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## Reproducing Inequality Under Title IX

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# REPRODUCING INEQUALITY UNDER TITLE IX

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

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## I. INTRODUCTION

Title IX was landmark legislation in 1972, promising to secure equal educational opportunities to girls and women and recognizing the importance of education to women's lifelong opportunity and economic security.<sup>1</sup> Title IX has many successes to its credit, including opening the doors of higher education to women and equalizing (if still only partially) athletic opportunities for women and men. Less attention has been paid to the law's intersection with pregnancy and reproduction, even though pregnancy and maternity were at the time, and remain, significant obstacles to educational attainment for many girls and young women. Because of the overlap between reproductive age and the years in which girls and women are students, navigating pregnancy and education is of crucial importance for women's equality.<sup>2</sup> Although causality is more complicated than one might assume,<sup>3</sup> it is undeniable that becoming pregnant and having a child impose significant challenges to women's educational success.<sup>4</sup> Yet, from the beginning, Title IX has treated pregnancy as a *fait accompli*, an equality issue to be reckoned with only after a student's pregnancy affects her educational opportunity.

Nowhere is this limited range more evident than in the statute's approach to abortion. In a legislative compromise, Title IX was amended to include an abortion carve-out—a provision declining to place any obligation

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<sup>1</sup> 20 U.S.C. § 1681 (2018).

<sup>2</sup> See Francesca Cocuzza, *Title IX's Reproductive Remedies*, 32 COLUM. J. GENDER & L. 211, 221–22 (2017) (noting that half of all pregnancies are unintended and that the highest rates of unintended pregnancy are among teens and women in their early twenties).

<sup>3</sup> See Jennifer B. Kane et al., *The Educational Consequences of Teen Childbearing*, 50 DEMOGRAPHY 2129 (2013) (exploring the significance of methodology in ascertaining causal connection between educational attainment and teen motherhood).

<sup>4</sup> See, e.g., Liz Watson & Peter Edelman, *From Fragmentation to Integration: A Comprehensive Policy Approach to Serving Young Mothers and Their Families Through School-Based Interventions*, 20 GEO. J. POVERTY L. & POL'Y 269, 274 (2013) (“Only 50% of teen mothers get a high school diploma by age twenty-two, compared to 90% of teen girls who do not give birth. Nationally, 30% of all teen girls who dropped out of high school cite pregnancy or parenthood as a reason for dropping out. Among minority students the rate is even higher; 36% of Hispanic girls and 38% of African American girls cite pregnancy or parenthood as a reason for dropping out.”); Nat'l Campaign to Prevent Teen & Unplanned Pregnancy, *Unplanned Pregnancy Among College Students*, 1, 1 (2015) (“61 percent of community college students who have children after enrolling do not complete finish their education, a figure that is 65 percent higher than for women who do not have children while in college.”); *Pregnancy Prevention: Adverse Effects*, YOUTH.GOV, <https://youth.gov/youth-topics/pregnancy-prevention/adverse-effects-teen-pregnancy> [<https://perma.cc/VMA8-HMN6>] (“By age 22, only around 50 percent of teen mothers have received a high school diploma and only 30 percent have earned a General Education Development (GED) certificate, whereas 90 percent of women who did not give birth during adolescence receive a high school diploma. Only about 10 percent of teen mothers complete a two- or four-year college program.”); see also Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415 (2017) (exploring the costs to human capital of pregnancy and childrearing).

on educational institutions to provide access to abortion services.<sup>5</sup> The broader message is that abortion is of no concern to Title IX's promise of women's equality in education. While the statute explicitly disclaims any applicability to abortion, it is silent about what sex equality might mean for securing access to contraception as part of the school's student health services under the law's nondiscrimination mandate. That silence has been understood as indicative of a lack of coverage. In practical effect, Title IX touches women's reproductive lives only at the point that pregnancy affects a student's educational career. Pregnancy is recognized as a sex equality issue affecting education, but pregnancy prevention and termination are not. The separation of pregnancy from women's control over reproduction more generally undermines the overarching promise of Title IX, even as it has the (unintended?) consequence of hurting the case for reproductive rights for girls and young women.

With no footprint in Title IX, the reproductive rights of women in relation to education have been left to other sources of law. The legal framework governing reproductive rights is grounded in liberty rather than sex equality. The main federal source of rights to prevent or terminate pregnancy is the constitutional right to privacy recognized in *Griswold v. Connecticut* and extended and refined in subsequent cases.<sup>6</sup> Privacy, a dimension of liberty, as a source of women's reproductive rights is vulnerable to critique for many reasons. It is particularly inadequate when it comes to protecting a right to pregnancy avoidance for minors—a group particularly vulnerable to negative educational effects resulting from pregnancy. Minors' self-determination rights give way to parental rights in many settings, making restrictions on minors' rights to terminate pregnancy difficult to challenge as a violation of liberty. Minors' access to contraception is also subject to parental limitation, a problem exacerbated by the new domestic gag rule curtailing the number of Title X clinics, which provide contraception to teens without parental consent. Even young women who are of majority age must reckon with how the exercise of their liberty affects others, including (as constitutional law has developed) the state's interest in protecting the unborn. Young women with few resources and those in coercive relationships are particularly poorly positioned to exercise their liberty to prevent or terminate a pregnancy.

One consequence of situating women's reproductive rights in a legal framework grounded in liberty, rather than as a dimension of women's equality protected by anti-discrimination law, is that the educational consequences of restrictions on women's reproductive control have been largely obscured. For young women in particular, the inadequacy of the existing liberty-based framework for protecting reproductive rights is exacerbated by the absence of any focus on the educational consequences of failing to fully

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<sup>5</sup> See Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 38(b) (codified at 20 U.S.C. § 1688 (2018)).

<sup>6</sup> 381 U.S. 479 (1965).

protect young women's ability to avoid maternity. The framing of the right as a matter of privacy does not invite any emphasis on educational equality for girls and women. Moreover, the public discourse surrounding abortion as it relates to young women almost never captures the educational impacts of unwanted pregnancy.

Because Title IX largely carved out reproductive rights from its coverage, Title IX's equality-based approach to women's rights in education does too little too late to address the educational impact of unwanted pregnancy on girls and women. Neither the statute nor the Title IX regulations require changes to the curriculum, such as effective sex education. Despite the documented ineffectiveness of abstinence education and the presence of sex stereotypes shaming female sexuality, Title IX has not been a source of rights in challenging such programming. Nor has it been a vehicle for securing access to contraception or abortion for girls and young women in school who fear the educational impact of pregnancy. Instead, Title IX provides a limited set of rights for students who find themselves pregnant or are recovering from childbirth. After giving birth, students who are parenting a young child receive even less help from Title IX. To be sure, Title IX was a major step forward for protecting educational opportunity for students while they are pregnant; yet it has been inadequate to address educational disadvantages girls and women face resulting from lack of control over their reproductive lives.

Despite having been in effect since 1975,<sup>7</sup> the Title IX regulation addressing pregnancy discrimination has rarely been invoked in litigation, and most challenges have been brought by students at the college or graduate school level.<sup>8</sup> The relevant cases reveal an equality paradigm that blocks punitive responses to pregnancy but fails to ensure that pregnancy and new parenthood will not interfere with a student's educational opportunity. Younger students, those in high school and middle school, have gained even less from this set of rights, as they are unlikely to have the resources to know or assert their rights. Without a lost scholarship or other financial penalty, their case may be mooted before it can be decided in court. Although the regulation expressly guarantees a formerly pregnant student who takes an educational leave the right to reinstatement at the conclusion of her pregnancy, it does not require schools to provide the supports that pregnant students or new mothers might actually need to succeed in the program.<sup>9</sup> Separate schools for pregnant and parenting students have declined in recent years—a largely positive development given their weak academic programs.<sup>10</sup> However, the mainstreaming of pregnant and parenting students has

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<sup>7</sup> 34 C.F.R. § 106.40(b) (2020).

<sup>8</sup> See *infra* at Part I.B.5.

<sup>9</sup> 34 C.F.R. § 106.40(b) (2020).

<sup>10</sup> See Tamara S. Ling, *Lifting Voices: Towards Equal Education for Pregnant and Parenting Students in New York City*, 29 *FORDHAM URB. L.J.* 2387 (2002) (criticizing separate schools for pregnant and parenting students); Ben Arnoldy, *Special Schools for*

contributed to a lack of visibility and attention to this population of students, who often get lost in the system. Racial and class-based stratification in education compound the challenges pregnant students face. Title IX guarantees pregnant students only the right to equal treatment compared to students with other temporary disabilities; it offers no help to students in under-resourced schools that do too little for those students too.

This article elaborates on and critiques the law's separation of pregnancy, with rights grounded in sex equality under Title IX, from reproductive control, which the law treats as a matter of privacy, a species of liberty under the due process clause. While pregnancy is the subject of Title IX protection, reproductive control is parceled off into a separate legal framework grounded in privacy, rather than recognized as a matter that directly implicates educational equality. This fragmentation was not an inevitable development in the law. The right to prevent an unwanted pregnancy might have been better understood as a matter of both liberty and equality. Various of the Justices' opinions in the foundational *Casey* decision refining *Roe's* constitutional framework for abortion rights have recognized as much, at least in dicta.<sup>11</sup> And yet, Title IX links pregnancy to educational equality for girls and women only at the point when pregnancy affects schooling. In parceling out pregnancy prevention from Title IX's protections, the statute's broad promise of sex equality in education for all girls and women was doomed to fall short. The law's division between educational equality and liberty in two non-intersecting sets of legal rights has done no favors to the reproductive rights movement either. By giving a formal "right" to stay in school and the right to equal treatment with temporarily disabled students, Title IX may be strategically deployed by proponents of restricting abortion rights to minimize the educational consequences of involuntary motherhood. The hard realities of how pregnancy and parenting impact schooling are obscured.

This article explores the legal divide between pregnancy discrimination and reproductive rights in relation to education in three parts. Part I discusses the rights included in, and omitted from, Title IX relating to pregnancy and reproduction. As previewed above, Title IX rights for students come into play only once a woman becomes pregnant; the law offers no support for preventing or ending pregnancy. Part II surveys the liberty-based reproductive rights framework for pregnancy prevention and termination, and discusses its limits in protecting young women from the educational effects of unwanted pregnancy and motherhood. Part III concludes by discussing the implications of separating out pregnancy discrimination from the broader set of reproductive rights and elaborating on the harms that flow

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*Pregnant Girls?*, CHRISTIAN SCI. MONITOR (Apr. 30, 2008), <https://www.csmonitor.com/USA/Politics/2008/0430/p02s01-uspo.html> [<https://perma.cc/XV5T-UB58>] ("Separate schools for pregnant teens have dwindled in recent years because of concerns for educational equality, budget constraints, and changing social mores.").

<sup>11</sup> See *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992).

from the law's failure to recognize the educational equality dimensions of the denial of reproductive rights.

## II. TITLE IX: SEX EQUALITY AT THE CROSSROADS OF PREGNANCY AND REPRODUCTION

Title IX of the Education Amendments of 1972 prohibits sex discrimination by educational institutions that receive federal financial assistance.<sup>12</sup> The Title IX regulations make clear that this prohibition encompasses discrimination on the basis of pregnancy.<sup>13</sup> By acknowledging that pregnancy is a site of educational inequality and that remedying pregnancy discrimination is necessary in order to secure equal opportunity for girls and women in education, Title IX might have served as a basis for securing the rights of girls and women to control their fertility and avoid pregnancy. Instead, the ban on pregnancy discrimination is effectively limited to the point at which a student's education is already affected by pregnancy. Title IX pays very little attention to what precedes or follows pregnancy.

Enacted in 1972, Title IX itself says nothing about pregnancy.<sup>14</sup> Instead, it sets down an open-ended ban on discrimination in education programs and activities by federal funding recipients against any individual on the basis of sex. What little discussion of pregnancy there was in congressional debates over Title IX reflected the view that opening up educational opportunities to women would give women sufficient reason to not become pregnant—at least not too early or too often. As a leading sponsor of Title IX, Senator Birch Bayh, put it, without access to equal educational opportunities, women will have “too many babies.”<sup>15</sup> This telling statement recognizes a tension between motherhood and educational opportunity and reveals a belief that opening up equal educational opportunity to girls and women will be sufficient to resolve it. The statement reflects an implicit assumption that having

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<sup>12</sup> 20 U.S.C. § 1681(a) (2018) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .”).

<sup>13</sup> 34 C.F.R. § 106.40(b) (2020).

<sup>14</sup> There was no federal law barring pregnancy discrimination when Title IX was enacted. Two years later, the Supreme Court would hold that pregnancy discrimination is not sex discrimination for purposes of the Equal Protection Clause. *Geduldig v. Aiello*, 417 U.S. 484, 496–97 (1974) (upholding state disability insurance system that omitted coverage for pregnancy-related disability on grounds that pregnancy discrimination does not warrant heightened scrutiny under the Equal Protection Clause). Two years after that, it would reach the same conclusion under Title VII. *General Electric v. Gilbert*, 429 U.S. 125, 145–46 (1976) (upholding employer-based disability system that omitted coverage for pregnancy-related disability on grounds that pregnancy discrimination is not sex discrimination for purposes of Title VII and therefore not an unlawful employment practice).

<sup>15</sup> 118 CONG. REC. 5812 (1972) (citing BERNICE SANDLER, *THE STATUS OF WOMEN: EMPLOYMENT AND ADMISSIONS*).

babies is a choice and that having better (and mutually exclusive) alternative opportunities would redirect that choice.

Although Title IX itself does not explicitly address pregnancy discrimination, the federal agency to which Congress delegated authority to enforce the statute, the precursor to the Department of Education (DOE), issued proposed regulations in 1974.<sup>16</sup> The regulations, which took effect in 1975, included provisions explicitly covering pregnancy discrimination.<sup>17</sup> Because the regulation's ban on pregnancy discrimination is an authoritative and reasonable construction of the statute, it is enforceable through a private right of action.<sup>18</sup> The Title IX regulations state that recipients must "treat pregnancy, childbirth, false pregnancy, termination of a pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability."<sup>19</sup> Additional provisions, described below, place specific obligations on federal funding recipients relating to coverage of health and medical services, separate education programs for pregnant and parenting students, and medical leave for pregnancy and childbirth. For each of these provisions, meaningful protection kicks in only once pregnancy (or the perception of pregnancy, evidenced by the regulation's reference to "false pregnancy") has occurred. Neither the regulations nor the statute encompass meaningful rights relating to pregnancy prevention or termination—nor any guarantee of protection for reproductive freedom more generally.

### A. *Title IX's Carve-Out of Reproductive Rights*

While Title IX prohibits discrimination based on pregnancy, other aspects of reproduction that bear on educational equality are left out.

#### 1. *Abortion*

The prospect that Title IX might be interpreted to support a woman's right to terminate a pregnancy was extinguished in 1987 when Congress amended the statute to add the so-called abortion neutrality provision. This provision was included in the Civil Rights Restoration Act of 1987,<sup>20</sup> which was passed with the primary purpose of overturning the Supreme Court's

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<sup>16</sup> 39 Fed. Reg. 22228, 22236 (June 20, 1974). Health, Education, and Welfare, or HEW, was subsequently split into the Department of Education and Health and Human Services, with the former inheriting the Title IX responsibilities of HEW. *See* Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 668 (1979) (codified at 20 U.S.C. §§3441-3442).

<sup>17</sup> 34 C.F.R. § 106.40(b) (2020).

<sup>18</sup> *See, e.g.,* Conley v. Nw. Fla. State Coll., 145 F. Supp. 3d 1073, 1076 (N.D. Fla. 2015) (considering and rejecting the argument that Title IX's coverage of pregnancy discrimination is not enforceable through a private right of action and citing supporting authorities).

<sup>19</sup> 34 C.F.R. § 106.40(b) (2020).

<sup>20</sup> Pub. L. No. 100-259, § 38(b) (codified at 20 U.S.C. § 1688 (2018)).

decision in *Grove City College v. Bell*.<sup>21</sup> This decision had drastically limited Title IX's scope by holding that only particular programs in receipt of federal funding needed to comply. The abortion provision provides:

Nothing in this chapter shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion.<sup>22</sup>

It is unclear exactly what Congress intended to accomplish with this provision or what it understood would be the implications for Title IX if this disclaimer had not been included. One possible interpretation is that at least some members of Congress were concerned, given the obvious connections between women's equality and women's control over their reproductive lives, that unless abortion rights were carved out of the statute, Title IX might have implications for women's access to, or education related to, this and other reproductive services. The Title IX regulation defines pregnancy discrimination to encompass "termination of a pregnancy"—which prohibits a covered entity from punishing a student for having an abortion.<sup>23</sup> This provision might have raised concerns that, without a statutory exemption, a university's student health services might have to cover or provide access to abortion in order to comply with the statute's general non-discrimination mandate.

By defining pregnancy discrimination to encompass discrimination against an individual for terminating a pregnancy, the Title IX regulation extends some limited protections to students who have an abortion. The clear import of the provision is that a student whose pregnancy was terminated may not be penalized, whatever the reason for the termination, including abortion. However, it is not clear what practical significance this provision has since it has prompted scant attention and no case law. School officials are unlikely to find out about a student's abortion, as it would likely be less visible than a pregnancy that progresses to term. And in those educational settings where students are most likely to be penalized for having an abortion, such as religious institutions where abortion is against the tenets of the religion, the institution would likely be exempt from this provision anyway under Title IX's religious exemption, discussed below.<sup>24</sup>

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<sup>21</sup> 465 U.S. 555, 571–72 (1984) (holding that Title IX applied only to those programs within an educational institution that received federal financial assistance, rather than to the institution as a whole).

<sup>22</sup> 20 U.S.C. § 1688 (2018).

<sup>23</sup> 34 C.F.R. § 106.40(b)(1) (2020). On the history behind the abortion provision, see Kif Augustine-Adams, *Religious Exemptions to Title IX*, 65 U. KAN. L. REV. 327, 384–87 (2016); Kathleen A. Bergin, *Contraceptive Coverage Under Student Health Insurance Plans: Title IX as a Remedy for Sex Discrimination*, 54 U. MIAMI L. REV. 157, 177–78 (2000).

<sup>24</sup> 20 U.S.C. §§ 1681(a)(3), 1687 (2018).

Aside from the regulation's ban on punitive measures against a student for terminating a pregnancy, Title IX creates no rights with respect to abortion. The statutory amendment makes clear that Title IX does not require educational institutions to provide any support for students seeking or having an abortion, such as referrals to abortion providers, education about abortion as an option, or access to abortion care as part of a student health services plan.<sup>25</sup>

## 2. Contraception

Contraceptive access and support for pregnancy prevention also appear to be outside of the statute's protections, although, unlike abortion, no statutory provision explicitly says so. To be sure, plausible arguments exist that, since only the female reproductive system can sustain pregnancy, restrictions on support for contraception constitute sex discrimination against women.<sup>26</sup> At least for educational institutions that provide basic student health services, the omission of contraceptive care might be thought to discriminate against women. The Title IX regulations, after all, require that federal funding recipients offering full-coverage health services must include "gynecological care" among the range of health services provided.<sup>27</sup> Regulations specifically prohibit sex discrimination in the administration of a university-sponsored health or medical "benefit, service, policy or plan."<sup>28</sup> These regulations, along with the statute's broad ban on sex discrimination, might be understood to impose obligations on school health services with respect to contraception. One law journal article published two decades ago argues that Title IX requires parity in contraceptive coverage, such that access to contraception is at least equivalent to the availability of other prescription drugs.<sup>29</sup> At that time, long before the passage of the Affordable Care Act (ACA), the author pointed out that the vast majority of university student health insurance plans denied or substantially limited contraceptive coverage.<sup>30</sup>

The argument that restricting coverage of contraceptives in student health services violates Title IX closely tracks similar arguments under Title VII, that employer-provided insurance that treats prescription contraception less favorably than other prescription drugs violates the statute. Although

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<sup>25</sup> California is the first state to require public colleges and universities in the state to provide medication abortion, a method that can be used until the tenth week of gestation, on campuses. See Melody Gutierrez, *Abortion Medication to Be Available at California's College Health Centers Under New Law*, L.A. TIMES (Oct. 11, 2019, 1:44 PM), <https://www.latimes.com/california/story/2019-10-11/abortion-medication-california-college-health-centers-legislation> [<https://perma.cc/SW96-622R>].

<sup>26</sup> See *infra* text accompanying notes 193-96. The fact that trans men can also become pregnant does not undermine the sex discrimination argument for reproductive rights, nor lessen the connection between women's equality and contraceptive access.

<sup>27</sup> 34 C.F.R. § 106.39 (2020).

<sup>28</sup> 34 C.F.R. §§ 106.39-40 (2020).

<sup>29</sup> Bergin, *supra* note 23.

<sup>30</sup> *Id.* at 171-72.

some federal district courts have been receptive to the Title VII argument, the only circuit court to address the argument found in favor of the employer, holding that denying contraceptive coverage to all employees did not discriminate against women.<sup>31</sup> Although the decision has been widely criticized, it took the ACA to impose contraceptive equity on employers.<sup>32</sup> Title IX is not likely to be interpreted more robustly than Title VII on this front, particularly since student health plans tend to be more bare bones in terms of coverage than employer health plans.<sup>33</sup>

Disparate impact theory, which permits challenges to neutral practices that result in a disparate impact against a protected group, might be a viable way of challenging contraceptive inequity under Title VII. But the disparate impact theory is itself on shaky ground under Title IX after the Supreme Court's decision in *Alexander v. Sandoval*, at least as a basis for private lawsuits.<sup>34</sup> Whether grounded in disparate impact or disparate treatment tied to female reproductive capacity, arguments that Title IX requires contraceptive equity or access have not been embraced by courts or the Office of Civil Rights (OCR).

### 3. *Sex Education*

Sex education, including education about pregnancy prevention, also lies outside the scope of Title IX. The Title IX regulations generally exempt curricular materials from Title IX coverage.<sup>35</sup> Neither gender bias in what is taught nor decisions about what to include in the curriculum are governed by Title IX, apparently out of concern that such intrusions into curricular matters would implicate academic freedom and, in the case of public schools, the First Amendment.<sup>36</sup> As a result, Title IX has been of no help in challeng-

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<sup>31</sup> *Standridge v. Union Pac. R.R. Co.*, 479 F.3d 936, 944–45 (8th Cir. 2007) (holding that the exclusion of coverage for prescription contraceptives from an employer-based health plan does not violate Title VII's ban on sex discrimination, in part because the plan also omitted coverage for condoms and male sterilization). District courts were split on this issue. *Compare* *Stocking v. AT&T Corp.*, 436 F. Supp. 2d 1014, 1017 (W.D. Mo. 2006) (Title VII, as amended by the Pregnancy Discrimination Act, requires that contraceptives be included in comprehensive insurance plan), *and* *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1272 (W.D. Wash. 2001) (exclusion of contraceptives from otherwise comprehensive insurance plan constitutes sex discrimination), *with* *Cummins v. Illinois State*, No. 2002-cv-4201-JPG, 2005 U.S. Dist. LEXIS 42634, at \*14–15 (S.D. Ill. Aug. 30, 2005) (PDA does not require coverage).

<sup>32</sup> See *infra* text accompanying notes 197–208.

<sup>33</sup> Jimmy Gao, *Student Health Insurance Hinges Upon Obamacare's Fate*, WASH. EXAMINER, Feb. 10, 2018, <https://www.washingtonexaminer.com/student-health-insurance-hinges-upon-obamacares-fate>.

<sup>34</sup> 532 U.S. 275 (2001) (holding no private right of action exists under Title VI to enforce disparate impact regulations).

<sup>35</sup> 34 C.F.R. § 106.42 (2020) (“Nothing in this regulation shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials.”).

<sup>36</sup> See MYRA SADKER FOUND., WHAT IS TITLE IX?, <https://www.sadker.org/TitleIX.html> [<https://perma.cc/D4LV-UU9Z>].

ing abstinence-only education as the model of sex education taught in many schools. Such programs are frequently taught in schools despite having abysmal records of preventing unwanted pregnancy, protecting sexual health, and providing a foundation for healthy relationships.<sup>37</sup> A large-scale analysis showed that states requiring abstinence-only sex education in public schools have significantly higher rates of teen pregnancy than states with comprehensive sex education.<sup>38</sup> Other studies have showed other deleterious effects of abstinence-only education, including higher rates of sexually transmitted infections and misinformation about sexual health.<sup>39</sup> Importantly, not one study has showed that abstinence-only education causes teens to delay sexual activity, the primary justification for the programs in the first place.<sup>40</sup> Moreover, legal scholars have pointed out that these programs are rife with gender stereotyping;<sup>41</sup> the curricula largely presume women to be naturally less driven by sexual desire and hold women responsible for controlling male sexuality.<sup>42</sup> Cornelia Pillard argues that abstinence-only curricula not only propagate gendered messages about sexuality, holding up women as the gatekeepers of chastity while normalizing male sexual aggression, but they also implicitly promote long-term gender role segregation. Pillard argues:

A decision to practice abstinence until marriage assumes early, heterosexual marriage and early childbearing. The expectation is not that marriage will be delayed until a person's late twenties or early thirties so that both parents can complete higher education and establish themselves at work, but that couples will marry young and the woman will become a family caretaker, principally

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<sup>37</sup> See Cornelia T.L. Pillard, *Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy*, 56 EMORY L.J. 941, 947–48 (2007).

<sup>38</sup> See Kathrin F. Stanger-Hall & David W. Hall, *Abstinence-Only Education and Teen Pregnancy Rates: Why We Need Comprehensive Sex Education in the U.S.*, 6 PLoS ONE 1371, at 1, 6 (2011).

<sup>39</sup> See, e.g., Hannah Bruckner & Peter Bearman, *After the Promise: The STD Consequences of Adolescent Virginity Pledges*, 36 J. ADOLESCENT HEALTH 271, 277 (2005) (concluding that students who take virginity pledges delay sexual activity slightly but then use condoms less frequently the first time they have intercourse and are more likely to contract a sexually transmitted infection); Hannah Bruckner & Peter Bearman, *Promising the Future: Virginity Pledges and First Intercourse*, 106 AM. J. SOC. 859, 900 (2001) (exploring the effects of virginity pledges, which delay sexual activity only among younger adolescents and only if relatively few people take the pledge); Julie F. Kay, *What's Not Being Said About Sex and Who It's Hurting*, AMER. PROGRESS (Mar. 27, 2008, 9:00 AM), <https://www.americanprogress.org/issues/education-k-12/news/2008/03/27/4082/whats-not-being-said-about-sex-and-who-its-hurting/> [<https://perma.cc/N8G9-P4RG>].

<sup>40</sup> See John Santelli et al., *Abstinence-Only Until Marriage: An Updated Review of U.S. Policies and Programs and Their Impact*, 61 J. ADOLESCENT HEALTH 273, 277, 278 (2017).

<sup>41</sup> *Id.*

<sup>42</sup> See Danielle LeClair, *Let's Talk About Sex Honestly: Why Federal Abstinence-Only-Until-Marriage Education Programs Discriminate Against Girls, Are Bad Public Policy, and Should Be Overturned*, 21 WISC. WOMEN'S L.J. 291, 302–03 (2006).

supported by her husband, who remains relatively free of caregiving duties to pursue his career.<sup>43</sup>

This messaging stands in stark contrast to the policies underlying Title IX, which seek to ensure that women have all of the educational opportunities available to men for professional advancement. And yet, due to Title IX's omission of curricular coverage and teaching materials, the statute has no application to such programs.<sup>44</sup> With no legal footprint in Title IX, abstinence-only policies typically spark debate about their effectiveness in preventing unwanted pregnancies, but rarely about their consequences for equal educational opportunity for girls and women.

#### 4. *Sexual Assault and Pregnancy*

One area that is governed by Title IX and that does have implications for protecting women's reproductive autonomy is the law's requirement that educational institutions respond to sexual assault. Title IX has long covered sexual assault as part of the statute's prohibition against sexual harassment—an understanding that was solidified through judicial interpretation and clarified through a series of guidance documents by the Department of Education.<sup>45</sup> Title IX enforcement against inadequate campus responses to sexual assault was ramped up under the Obama Administration but rolled back when the Trump Administration took the reins over the Department of Education. In November of 2018, the Trump Administration released a Notice of Proposed Rulemaking.<sup>46</sup> The notice announced proposed revisions to the Title IX regulations. If adopted, the new regulations would severely cut back on the obligations Title IX places on schools to respond to sexual assault, and drastically curtail the underlying conduct that triggers Title IX obligations.<sup>47</sup> For example, the proposed regulations would leave unregulated sexual assaults that take place off-campus even if the assaults involve students and student associations, such as fraternities, and even if they affect a survivor's ability to attend classes and complete her education.<sup>48</sup> The proposed regulations were the subject of a public notice and comment period that ended in January of 2019,<sup>49</sup> and it remains to be seen whether and in what form the Trump DOE will issue final regulations that change the governing stan-

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<sup>43</sup> Pillard, *supra* note 37, at 954.

<sup>44</sup> Although one student note argues that abstinence-only programs violate Title IX because they fail to adequately address issues that disproportionately affect girls, such as unwanted pregnancy and STIs, the argument fails to consider the Title IX regulation's exemption of curricular materials. LeClair, *supra* note 42, at 316.

<sup>45</sup> See Deborah L. Brake, *Back to Basics: Excavating the Sex Discrimination Roots of Campus Sexual Assault*, 6 TENN. J. RACE, GENDER & SOC. J. 7, 21 (2017).

<sup>46</sup> U.S. Dep't of Educ., Notice of Proposed Rulemaking, 83 Fed. Reg. 61,462 (Nov. 29, 2018) (describing the new proposals under the Trump administration).

<sup>47</sup> *Id.*

<sup>48</sup> See *id.*

<sup>49</sup> 83 Fed. Reg. 61462 (Nov. 29, 2018).

dards for schools. Curtailing institutional obligations under Title IX for responding to sexual assault will erode the legal culture that pressed colleges and universities to take a more proactive approach to sexual assault under the Obama Administration.<sup>50</sup>

Even the Obama-era Title IX enforcement was insufficient to curb the underlying problem of sexual assault and sexual coercion among students. A 2019 American Association of Universities (AAU) study, which updated findings from its 2016 study, found that the prevalence of actual and attempted sexual assault on campuses remains as high as ever and, at some institutions, increased in the intervening years.<sup>51</sup> Of course, not all of these numbers represent sexual intercourse with an attendant risk of pregnancy. But the estimates for such conduct remain alarmingly significant. Some sexual assaults will result in unwanted pregnancy. According to the best available estimates, around five percent of all rapes result in pregnancy.<sup>52</sup> The Title IX framework, focused as it is on institutional responses to sexual assault after the fact, has done little to protect women from the risk of unwanted sex that may lead to pregnancy.<sup>53</sup>

In addition to the gap between responding to sexual assault after the fact and preventing it in the first place, another limitation on Title IX's ability to deter sexual activity resulting in unwanted pregnancy is in the definition of the sexual conduct that Title IX covers. Robin West observes that there is a category of sexual conduct that the law leaves unregulated but which is equally harmful in terms of costs to women's equality and agency: sex that is consensual but not desired.<sup>54</sup> Title IX does not—and likely cannot—deter such sexual conduct, nor does it create conditions on campus for sexual equality between men and women in acting on sexual desire.

Perhaps the biggest flaw in the Title IX framework in terms of its impact on women's reproductive control is that it considers only the unwelcomeness of the sexual contact itself and not of the reproductive consequences of sexual intimacy. Sexual contact that is welcome but that involves reproductive coercion is not addressed by the case law or OCR guidance documents. Even the Obama Administration's guidance documents did not consider the case of a male sexual partner coercing a female partner

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<sup>50</sup> For more details and context surrounding the proposed changes, see Joanna L. Grossman & Deborah L. Brake, *A Sharp Backward Turn: Department of Education Proposes to Undermine Protections for Students Against Sexual Harassment and Assault*, JUSTIA'S VERDICT (Nov. 27, 2018), <https://verdict.justia.com/2018/11/27/a-sharp-backward-turn-department-of-education-proposes-to-undermine-protections-for-students-against-sexual-harassment-and-assault> [https://perma.cc/6WEG-4638].

<sup>51</sup> ASS'N AM. UNIV., AAU CAMPUS CLIMATE SURVEY vii (2019), <https://www.aau.edu/key-issues/campus-climate-and-safety/aaucampus-climate-survey-2019> [https://perma.cc/4HMX-CHRZ].

<sup>52</sup> Francesca Cocuzza, *supra* note 2, at 219.

<sup>53</sup> Katherine Silbaugh, *Reactive to Proactive: Title IX's Unrealized Capacity to Prevent Campus Sexual Assault*, 95 B.U. L. REV. 1049, 1049 (2015).

<sup>54</sup> Robin West, *Consensual Sexual Dysphoria: A Challenge for Campus Life*, 66 J. LEGAL EDUC. 804, 806 (2017).

into unprotected sex and a risk of pregnancy, as long as the sex itself was consensual. A male partner who removes a condom during sex against his female partner's wishes or pressures a female partner into not using contraception, engages in reproductive coercion, even if the sexual contact itself is consensual. Recent studies have documented high prevalence rates of reproductive coercion among school-age sexual partners, with approximately one in eight sexually active high school girls reporting having experienced reproductive coercion by a male partner.<sup>55</sup> A recent study by University of Pittsburgh researchers found that African American and Latina young women experience reproductive coercion in sexual relationships at particularly high rates.<sup>56</sup> Several legal scholars have recently argued for legal recognition of reproductive coercion as a violation of sex equality principles.<sup>57</sup> To date, however, Title IX has not been applied to address reproductive coercion as a form of sexual assault.

A final limitation of the Title IX framework regulating sexual assault lies in the remedies Title IX extends to sexual assault survivors, even when the underlying sexual conduct is within the boundaries of Title IX's scope. Title IX does not require campus services for sexual assault survivors to provide emergency contraception to prevent unwanted pregnancy resulting from nonconsensual sex, nor access to abortion education, referrals or services if unwanted pregnancy does result. Even the Obama DOE Title IX guidance documents (which the Trump Administration has now rescinded) stopped short of recognizing pregnancy as a harm resulting from sexual assault for which schools have an obligation to provide a remedy.<sup>58</sup> As a result, survivors of sexual assault may be unable to access emergency contraception through campus health services or to access it off campus on a timely basis, interfering with their ability to prevent pregnancy.<sup>59</sup>

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This survey of the gaps in Title IX relating to women's control over their reproductive lives reveals an overarching theme: Title IX has little or

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<sup>55</sup> Gwen Aviles & Rosa Guevara, *Latina and Black Adolescents May Be More Vulnerable to Reproductive Coercion*, NBC NEWS (July 24, 2019, 9:59 AM), <https://www.nbcnews.com/news/latino/latina-black-adolescents-may-be-more-vulnerable-reproductive-coercion-n1031711> [<https://perma.cc/4L95-FLDX>].

<sup>56</sup> Amber L. Hill et al., *Reproductive Coercion and Relationship Abuse Among Adolescents and Young Women Seeking Care at School Health Centers*, 134 OBSTETRICS & GYNECOLOGY 351, 353 (2019).

<sup>57</sup> See Alexandra Brodsky, *Rape-Adjacent: Imagining Legal Responses to Nonconsensual Condom Removal*, 32 COLUM. J. GENDER & L. 183 (2017); Rachel Camp, *Coercing Pregnancy*, 21 WM. & MARY J. WOMEN & L. 275 (2015); Leah Plunkett, *Contraceptive Sabotage*, 28 COLUM. J. GENDER & L. 97 (2014).

<sup>58</sup> See Cocuzza, *supra* note 2, at 212 (arguing that Title IX should recognize pregnancy as a harm to be remedied when it results from sexual assault).

<sup>59</sup> *Id.*

no applicability to pregnancy prevention or termination. The constraints limiting women's control over their reproductive lives are not the subject of Title IX's promise of equal educational opportunity for girls and women. Title IX's protection from discrimination on the basis of pregnancy kicks in only once pregnancy is a *fait accompli*. The following section examines the scope and limitations of Title IX's framework of rights for pregnant and parenting students.

### B. *Title IX's Protection from Discrimination Against Pregnant and Parenting Students*

Unlike pregnancy prevention or termination, which are not encompassed by the educational equality that Title IX promises, students' pregnancies are the subject of Title IX rights.

Title IX's prohibition on pregnancy discrimination creates an important set of rights that delineate a baseline of educational opportunity to which pregnant students are entitled. Even here, however, these rights are insufficient to fully protect students from having their educational careers derailed by pregnancy and motherhood.

#### 1. *The Social Construction of the Pregnant Subject of Title IX Rights*

The history of social policy surrounding teen pregnancy is an important starting point in understanding the need for and limitations of Title IX rights for pregnant students. Gender and education scholar Wanda Pillow has traced the history of how teen pregnancy has been socially constructed as an educational "problem" and how the prototype of the pregnant teen and teen mother has shifted over time, shaped by changing racial and class-based assumptions and biases.<sup>60</sup> Pillow argues that the pregnant teen whom legislators and regulators sought to protect in passing Title IX in 1972 was implicitly an otherwise virtuous young white woman who made a mistake and deserved a second chance.<sup>61</sup> That prototype of the pregnant teen, who typically gave up her child for adoption and returned to school with no (visible) marker of motherhood, transformed in the 1980s and 1990s, with the rise of welfare mother discourses and racialized concerns about urban

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<sup>60</sup> Wanda S. Pillow, *Embodying Policy Studies: Feminist Genealogy as Methodology*, in *EDUCATION POLICY AND CONTEMPORARY THEORY: IMPLICATIONS FOR RESEARCH* 134, 137–38 (Kalervo N. Gulson et al. eds., 2015). For a comprehensive analysis of how discourses surrounding pregnant teens and teen mothers affect educational policy, see WANDA S. PILLOW, *UNFIT SUBJECTS: EDUCATION POLICY AND THE TEEN MOTHER, 1972–2002* (2004).

<sup>61</sup> See PILLOW, *UNFIT SUBJECTS*, *supra* note 60, at 22 (2004). During the 1950s and 1960s, pregnant teens were often whisked away to homes for unwed mothers, where their pregnancy could progress in secret, and their babies could be surrendered (in some cases involuntarily) for adoption. See ANN FESSLER, *THE GIRLS WHO WENT AWAY* (2006).

crime.<sup>62</sup> Along with this change in the discourse and underlying assumptions about the problem of teen pregnancy, the imagined subject of Title IX rights became racialized and less sympathetic. The prototype of the pregnant teen subject morphed from white to black or white to Latina, with notable shifts in how policy-makers and educators responded to the “problem” of teen pregnancy.<sup>63</sup>

As evidence of this shift, Pillow points to literature promoting non-profit, charitable homes for pregnant girls in the late nineteenth and early twentieth century; pictures depict middle class white girls and their babies in a sympathetic light.<sup>64</sup> By contrast, a very different image of teen motherhood emerged in a high-profile 2013 New York City subway public education “shaming” campaign meant to deter teen pregnancy. On bus and subway billboards, teen mothers were “depicted clearly racialized (brown, bi-racial, black),” holding crying, distressed babies, alongside guilt-inducing phrases through which the babies rebuked their mothers for having them too young and hurting their educational and life chances.<sup>65</sup> The teen mother depicted in this public education campaign was someone who selfishly and irresponsibly hurt society and her own child and implicitly has little claim to opportunities for herself.

As explained below, Title IX constrains how educational institutions are permitted to respond to pregnancy and motherhood. The legal framework is premised on an (implicitly white) presumptively deserving educational subject, Pillow argues, even as policymakers and educators have over time presumed pregnant teens and teen mothers (implicitly black and Latina) to be underserving, educationally deficient failures to be mitigated. Pillow contends that the social construction of the pregnant teen and teen mother as a rights-bearing subject has undercut the effectiveness of the legal framework: “Title IX has not been effective at encouraging schools to implement the language of Title IX to the fullest extent nor has Title IX been able to separate entrenched social beliefs about teen mothers from the educational rights of these students.”<sup>66</sup>

## 2. *The Title IX Regulations and Rights of Pregnant and Parenting Students*

Indeed, assumptions about the educational potential of the Title IX subject underpin both the substantive interpretation of Title IX rights and their enforcement. The limited obligations Title IX places on schools treat the pregnant subject as a problem to be managed and do not require the kind of long-term supports necessary for educational success. Title IX treats preg-

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<sup>62</sup> Pillow, *UNFIT SUBJECTS*, *supra* note 60, at 33-50.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 20-26.

<sup>65</sup> Pillow, *Embodying Policy Studies*, *supra* note 60, at 142.

<sup>66</sup> *Id.* at 140.

nancy as, at most, a temporary physical impairment in relation to education that requires limited accommodation. For the most part, accommodations for pregnant students are guaranteed only to the same extent as provided for students with temporary disabilities.<sup>67</sup> In the one area in which the Title IX framework extends beyond equal treatment and into the substantive equality realm of affirmative accommodation mandates, the specific accommodations required are tied to the student's physical condition only and do nothing to ease the educational impacts of motherhood.<sup>68</sup> Even this limited set of rights is structurally designed such that under-enforcement and a lack of knowledge of Title IX are rampant.

The starting point in Title IX's framework of rights for pregnant students is that pregnancy can no longer be a flashpoint for pushing students out of school or educational activities. The Title IX regulations state that "A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy . . . unless the student requests voluntarily to participate in a separate portion of the program or activity. . . ." <sup>69</sup> The significance of this prohibition should not be understated, as it marks an important departure from the pre-Title IX era in which pregnant students were commonly excluded from school entirely or confined to separate schools for pregnant (or otherwise delinquent) girls on the theory that pregnancy was a contagion that might spread if other students were exposed to it.<sup>70</sup> Title IX put an end to such blatantly exclusionary school push-out policies for pregnant girls.

Title IX's ban on excluding students from school on the basis of pregnancy is not limited to formal policies; it may also capture more subtle exclusionary practices. A Title IX violation may be established by evidence that pregnancy was the real, if undisclosed, reason for a student's dismissal from an education program. In *Varlesi v. Wayne State University*,<sup>71</sup> for example, a master's student in the School of Social Work alleged that she was terminated by her field placement supervisor because of her pregnancy. When she received a failing grade and was dismissed from the program, she sued, claiming that the university's asserted reason, poor performance, was a pretext for pregnancy discrimination.<sup>72</sup> The court denied the employer summary judgment based on the evidence that the plaintiff was doing a good job otherwise and that her failing grade was because her supervisor disapproved of her pregnancy.<sup>73</sup> The case went to trial and the jury awarded the plaintiff

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<sup>67</sup> 34 C.F.R. § 106.40(b) (2020).

<sup>68</sup> *Id.*

<sup>69</sup> 34 C.F.R. § 106.40(b)(1) (2020).

<sup>70</sup> Kendra Fershee, *Hollow Promises for Pregnant Students: How the Regulations Governing Title IX Fail to Prevent Pregnancy Discrimination in School*, 43 IND. L. REV. 79, 82 (2009).

<sup>71</sup> 909 F. Supp. 2d 827 (E.D. Mich. 2012).

<sup>72</sup> *Id.* at 851.

<sup>73</sup> *Id.* at 853–54.

nearly \$850,000 in damages.<sup>74</sup> However, in other cases, plaintiffs have failed to convince the court that the reason for termination from an education program was pregnancy discrimination, as opposed to poor academic performance.<sup>75</sup>

Title IX's prohibition on excluding students on the basis of pregnancy applies to all school programs, including extracurricular activities such as athletics. Title IX permits educators to require pregnant students to provide a doctor's note certifying their ability to participate, but only on the same terms that they require for students with other medical conditions.<sup>76</sup> Pregnant students may not be forced out of any education program for as long as their doctor verifies their ability to continue to participate.<sup>77</sup> In 2007, OCR issued a Dear Colleague letter reminding recipients of this obligation in response to media reports of student athletes who became pregnant and then had their athletic scholarships revoked.<sup>78</sup> Athletes who become pregnant have the right to stay on the team for as long as their doctor permits and to take a medically necessary leave from the team when needed, with the right to reinstatement at the same status as when the leave began.<sup>79</sup> For scholarship athletes, this status encompasses retention of athletic scholarships.<sup>80</sup> Because athletic programs routinely keep "red-shirted" injured athletes on scholarship, Title IX's equal treatment guarantee requires no less for athletes who are pregnant or recovering from pregnancy.<sup>81</sup>

### 3. *Pregnancy as a Trigger for Penalizing Sexual Activity*

Although stated in absolute terms, the ban on excluding students from education programs on the basis of pregnancy is not as all-encompassing as it first appears. While pregnancy itself may not serve as the basis for exclusion, the conduct that leads to pregnancy—sexual activity—may, as long as it is the subject of a gender-neutral proscription. A handful of cases challeng-

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<sup>74</sup> Jill Lubas, *WSU Student Wins Suit*, S. END WEEKLY (Feb. 18, 2013), [https://www.thesouthend.wayne.edu/archives/article\\_3445bc5d-0648-59eb-9740-7eeb88b630c7.html](https://www.thesouthend.wayne.edu/archives/article_3445bc5d-0648-59eb-9740-7eeb88b630c7.html) [<https://perma.cc/MTR6-2N4M>].

<sup>75</sup> See, e.g., *Workman v. Univ. of Akron*, No. 5:16-cv-156, 2017 WL 6326898, at \*4 (N.D. Ohio 2017) (granting defendant summary judgment where plaintiff failed to prove that her failures in the program were due to bias against her pregnancy as opposed to her failure to complete program requirements); *McConaughy v. Univ. of Cincinnati*, No. 1:08-cv-320, 2011 WL 1459292, at \*9 (S.D. Ohio 2011) (granting summary judgment to defendant where plaintiff could not establish a prima facie case of pregnancy discrimination because her academic performance was not satisfactory).

<sup>76</sup> 34 C.F.R. § 106.40(b)(1)–(2) (2020).

<sup>77</sup> *Id.*

<sup>78</sup> Stephanie J. Monroe, *Dear Colleague Letter*, DEP'T OF EDUC., (June 25, 2007), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20070625.html> [<https://perma.cc/G23K-GR62>].

<sup>79</sup> *Id.*

<sup>80</sup> See Deborah L. Brake, *The Invisible Pregnant Athlete and the Promise of Title IX*, 31 HARV. J.L. & GENDER 323, 329 (2008).

<sup>81</sup> *Id.* at 329–30.

ing the exclusion of pregnant students from the National Honor Society, read together, draw this distinction. Four reported cases involve Title IX challenges to the exclusion of pregnant students from membership in their school's chapter of the National Honor Society.<sup>82</sup> Plaintiffs succeeded in proving likely or actual Title IX violations in three of them, and won a partial, but ultimately limited, victory in the fourth by overturning a grant of summary judgment. Although these odds seem to favor plaintiffs, the principles and distinctions drawn by the cases are more nuanced. The guiding principle is that schools may not punish or stigmatize pregnancy *per se*, but they may punish the sexual activity that results in pregnancy, as long as they do so on formally gender-neutral terms that they apply to men and women alike.

The precedent that most clearly inscribes this line is the Third Circuit's decision in *Pfeiffer v. Marion Center Area School District*, where the court upheld the district court's finding that the plaintiff "was dismissed because of premarital sexual activity and not because of gender discrimination."<sup>83</sup> The court nevertheless reversed summary judgment and remanded to the district court on the narrow ground that the lower court had erroneously excluded evidence that a former male student who had impregnated his girlfriend was not barred from membership in the National Honor Society.<sup>84</sup> Even so, the court hedged on whether such evidence would necessitate a different result, even as the court opened the door to the possibility that applying different rules to boys and girls regarding their involvement in sexual activity would violate Title IX.<sup>85</sup>

Although *Pfeiffer* at first blush appears to be an outlier in this grouping of cases, on further study, even the three more clear-cut victories for plaintiffs are narrower than they may first appear. In the earliest of these challenges, *Wort v. Vierling*, the plaintiff won a bench trial and was reinstated as a member of the National Honor Society, but without a reported decision.<sup>86</sup> The appeal in the Seventh Circuit was on the issue of attorney's fees only and not on the merits.<sup>87</sup> In *Pfeiffer*, the Third Circuit dismissed *Wort* as precedent on the ground that the court had "declined to distinguish the sexual conduct from the resulting pregnancy," while the lower court in *Pfeiffer* found that the plaintiff "was dismissed not because she was pregnant but because she had engaged in premarital activity."<sup>88</sup> That reasoning makes it

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<sup>82</sup> *Cazares v. Barber*, 959 F.2d 753, 755 (9th Cir. 1992); *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779, 780 (3d Cir. 1990); *Wort v. Vierling*, 778 F.2d 1233, 1233 (7th Cir. 1985); *Chipman v. Grant Cty. Sch. Dist.* 30 F. Supp. 2d 975, 977 (E.D. Ky. 1998).

<sup>83</sup> *Pfeiffer*, 917 F.2d at 780.

<sup>84</sup> *Id.* at 783.

<sup>85</sup> *Id.* at 781 ("[W]e do not suggest that the admission of this evidence would, in and of itself, produce a different result from that previously reached by the trial court.").

<sup>86</sup> *Wort*, 778 F.2d at 1233.

<sup>87</sup> *Id.*

<sup>88</sup> *Pfeiffer*, 917 F.2d at 784.

difficult to read *Wort* as a rejection of *Pfeiffer*'s separation of pregnancy from the sexual conduct that precedes pregnancy.

A case decided soon after *Pfeiffer*, *Cazares v. Barber*,<sup>89</sup> is also consistent with, and further reinforces, the distinction between pregnancy and sexual activity. In that case, the district court found that the school's denial of National Honor Society membership to the plaintiff because she was pregnant, unmarried, and living with the father violated Title IX.<sup>90</sup> However, the lower court also pointedly noted that a male student who had fathered a child out of wedlock and who did not live with the mother was accepted as a National Honor Society member.<sup>91</sup> The court's recitation of that fact appears to embrace, rather than reject, the distinction between sexual activity and pregnancy drawn in *Pfeiffer*. And, in a hollow victory, the school decided to cancel their participation in the honor society rather than induct the plaintiff.<sup>92</sup>

The most recent case challenging the exclusion of pregnant students from the National Honor Society, *Chipman v. Grant County School District*, appears to rebuke the *Pfeiffer* court's reasoning.<sup>93</sup> It is also, however, less of a break with *Pfeiffer* than it first appears. The court's opinion begins by pointing out that the sexual conduct of the two excluded pregnant students came to the attention of school authorities only because of their pregnancies.<sup>94</sup> The court credited the school's evidence that the selection committee "would have considered any evidence of paternity in evaluating the character of male students," but noted that "it was unlikely that any such knowledge would come before the committee in any way but rumor and gossip."<sup>95</sup> The court then summarized the three cases above and expressed agreement with *Wort* and *Cazares* and disagreement with *Pfeiffer*.<sup>96</sup> The court granted the plaintiffs a preliminary injunction enjoining their exclusion from the National Honor Society, concluding that the plaintiffs were likely to succeed on the merits of the Title IX claim under either a disparate treatment or disparate impact theory of discrimination.<sup>97</sup> However, the precedential force of this ruling as a rejection of *Pfeiffer*'s distinction between pregnancy and sexual activity is undercut by the court's heavy reliance on a disparate impact analysis, rather than disparate treatment, in evaluating the likelihood of the plaintiffs' success on the merits. Analogizing to the availa-

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<sup>89</sup> 959 F.2d 753 (9th Cir. 1992).

<sup>90</sup> *Id.* at 755.

<sup>91</sup> See Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law*, 46 WM. & MARY L. REV. 513, 517 n.14 (2004) (discussing *Cazares v. Barber*, No. CIV-90-0128-TUC-ACM (D. Ariz. May 31, 1990)).

<sup>92</sup> *Cazares*, 959 F.2d at 755; see also Brake, *supra* note 91, at 518 (discussing and criticizing this decision as a form of leveling down).

<sup>93</sup> 30 F. Supp. 2d 975 (E.D. Ky. 1998).

<sup>94</sup> *Id.* at 977.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 978.

<sup>97</sup> *Id.* at 979-980.

bility of disparate impact claims under Title VII and the Pregnancy Discrimination Act, the court concluded that disparate impact claims for pregnancy discrimination should likewise be cognizable under Title IX. The court described the relevant proof as follows:

Although 100% of young women who are visibly pregnant or who have had a child out of wedlock are denied membership, as far as the record reflects, defendants' policy excludes 0% of young men who have had premarital sexual relations and 0% of young women who have had such relations but have not become pregnant or have elected to have an early abortion.<sup>98</sup>

Finding that the school had "many alternate means to assess the character of candidates," the court concluded that the defendants failed to meet their burden to prove that the policy was reasonably necessary to serve its educational purposes.<sup>99</sup> Turning to a disparate treatment analysis, the court ruled that the defendants failed to articulate a legitimate nondiscriminatory reason for excluding the plaintiffs, describing their articulated reasons as "vague, conclusory and undocumented."<sup>100</sup> The tenor of the decision is certainly a win for pregnant students and, on its face, a refusal to distinguish rules punishing pregnancy from rules punishing sexual activity. However, the precedential value of the case, insofar as it rejects a distinction between pregnancy and sexual activity, is limited by the court's reliance on a disparate impact analysis (which, as discussed below, subsequent developments have rendered less viable under Title IX) and by the paucity of the record before the court. Had the school more convincingly demonstrated a policy of excluding students for nonmarital sexual activity, it may have been more successful in defending against a disparate treatment claim.

The fact that courts can credibly distinguish excluding a student because of pregnancy from excluding a student for having engaged in sexual intercourse underscores Title IX's sharp divide in protecting pregnancy from punishment but excising the conduct leading to pregnancy from that protection. The courts' distinction between pregnancy and sexual activity also casts into sharp relief the fragility of Title IX's protection from pregnancy discrimination. If students can be punished for having engaged in sexual activity, as long as they are subjected to formally gender-neutral rules, pregnant students will always suffer more than non-pregnant, sexually active students (a group that includes all sexually active male students) for the obvious reason that their pregnancy, at some point, makes their past sexual activity visible.

An example from the higher education setting of how distinguishing sexual activity from pregnancy undercuts Title IX's protection from preg-

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<sup>98</sup> *Id.* at 979.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 980.

nancy discrimination can be found in *Hall v. Lee College, Inc.*<sup>101</sup> Lee College, a private religious college, suspended Melissa Hall after she became pregnant for violating its student code of conduct rules on sexual activity.<sup>102</sup> The court held that because the college's ban on "sexual immorality" applied to men as well as women and because Hall could not point to any similarly situated male students who were not disciplined under the policy, she failed to prove that the college discriminated in violation of Title IX.<sup>103</sup> It would not have been surprising if Hall was unable to point to a similarly situated male student, since there is no visible marker of male sexual conduct akin to pregnancy. In fact, however, Hall did identify a male comparator who impregnated his girlfriend but was not suspended.<sup>104</sup> The court rejected the male student as a comparator on the ground that he married his pregnant girlfriend, which cured the immorality in the eyes of the college.<sup>105</sup> The court did not address the fact that the college offered him, but not Hall, the option to marry the sexual partner and avoid suspension. In addition to the marital difference between Hall and the male comparator, the court also noted that the male comparator had a close familial relationship with the college president, which rendered him dissimilar to Hall for that reason as well.<sup>106</sup> Importantly, the court's ruling was that the college did not discriminate against Hall on the basis of pregnancy.<sup>107</sup> The court did not address the religious exemption to Title IX or the school's noncompliance with the statutory requirement that religious institutions submit a written request for the exemption to the Department of Education.<sup>108</sup> As a result, the precedential value of the case is not limited to religious institutions. Instead, the court's decision illustrates how, despite Title IX's ban on excluding students from educational programs on the basis of pregnancy, the statute's separation of pregnancy from sexual activity limits the scope of its pregnancy discrimination ban.

Although the religious exemption was not needed for the court to side with the college in *Hall*, Title IX's exemption for religious institutions does significantly limit Title IX's protection of pregnant students, even for the regulation's strongest provision barring their exclusion. Since its enactment, Title IX has provided an "out" for religious institutions to seek an exemption from the law when compliance with the statute or regulations would be inconsistent with the religious tenets of the institution.<sup>109</sup> The Department of Education grants religious exemptions without issuing public notices or opinions, making it difficult to track exemptions. But by all indications, the

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<sup>101</sup> 932 F. Supp. 1027 (E.D. Tenn. 1996).

<sup>102</sup> *Id.* at 1030.

<sup>103</sup> *Id.* at 1031, 1033.

<sup>104</sup> *Id.* at 1031–32.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 1033.

<sup>108</sup> *Id.*

<sup>109</sup> 20 U.S.C. § 1681(a)(3) (2020).

Department freely grants religious exemptions without much scrutiny, especially of late.<sup>110</sup> Pregnancy was a focal point behind the religious exemption and a primary concern of Congress in including it in the bill.<sup>111</sup> Institutions with religious affiliations will likely be successful in lifting Title IX's obligations with respect to pregnancy whenever they can plausibly claim a conflict with their religious precepts. By asserting religious views against premarital sexual activity, an institution could penalize virtually all pregnant students, and few or no male students, for having sex outside of marriage. Undoubtedly, the statute's religious exemption would also effectively exempt religious institutions from any obligations with respect to reproductive rights, were Title IX expanded or interpreted differently to have a broader application in that realm.<sup>112</sup> Indeed, all of the rights discussed herein would give way for religiously affiliated institutions that successfully invoke the religious exception to Title IX. For nonreligious institutions, however, Title IX creates a set of rights for pregnant students beyond the ban on exclusion, with varying levels of protection, as described below.

#### 4. *Title IX's Accommodation and Equal Treatment Approaches to Pregnancy*

The most expansive of Title IX's rights relating to pregnancy is the guarantee of a reasonably necessary medical leave for pregnancy and recovery therefrom, with a right to reinstatement at the same level one was employed at which when the leave began.<sup>113</sup> This right is substantive rather than comparative in nature because it does not depend on whether any other medical conditions qualify for such a leave.<sup>114</sup> This provision of the Title IX regulations was the basis for the successful effort to call attention to and end the plight of athletes who lost their athletic scholarships after becoming pregnant—a practice that came to light when ESPN exposed it in a widely watched episode of the show, "Outside the Lines," that first ran on Mother's

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<sup>110</sup> See Amanda Bryk, *Title IX Giveth and Title IX Taketh Away: How the Religious Exemption Eviscerates Protection Afforded Transgender Students Under Title IX*, 37 CARDOZO L. REV. 751, 777 (2015); Cocuzza, *supra* note 2, at 243.

<sup>111</sup> Cocuzza, *supra* note 2, at 244 n.151.

<sup>112</sup> Cf. Elizabeth B. Deutsch, *Expanding Conscience, Shrinking Care: The Crisis in Access to Reproductive Care and the Affordable Care Act's Nondiscrimination Mandate*, 124 YALE L.J. 2470 (2015) (exploring the stakes of expanding the religious exemption in the ACA).

<sup>113</sup> 34 CFR § 106.40(b)(5) (2020).

<sup>114</sup> Under the Pregnancy Discrimination Act, pregnant employees have only a comparative right of accommodation; they are entitled only to those accommodations that the employer has chosen to provide to employees with comparable disabilities from a different source. See *Young v. United Parcel Serv.*, 575 U.S. 206 (2015) (interpreting PDA's right of accommodation); see also Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model*, 21 YALE J. L. & FEMINISM 15 (2009) (exploring limits of comparative right of accommodation).

Day of 2007.<sup>115</sup> The 2007 OCR “Dear Colleague” letter was issued soon after the show aired. The letter explained that institutions must grant pregnant athletes a medically necessary leave from sport when the athlete’s doctor determined it was necessary and maintain their status as scholarship athletes.<sup>116</sup> Upon their return to the team, the athletes would be protected under the equal treatment mandate, discussed below, and must be treated no worse than athletes who return after recovery from other medical conditions.<sup>117</sup>

Although this set of rights is very helpful for athletes who become pregnant,<sup>118</sup> it has had a more modest effect on other areas of educational opportunity. Because the leave and reinstatement right accommodate only the physical effects of pregnancy, it is less helpful in navigating the longer-term conflicts that continue well after the student has physically recovered from pregnancy. The accommodation right in the leave provision is a time-limited accommodation with a short clock. While the physical effects of pregnancy and recovery are present, a student has the implicit right to make up the missed work so that the student may continue their education at the same level at which the leave began. Hence, students sidelined by pregnancy and recovery may succeed in asserting a right to finish a course or, at the graduate level, continue with a fellowship or research opportunity.<sup>119</sup> These rights are no small matter for a student seeking to minimize the disruptions due to pregnancy in her educational trajectory.<sup>120</sup> However, the accommodation and reinstatement right ends when the physical recovery period is over and does not require leave or opportunities to make up missed work for absences related to the care of a newborn, such as pediatrician appointments, breastfeeding, or other caretaking.<sup>121</sup> As a result, despite a relatively strong

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<sup>115</sup> Brake, *The Invisible Pregnant Athlete*, *supra* note 80, at 327.

<sup>116</sup> Stephanie J. Monroe, *supra* note 78. The following year, the NCAA amended its scholarship rules to require member schools to treat pregnancy no worse than other injuries or illnesses, which means a scholarship cannot be withdrawn based on pregnancy alone. The new rules came with a model policy that includes other protections for pregnant college athletes. See NCAA, 2019–2020 NCAA DIVISION I MANUAL, 15.3.4.3, 15.3.2.1 Division I and II Bylaw 15, § 3.4.3; see also Bylaw 15, § 3.2.2; Nancy Hogshhead-Makar & Elizabeth A. Sorensen, *Pregnant and Parenting Student-Athletes*, NCAA GENDER EQUITY 1, 31 (2008), <http://www.ncaa.org/sites/default/files/PregnancyToolkit.pdf> [<https://perma.cc/A5LD-EQN2>].

<sup>117</sup> NCAA, 2019–2020 NCAA DIVISION I MANUAL, 15.3.4.3, 15.3.2.1 Division I and II Bylaw 15, § 3.4.3; see also Bylaw 15, § 3.2.2.

<sup>118</sup> See Brake, *The Invisible Pregnant Athlete*, *supra* note 80, at 340–44.

<sup>119</sup> Mary Ann Mason & Jaclyn Younger, *Title IX and Pregnancy Discrimination in Higher Education: The New Frontier*, 38 N.Y.U. REV. L. & SOC. CHANGE 269, 296 (2014).

<sup>120</sup> See, e.g., *Frankola v. La. St. Univ. Sch. of Med.*, No. 15-5933, 2017 WL 372520 (E.D. La. Jan. 26, 2017) (finding that student’s allegation that she was denied readmission to medical school in part due to her pregnancy after taking a medical leave of absence was sufficient to state a claim under Title IX and survived defendant’s motion to dismiss).

<sup>121</sup> Medical professionals define the physical recovery period from normal childbirth as six weeks for a vaginal birth and eight weeks for a Caesarean section. That period can vary tremendously for individuals who have a complicated birth or develop postpartum

set of rights, the leave and reinstatement requirement does not prevent a good portion of the educational disruption likely to result from pregnancy and childbirth.

The guarantee of an absolute right of accommodation for pregnant students is the hallmark of a “special treatment” approach to pregnancy in which rights are designed to protect pregnant women regardless of whether individuals with comparable temporary disabilities have the same protections.<sup>122</sup> A downside of this approach is that it sets the stage for treating pregnancy specially in ways that may put pregnant students at an educational disadvantage. The Title IX regulation takes this path by allowing separate schools and programs for pregnant and parenting students, as long as they are offered on a “completely voluntary” basis and the instructional component is “comparable.”<sup>123</sup> The comparable and voluntary restrictions on separate programs have proven difficult to enforce. To require a program to be comparable is a low bar. Separate programs have been criticized for focusing on parenting skills and “soft skills” like quilting and home economics instead of offering a college prep curriculum.<sup>124</sup>

Although some of these programs have been discontinued due to public pressure, none has yet been ruled by a court to be in violation of the regulation’s comparability requirement.<sup>125</sup> The closest case to do so involved the Catherine Ferguson Academy (CFA), a separate charter school in Detroit for pregnant and parenting students that was restructured as part of a “strict discipline” school for delinquent youth.<sup>126</sup> In a Title IX lawsuit brought by students and their parents, the court issued a ruling permitting the plaintiffs to amend their complaint to add Title IX claims, crediting the plaintiffs’ allegations that the education offered by CFA was inferior and contrary to the Title IX regulations.<sup>127</sup> The inequalities in that case were extreme, as the school lacked even basic courses needed to graduate from high school.<sup>128</sup>

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conditions. See Mattea Romano, *Postpartum Period: Three Distinct but Continuous Phases*, 4 J. Prenatal Med. 22 (2010); cf. Cal. Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272, 290 (1987) (holding under the Pregnancy Discrimination Act that the right of accommodation extends only to “the period of *actual physical disability* on account of pregnancy, childbirth, or related medical conditions”).

<sup>122</sup> On the longstanding debate among women’s rights advocates about whether this is the right approach, see Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567, 603–05 (2010); Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN’S L.J. 1 (1985); Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN’S RTS. L. REP. 175 (1982).

<sup>123</sup> 34 C.F.R. § 106.40(b)(3) (2020).

<sup>124</sup> Monica J. Stamm, *A Skeleton in the Closet: Single-Sex Schools for Pregnant Girls*, COLUM. L. REV. 1203, 1218 (1998). Julie Bosman, *Schools for Pregnant Girls, Relic of 1960s New York, Will Close*, N.Y. TIMES (May 24, 2007), <https://www.nytimes.com/2007/05/24/education/24educ.html> [<https://perma.cc/LL9A-ZU7E>]

<sup>125</sup> Stamm, *supra* note 124, at 1218; Bosman, *supra* note 124.

<sup>126</sup> D.W. ex rel Crosby v. Blanche Kelso Bruce Acad., No. 13-12415, 2013 WL 5819619, at \*1–2 (E.D. Mich. Oct. 29, 2013).

<sup>127</sup> *Id.* at \*5.

<sup>128</sup> *Id.* at \*1.

CFA closed one year after the court's ruling, but a new charter school, Pathways Academy, opened to serve pregnant and parenting students in the Detroit school district.<sup>129</sup> It was identified as a low-performing school by the Michigan Department of Education in 2018.<sup>130</sup> The Title IX regulation's allowance of separate, academically diluted programs for pregnant and parenting students reflects the mentality of *just get her through*, prioritizing a lower school drop-out rate over other more ambitious educational objectives.

Like the comparability requirement, the voluntariness of separate programming has also proven difficult to enforce. Although explicit school policies requiring pregnant girls to attend separate programs are clearly impermissible, counseling girls that they would be better off in separate programs is more difficult to address. For example, in the Title IX challenge to the CFA separate school in Detroit, plaintiffs alleged that Detroit public school officials forced them to leave their regular schools when they became pregnant, telling them they "could not guarantee their public safety in their pregnant condition" in their regular schools.<sup>131</sup> It is impossible to quantify how often such "counseling" occurs, but commentators opine that Title IX has not done enough to stop such practices.<sup>132</sup> Even without overtly pushing students toward a separate school, voluntariness is undermined when a separate school is the only program with on-site child care and other services needed to support pregnant and parenting students.<sup>133</sup> And yet, providing unique services to pregnant and parenting students at a separate school appears to be anticipated by, and not in violation of, the regulation's allowance of separate programs.

Apart from the right to a medically necessary leave and full reinstatement, the remaining Title IX rights for pregnant students are firmly enshrined in an equal treatment model of equality. Pregnant students must be treated no worse than similarly situated non-pregnant students, and the regulation identifies the relevant comparison group as nonpregnant students with

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<sup>129</sup> See Kate Wells, *Detroit High School for Pregnant Teens is Closing—This Time, For Real*, MICH. RADIO (June 5, 2014), <https://www.michiganradio.org/post/detroit-high-school-pregnant-teens-closing-time-real> [<https://perma.cc/ZGG9-QU5E>].

<sup>130</sup> See Lori Higgins, *More Michigan Schools Are Failing: Most Are Charters*, DETROIT FREE PRESS (Mar. 30, 2018), <https://www.freep.com/story/news/education/2018/03/30/charter-schools-michigan-failing/472900002/> [<https://perma.cc/3WEY-2XE7>].

<sup>131</sup> *Id.* at \*1; see also *Kicklighter v. Evans Cty. Sch. Dist.*, 968 F. Supp. 712 (S.D. Ga. 1997) (plaintiff lost equal protection claim brought under § 1983 despite allegations that school administrators suggested plaintiff attend an alternative school for disruptive students because of her pregnancy status).

<sup>132</sup> See Kendra Fershee, *An Act for All Contexts: Incorporating the Pregnancy Discrimination Act into Title IX to Help Pregnant Students Gain and Retain Access to Education*, 39 HOFSTRA L. REV. 281, 313 (2010) (discussing an unreported decision in a 2005 case in which students alleged they were involuntarily sent to an inferior separate school for pregnant students once school officials learned of their pregnancies).

<sup>133</sup> *Id.* at 315 (alleging that they had no other educational options because CFA was the only school that provided the services they needed and a non-stigmatizing environment for pregnant and parenting students).

temporary disabilities.<sup>134</sup> Pregnancy, then, is treated as a temporary interruption of education without long-term consequence. This framework reflects a similar resistance to “special rights” as was evident in the Supreme Court’s most recent Pregnancy Discrimination Act case, *Young v. United Parcel Service, Inc.*<sup>135</sup> Although the Court in *Young* crafted a standard that allows pregnant employees to challenge many refusals to accommodate pregnancy under Title VII, the Court repeatedly characterized the plaintiff’s argument as seeking “most favored nation” status—demanding to be compared to the employees receiving the most generous accommodations from the employer.<sup>136</sup> The phrase reflects the Court’s resistance to a model of equality that would grant pregnant workers “special rights.” The Court’s ruling suggests that accommodations for pregnancy may go only so far before moving from equal to special treatment.

Wanda Pillow has critiqued Title IX’s approach to pregnancy, observing that the equal treatment standard invites implicit judgments about the deservingness of pregnant students. She asks, “[i]s ‘equal treatment’ enacted through discourses and beliefs that pregnant/parenting students deserve to be treated equally or because these students do *not* deserve any extra consideration?”<sup>137</sup> Pillow argues that equal treatment is not “neutral” at all but actually harmful to pregnant students if the treatment deemed “equal” does not go far enough to provide pregnant students with the support and resources they need to succeed educationally. Comparing pregnancy to a urinary tract infection, for example, and allotting bathroom breaks accordingly, or to physical conditions requiring modifications to desks, reduces pregnancy to a temporary physical inconvenience incommensurate with its impact on education. The equal treatment lens lends credence to a stingy view of what pregnant students are and are not entitled to receive. Title IX’s limited accommodation of pregnancy—requiring a medically necessary leave—does little better, as it too requires only a temporary workaround for the period in which pregnancy keeps a student homebound. Both sets of rights under Title IX address only pregnancy’s physical effects on education, rather than the long-term educational impacts of motherhood.

### 5. *Surveying the Title IX Case Law on Pregnancy*

To be sure, there have been some “wins” for pregnant students under Title IX. In one such case, *Hogan v. Ogden*, the plaintiff was a student at Central Washington University and in her eighth month of pregnancy when her physician placed her on bed rest.<sup>138</sup> Instead of allowing her to complete the work required for a group project assignment, the professor allegedly

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<sup>134</sup> 34 C.F.R. § 106.40(b)(4) (2020).

<sup>135</sup> 575 U.S. 206, 223–24 (2015).

<sup>136</sup> *Id.* at 235.

<sup>137</sup> Pillow, *Embodying Policy Studies*, *supra* note 60, at 143.

<sup>138</sup> No. CV-06-5078-EFS, 2008 WL 2954245, at \*1 (E.D. Wash. July 30, 2008).

attempted to persuade her to drop the class even though the other students in her group offered to work at the plaintiff's house and wanted her to remain in the group.<sup>139</sup> The plaintiff alleged that other students who had similar conflicts had been accommodated and were allowed to complete their coursework, while she was not.<sup>140</sup> The court denied the university's motion for summary judgment, and the case later settled.<sup>141</sup> Similarly, in *Frankola v. Louisiana State University School of Medicine*, the plaintiff was able to prevail on a motion to dismiss the complaint based on allegations that she was denied readmission to medical school due in part to her pregnancy after taking a medical leave of absence.<sup>142</sup> These and other partial victories show that Title IX can be a useful tool for challenging pregnancy discrimination in education.<sup>143</sup>

However, the case law is mixed,<sup>144</sup> and perhaps more importantly, it is sparse.<sup>145</sup> In her 2011 article, Michelle Gough identified only eighteen cases decided in nearly four decades, from 1972 to January of 2010, implicating Title IX issues related to pregnant and parenting students.<sup>146</sup> Several of these cases did not include Title IX claims even though they involved allegations of discrimination in education programs relating to a student's pregnancy or

<sup>139</sup> *Id.* at \*2.

<sup>140</sup> *Id.* at \*10.

<sup>141</sup> Emily McNee, *Pregnancy Discrimination in Higher Education: Accommodating Student Pregnancy*, 20 CARDOZO J.L. & GENDER 63, 72 (2013).

<sup>142</sup> No. 15-59332017, 2017 WL 372520, at \*1,\*5 (E.D. La. Jan. 26, 2017).

<sup>143</sup> See, e.g., *Conley v. Nw. Fla. St. C.*, 145 F Supp.3d 1073, 1074 (N.D. Fla. 2015) (rejecting college's motion to dismiss plaintiff's claim that she was denied participation in clinical rotation program due to her pregnancy in violation of Title IX and holding that Title IX provides a private right of action to sue for pregnancy discrimination); *Varlesi v. Wayne St. U.*, 909 F. Supp. 2d 827, 852–53 (E.D. Mich. 2012) (holding plaintiff's claim that she was given a failing performance review in her internship because of her pregnancy outside of marriage in violation of Title IX survived defendant's motion for summary judgment).

<sup>144</sup> See, e.g., *Workman v. Univ. of Akron*, No. 5:16-cv-156, 2017 WL 6326898, at \*8 (N.D. Ohio 2017) (granting defendant's motion for summary judgment because plaintiff failed to plead sufficient facts to support her claim that she was unable to complete practicum necessary for her masters in family counseling and failed several exams due to pregnancy discrimination); *McConaughy v. U. of Cincinnati*, No. 1:08-cv-320-HJW, 2011 WL 1459292, at \*1 (S.D. Ohio April 15, 2011) (granting defendant's motion for summary judgment where plaintiff, student in Design Architecture Art and Planning, sued for failure to accommodate her pregnancy, but failed to make out prima facie case because she failed to allege that she was performing at a level up to her professor's legitimate expectations).

<sup>145</sup> OCR can enforce Title IX on a separate track apart from private lawsuits, but it is a weak enforcement mechanism; termination of federal funds is not a realistic threat and, even if found in violation, recipients can agree to come into compliance before any penalty is meted out. Fershee, *supra* note 132, at 319–20.

<sup>146</sup> See Michelle Gough, *Parenting and Pregnant Students: An Evaluation of the Implementation of the "Other" Title IX*, 17 MICH. J. GENDER & L. 211, 219 (2011); see also Fershee, *supra* note 132, at 310 ("Since the passage of Title IX, there have been fewer than fifteen reported cases where a federal court has heard a claim of pregnancy discrimination under Title IX, and fewer than five where a student brought an action for pregnancy discrimination against her school.").

parenting status.<sup>147</sup> Our research updating Gough's list found only seven cases since 2010 involving alleged sex discrimination on the basis of pregnancy or parenting in education programs, one of which did not include a Title IX claim.<sup>148</sup> This paucity of case law, combined with evidence of widespread noncompliance, suggests a larger disconnect between Title IX's promise of rights and the reality facing pregnant students. Title IX's pronouncement of rights may trigger resistance by teachers and administrators leery of "special treatment" for students viewed as having compromised their educational potential by becoming pregnant. The low number of cases may also be indicative of a disconnect between what the law forbids and the obstacles pregnant and parenting students encounter.

Perhaps most tellingly, all of the recent cases in which plaintiffs have succeeded in being reinstated or receiving the sought-after accommodations are at the higher education level. In Gough's review of the pre-2011 case law, she found the vast majority of the successful Title IX plaintiffs were higher education students.<sup>149</sup> In our update to that research, all of the cases except the challenge to the Detroit charter school for pregnant and parenting students, discussed above, were challenges to alleged pregnancy discrimination in higher education. What explains the absence of cases at the middle and high school level?<sup>150</sup> The commentary suggests that students at this level encounter numerous obstacles and discrimination that would violate Title IX, including refusals to excuse pregnancy-related absences, denial of opportunities to make up missed work, and hostility or tracking from teachers and administrators discouraging these students from continuing in academically rigorous programs.<sup>151</sup> Younger students may be less likely to know their rights and less able to mobilize to assert them. In addition, Pillow's analysis suggests that younger students may be particularly vulnerable to the stigmatizing discourses that depict pregnant teens and teen mothers as educationally expendable.<sup>152</sup> Teachers, administrators, and even the students

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<sup>147</sup> See Gough, *supra* note 146, at 220.

<sup>148</sup> See *Holloway v. Howard Univ.*, 206 F. Supp. 3d 446 (D.D.C. 2016); *Conley v. Nw. Fla. St. Coll.*, 145 F. Supp. 3d 1073 (N.D. Fla. 2015); *Frankola v. La. St. Univ. Sch. of Med.*, NO: 15-5933, 2017 WL 372520 (E.D. La. Jan. 26, 2017); *D.W. ex rel Crosby v. Blanche Kelso Bruce Acad.*, No. 13-12415, 2013 WL 5819619 (E.D. Mich. Oct. 29, 2013); *Varlesi v. Wayne State Univ.*, 909 F. Supp. 2d 827 (E.D. Mich. 2012); *Workman v. Univ. of Akron*, No. 5:16-cv-156, 2017 WL 6326898 (N.D. Ohio 2017); *McConaughy v. U. of Cincinnati*, no 1:08-cv-320-HJW, 2011 WL 1459292 (S.D. Ohio Apr. 15, 2011)

<sup>149</sup> See Gough, *supra* note 146, at 220-247.

<sup>150</sup> Fershee, *supra* note 132, at 311 ("This dearth of case law could imply that pregnancy discrimination is not happening in federally funded schools, or, as is more likely, it could mean that when it happens, bringing a case is simply not a possible or desirable remedy.")

<sup>151</sup> See, e.g., Victoria Ryan, *Eliminating the Element of Chance: School District Title IX Implementation to Support Pregnant and Parenting Students*, 32 BERKELEY J. GENDER L. & JUST. 73, 78-79 (2017); Brittany Ducker, *Overcoming the Hurdles: Title IX and Equal Educational Attainment for Pregnant and Parenting Students*, 36 J.L. & EDUC. 445, 448-50 (2007).

<sup>152</sup> Pillow, *Embodying Policy Studies*, *supra* note 60, at 138.

themselves may view pregnancy as an unfortunate but fatalistic ending point of a successful educational trajectory. Without advocates and resources to challenge that view, violations of rights are likely to go uncontested and even unnoticed.<sup>153</sup>

### 6. *Few Protections Against Discrimination Against Mothers*

Whatever rights Title IX secures to help pregnant students navigate their educational pathways, for all practical purposes, come to a screeching halt once the pregnancy and recovery from it are over. New mothers gain little from Title IX's set of rights for pregnant and parenting students. The accommodation right in Title IX ends upon reinstatement to the program after the conclusion of a medically necessary leave.<sup>154</sup> And the equal treatment set of rights, which compare pregnancy to a temporary disability, is of no use once the physical limitations of pregnancy have resolved. At that point, the regulation guarantees only formal equality. The only Title IX regulation on the rights of parents states that "[a] recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex."<sup>155</sup> Mothers may not be treated worse than fathers, but no educational accommodations or supports need be provided to either. In the Office for Civil Rights pamphlet on the rights of pregnant and parenting students, all of the examples of Title IX violations in the Question and Answer section of the pamphlet involved schools' treatment of pregnant students and no Title IX violations specific to the rights parenting students.<sup>156</sup> This absence speaks to the weaker framework of rights for parenting as opposed to pregnancy.

Gender neutrality toward new parents falls far short of what is needed to cushion new mothers from disruptions in their education.<sup>157</sup> Younger women likely feel the conflicts between parenting and education most acutely due to the typical lack of flexibility in the school day and the bureaucratic rigidity of educators at this level.<sup>158</sup> Students parenting babies and young children can quickly fall behind academically or be forced to leave school altogether for missing school to bond with a newborn, care for a sick child,

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<sup>153</sup> Fershee, *supra* note 132, at 319 (criticizing the Title IX regulatory framework for lack of reporting requirements with respect to pregnant students and weak enforcement mechanism, and elaborating the challenges facing pregnant students in asserting their rights under Title IX).

<sup>154</sup> 34 C.F.R. § 106.40(b)(5) (2020).

<sup>155</sup> 34 C.F.R. § 106.40(a) (2020).

<sup>156</sup> U.S. DEPT. OF EDUC., OFF. FOR CIVIL RIGHTS, SUPPORTING THE ACADEMIC SUCCESS OF PREGNANT AND PARENTING STUDENTS (June 2013).

<sup>157</sup> See Jocelyn Tillisch, *Title IX and Gender Stereotype Theory: Protecting Students from Parental Status Discrimination*, 42 SEATTLE U. L. REV. 1223 (2019).

<sup>158</sup> See Brittany L. Grome, *The Four-Week Challenge: Student Mothers, Maternity Leaves, and Pregnancy-Based Sex Discrimination*, 4 ALB. GOVT. L. REV. 538 (2011) (discussing the challenges faced by new mothers returning to school).

or take the baby to the doctor.<sup>159</sup> The refusal of schools to excuse absences for missed classes to care for a sick child affects student-mothers much more than student-fathers.<sup>160</sup> Combined with other rigid practices, such as not allowing make-up work, the refusal to accommodate new parents' caretaking obligations can mean academic failure for student parents, especially mothers.<sup>161</sup> Pillow identifies deep structural conflicts between schools and the legal and social service framework governing parents, especially economically vulnerable parents and students of color.<sup>162</sup> The social welfare system and publicly funded child care options, Pillow argues, place demands on teen mothers that are often incompatible with school rules.<sup>163</sup> Educational policy prioritizing standardized test performance pressures schools to enforce strict attendance policies and eschew flexibility toward students with parenting conflicts.<sup>164</sup> Title IX does not require schools to adjust their rules in the face of these conflicting demands.

An early Title IX precedent offered some hope that the law might serve as a vehicle for challenging formally gender-neutral practices that effectively deny mothers the support they need to succeed educationally. In *De La Cruz v. Tormey*, the Ninth Circuit reinstated a claim challenging the refusal of a community college to provide child care to students, reversing the lower court's grant of summary judgment to the college.<sup>165</sup> The court noted several distinctive facts in the record that made the case more than a run-of-the-mill lack of sufficient child care, including the college's awareness of a severe shortage of affordable child care options in the surrounding area and its failure to take advantage of grant opportunities that would have provided financial support for the college to provide needed care, contrary to the recommendations of its own hired consultant and a faculty-student committee.<sup>166</sup>

*De La Cruz* has never been overruled but likely does not survive subsequent developments in the Supreme Court. Much has happened in the quarter century since *De La Cruz* was decided—most prominently, the Supreme Court's holding that disparate impact is not actionable under the statute upon

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<sup>159</sup> Pillow, *Embodying Policy Studies*, supra note 60, at 143; Elizabeth M. Hady, *The Absence of Parenting Students' Rights: How and Why Title IX Tolerates Discriminatory Attendance Policies*, 21 *CARDOZO J.L. & GENDER* 95, 101 (2014).

<sup>160</sup> Hady, supra note 159, at 109.

<sup>161</sup> The disproportionate caretaking burdens borne by mothers versus fathers are well established. See, e.g., DARCY LOCKMAN, *ALL THE RAGE, MOTHERS, FATHERS, AND THE MYTH OF EQUAL PARTNERSHIP* 205–241 (2019); Claire Cain Miller, *Millennial Men Aren't the Dads They Thought They'd Be*, *N.Y. TIMES* (July 30, 2015), <https://www.nytimes.com/2015/07/31/upshot/millennial-men-find-work-and-family-hard-to-balance.html> [<https://perma.cc/8P4U-95GS>]; see also Lisa Bunting & Colette McAuley, *Research Review: Teenage Pregnancy and Parenthood: The Role of Fathers*, 9 *CHILD & FAM. SOC. WORK* 295 (2004).

<sup>162</sup> Pillow, *Embodying Policy Studies*, supra note 60, at 143–44.

<sup>163</sup> *Id.*

<sup>164</sup> Hady, supra note 159, at 101.

<sup>165</sup> 582 F.2d 45, 64 (9th Cir. 1978).

<sup>166</sup> *Id.* at 48–49.

which Title IX was modeled, Title VI of the Civil Rights Act of 1964. In *Alexander v. Sandoval*, the Court held that Title VI's ban on race discrimination in federally funded programs does not encompass disparate impact, so while the regulations prohibiting disparate impact may be administratively enforced, they do not support a private right of action for disparate impact claims.<sup>167</sup> What this means for Title IX is not settled, but there is good reason to believe that post-*Sandoval*, courts will not sustain disparate impact challenges under Title IX, whether for the lack of affordable child care options for student parents or the disparate effects on mothers of other formally gender-neutral educational practices.<sup>168</sup>

In sum, Title IX's sex equality framework extends important, but ultimately limited, protection from discrimination against students who are pregnant and, to an even lesser extent, newly parenting students. Title IX offers no support, however, for avoiding pregnancy and motherhood in the first place. For that, the law eschews sex equality altogether in favor of grounding a limited and ultimately inadequate set of rights in liberty and autonomy. The next section explores the logic and limits of the law's approach to reproductive rights, especially in relation to minors, a group especially likely to face educational impacts from an unwanted pregnancy.

### III. REPRODUCTIVE RIGHTS AS AUTONOMY RIGHTS: THE AUTONOMY/ EQUALITY SPLIT AND THE LIMITS OF AN AUTONOMY FRAMEWORK FOR FEMALE STUDENTS

Feminist scholars have long argued that the key difference between men and women is their differing roles in the reproductive process. Women's unique role, which is more extensive and burdensome in every respect, has been a significant determinant of their inequality in other areas of life such as education and work.<sup>169</sup> Several Supreme Court Justices have made this connection at various times as well, observing, for example, in *Planned Parenthood v. Casey* that the "ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."<sup>170</sup> Indeed, as Justice Ginsburg noted in a later pregnancy discrimination case, "[c]ertain attitudes about pregnancy and childbirth, throughout human history, have sustained pervasive, often law-sanctioned, restrictions on a woman's place among paid workers and

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<sup>167</sup> 532 U.S. 275, 282–85 (2001).

<sup>168</sup> Hady, *supra* note 159, at 104–06 (taking a dim view of Title IX's applicability to disparate impact claims); *cf.* Mason & Younger, *supra* note 119, at 297 (acknowledging contrary arguments but arguing that *Sandoval* need not govern Title IX and describing *Cannon* as a disparate impact challenge).

<sup>169</sup> *See, e.g.,* Kay, *supra* 122; Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PENN. L. REV. 955 (1984).

<sup>170</sup> 505 U.S. 833, 856 (1992).

active citizens.”<sup>171</sup> Yet the Court as a whole has often been blind to the sex equality aspects of women’s reproductive rights and has bifurcated sex equality law from reproductive rights, which are protected as a matter of liberty but not women’s equality. Despite some early missteps by the Court, the treatment of a pregnant student or a pregnant worker is now understood to implicate sex equality. However, the treatment of that same woman’s fertility, use of contraception, or access to abortion has been understood to implicate her “liberty” and therefore her right of “privacy.” But, as Justice Ruth Bader Ginsburg argued during her career as a lawyer and advocate for women’s rights, this distinction is misguided. “Not only the sex discrimination cases,” she wrote, “but the cases on contraception, abortion, and illegitimacy as well, present various faces of a single issue: the roles women are to play in society. Are women to have the opportunity to participate in full partnership with men in the nation’s social, political, and economic life?”<sup>172</sup>

As this section will explore, the Supreme Court’s decision to situate reproductive rights within a liberty framework under the constitutional right to privacy rather than an equality one has had many consequences, chief among them that neither the state nor its institutions (such as schools) are typically under any obligation to create conditions where a woman’s autonomy can be fully exercised. This section will explore the doctrinal grounding of rights related to the entire reproductive process—not just to a woman’s plight while pregnant or giving birth—and the consequences for young women, especially those already marginalized by race, class, or other potential sources of disadvantage.

### A. *Grounding of Rights Related to Reproduction*

An average woman will be of “reproductive age” for at least three decades.<sup>173</sup> Eighty-six percent of women in the United States will give birth to at least one child, and the average woman will have two or three children.<sup>174</sup> Whether a woman has zero, one, or two or more children, she will spend the

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<sup>171</sup> AT&T Corp. v. Hulteen, 556 U.S. 701, 724 (2009) (Ginsburg, J., dissenting).

<sup>172</sup> Ruth Bader Ginsburg, *Sex Equality and the Constitution: The State of the Art*, 4 WOMEN’S RTS. L. REP. 143, 143 (1978).

<sup>173</sup> ADAM SONFIELD ET AL., GUTTMACHER INST., MOVING FORWARD: FAMILY PLANNING IN THE ERA OF HEALTH REFORM (2014), [https://www.guttmacher.org/sites/default/files/report\\_pdf/family-planning-and-health-reform.pdf](https://www.guttmacher.org/sites/default/files/report_pdf/family-planning-and-health-reform.pdf) [<https://perma.cc/QGP4-9N3K>] (“In the United States, the average desired family size is two children. To achieve this family size, a woman must use contraceptives for roughly three decades.”).

<sup>174</sup> Claire Cain Miller, *Fertility Rate Is Down, Yet More U.S. Women Are Becoming Mothers*, N.Y. TIMES (Jan. 19, 2018), <https://www.nytimes.com/2018/01/18/upshot/the-us-fertility-rate-is-down-yet-more-women-are-mothers.html> [<https://perma.cc/3GPT-FDSY>] (“86 percent of women ages 40 to 44—near the end of their reproductive years—are mothers . . . .”); GRETCHEN LIVINGSTON, PEW RES. CTR., FAMILY SIZE AMONG MOTHERS (2015), <https://www.pewsocialtrends.org/2015/05/07/family-size-among-mothers/> [<https://perma.cc/72WJ-6Z72>] (“Now, moms have 2.4 children on average—a number that has been fairly stable for two decades.”).

vast majority of her fertile decades trying to prevent pregnancy and likely some time responding to unwanted pregnancies. What rights does she have for the aspects of the reproductive process that do not include a viable, continued pregnancy?

Women's rights to prevent pregnancy through contraception or to terminate pregnancy via abortion have been understood to raise constitutional, and often only constitutional, questions. That approach has clear benefits—rights deemed to be constitutional in nature are more uniform across the country and cannot, at least in theory, be undermined by legislative policies that are hostile to those rights—but drawbacks as well. A constitutional right to buy or use contraception can mean very little to a woman who cannot afford it, and the constitutional right to terminate a pregnancy can mean very little to a woman who lives in a state that has driven all the providers out. The inability to prevent pregnancy or to terminate an unwanted pregnancy will have hugely disproportionate consequences for the women than for the men who were involved in conception. The consequence of situating these rights in a privacy framework means that courts are rarely asked to consider the implications for gender equality of fettered access to reproductive health information and services.

### 1. *Contraception: Rights and Access*

Legal regulation of contraception in the United States dates primarily to the Comstock Act, passed by Congress in 1873.<sup>175</sup> This law, followed in form by many state laws, was predicated on the idea “that it was obscene to separate sex and procreation.”<sup>176</sup> Although the Comstock Act was repealed in 1909, some of the state analogs persisted well into the twentieth century. These laws were ostensibly gender-neutral, but they were enacted against a backdrop of deeply entrenched views about the proper roles of men and women and equally entrenched double standards when it came to sex. As Neil and Reva Siegel argue, the gender differences were not limited to social norms or disparate impact—courts interpreted the laws in sex-differentiated ways, permitting, for example, exceptions for men who wanted to use condoms to prevent sexually transmitted diseases but not for women who wanted to prevent even a dangerous pregnancy.<sup>177</sup> What put an end to these laws was not a recognition of the role these laws played, both as written and as interpreted, in exacerbating women's inequality. Rather, the Supreme Court intervened to protect the right of privacy.

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<sup>175</sup> Comstock Act ch. 258, 17 Stat. 598, 598 (1873) (prohibiting the sale or distribution in the U.S. mail of articles used “for the prevention of conception, or for causing unlawful abortion” and prohibiting dissemination of information about contraception or abortion because it was deemed “obscene”).

<sup>176</sup> Neil S. Siegel & Reva B. Siegel, *Contraception as a Sex Equality Right*, 124 *YALE L.J. F.* 349, 351 (2015).

<sup>177</sup> *Id.* at 351–52.

Connecticut law made it a crime for any person to use “any drug, medicinal article or instrument for the purpose of preventing conception” or for any person to assist or abet another person’s use of contraception.<sup>178</sup> To stage a challenge to the law, a doctor and an executive at Planned Parenthood opened a clinic in New Haven, through which they gave “information, instruction, and medical advice to ‘married persons’ as to the means of preventing conception.”<sup>179</sup> They then “examined the wife and prescribed the best contraceptive device or material for her use.”<sup>180</sup> The doctor and clinic director were arrested and convicted under these statutes, the constitutionality of which they challenged.<sup>181</sup> This challenge ultimately reached the U.S. Supreme Court, in *Griswold v. Connecticut*, which was asked whether the state of Connecticut could constitutionally criminalize the distribution and use of contraception by married couples.<sup>182</sup> In a brief majority opinion, Justice William O. Douglas described the many different provisions of the Constitution that expressly or by interpretation recognized rights of privacy—the right against unreasonable search and seizure, the right to freely associate, the right to raise children without interference from the government, for example.<sup>183</sup> He then wrote that Connecticut’s contraceptive ban “concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.”<sup>184</sup> By criminalizing not only the sale of contraceptives but also their *use*, Connecticut sought to achieve its goal of restricting sex to reproductive purposes with “a maximum destructive impact upon that relationship.”<sup>185</sup> In a now-famous quote, he asked whether Connecticut would have the police “search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?”<sup>186</sup> Surely, he concluded, the “very idea is repulsive to the notions of privacy surrounding the marriage relationship,” and barring the police from such a “sacred precinct” was one function of “a right of privacy older than the Bill of Rights.”<sup>187</sup>

In 1972, the Court extended the constitutional right to use contraceptives to single people in *Eisenstadt v. Baird*.<sup>188</sup> In the majority opinion, Justice William J. Brennan wrote that the right of privacy was a right of individuals, married or not. The decision whether to have a baby was to

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<sup>178</sup> CONN. REV. STAT. § 6246 (1939); *see also* *State v. Nelson*, 11 A.2d 856, 862 (Conn. 1940) (refusing to uphold “medicinal” ban on contraceptives). For a detailed account of the challenges to the Connecticut law before one reached the U.S. Supreme Court, *see* Siegel & Siegel, *supra* note 176, at 350–56.

<sup>179</sup> 381 U.S. 479, 480 (1965).

<sup>180</sup> *Id.*

<sup>181</sup> *See id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 483–85.

<sup>184</sup> *Id.* at 485.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 485–86.

<sup>188</sup> 405 U.S. 438, 453 (1972).

remain free of “unwarranted governmental intrusion.”<sup>189</sup> That everyone has the *right* to use birth control is a widely accepted principle. Judge Robert Bork’s open opposition to the *Griswold* ruling cost him a seat on the Supreme Court in 1987.<sup>190</sup> The legacy of a landmark ruling like *Griswold v. Connecticut* goes far beyond increasing the accessibility of contraception. *Griswold* was part and parcel of an era that gave women—through legal, social, and technological developments—greater control over reproduction. Of women who have ever had sex, ninety-nine percent have used contraception other than natural family planning (including ninety-eight percent of Catholic women, despite the Church’s official denunciation in response to the development of the birth control pill in 1968).<sup>191</sup> And that control, in turn, facilitated women’s greater integration into the labor force and access to better economic security.

A constitutional right does not, however, guarantee access, and the fights after *Griswold* were focused almost exclusively on funding. The birth control pill was first approved in 1960, and its use became even widespread after Congress passed Title X in 1970, which resulted in the establishment of family planning clinics supported by federal money.<sup>192</sup> Many poor women now had access to birth control.<sup>193</sup> But middle-class women struggled to afford birth control, in part because it was routinely excluded from otherwise comprehensive health insurance plans.<sup>194</sup> Their fight revolved around “contraceptive equity” lawsuits, which raised the question whether employer-based health plans should cover the cost of prescription birth control that was used only by women and the deprivation of which harmed women disproportionately. Cases were litigated under Title VII, a broad employment discrimination law, with mixed results.<sup>195</sup> The number of plans that covered

<sup>189</sup> *Id.*

<sup>190</sup> See MARK GITENSTEIN, MATTERS OF PRINCIPLE: AN INSIDER’S ACCOUNT OF AMERICA’S REJECTION OF ROBERT BORK’S NOMINATION TO THE SUPREME COURT 211–13 (1992); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 7–12 (1971).

<sup>191</sup> RACHEL K. JONES & JOERG DREWEKE, GUTTMACHER INST., COUNTERING CONVENTIONAL WISDOM: NEW EVIDENCE ON RELIGION AND CONTRACEPTIVE USE (2011), [https://www.guttmacher.org/sites/default/files/report\\_pdf/religion-and-contraceptive-use.pdf](https://www.guttmacher.org/sites/default/files/report_pdf/religion-and-contraceptive-use.pdf) [<https://perma.cc/7QEV-UH68>]; see also Lisa McClain, *How the Catholic Church Came to Oppose Birth Control*, HUFFINGTON POST (July 16, 2018, 6:03 PM), [https://www.huffingtonpost.com/entry/how-the-catholic-church-came-to-oppose-birth-control\\_us\\_5b4cd603e4b02538dbcaf463](https://www.huffingtonpost.com/entry/how-the-catholic-church-came-to-oppose-birth-control_us_5b4cd603e4b02538dbcaf463) [<https://perma.cc/CVU5-JVKH>] (analyzing the ever-changing view of the Catholic church regarding use of contraceptives).

<sup>192</sup> See Public Health Service Act of 1970, Pub. L. No. 91-572, § 6, 84 Stat. 1504, 1506 (1970).

<sup>193</sup> RACHEL BENSON GOLD, GUTTMACHER INST., TITLE X: THREE DECADES OF ACCOMPLISHMENT (Feb. 2001), [https://www.guttmacher.org/sites/default/files/article\\_files/gr040105.pdf](https://www.guttmacher.org/sites/default/files/article_files/gr040105.pdf).

<sup>194</sup> Robyn E. Zolman, *Insurance Coverage of Prescription Contraceptives* (unpublished paper), <https://dash.harvard.edu/bitstream/handle/1/8889475/Zolman.html?sequence=2&isAllowed=y>.

<sup>195</sup> *Compare* Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266, 1271 (W.D. Wash. 2001) (omitting coverage for contraception from a comprehensive health insurance plan

prescription contraceptives increased dramatically as a result of state mandated-benefit laws.<sup>196</sup> The growth in coverage was the product largely of state mandated-benefit laws, passed in twenty-eight states beginning with Maryland in 1998, which required insurers to include contraceptive coverage in their plans.<sup>197</sup> But insurance coverage is only a threshold issue; prescription birth control can still be out of reach because of co-payments and deductibles.

The Affordable Care Act was signed into law in 2010.<sup>198</sup> Subsequent regulations required employer-based health plans to cover prescription contraceptives at no cost to the patient.<sup>199</sup> The so-called contraceptive mandate was based on information from a comprehensive study of health care needs and access in the United States, which was conducted by the nonpartisan, congressionally chartered group, the Institute of Medicine (IOM).<sup>200</sup> Focusing on health outcomes and access, IOM concluded that contraception is an “essential health benefit” and that the largest barrier to access is cost.<sup>201</sup> IOM’s recommendations were adopted in the Women’s Preventative Services Guidelines, which require coverage, without charging patients “a co-payment, co-insurance, or deductible” for all FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling.<sup>202</sup> This mandate is aligned with the consensus of the medical profession—that

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constitutes sex discrimination), *with* *Cummins v. Illinois*, 2005 WL 8143169 at \*1 (S.D. Ill. 2010) (excluding coverage does not violate Title VII, as amended by the PDA), *and* *Standridge v. Union Pacific Railroad Co.*, 479 F.3d 936, 938 (8th Cir. 2007) (excluding coverage does not violate Title VII).

<sup>196</sup> See GUTTMACHER INST., *Contraceptive Use in the United States* (Oct. 2015), [http://www.guttmacher.org/pubs/fb\\_contr\\_use.html](http://www.guttmacher.org/pubs/fb_contr_use.html) [<https://perma.cc/873D-TYAM>]; *see also* GUTTMACHER INST., *Insurance Coverage of Contraceptives* (Aug. 2018), <https://www.guttmacher.org/state-policy/explore/insurance-coverage-contraceptives> [<https://perma.cc/Z4AT-K5LF>].

<sup>197</sup> KAISER FAM. FOUND., *State Requirements for Insurance Coverage of Contraceptives* (2018), <https://www.kff.org/other/state-indicator/state-requirements-for-insurance-coverage-of-contraceptives/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> [<https://perma.cc/6WMF-CDS2>]. Health plans participating in the Federal Employees Health Benefit Program were required to cover prescription contraceptives beginning in 1998. *See* Pub. L. No. 108-7, 117 Stat. 474 (2003).

<sup>198</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); *Obama Signs Historic Health Care Legislation*, NPR (Mar. 23, 2010), <https://www.npr.org/templates/story/story.php?storyId=125058400> [<https://perma.cc/2RTR-RH8R>].

<sup>199</sup> 42 U.S.C. § 300gg-13(a)(4) (2018).

<sup>200</sup> 77 Fed. Reg. 8725–26 (Feb. 15, 2012).

<sup>201</sup> Press Release, U.S. Dept. of Health & Hum. Servs., *Affordable Care Act Ensures Women Receive Preventive Services at No Additional Cost* (Aug. 1, 2011), <https://wayback.archive-it.org/3926/20140108162111/http://www.hhs.gov/news/press/2011pres/08/20110801b.html> [<https://perma.cc/4N4T-JMG7>]; *see also* Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps 2* (2011).

<sup>202</sup> Women’s Preventive Services Guidelines, U.S. HEALTH RES. & SERV. ADMIN. (2019), <https://www.hrsa.gov/womens-guidelines/index.html> [<https://perma.cc/KJH7-SELS>].

women's health depends on access to contraception.<sup>203</sup> Although the mandate increased access greatly,<sup>204</sup> it has been the subject of many legal challenges and has been curtailed through the Supreme Court's recognition of a religious exemption. The original regulations mandating contraceptive coverage contained a limited religious exemption.<sup>205</sup> The limits were challenged by owners of a closely held corporation, and the Supreme Court sided with the owners, broadening the exemption in the process. In *Burwell v. Hobby Lobby Stores, Inc.*,<sup>206</sup> the Court reached the dubious conclusion that corporations that are not religious in nature can *have* religious beliefs and, on the basis of those beliefs, demand an exemption.<sup>207</sup> The Trump administration went even further, permitting any insurer to omit contraceptive coverage for religious or moral reasons.<sup>208</sup> These actions are ostensibly premised on the goal of deterring risky sexual behavior among teens and adults, but there is no scientific evidence to suggest that depriving people of access to contraception will have this effect.<sup>209</sup>

The Trump administration's rollback of the contraceptive mandate is part and parcel of a general attack on contraceptive access. The constitutional "right" is intact, but access is more threatened than at any point in the last several decades. Ideological battles have made contraceptive access controversial, and individuals, legislators, and corporations have gained greater ability to interfere with the reproductive healthcare of others based on their asserted religious beliefs. While it still may be a minority view, religious and

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<sup>203</sup> *Id.*

<sup>204</sup> The proportion of women paying for prescription oral contraceptives dropped from 20 percent to less than 4 percent. In total, more than 55 million women can obtain birth control at no cost. In 2013 alone, women saved \$1.4 billion in costs for oral contraceptives. See Gaylynn Burroughs, *Not Going Back: The Affordable Care Act and Medicaid*, Ms. MAG., (Dec. 27, 2016), <https://msmagazine.com/2016/12/27/not-going-back-health-care-abortion-birth-control/> [<https://perma.cc/UGP4-NJAW>]; see also Ashley H. Snyder et al., *The Impact of the Affordable Care Act on Contraceptive Use and Costs among Privately Insured Women*, 28 WOMEN'S HEALTH ISSUES 219, 221 (2018).

<sup>205</sup> U.S. DEP'T OF HEALTH & HUMAN SERVS., FACT SHEET: FINAL RULES ON RELIGIOUS AND MORAL EXEMPTIONS AND ACCOMMODATION FOR COVERAGE OF CERTAIN PREVENTIVE SERVICES UNDER THE AFFORDABLE CARE ACT (2018), <https://www.hhs.gov/about/news/2018/11/07/fact-sheet-final-rules-on-religious-and-moral-exemptions-and-accommodation-for-coverage-of-certain-preventive-services-under-affordable-care-act.html> [<https://perma.cc/P8Y4-VRAQ>].

<sup>206</sup> 573 U.S. 682 (2014).

<sup>207</sup> *Id.* at 692–93. The Supreme Court recently agreed to review another case on the religious exemption to the contraceptive mandate. See *Little Sisters of the Poor v. Pennsylvania*, No. 19-431, 2020 WL 254158 at \*1 (Jan. 17, 2020).

<sup>208</sup> See Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57536, 57537 (Nov. 15, 2018) (to be codified at 45 C.F.R. pt. 147); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57592, 57593 (Nov. 15, 2018) (to be codified at 45 C.F.R. pt. 147).

<sup>209</sup> See Abigail Abrams, *No, Birth Control Doesn't Make You Have Riskier Sex, Researchers Say*, TIME (Oct. 12, 2017), <http://time.com/4975951/donald-trump-birth-control-mandate-sexual-behavior> [<https://perma.cc/W2DB-VC73>].

moral opposition to contraception is a view now freely expressed and part of the discourse.<sup>210</sup>

Denial of access to contraception reverberates far beyond the uterine walls. Women who cannot control the timing and number of pregnancies face impaired economic security, especially low-income women.<sup>211</sup> In addition to other disadvantages, low-income women are overrepresented among those who are not using contraception but do not wish to become pregnant.<sup>212</sup> They are more likely to rely on public funding, including Title X and Medicaid, and thus have their access impaired from a variety of different governmental actions.<sup>213</sup>

Although the right to contraception is often cast in terms of privacy and battles over access often focus on cost or religious freedom, women's equality is very much compromised in a system that does not ensure meaningful access to birth control. Insufficient attention has been paid to the ways in which access to contraception is essential to women's equality. Elizabeth Sepper points out the consequences of such a blind spot in the Court's analysis of the religious exemption to the contraceptive mandate:

As feminists have long recognized, without control over their reproductive health, women can pursue their professional and educational ambitions only with great difficulty. Empirical studies confirm that access to contraception contributes to higher educational attainment and more financially desirable jobs for women,

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<sup>210</sup> See generally Elizabeth W. Patton et al., *How Does Religious Affiliation Affect Women's Attitudes Toward Reproductive Health Policy? Implications for the Affordable Care Act*, 91 *CONTRACEPTION* 513 (2015) (concluding that, although the majority of religious people support contraception, there exists an identifiable minority that opposes contraceptive measures).

<sup>211</sup> Research also demonstrates that access to abortion plays an important role in women's independence and autonomy. See, e.g., Caitlin Knowles Myers, *The Power of Abortion Policy: Reexamining the Effects of Young Women's Access to Reproductive Control*, 125 *J. POL. ECON.* 2178, 2222 (2017).

<sup>212</sup> See KAISER FAM. FOUND., *WOMEN'S SEXUAL AND REPRODUCTIVE HEALTH SERVICES: KEY FINDINGS FROM THE 2017 KAISER WOMEN'S HEALTH SURVEY* (2018), <https://www.kff.org/womens-health-policy/issue-brief/womens-sexual-and-reproductive-health-services-key-findings-from-the-2017-kaiser-womens-health-survey> [<https://perma.cc/AAE5-BBHZ>] (concluding, also, that Trump Administration policies would "disproportionately limit access [to reproductive health care] to low-income and minority women").

<sup>213</sup> USHA RANJANI ET AL., KAISER FAM. FOUND., *FINANCING FAMILY PLANNING SERVICES FOR LOW-INCOME WOMEN: THE ROLE OF PUBLIC PROGRAMS* (2019), <https://www.kff.org/womens-health-policy/issue-brief/financing-family-planning-services-for-low-income-women-the-role-of-public-programs> [<https://perma.cc/K7BL-XJ3Q>]; see also LAURIE SOBEL ET AL., KAISER FAM. FOUND., *PROPOSED CHANGES TO TITLE X: IMPLICATIONS FOR WOMEN AND FAMILY PLANNING PROVIDERS* (2018), <https://www.kff.org/womens-health-policy/issue-brief/proposed-changes-to-title-x-implications-for-women-and-family-planning-providers> [<https://perma.cc/A5YA-3HRH>]; Kari White et al., *The Impact of Reproductive Health Legislation on Family Planning Clinic Services in Texas*, 105 *AM. J. PUB. HEALTH* 851, 851 (May 2015); C. Junda Woo et al., *Women's Experiences After Planned Parenthood's Exclusion from a Family Planning Program in Texas*, 93 *CONTRACEPTION* 298, 298 (2016).

in turn reducing the gender pay gap. . . . The fact that only women bear children and (due to the limits of today's technology) use prescription contraceptives is biological, but the imposition of financial burdens on reproductive control is social. By allowing employers to exclude contraceptives from insurance plans, society, not biology, has subjected women to inequality.<sup>214</sup>

Even more broadly, the lack of access to contraception contributes to women's inequality. The ability to control the number and timing of pregnancies is a key determinant of women's ability to achieve equality in many dimensions, including family, education, and work.<sup>215</sup> The connection between greater access to contraception and fewer unintended pregnancies, fewer abortions, and fewer maternal deaths, is both direct and proven.<sup>216</sup> And the benefits go beyond the obvious ones. Control over reproduction is central to a woman's ability to obtain an education, pursue a career, and achieve economic self-sufficiency.<sup>217</sup> The argument that women must have the ability to control reproduction, as Justice Ginsburg argued in her dissent in *Hobby Lobby*, in order "to participate equally in the economic and social life of the Nation" is undeniable.<sup>218</sup>

## 2. *Abortion: Rights and Access*

The right to privacy is also the grounding for abortion rights. In 1973, the Supreme Court drew on the notion of privacy that it relied on in *Griswold* to decide that a woman has the right to terminate a pre-viability pregnancy.<sup>219</sup> Abortion, at the time, was criminalized in most U.S. states under laws adopted during the middle of the nineteenth century.<sup>220</sup> At common

<sup>214</sup> Elizabeth Sepper, *Gendering Corporate Conscience*, 38 HARV. J.L. & GENDER 193, 208–09 (2015).

<sup>215</sup> See, e.g., ADAM SONFIELD ET AL., GUTTMACHER INST., THE SOCIAL AND ECONOMIC BENEFITS OF WOMEN'S ABILITY TO DETERMINE WHETHER AND WHEN TO HAVE CHILDREN 7–14 (2019), [https://www.guttmacher.org/sites/default/files/report\\_pdf/social-economic-benefits.pdf](https://www.guttmacher.org/sites/default/files/report_pdf/social-economic-benefits.pdf) [<https://perma.cc/3S68-AUM8>]; Claudia Goldin & Lawrence F. Katz, The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decisions, 110 J. POL. ECON. 730 (2002).

<sup>216</sup> See, e.g., Frank A. Sonnenberg et al., *Costs and Net Health Effects of Contraceptive Methods*, 69 CONTRACEPTION 447, 456–57 (2004).

<sup>217</sup> On the connection between contraceptive access and women's economic empowerment, see e.g., Joanna L. Grossman, *Griswold v. Connecticut: The Start of the Revolution*, JUSTIA'S VERDICT (June 8, 2015), <https://verdict.justia.com/2015/06/08/griswold-v-connecticut-the-start-of-the-revolution> [<https://perma.cc/N8CQ-2PTN>].

<sup>218</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 741 (2014) (Ginsburg, J., dissenting) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992)). On the connection between reproductive rights and women's economic security, see CYNTHIA HESS ET AL., INST. FOR WOMEN'S POL'Y RES., THE STATUS OF WOMEN IN THE STATES: 2015, 165–77 (2015), <https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/R400-FINAL%208.25.2015.pdf> [<https://perma.cc/A7LH-QLBD>].

<sup>219</sup> 410 U.S. 113, 152–160 (1973).

<sup>220</sup> *Id.* at 139–41.

law, both in England and the U.S., abortions before “quickening”—the first detectable fetal movement around sixteen to eighteen weeks gestation—had been permitted.<sup>221</sup> *Roe* launched an era of abortion rights along with a powerful countermovement.

Justice Blackmun wrote the majority opinion in *Roe*, anchoring the right of abortion in the right to privacy under the Fourteenth Amendment Due Process Clause and encompassing the right to terminate a pregnancy before a certain point.<sup>222</sup> There is no discussion in the opinion of women’s equality vis-à-vis men or in society generally or of the ways in which forced pregnancy might impair the ability of women to participate fully in society. Rather, the opinion rested on a contest of rights, resolved by the primacy of a woman’s right to privacy.<sup>223</sup> Rejecting the state’s claim, the Court held that a fetus is not a person for constitutional purposes and is not entitled to constitutional protection in its own right that needs to be balanced against the woman’s own rights.<sup>224</sup> The state, the Court held, acquires an interest in protecting fetal life when the fetus reaches viability.<sup>225</sup> This ruling was a death knell to abortion laws remaining on the books, which had restrictions that could not comport with the newly announced standard.

The Supreme Court revisited the abortion issue many times after *Roe*, including in an important 1992 case, *Planned Parenthood v. Casey*, in which it reformulated the constitutional right to give states a greater opportunity to express their preference for childbirth over abortion and their regard for fetal life.<sup>226</sup> In the 1980s, states began passing restrictive abortion laws that arguably violated *Roe*—or at least pushed its boundaries.<sup>227</sup> In *Casey*, the Court considered the validity of several restrictions, including parental consent, spousal notification, a twenty-four hour waiting period, and an informed

<sup>221</sup> JANET FARRELL BRODIE, *CONTRACEPTION AND ABORTION IN NINETEENTH-CENTURY AMERICA* 253–54 (1994); JAMES C. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900* 8 (1978); ROSEMARY NOSSIFF, *BEFORE ROE: ABORTION POLICY IN THE STATES* 31–34 (2001). The pre-*Roe* bans typically penalized and were enforced against doctors but not pregnant women. On this complex history of abortion and punishment, see Mary Ziegler, *Some Form of Punishment: Penalizing Women for Abortion*, 26 WM. & MARY BILL RTS. J. 735, 740 (2018) (noting that although some laws technically permitted pregnant women to be prosecuted for soliciting or conspiring with the abortion provider, “few women went to prison for having an abortion”).

<sup>222</sup> See *Roe*, 410 U.S. at 164–65.

<sup>223</sup> See *id.* at 158 (“[T]he word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.”).

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 163–64.

<sup>226</sup> See *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) (considering the constitutionality of a wide range of abortion restrictions). There was no majority opinion in *Casey*. Justice Kennedy wrote for a three-judge plurality and found additional votes in the concurrences for the undue burden standard. For a comprehensive history, see MARY ZIEGLER, *AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE* (2015).

<sup>227</sup> See Mary Ziegler, *Substantial Uncertainty: Whole Women’s Health v. Hellerstedt and the Future of Abortion Law*, 2016 S. Ct. Rev. 77, 93-101; see generally Ziegler, *supra* note 221.

consent provision requiring physicians to provide information on fetal development and adoption.<sup>228</sup> Each restriction survived the Court's analysis except the spousal notification provision.<sup>229</sup> Although the Court reaffirmed the basic principle of *Roe* that women have a constitutional right to terminate a pregnancy within certain constraints, a majority of the Justices reformulated the standard to protect a right to abortion before viability without undue burden from the government.<sup>230</sup> The Court also recognized the right of states to express their interest in protecting fetal life from the outset of pregnancy, rather than only after viability, a shift that has eased the way for a variety of onerous burdens purporting to provide women with the opportunity for more informed consent.<sup>231</sup>

The Supreme Court reaffirmed constitutional protection for the abortion decision as recently as 2016, in *Whole Woman's Health v. Hellerstedt*.<sup>232</sup> In that case, the Court invalidated two provisions of Texas law that imposed requirements that made it difficult or impossible for many abortion clinics to operate.<sup>233</sup> Those regulations constituted an undue burden that Texas had placed in front of women seeking to terminate their pregnancies.

The Court's abortion jurisprudence—even when it appears to protect women's rights—reflects an idealization of motherhood, a pro-maternalism that elevates women's role as nurturers and mothers rather than as autonomous decisionmakers who might pursue any number of avenues to individual fulfillment. This view was most obviously on display in *Gonzales v. Carhart*, in which the Supreme Court upheld a federal ban on a particular method of second-trimester abortion in order to protect women from their own regret (which they were assumed to experience).<sup>234</sup> As Justice Kennedy wrote, "It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form."<sup>235</sup> The woman in this narrative is already a mother, whether or not she has or ever gives birth; is bonded to an unborn child; and will suffer from the lost pregnancy.<sup>236</sup> This ruling was made possible by *Casey*, which permitted state restrictions de-

<sup>228</sup> 505 U.S. at 833.

<sup>229</sup> *Id.* at 881–87.

<sup>230</sup> *Id.* at 887–98.

<sup>231</sup> *Id.* at 860, 872–73, 876–77, 881.

<sup>232</sup> 136 S. Ct. 2292, 2300 (2016).

<sup>233</sup> *Hellerstedt*, 136 S. Ct. at 2318–20.

<sup>234</sup> 550 U.S. 124, 159 (2007) (“While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.”).

<sup>235</sup> *Id.* at 159–60.

<sup>236</sup> On this treatment of women in abortion law, see Joanna L. Grossman & Linda McClain, *Gonzales v. Carhart: How the Supreme Court's Validation of the Federal Partial-Birth Abortion Ban Act Affects Women's Constitutional Liberty and Equality*, *FINDLAW* (May 7, 2007), <https://supreme.findlaw.com/legal-commentary/gonzales-v-car>

signed to persuade women to choose motherhood as purportedly consistent with a core autonomy right, as long as it stopped short of coercion. Abortion rulings routinely refer to the women involved as “mothers,” suggesting that most women would, or should, choose motherhood, given the proper amount of support, information, or persuasion. This kind of pro-maternalism language is incompatible with the prioritization of girls’ and women’s education in Title IX. It sets up the girl or woman who abandons her child or who terminates her pregnancy to pursue her own fulfillment or potential as deviating from the ideal—an unsympathetic subject for rights.

The Supreme Court’s idealization of mothers in its abortion jurisprudence is one way that the privacy grounding of the abortion right is in tension with sex equality law, including Title IX. A more practical consequence of locating abortion rights in a privacy right rather than in sex equality is that the right to privacy secures only a right to be let alone, and not a right to the conditions or resources necessary to carry out one’s choices. As a result, abortion jurisprudence developed in ways that cemented a strong dividing line between the right to terminate a pregnancy and the ability to access that right in practical terms. The former was of constitutional interest, the latter left for policymakers to fight over and women to suffer their wrath. The key barriers to access include cost and the lack of access to providers.<sup>237</sup> The restrictions permitted by *Casey* have made both of these barriers even more difficult to overcome. State laws that require waiting periods, for example, sometimes force women to add the cost of a hotel stay and additional days of missed work to the calculation.<sup>238</sup> Mandatory waiting periods and multiple trips to providers to satisfy informed consent requirements also burden young women who are still in school and subject to strict attendance policies. Laws that impose restrictions on providers have caused many of them to go out of business, and they often remain out of business even if the restriction is invalidated by a court.<sup>239</sup> Although the Court’s ruling in *Whole Women’s Health* invalidated some of these restrictions, many providers had

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hart-how-the-supreme-courts-validation-of-the-federal-partial-birth-abortion-ban-act-affects-womens-constitutional-liberty-and-equality.html [https://perma.cc/7QYZ-GCTD].

<sup>237</sup> See generally Jenna Jerman et al., *Barriers to Abortion Care and Their Consequences for Patients Traveling for Services: Qualitative Findings from Two States*, 49 PERSP. ON SEXUAL & REPROD. HEALTH 95 (2017).

<sup>238</sup> See, e.g., Texas Policy Evaluation Project, *Impact of abortion restrictions in Texas* (2013), [http://www.utexas.edu/cola/txpep/\\_files/pdf/TxPEP-ResearchBrief-ImpactofAbortionRestrictions.pdf](http://www.utexas.edu/cola/txpep/_files/pdf/TxPEP-ResearchBrief-ImpactofAbortionRestrictions.pdf) [https://perma.cc/Y2A8-YTZ5]; Jerman et al., *supra* note 237; see also Kinsey Hasstedt, *The State of Sexual and Reproductive Health and Rights in the State of Texas: A Cautionary Tale*, 17 GUTTMACHER POL’Y REV. 14, 16 (2014).

<sup>239</sup> See, e.g., Marie Solis, *Indie Abortion Clinics Can’t Be Replaced, but They’re Dying Out*, VICE (Dec. 23, 2019 11:11 a.m.), [https://www.vice.com/en\\_us/article/qjdp4x/independent-abortion-clinics-are-closing-thanks-to-abortion-restrictions](https://www.vice.com/en_us/article/qjdp4x/independent-abortion-clinics-are-closing-thanks-to-abortion-restrictions) [https://perma.cc/N6T9-9WT2]; Abortion Care Network, *2019 Report: Communities Need Clinics* (2019), <https://www.abortioncarenetwork.org/wp-content/uploads/2019/12/Communities-NeedClinics2019.pdf> [https://perma.cc/284H-DHF7].

already closed and remain closed.<sup>240</sup> Moreover, the Supreme Court just agreed to review a ruling of the Fifth Circuit that upheld the constitutionality of TRAP laws that are almost identical to the ones struck down in *Whole Women's Health*, a sign that the newly composed Supreme Court is prepared to roll back abortion rights in ways that, at a minimum, impair access.<sup>241</sup>

The Supreme Court exacerbated this disconnect between rights and access to abortion when it upheld the constitutionality of the Hyde Amendment, a federal law that limits federal reimbursement for abortions to few circumstances, such as when necessary to save the life of the mother or to end pregnancies resulting from rape or incest.<sup>242</sup> The Supreme Court upheld the Hyde Amendment on the theory that it does not unconstitutionally burden a woman's exercise of her fundamental right to an abortion but rather leaves her in the same place she would be without a federal funding program.<sup>243</sup> Medicaid is most affected by this rule.<sup>244</sup> Although thirty-three states and the District of Columbia provide their own funds for indigent women, only eight states voluntarily provide funds for all or most medically necessary abortions, with nine additional states providing funds only pursuant to court order.<sup>245</sup> Moreover, more than half the states restrict abortion coverage in plans sold on healthcare exchanges created under the Affordable Care Act, and eleven restrict abortion coverage in all private insurance plans.<sup>246</sup>

Poor women have fewer reproductive choices and more abortions due to the chronic underfunding of family planning programs. This problem will get worse under the new domestic "gag rule" adopted by the Trump administration. Nearly half of pregnancies are unintended, and forty-two percent of these end in abortion.<sup>247</sup> Black women are more than twice as likely to have unintended pregnancies as non-Hispanic white women, and poor women are

<sup>240</sup> See Ashley Lopez, *For Supporters of Abortion Access, Troubling Trends in Texas*, NPR (Nov. 18, 2019 5:01 a.m.), <https://www.npr.org/sections/health-shots/2019/11/18/741117422/for-supporters-of-abortion-access-troubling-trends-in-texas> [<https://perma.cc/R62R-HYAG>].

<sup>241</sup> See *June Medical Services, L.L.C. v. Gee*, 140 S. Ct. 35, 35 (2019) (granting certiorari).

<sup>242</sup> *Harris v. McRae*, 448 U.S. 297, 322 (1980) (rejecting constitutional challenge to the Hyde Amendment, which withdrew federal funding even for "medically necessary abortions").

<sup>243</sup> *Id.* at 317.

<sup>244</sup> Cf. GUTTMACHER INST., *State Funding of Abortion Under Medicaid* (Aug. 1, 2019), [http://www.guttmacher.org/statecenter/spibs/spib\\_SFAM.pdf](http://www.guttmacher.org/statecenter/spibs/spib_SFAM.pdf) [<https://perma.cc/UR6P-NPQN>] (analyzing state funding of abortion under Medicaid, guided by Hyde Amendment).

<sup>245</sup> *Id.*

<sup>246</sup> GUTTMACHER INST., *Regulating Insurance Coverage of Abortion* (Aug. 1, 2019), <https://www.guttmacher.org/state-policy/explore/restricting-insurance-coverage-abortion> [<https://perma.cc/P2WA-2RXJ>] ("26 states restrict abortion coverage in plans offered through the insurance exchanges").

<sup>247</sup> GUTTMACHER INST., *Unintended Pregnancy in the United States* (Jan. 2019), <https://www.guttmacher.org/fact-sheet/unintended-pregnancy-united-states> [<https://perma.cc/9KPH-U9XX>].

more than five times as likely as women at the highest income level.<sup>248</sup> Women of color are more likely to be on Medicaid.<sup>249</sup> Two-thirds of the 1.5 million unplanned births in 2010 were paid for by public insurance programs, primarily Medicaid, as compared to thirty-eight percent of planned births.<sup>250</sup>

All this to say that the Court's distinction between rights and access harms marginalized women even more harshly. Reproductive justice advocates Loretta Ross and Rickie Solinger argue persuasively that government funding for abortion is a key determinant of access: "When a low-income person makes a decision to have an abortion, her federal health insurance, Medicaid, will not pay for it. So to pay for the abortion she may have to make the brutal decision to use money meant to pay for basic necessities, such as heat and water and rent and food for herself and her children."<sup>251</sup> Moreover, they explain, the "officials who make law and policy do not compute the ways that her poverty and the state's refusal to provide comprehensive health care rob the woman of dignity and physical safety and are likely to deepen her poverty and lack of options."<sup>252</sup> There has been renewed activism against the Hyde Amendment, but it remains controlling law.<sup>253</sup> Some women are paying a steep price for the recent shifts in favor of "religious liberty" over women's health.

### 3. *Sexual and Reproductive Health for Minors*

Perhaps the biggest problem with leaving reproductive rights outside of sex discrimination law is that the framework to which they are left is designed for adults. Reproductive rights are grounded in autonomy, and autonomy presupposes an adult subject. In fact and in law, minors are constrained in their agency; they have only limited autonomy. Accordingly, the right to privacy in reproduction for minors was destined to impose greater restrictions on young women who have not yet reached the age of majority. The

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<sup>248</sup> See *id.*

<sup>249</sup> See ALINA SALGANICOFF ET AL., KAISER FAM. FOUND., *THE HYDE AMENDMENT AND COVERAGE FOR ABORTION SERVICES* (2019), <https://www.kff.org/womens-health-policy/issue-brief/the-hyde-amendment-and-coverage-for-abortion-services/> [https://perma.cc/VJ29-FVKY].

<sup>250</sup> ADAM SONFIELD & KATHRYN KOST, Guttmacher Inst., *Public Costs from Unintended Pregnancies and the Role of Public Insurance Programs in Paying for Pregnancy-Related Care: National and State Estimates for 2010* (2015), <https://www.guttmacher.org/report/public-costs-unintended-pregnancies-and-role-public-insurance-programs-paying-pregnancy> [https://perma.cc/9V99-YHSF].

<sup>251</sup> LORETTA J. ROSS & RICKIE SOLINGER, *REPRODUCTIVE JUSTICE: AN INTRODUCTION* 135–36 (2017).

<sup>252</sup> *Id.*

<sup>253</sup> See Maggie Astor, *What Is the Hyde Amendment? A Look at Its Impact as Biden Reverses His Stance*, N.Y. TIMES, June 7, 2019, at A12; Julian Shen-Berro, *The Hyde Amendment: How a 43-Year-Old Provision Became a 2020 Issue*, HUFFINGTON POST (June 6, 2019), [https://www.huffpost.com/entry/hyde-amendment-repeal-democratic-primary-joe-biden\\_n\\_5cf92b3be4b0638bdfa5eaae](https://www.huffpost.com/entry/hyde-amendment-repeal-democratic-primary-joe-biden_n_5cf92b3be4b0638bdfa5eaae) [https://perma.cc/2GGB-44WX].

law's bifurcation of minors' reproductive rights into the realm of privacy instead of equality has grave consequences for younger women's educational equality. Although, of course, not all minors are in school and not all students are minors, most persons under the age of eighteen are either in school or would benefit from additional schooling in their future careers.

Indeed, consistent with the logic of an autonomy-based set of rights, women under the age of eighteen face additional and unique barriers to access of sexual and reproductive health services. Although the educational consequences of an unintended pregnancy are even more dire for them than for adult women, these consequences are neglected by a set of legal rights that pays no attention to educational equality. The barriers minors face take a variety of forms, both legal and non-legal.

For minors, access to contraception is undermined by cost and logistics, but also by fewer protections for their "right" to access it in the first instance. In *Carey v. Population Serv. Int'l*, the Court invalidated a New York law that, among other things, restricted the sale of contraceptives to minors younger than sixteen, but sidestepped the underlying question of whether minors have a constitutional right to access to contraception.<sup>254</sup> Minors cannot traditionally consent to their own medical care; that right belonged to their legal parent or guardian.<sup>255</sup> Some minors are able to obtain parental consent for birth control, but those who are not live at the mercy of their state legislature. Twenty-three states and the District of Columbia permit minors to consent to contraceptive services on their own behalf, and another twenty-four states permit them to consent in at least some circumstances.<sup>256</sup> In the four states with no statute, minors need parental consent as they would for any other medical procedure or prescription unless they seek services with a provider federally funded by Title X, which overrides state parental consent laws in this context.<sup>257</sup> The rollback of Title X will affect minors and adult women, especially in those states in which only Title X clinics can dispense birth control without parental consent. Minors thus start with less of a right, compounded by unique challenges that impair access such as the

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<sup>254</sup> 431 U.S. 678, 693–94 (1977).

<sup>255</sup> See, e.g., VERNON'S TEX. FAMILY CODE § 32.003 (listing specific instances in which a minor can consent to her own treatment); see generally HEATHER D. BOONSTRA & ELIZABETH NASH, GUTTMACHER INST., MINORS AND THE RIGHT TO CONSENT TO MEDICAL CARE (2000), <https://www.guttmacher.org/gpr/2000/08/minors-and-right-consent-health-care> [<https://perma.cc/3ZYA-LQ6E>] (noting evolution of minors' right to consent to own medical care over time and across states).

<sup>256</sup> See GUTTMACHER INST., *Minors' Access to Contraceptive Services* (Mar. 1, 2020), <https://www.guttmacher.org/state-policy/explore/minors-access-contraceptive-services> [<https://perma.cc/6CPB-D8J7>].

<sup>257</sup> The four states with no relevant statute are North Dakota, Ohio, Rhode Island, and Wisconsin. See *id.* On Title X's parameters, see 42 U.S.C. § 300(a) (2018); 42 C.F.R. §§ 59.5(a)(4), (14) (2020).

lack of transportation or money and the inability to sneak away for medical appointments undetected by a disapproving parent.<sup>258</sup>

Such policies run counter to abundant evidence that minors benefit from unfettered access to contraception—including promising results of a program in Colorado that has provided long-acting contraceptives, such as IUDs, completely free to teenagers and low-income women.<sup>259</sup> The teen birth rate fell forty percent in four years, as did the rate of abortion.<sup>260</sup> Nonetheless, the federal government continues to implement public health rules based on ideology rather than on science, eschewing evidence-based approaches.

For minors, the right to obtain an abortion is even more tenuous than their right to access contraception. Their abortion rights are determined not only by *Roe* and *Casey*, but also by a series of cases beginning in 1976. In *Planned Parenthood of Missouri v. Danforth*, the Court invalidated a provision of Missouri law that required all unmarried women under eighteen to obtain parental consent for an abortion.<sup>261</sup> Justice Blackmun acknowledged that minors' rights might not be equivalent to those held by adult women, but concluded that giving an absolute veto to a parent was clearly an infringement.<sup>262</sup> Then, in 1979, the Court spelled out the circumstances under which parental notification or consent could be required. The Court held in *Bellotti v. Baird*<sup>263</sup> that the right to seek an abortion belongs to minor as well as adult women but in a less robust forum. In *Hodgson v. Minnesota*, the Court upheld a law requiring notification of both parents but with a judicial bypass provision.<sup>264</sup> Then, in 2006, the Court struck down a law that required a forty-eight-hour waiting period after parental notification before a minor could obtain an abortion.<sup>265</sup> The defect was the lack of an exception to preserve the woman's health. Minors have the same right to seek an abortion without undue burden by the government, but they also face the thorny issue of parental consent, as abortion is a medical procedure that would typically be consented to by a parent rather than by the minor herself. But in *Belotti*, the Court held that no third party, including a parent, can be given an absolute veto over a minor's decision to terminate a pregnancy.<sup>266</sup> To that end, the Court held that state laws requiring parental notification or consent for abortion are constitutional only if the state provides a judicial bypass procedure

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<sup>258</sup> See, e.g., David Eisenberg et al., *Cost as a Barrier to Long-Acting Reversible Contraceptive (LARC) Use in Adolescents*, 52 J. ADOLESCENT HEALTH 59, 62 (2013).

<sup>259</sup> See CO. DEPT' OF PUB. HEALTH & ENV'T, *Taking the Unintended Out of Pregnancy: Colorado's Success with Long-Acting Reversible Contraception* viii-ix (2017).

<sup>260</sup> Sabrina Tavernise, *Colorado Finds Startling Success in Effort to Curb Teenage Births*, N.Y. TIMES, July 7, 2015, at A1.

<sup>261</sup> 428 U.S. 52, 74 (1976).

<sup>262</sup> 428 U.S. at 75.

<sup>263</sup> 443 U.S. 622, 635-37 (1979).

<sup>264</sup> 497 U.S. 417, 423 (1990).

<sup>265</sup> *Ayotte v. Planned Parenthood of New England*, 546 U.S. 320, 328 (2006).

<sup>266</sup> 443 U.S. at 643 (citing *Danforth*, 428 U.S. at 74).

that allows the minor to obtain permission from a court to make the decision on her own.<sup>267</sup> To be constitutional, such a procedure must be expeditious, confidential, and must allow the minor to make her own decision if (1) she is mature enough to make an informed decision or (2) if her best interests would be served by having an abortion.<sup>268</sup>

While the vast majority of states have passed laws enabling minors to access contraception without parental consent, they have gone completely in the opposite direction on abortion. Thirty-seven states require parental involvement in a minor's decision to have an abortion.<sup>269</sup> In the remaining states, young women are as free (or constrained) as adult women in their decision to terminate a pregnancy, though they are likely to face greater practical barriers regardless of the legality of their choice to terminate. But in parental involvement states, pregnant minors are subject to the whim of the state legislators who craft the bypass law, the judges who preside over bypass hearings, and the attorneys and guardians ad litem who may be involved in their cases. The hearings often reinforce stereotypical attitudes about girls and their sexuality and force them into a situation where they have to beg an authority figure for autonomy.<sup>270</sup> The hearings focus on ma-

<sup>267</sup> *Id.* at 649–51.

<sup>268</sup> *See id.* at 643–45; *see also* Ohio v. Akron Ctr. For Reprod. Health, 497 U.S. 502, 506–07 (1990) (upholding Ohio's bypass procedure against a constitutional challenge); Lambert v. Wicklund, 520 U.S. 292, 298–99 (1997) (per curiam) (upholding Montana's bypass procedure against a constitutional challenge).

<sup>269</sup> *See* GUTTMACHER INST., *Parental Involvement in Minors' Abortions* (2019), <https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortions> [<https://perma.cc/QXD4-N5KN>].

<sup>270</sup> For discussion of how the bypass system operates in practice, *see* Amanda Jean Stevenson et al., *Denials of Judicial Bypass Petitions in Texas Before and After the 2016 Bypass Process Change: 2001-18*, 110 AM. J. PUB. HEALTH 351 (forthcoming Mar. 2020); Murray Levine et al., *An Illustration of the Intersection of Social Science and the Law: The Legal Rights of Adolescents to Make Medical Decisions*, 30 HASTINGS WOMEN'S L.J. 241 (2019); Rachel Rebouché, *Parental Involvement Laws and New Governance*, 34 HARV. J.L. & GENDER 175 (2011); Carol Sanger, *Regulating Teenage Abortion in the United States: Politics and Policy*, 18 INT'L J.L. POL'Y & FAM. 305 (2004); Carol Sanger, *Decisional Dignity; Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409 (2009); CAROL SANGER, *Sending Pregnant Teenagers to Court, in ABOUT ABORTION: TERMINATING PREGNANCY IN TWENTY-FIRST CENTURY AMERICA* 154–84 (2017); Helena Silverstein & Leanne Speitel, *"Honey, I Have No Idea": Court Readiness to Handle Petitions to Waive Parental Consent for Abortion*, 88 IOWA L. REV. 75 (2002); HELENA SILVERSTEIN, *GIRLS ON THE STAND: HOW COURTS FAIL PREGNANT MINORS* (2007); AMANDA DENNIS ET AL., *THE IMPACT OF LAWS REQUIRING PARENTAL INVOLVEMENT FOR ABORTION: A LITERATURE REVIEW* (2009); Elizabeth M. Smith, *A Follow-up Study of Women Who Request Abortion*, 43 AM. J. ORTHOPSYCHIATRY 574 (1973); Catherine Lewis, *Minors' Competence to Consent to Abortion*, 42 AM. PSYCHOLOGIST 84 (1987); Freddie Clary, *Minor Women Obtaining Abortions: A Study of Parental Notification in a Metropolitan Area*, 72 AM. J. PUB. HEALTH 283 (1982); Kathryn Kost & Stanley Henshaw, *Parental Involvement in Minors' Abortion Decisions*, 24 FAM. PLAN. PERSP. 196 (1992); V.G. Cartoof & L.V. Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 76 AM. J. PUB. HEALTH 397 (1986); R.W. Blum et al., *Factors Associated with the Use of Court Bypass by Minors to Obtain Abortion*, 22 FAM. PLAN. PERSP. 158 (1990); J. Shoshanna Ehrlich, *Choosing Abortion: Teens Who Make the Decision Without Parental Involvement*, GENDER ISSUES 3 (2003); Rachel

turity, not equality, by constitutional design. Because the right to privacy is a right grounded in autonomy, a dimension of the liberty protected under the due process clause, granting the right to an under-age woman depends on her ability to convince the judge that she is mature enough to responsibly exercise her autonomy in decision-making. The inquiry is not focused on how an unwanted pregnancy would interfere with her educational opportunities. The framing of the right as a matter of “choice” obscures the inequalities in education young women, but not men, face from being forced to carry to term an unwanted pregnancy.

In the early challenges to contraceptive bans, plaintiffs explicitly drew the connection between unwanted pregnancy and education; they argued that if they could not control the timing of children, they would not be able to complete high school, college, graduate programs, or training for a profession.<sup>271</sup> Early litigation strategies pressed the connection between controlling fertility and equal educational opportunity. But that thread largely has been lost as abortion law has developed. Despite dicta in *Casey*, quoted above, and some other opinions that reflected some understanding of the need for women to be able to control reproduction in order to fully participate in society, a sex equality grounding for reproductive rights never materialized.<sup>272</sup> Given the current assault on reproductive control and the tenuous nature of the constitutional protection, it is more important than ever to make explicit the equality dimensions of restrictions on abortion rights. Moreover, teen girls will be affected even more harshly than adult women by the new wave of early gestational bans on abortion, if they are ever permitted to take effect, as teens experience less regular menstrual cycles and therefore will be less likely to detect a pregnancy in time.<sup>273</sup>

The harm to young women of the current system is not limited to contraception and abortion. There is no recognized autonomy right to high quality sex education that would inform or support contraceptive use,<sup>274</sup> nor a right to equality in relationships so as to make the right to use contraception

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Rebouché, *Report of a National Meeting: Parental Involvement Laws and the Judicial Bypass*, 37 LAW & INEQ. 21 (2019); Molly Redden, *This is How Judges Humiliate Pregnant Teens Who Want Abortions*, MOTHER JONES (Sept./Oct. 2014), <https://www.motherjones.com/politics/2014/10/teen-abortion-judicial-bypass-parental-notification/> [<https://perma.cc/EW86-3UAZ>]; Jamin B. Raskin, *The Paradox of Judicial Bypass Proceedings*, 10 AM. U. J. GENDER SOC. POL'Y & L. 281 (2002).

<sup>271</sup> See Siegel & Siegel, *supra* note 176, at 355.

<sup>272</sup> See Reva B. Siegel, *Equality and Choice: Sex Equality Perspectives on Reproductive Rights in the Work of Ruth Bader Ginsburg*, 25 COLUM. J. GENDER & L. 63, 73 (2013).

<sup>273</sup> See Paula J. Adams Hillard, *Menstruation in Adolescents: What's Normal?*, 10 Medscape J. Med. 295, 296 (2008); see also Megan K. Donovan, Guttmacher Inst., *Gestational Age Bans: Harmful at Any Stage of Pregnancy* (2020), <https://www.guttmacher.org/gpr/2020/01/gestational-age-bans-harmful-any-stage-pregnancy> [<https://perma.cc/BXK6-XMUJ>].

<sup>274</sup> See, e.g., Hazel Glenn Beh & Milton Diamond, *The Failure of Abstinence-Only Education: Minors Have a Right to Honest Talk About Sex*, COLUM. J. GENDER & L. 12 (2006).

meaningful. Not surprisingly, lower income and minority minors have the weakest protections due to barriers to access.<sup>275</sup> As a result, teenage girls of color are especially likely to incur the costs of unwanted pregnancy, which feed “the problem” narrative of teen pregnancy as the cause of crime, welfare, and other burdens on society. In the educational setting, the pregnant teen is assumed to be an educational problem, and the law’s focus is just on getting her through the system rather than on maximizing her potential. The concluding section explores the ways in which the law’s bifurcation of pregnancy as a sex equality issue and reproductive rights as a matter of privacy has undermined both sets of rights and contributed to a myopic approach to women’s educational equality.

#### IV. MISSED CONNECTIONS AND OPPORTUNITIES FOR INTEGRATING REPRODUCTIVE RIGHTS AND PREGNANCY IN THE TITLE IX CONVERSATION

The parsing of pregnancy’s effects on education into an equality framework and reproductive rights, notwithstanding their implications for education, into a separate legal framework grounded in autonomy, has a number of troubling implications. In terms of the effect on reproductive rights, this divide contributes to the submergence of equality as a key dimension of restrictions on women’s control over their reproductive lives. The right to privacy stems from the liberty that the state must respect as a matter of personal autonomy. It is fundamentally the right to be left alone in matters central to a person’s autonomy. The ways in which reproduction affects women’s educational attainment and career goals are extrinsic to the right to privacy analysis.

Unfortunately, the core statute promising girls and women educational equality fails to bridge the gap between reproductive control and a right to sex equality in education. Title IX is vulnerable to Reva Siegel’s critique that “courts and the nation often do not grasp the relationships” between women’s reproductive control and sex equality.<sup>276</sup> The consequences of this failure are generally negative for both liberty-based reproductive rights and equality-based rights in education.

For reproductive rights, leaving equality out of the calculus—and specifically, those inequalities in education that women confront due to pregnancy—ultimately serves to weaken the justifications for ensuring girls and women full control of their reproductive lives. With respect to abortion rights in particular, privacy as the grounding for the right to terminate a pregnancy presupposes a fully autonomous person who is entitled to make

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<sup>275</sup> See, e.g., Sadia Halder et al., *Reproductive Health Disparities: A Focus on Family Planning and Prevention Among Minority Women and Adolescents*, 2 GLOBAL ADVANCES HEALTH & MED. 94, 96 (2013).

<sup>276</sup> See Siegel, *supra* note 272, at 80.

fundamental personal decisions. From the beginning, it was a poor fit for women who have not reached majority age and whose decision-making is often displaced by parents, legal guardians and/or the state. Even for adult women, privacy is vulnerable to loss when the decisions sought to be respected are impugned. Consider the rhetoric commonly used to describe the privacy right, the right to choose, or “choice.” Framing abortion as a matter of choice invites restrictions when pregnancy is viewed as the product of poor choices. Not surprisingly then, abortion rights are the most robust when an unwanted pregnancy is widely understood as not the woman’s fault. The prevalence of laws allowing exceptions for rape and incest in otherwise sweeping restrictions on funding abortion traces back to disparaging discourses about women’s fault in becoming pregnant. Grounding the abortion right in equality might have homed in on the ways sex stereotypes about female sexuality underpin abortion restrictions, but privacy gives no traction to such arguments. Framing the abortion right as a matter of choice presupposes full agency, making it easier to blame a woman’s poor choices for an unwanted pregnancy. Such discourses make women unsympathetic subjects for abortion rights and invite further restrictions.

Arguments for centering equality in a reproductive rights discourse have long been part of a critique by feminist legal scholars of the liberty-based framework for reproductive rights.<sup>277</sup> Focusing this critique on inequality in education and on its connection to reproductive control for women who are school-age or pursuing higher education adds a new and important dimension to this critique. Considering reproductive rights in relation to education and the rights of school-age women, and teenage girls in particular, highlights how poorly the autonomy framework works for minors, who are subject to additional restraints on their reproductive lives. For example, it is unsurprising (but problematic) that the judicial bypass proceeding for minors focuses exclusively on the young woman’s maturity and not on her educational opportunity.

The law’s grounding of reproductive rights in autonomy, unmoored from equality, has also opened the door to a number of damaging discourses that have a blowback effect that drains support for pregnant and parenting students in education. Title IX’s inapplicability to those aspects of reproduction occurring prior to pregnancy leaves unaddressed the conditions of inequality under which young women face an unwanted pregnancy. By steering the conversation about sex equality in education away from women’s reproductive control, Title IX stages an equality discourse that leaves out much of what contributes to sex inequality in education. Title IX’s boundaries thereby reinforce the understanding that reproductive rights present issues that are distinct from issues of sex equality in education and that unwanted pregnancy is a matter of individual responsibility and poor choices. This understanding, in turn, undermines support for strong equal rights for pregnant

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<sup>277</sup> See, e.g., *id.* (reviewing the history of such arguments in litigation).

and parenting students. If the educational consequences of pregnancy and parenting can be attributed to a student's poor choices, it is easier to write off these students as undeserving under-achievers. This, in turn, feeds into the stigmatized view of pregnant students and makes it easier to pathologize teen pregnancy in a way that undermines empathy for this population of students. This kind of discourse supports an understanding of Title IX that sets a low bar for what schools have to do to accommodate pregnant students. In addition, stigmatized views about pregnant students make it less likely that educators will voluntarily adhere to a strong set of rights—regardless of what those rights are—especially given Title IX's weak enforcement structure and the low likelihood that a pregnant student or new parent will sue.

Framing reproductive rights as a matter of liberty, and not equality, has also meant that the protected right is limited to decisional autonomy and does not encompass access to the resources necessary for effectuating women's choices. The right to privacy grounding for both contraception and abortion rights is a right to decide without government interference (within the limits discussed above). It is not a right to government support in eradicating the barriers to contraception or abortion access. As discussed in Part II, barriers of access particularly impede girls and women of color and with lower incomes, resulting in disparate capacities to exercise "choice" in preventing or terminating pregnancy. The racial and class disparities in who can access these rights also contribute to the racialization and stigmatization of the pregnant teen subject, described in Part I. These race and class impacts fuel the narrative of the educationally expendable pregnant student, undeserving of more than modest accommodations.

Grounding reproduction in a framework of choice not only contributes to the stigma surrounding pregnant students but also supports a discourse of contagion that underlies the most blatant discrimination against pregnant students. Under this logic, if young women have reproductive autonomy and the right to avoid pregnancy is grounded in choice, the visibility of pregnant and parenting students might negatively influence the choices of other students. As Kendra Fershee explains, the rationale for the pre-Title IX practice of excluding pregnant students from school is "rooted in a fear that providing help to pregnant students might positively reinforce their 'bad behavior' of getting pregnant in the first place," and a concern that the "character flaw" in the pregnant student should be "negatively reinforced," lest it encourage others to follow suit.<sup>278</sup>

Cornelia Pillard makes a similar point in her critique of the law's divide between liberty and equality in connection with reproductive rights: "Arguments from equality may be weakened by the sense that laws and policies need not change to be fairer to women if, supplied with the liberty to control

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<sup>278</sup> Fershee, *supra* note 132, at 317.

fertility and have abortions, women thereby become ‘just like men.’”<sup>279</sup> In other words, if young women are presumed to have the choice to remain unencumbered by pregnancy and motherhood, then perhaps they do not need (or deserve) help from antidiscrimination law to accommodate the effects of pregnancy on education in order to have equal opportunity. Under this logic, the rhetoric of choice may be used to limit what schools must do to accommodate pregnancy and motherhood—if getting pregnant and having a child is a choice, then that argues against going to great lengths to protect students from educational opportunity costs. Choices, after all, have opportunity costs.

Separating reproductive control and educational equality into distinct bodies of law makes it more difficult to see their intersections and how each set of rights reinforces the limitations of the other. One example of this dynamic is that Title IX’s promise of educational equality for pregnant students actually plays into the anti-abortion discourse that views carrying a pregnancy to term as a temporary inconvenience, instead of a life-altering proposition, as it often is. Title IX analogizes pregnancy to temporary disability, making it easier to keep the educational consequences out of the conversation about abortion and contraception. Abortion rights advocates working within a separate body of law may not be steeped in the particularities of Title IX’s framework. They may not be able to elaborate the ways in which Title IX’s equality framework falls short of actually neutralizing the educational consequences of pregnancy.

At the same time, an autonomy-based framework for reproductive rights gives rise to a narrative of choice that reinforces a discourse of “shame and blame” that serves to undermine educational supports for pregnant students and new mothers.<sup>280</sup> Educators and lawyers who work within Title IX may lack a sufficient understanding of the limits of reproductive rights and the gap between the promise of choice and the reality of constrained choices to be able to effectively push back against this narrative. Reproductive rights lawyers and Title IX lawyers operate in separate silos of law with little cross-pollination of ideas or collaboration between them.

Bridging the gap at this point in the development of the law will not be easy. Importing stronger reproductive rights into Title IX would be an uphill battle to say the least. Although restrictions on contraception, pregnancy termination, and sex education that would empower young women in their sexual relationships deeply implicate issues of educational equality for girls and women, Title IX’s inapplicability to these areas is, at least for now, firmly entrenched. Expanding reproductive rights discourse to draw upon educa-

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<sup>279</sup> Pillard, *supra* note 37, at 942.

<sup>280</sup> Lauren Ann Rankin, *Shame and Blame Campaign: The Use of Shame in Teen Pregnancy Prevention Campaigns* (May 2014) (M.A. thesis, Rutgers University) (on file with author), <https://doi.org/doi:10.7282/T3DZ06M1> (criticizing teen pregnancy prevention public education campaigns for stigmatizing young women’s sexuality and blaming teen mothers for being irresponsible sexual actors who contribute to poverty and crime).

tional equality arguments for lifting restrictions on women's reproductive control also appears unlikely to succeed, given the defensive posture of the reproductive rights movement. At least for now, reproductive rights are on the precipice of retrenchment rather than expansion.

As important as the gaps in legal doctrine and the disconnect between claims for educational equality and reproductive rights is the effect of this dichotomy on public understanding and the discourses that undermine support for both sets of rights. Title IX scholars and advocates and reproductive rights scholars and advocates share a common agenda, yet rarely connect their work and expertise. Reproductive rights lawyers need to find creative ways to highlight the educational costs of unwanted pregnancy and the costs to sex equality in education of denying young women full reproductive control. To push back against narratives of blame and shame that drain support for equality rights, Title IX advocates for pregnant and parenting students should call out the restrictions on autonomy and inequalities in social life and in the health care system that deny young women meaningful agency over their sexuality and reproductive lives. This article has sought to take an initial step toward bringing sex equality in education into dialogue with reproductive autonomy.