insurance coverage for contraceptives); Dean Schabner and Matt Negrin, *Sandra Fluke Says Rush Limbaugh's Apology Doesn't Change Anything*, ABC News, (March 3, 2012), abcnews.go.com/Politics/OTUS/rush-limbaugh-apologizes-calling-sandra-fluke-slut/print?id=15841687 (discussing controversy after Rush Limbaugh called this student a "slut" and a "prostitute").

347. Selmi, *supra* note 281, at 286-91

for judges to expect that a non-discriminatory employer would deny accommodations for a rational business reason rather than a discriminatory one. Beliefs about women's "choices" to opt out of the paid labor force, and about whether pregnant women deserve accommodations if they choose to remain at work, provide tempting alternative explanations besides discrimination that appeal to some judges. Dismantling the gender ideologies that create such expectations might be aided by situating the struggle in the social and historic movement for women's equality. Stereotypes related to pregnancy are integral to the culture wars over "choice," "opt-out" and the lingering societal ambivalence about working mothers. Although the ADA may get women litigants to the same place in the end, there is still value in continuing to fight pregnancy discrimination under the rubric of sex equality, even as feminist litigators also embrace the movement to link pregnancy and disability. There is nothing to be gained by choosing sides, and much to lose by conceding these battles under the PDA.

Finally, retaining a sex equality right connects pregnancy to other legal and social issues central to women's equality. The treatment of pregnancy at work is just one of the issues women face in seeking to integrate multiple aspects of their reproductive and family lives in a work world designed for an implicitly male ideal worker. There are a range of "accommodations" women may need to combine their reproductive lives with their work lives, including access to contraception, access to and time off for assisted reproduction technologies, and breaks for breastfeeding/lactation. Giving up on pregnancy as a sex discrimination claim does not bode well for these issues, which are unlikely to get ADA coverage. Nor does it bode well for the sex equality argument for reproductive choice to terminate a pregnancy, an argument that has gained traction since the Supreme Court's *Casey* decision.³⁴⁸ The precariousness of the privacy right for abortion necessitates continuing feminist efforts to ground the right in sex equality, even as theorists and litigators continue to explore new possibilities for securing a woman's right to self-determination.³⁴⁹ In addition, the broader movement for reproductive justice encompasses a wide range of practices that interfere with women's reproductive freedoms, including the freedom to become a mother. Early cases challenging the treatment of pregnant workers linked together arguments sounding in reproductive autonomy and gender subordination.³⁵⁰ By litigating pregnant worker's rights under the PDA, the connections between women's workplace equality and women's reproductive choices can be illuminated. Rather than give up on the PDA, we should reclaim it as a crucial law in the broader movement for reproductive

348. See *Planned Parenthood v. Casey*, 505 U.S. 833, 912 (1992) (Stevens, J., concurring in part and dissenting in part); *id.* at 928-29 (Blackmun, J., concurring in part and dissenting in part).

349. See CHAMALLAS, *supra* note 66, at 389-90 (discussing feminist work to reground the abortion right as a sex equality right); see also Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L. J. 815 (2007).

350. See Neil Siegel & Reva Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771 (2010) (discussing Justice Ginsburg's litigation strategy challenging pregnancy discrimination as linking together the inter-related concerns of gender subordination and reproductive liberty).

justice.³⁵¹ The goal of securing women's rights in the workplace is inextricably connected to the struggle for reproductive justice.³⁵²

In short, more is at stake in abandoning a sex discrimination claim for pregnancy discrimination than the treatment of pregnant workers *per se*. Battles over pregnancy and reproduction have played a central role in the social and legal struggles over women's equality. While feminist legal strategists should pursue all available avenues to secure justice for pregnant workers, and build bridges and broad coalitions in this pursuit, we should not abandon specifically *feminist* claims for gender justice with regard to pregnancy. While the ADA could and should play a useful role in protecting pregnant workers too, there remains value in using a sex equality framework as a foundation to link the broader movements to secure reproductive justice and women's workplace equality.

CONCLUSION

The problems with the PDA identified in this article could be fixed as they have been created, through judicial interpretation.³⁵³ Ideally, the lower courts would simply follow the Supreme Court's directive in *Johnson Controls* to "do no more than hold that the PDA means what it says."³⁵⁴ Recent trends in the PDA case law, however, are not encouraging.

In the thirty-five years since the PDA's enactment, lower courts appear to have missed the lessons of Congress' rejection of *Gilbert* and *Geduldig*. In those cases, the Court allowed pregnancy to be siphoned off in a class by itself when it came to extending employment benefits to workers in need of them. Treating pregnancy as a distinctive condition unique to women—and a voluntary one at that, for which women themselves would be responsible—the Court placed the work-related costs of pregnancy and childbirth on women alone. The PDA resoundingly rejected that philosophy, recognizing that for work-related purposes, pregnancy should be treated no worse than any other condition that impairs employees' work ability to a similar extent.

As employers have gradually—and at times begrudgingly—done more for other conditions, such as on-the-job injuries and disabilities covered by the ADA—the PDA should have extended the same treatment to pregnant workers. Instead, courts have allowed employers to deny pregnancy the same

351. Cf. Dinner, *supra* note 41 (detailing the feminist legal history leading up to the PDA in which feminist lawyers linked sex equality and reproductive liberty in fighting pregnancy discrimination in the workplace).

352. Cf. CHAMALLAS, *supra* note 66, at 391 (noting Joan Williams' observation that the ideal of "selfless mothers" underlies the gender ideology behind denying women choice, and citing public opinion polls showing that ¾ of Americans believe a woman should not be allowed to have an abortion if the decision is motivated by a desire to avoid interference with her career).

353. While we would support the Pregnant Workers Fairness Act (PWFA), introduced by democratic members of Congress in 2012 to guarantee pregnant women the right to reasonable accommodations absent undue hardship on the employer, we believe that the proper interpretation of the PDA, in relation to the ADA and other select accommodations granted to workers, would go a long way toward securing women these protections. A full exploration of the PWFA is beyond the scope of this article. See S. 3565, 112th Cong. (2012).

354. *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 211 (1991).

accommodations and benefits, as long as they do not detect a pregnancy-based animus as the reason for doing so. Through reading clause one as protecting only the status of pregnancy and not its effects, and especially by reading clause two as barring only those failures to accommodate that can be traced to proof of pregnancy-based animus, courts have made the PDA increasingly irrelevant to working women.

This article has argued that there is a gender stereotyping ideology behind pregnancy discrimination, and in particular behind refusals to accommodate pregnancy in the workplace, that has survived and thrived in recent years in the PDA case law. However, because it does not register with judges as pregnancy-based animus, it goes unchecked by the courts. Through their insistence on proof of animus in the PDA cases, the courts have failed to recognize that the carving out of pregnancy for disfavored treatment is itself based on an ideology of stereotyping about women, maternity and work: an ideology that presumes that women's maternity should not be accommodated in the workplace, and that women marked by pregnancy and maternity are compromised workers. Congress rejected such a gender ideology when it repudiated the *Gilbert* decision and enacted the PDA.³⁵⁵ But gender norms are sticky and ideologies about women, maternity and work not easily discarded. As is often the case when sex discrimination law fails, it is the least privileged women—those most in need of the law's protections—who bear the greatest costs.

355. See S. REP. NO. 95-331, at 40 (1977) (Senate committee report on the PDA, observing that “the assumption that women will become pregnant and leave the labor market is at the core of the sex stereotyping resulting in unfavorable disparate treatment of women in the workplace”); *Johnson Controls*, 499 U.S. at 211 (explaining that in passing the PDA, Congress recognized that “[c]oncern for a woman’s existing or potential offspring historically has been the excuse for denying women equal employment opportunities”).