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Strange Bedfellows at Work: Neomaternalism in the Making of Sex Discrimination Law

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STRANGE BEDFELLOWS AT WORK: NEOMATERNALISM IN THE MAKING OF SEX DISCRIMINATION LAW

DEBORAH DINNER*

ABSTRACT

In contests about pregnancy discrimination during the 1970s, feminists, the business lobby, and anti-abortion activists disputed the meaning of sex equality. Existing scholarship has yet to take account of the dynamic interaction between these groups. This Article fills that void by analyzing the legal and political debates that resulted in the passage of the Pregnancy Discrimination Act of 1978 ("PDA"). The Article reveals how competing ideas about the family, wage work, and reproductive choice shaped the evolution of pregnancy discrimination law. Feminists, the business lobby, and anti-abortion activists drew upon two legal discourses in debating pregnancy discrimination: liberal individualism and "neomaternalism." Each of these discourses, in turn, encompassed dual

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valences. Liberal individualist discourse challenged sex-role stereotypes, but it also reinforced the idea that private reproductive choice rendered reproduction a private economic responsibility. Neomaternalism leveraged the social value of motherhood to gain entitlements for pregnant women, but also reinforced the normative primacy of motherhood.

Feminists' legal goals and rhetorical frames at times overlapped with and at other times diverged from those of both the business lobby and anti-abortion activists. Feminists used liberal individualist principles of equal treatment and neutrality to challenge gender stereotypes that states and employers used to justify the exclusion of pregnancy from public and private insurance schemes. The business lobby used liberal individualist principles of private choice to advance a market libertarian interpretation of sex equality that justified the denial of pregnancy-related benefits. In opposition to the business lobby, both feminists and anti-abortion activists forged a fragile alliance. Both groups made neomaternal arguments in advocating the PDA. While feminists emphasized the value of pregnancy as a form of socially productive labor, however, anti-abortion activists stressed the need to protect pregnant women and fetuses.

The points of confluence and departure between the arguments of feminists, business opponents, and anti-abortion allies both advanced sex equality under the law and also limited its scope. Feminist advocates for the PDA synthesized liberal individualist and neomaternal discourses to pursue the elimination of sex-role stereotypes under the law as well as collective societal responsibility for the costs of reproduction. While the PDA took a significant step toward the realization of this vision, it remains illusory. Our legal culture evolved to embrace not only the valences of liberal individualist and maternalist ideologies that advance sex equality but also those valences that reinforce gender inequality. Market libertarianism continues to privatize the costs of reproduction, while maternalism reinforces the sexual division of reproductive labor. Ultimately, this Article points to the persistence of tensions in the definition of sex equality and the consequent need for new legal paradigms.

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INTRODUCTION

In contests about pregnancy discrimination during the 1970s, feminists, the business lobby, and anti-abortion activists disputed the meaning of sex equality. Existing scholarship has yet to take account of the dynamic interaction between these groups. This Article fills that void by analyzing the legal and political debates that resulted in the passage of the Pregnancy Discrimination Act of 1978 ("PDA").[1] For all sides in these debates, the definition of sex equality was contingent and dynamic rather than transcendent and static. Feminists' legal goals and rhetorical frames at times overlapped with and at other times diverged from those of both the business lobby and anti-abortion activists. These points of confluence and departure advanced sex equality under the law but also limited its scope.

Feminists, the business lobby, and anti-abortion activists drew upon two legal discourses in debating pregnancy discrimination: liberal individualism and what I call "neomaternalism." Liberal individualism emphasized principles of same treatment, private choice, and neutrality under law. This Article is the first piece of scholarship to identify and analyze neomaternalism, a form of advocacy in the 1970s that leveraged the social value of motherhood to lay claim to state entitlements for pregnant workers. Neomaternal advocacy modernized progressive and New Deal era maternalist reform traditions, which had mobilized conceptions of reproductive sex difference, maternal nurture, and motherhood's social value to argue for protective labor standards for women workers and social-welfare entitlements protecting low-income women and children. By contrast with this earlier form of maternalist advocacy, which had reinforced the family-wage ideal, the neomaternal advocacy of the 1970s promoted equal employment opportunity for women. Neomaternal advocacy used an older rhetoric—that motherhood constituted a service to society—to advance a new legal ideal affirmed pregnant women's right to economic independence as well as security.

The richer history provided in this Article challenges the conventional view that the PDA marked the apex of a transformation from the protection of women to sex equality. The dominant narrative takes two forms. Some scholars argue that the PDA marked a turn in American law from special treatment for women to same treatment of women and men.[2]

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1. Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (2006)).

2. *See, e.g.*, LISE VOGEL, MOTHERS ON THE JOB: MATERNITY POLICY IN THE U.S. WORKPLACE (1993) (depicting debates over the legal regulation of pregnant workers as contests between advocates

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More recent scholarship characterizes the PDA as a triumph of feminists' efforts to challenge sex-role stereotypes under the law.[3] This Article's historical analysis illustrates how both forms of the dominant narrative overlook the complex, surprising, and nuanced evolution of the meaning of sex equality during the 1970s. In particular, the dominant narrative overlooks the ways in which neomaternalism as well as liberal individualism shaped the debates leading to the PDA.

Neither liberal individualism nor neomaternalism captured the entirety of feminists' legal agenda. Rather each form of discourse posed specific benefits and risks. Feminists marshaled liberal individualist principles to challenge the sex-role stereotypes that state governments and employers used to rationalize the exclusion of pregnancy from public and private insurance plans. By contrast, the business lobby deployed liberal individualist discourse to legitimate concepts of free contract and private ordering that reinforced gender- and race-based status hierarchies.[4] Liberal

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of equal treatment and different treatment). The argument that the PDA represents a triumph for same treatment forms part of a larger narrative about feminist legal advocacy in the period. *See* Mary Becker, *The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics*, 40 WM. & MARY L. REV. 209 (1998) (arguing that feminism in the 1960s and 1970s shifted wholly from protection to a formalist conception of equal treatment); Nicholas Pedriana, *From Protective to Equal Treatment: Legal Framing Processes and the Transformation of the Women's Movement in the 1960s*, 111 AM. J. SOC. 1718 (2006) (arguing that in the late 1960s the women's movement shifted its legal framing from protection to equality).

3. Sophisticated recent scholarship enriches our historical understanding by showing that 1970s feminist legal activists did not reject sex-based classifications per se. In lieu of formal equality—same treatment for similarly situated individuals—feminist attorneys and activists sought to reform laws that entrenched sex-role stereotypes. *See* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 125–32 (2010) (arguing that feminist lawyers sought to extend the anti-stereotyping principle to the legal regulation of reproduction and pregnant workers but that the Supreme Court rejected this application); Neil S. Siegel & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771 (2010) (arguing that Ruth Bader Ginsburg's brief in the case of *Struck v. Secretary of Defense* challenging the exclusion of a pregnant woman from the military illustrated Ginsburg's commitment to anti-subordination values). The literature on anti-stereotyping suggests that the PDA marks a key moment in which Congress not only embraced equal treatment but also used law to challenge traditional gender norms. *See* Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1358–67 (2012) (arguing that the PDA rejected the narrow, anti-classificationist interpretation of sex equality that the Supreme Court had invented in the 1976 case of *Gen. Elec. Co. v. Gilbert*).

4. Historians show that liberalism's promise of free contract, free labor, and equal treatment under law simultaneously concealed and reinforced economic inequality and social status hierarchies. *See, e.g.*, ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 460–99 (1988) (arguing that liberal ideology limited the promise of Reconstruction in the North); AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION (1998) (analyzing the paradoxes presented by "freedom of contract" ideology at the moment of slave emancipation). For a theoretical discussion of the ways in which liberalism rests on the subordination of women within the family, see CAROLE PATEMAN, THE SEXUAL CONTRACT (1988) (arguing that contract theory cannot advance feminist politics).

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individualism thus held the potential to challenge the ways in which law entrenched the family-wage ideal as well as the potential to mask workplace structures that perpetuated gender inequalities as sex neutral.

Conversely, feminists and anti-abortion activists forged a tenuous alliance. Both groups drew upon neomaternal discourses to advocate the PDA. Anti-abortion activists argued for the protection of childbearing workers as a means to protect fetuses. They believed that prohibitions on pregnancy discrimination would increase women's economic security and encourage them to bring their pregnancies to term rather than to abort. Feminists also made neomaternal arguments that stressed the societal value of childbearing. Rather than calling for the protection of women in their childbearing roles, however, feminists emphasized that childbearing constituted a form of labor deserving of public support. Neomaternalism helped to articulate the relationship between sex equality and the just distribution of the costs of reproduction. But neomaternalism also threatened to reinforce the normative primacy of motherhood.

Feminists' synthesis of liberal individualist and neomaternal discourses aspired to a vision of sex equality that would both transform gender roles and support women in their gendered roles as mothers. In combatting the exclusion of pregnancy from public and private insurance schemes, feminists challenged several gender stereotypes about men and women's roles in the workplace and the family. The campaign for pregnancy disability and health insurance benefits, however, did more than challenge sex-role stereotypes. Feminists, advocating for pregnancy-related benefits, also took steps toward challenging what Martha Fineman has since theorized as the privatization of dependency.[5] Unlike advocacy by welfare rights activists and socialist feminists on behalf of state support for mothering within the home, feminist advocacy for pregnancy discrimination law aimed to help women reconcile the role of mother and worker. While feminist campaigns against pregnancy discrimination did not seek to upend private responsibility for caregiving and for the derivative dependence of caregivers, this advocacy did seek collective, societal responsibility for the costs of reproduction. Feminist advocacy for pregnancy discrimination law challenged the allocation of the economic costs of pregnancy and childbirth—partial incapacity and lost productivity in the workplace, temporary physical dependence, and medical and healthcare costs—to the private family. Feminists' vision for sex equality

5. MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY xv (2004) (arguing for augmented state support of caregivers and children).

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thus included at its core a claim about the just distribution of the costs of reproduction.[6]

The PDA only partially institutionalized this vision. The PDA created a baseline requirement of equal treatment for pregnancy and temporary disabilities but did not create an affirmative entitlement to pregnancy-related benefits. The statute thus spread the costs of reproduction among employers and workers but did not socialize the costs of reproduction or otherwise challenge the privatization of dependency. Moreover, the PDA advanced women's affirmative right to bear children without sacrificing economic autonomy, but reinforced the status of abortion as a negative right that does not merit public economic support.

The Article proceeds in four parts. Part I situates the legal and political debates of the 1970s in the longer political economy of pregnancy discrimination. This Part revisits the historiography analyzing feminist, labor, and social-welfare activism in the progressive era and New Deal. It shows how reformers mobilized maternalist ideology as a jurisprudential and political tool to achieve protective labor regulations, first for women and later for both sexes. Yet policy actors and businesses designed state, social insurance programs and voluntary, employer, fringe benefits plans according to a masculine norm. Accordingly, benefits designed to promote the economic security of workers excluded pregnancy from coverage. Labor unions began to challenge these pregnancy exclusions after World War II. By the late 1960s and early 1970s, nascent sex discrimination doctrines invested workers and feminist attorneys with a new tool to demand coverage for pregnancy.

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6. This Article does not argue that feminists advanced a comprehensive vision for distributive justice. Rather, it argues that feminists' claim that the entire society should take responsibility for the costs of reproduction concerned the just distribution of economic benefits and burdens. The focus on distributive justice claims in feminist advocacy for sex equality under the law helps to remedy a gap in the historical literature. Legal historians have analyzed the place of distributive justice claims in the civil rights movement. Risa Goluboff, for example, recovers the legal strategy of the Department of Justice's Civil Rights Section during the 1940s, which focused on Thirteenth Amendment claims rooted in the experience of African-American laborers. She argues that these claims held greater promise to combat the harms of Jim Crow for working-class blacks than did the NAACP's strategy of using the Fourteenth Amendment to challenge segregation. RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS (2007). Sophia Lee argues that African- American workers and attorneys challenged the state action doctrine through the 1950s; her research highlights the potential for equal protection to achieve economic security for African-American workers. SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT (forthcoming 2014). But the legal history of distributive justice claims made by the women's liberation movement of the late 1960s and 1970s remains to be told. For an initial analysis of these claims, see Deborah Dinner, Pregnancy at Work: Sex Equality, Reproductive Liberty, and the Workplace, 1964–1993 (May 2012) (unpublished Ph.D. dissertation, Yale University) (on file with author).

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Part II shows how the business lobby mobilized against pregnancy discrimination claims. Existing historical scholarship stresses social conservatives' opposition to feminism, but pays insufficient attention to market conservative mobilization against feminists' legal objectives.[7] This Part helps to remedy that oversight by showing how the business lobby fused the concepts of reproductive privacy and choice with free-market economic principles to develop a market libertarian interpretation of sex equality. The business lobby's arguments overlapped rhetorically with feminist arguments by drawing a distinction between sex and women's reproductive role as mothers. Employers and business trade associations, however, also undermined feminist efforts to realize collective responsibility for the costs of reproduction. This Part examines the influence of the business lobby's arguments on the Supreme Court's jurisprudence under Title VII of the Civil Rights Act of 1964[8] and the Equal Protection Clause of the Fourteenth Amendment.[9]

Part III examines the neomaternal politics of anti-abortion activists and analyzes how their advocacy influenced the passage of the PDA. Anti-abortion activists opposed the liberal individualist principles that made terminating pregnancy a private choice and also made childbearing a private economic burden. They understood the legalization of abortion as a new imperative to obtain public support for motherhood. Neomaternal advocacy by anti-abortion activists, as well as feminists, helped to overcome the business lobby's opposition to the PDA. Anti-abortion activists and Congressional members' construction of the PDA as a pro-life bill, however, also created the political space for the passage of an anti-abortion rider attached to the statute. The Beard Amendment to the PDA exempts employers from the obligation to provide equal health insurance coverage for abortion.[10] The PDA thus bears the imprint of neomaternalism in a manner that highlights the risk of this form of argument to feminists.

Part IV argues that the synthesis of liberal individualist and neomaternal ideals, which feminist advocates for the PDA pursued in the

7. The leading history of the 1970s, for example, while nuanced, nonetheless portrays social conservatives as feminists' opponents while ignoring business conservatives' opposition to feminists' goals. *See* BRUCE J. SCHULMAN, THE SEVENTIES: THE GREAT SHIFT IN AMERICAN CULTURE, SOCIETY, AND POLITICS 159–89 (2001).

8. 42 U.S.C. §§2000e–2000e-17 (2006 & Supp. V 2011).

9. U.S. CONST. amend. XIV, §1.

10. An exception mandates equal health insurance coverage for abortion when abortion is necessary to save the life of the mother or gives rise to medical complications. Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (2006)).

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1970s, has since fractured. In the 1980s, feminists confronted the limits of the PDA in a conservative political environment that forced activists to prioritize either anti-stereotyping or equal employment opportunity for working-class women. Through the present day, courts interpret the PDA through a market libertarian lens that occludes the statute's neomaternal potential. In conclusion, this Article examines the evolution of liberal individualism and maternalism at the close of the twentieth century and the start of the twenty-first century. It concludes that the evolution of these ideologies has compounded the difficulty of pursuing the elimination of sex-role stereotypes and, at the same time, collective responsibility for the costs of reproduction.

I. THE POLITICAL ECONOMY OF PREGNANCY DISCRIMINATION

Part I places 1970s debates about pregnancy discrimination in their historical political economy. Part I.A describes how *Lochner*-era constitutional jurisprudence fostered a split within feminist legal advocacy. Feminists who prioritized protections for working-class women and allied progressive reformers used maternalism strategically to establish the constitutional authority of states to regulate the employment relationship. Other feminists who prioritized equal treatment under the law came to understand that goal as antithetical to sex-specific protective labor legislation. The political and constitutional landscape of the progressive era and 1920s thus catalyzed a tension between maternalism and liberal individualism within modern feminism.

While protective labor regulation infringed on the private ordering of the labor market, the privatization of dependency persisted beyond the New Deal.[11] Part I.B shows how a patchwork of insurance systems, which developed from the New Deal through the post-World War II period, excluded childbearing workers from coverage. Maternal ideologies provided a constitutional justification for protective labor legislation, but did not provide a rationale for the inclusion of pregnant women in the workplace and in employment benefits. The valorization of maternal nurture justified the protection of women as mothers, but not equal

11. A voluminous body of scholarship examines the gender ideologies embodied in a two-tier welfare system that channeled women and people of color disproportionately toward means- and morals-tested benefits administered at the state level and male breadwinners toward universal, higher-quality entitlements administered at the federal level. *See generally* SUZANNE METTLER, DIVIDING CITIZENS: GENDER AND FEDERALISM IN NEW DEAL PUBLIC POLICY xi–xii (1998); Barbara J. Nelson, *The Origins of the Two-Channel Welfare State: Workmen's Compensation and Mothers' Aid*, *in* WOMEN, THE STATE, AND WELFARE 123 (Linda Gordon ed., 1990).

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treatment for women as workers. The legal construction of women workers as mothers, first, and employees, second, undermined the economic security of childbearing workers. Policy actors as well as employers premised benefits on a masculine norm.[12] Thus, even though women had formal equality of access to state and employer fringe benefits, the design of these benefits intensified the dependence of pregnant workers.

By the 1970s, increased rates of women's labor-market participation and rising rates of single motherhood deepened and broadened the injurious effect of these pregnancy exclusions. Part I.C discusses these trends and shows how labor activists and feminists used nascent sex equality doctrines under Title VII and the Equal Protection Clause to claim the inclusion of coverage for pregnancy within state insurance programs and employer fringe benefit plans. Part I.D examines how employers used family-wage and separate-spheres ideologies to defend against equal coverage for pregnancy. By the early 1970s, however, these forms of arguments about gender were diminishing in legal and political potency.

A. Liberal Individualism, Maternalism, and Labor Reform in the Progressive Era and New Deal

During the progressive era, reformers used maternalist gender ideologies as a wedge with which to crack Lochnerism. Federal as well as state courts used freedom of contract and substantive due process doctrines to reject states' authority under the police powers to enact labor regulations. Some feminist reformers and progressive allies turned to arguments about the need to protect women as a constitutional justification for labor regulations of women. They aspired to first win sex-specific protective laws for women and then to use this gain as a means to later expand protective labor regulations to men.[13] The first triumph for these reformers came in 1908 when the Court decided *Muller v. Oregon*.[14] Labor activist Josephine Goldmark and progressive lawyer Louis Brandeis teamed up to write the famous brief, packed with social scientific evidence, that helped persuade the Court to uphold a state maximum-hours

12. For a discussion of how a "gendered imagination" shaped the way in which policy actors designed social legislation, see ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA (2001).

13. *See* Joan G. Zimmerman, *The Jurisprudence of Equality: The Women's Minimum Wage, the First Equal Rights Amendment, and* Adkins v. Children's Hospital, *1905–1923*, 78 J. AM. HIST. 188, 199 n.15 (1991).

14. 208 U.S. 412 (1908).

law for women.[15] The majority opinion in *Muller* cited gender ideologies about sex difference and women's role to justify the state's police power regulation.[16] *Muller* represented the high watermark for maternalism in constitutional jurisprudence.

The constitutional constraints of the period catalyzed a split among feminists.[17] Activists who prioritized the protection of working-class women from exploitation continued to press for expansive labor regulations. Initially, feminist activists for the first Equal Rights Amendment believed that they could pursue sex-based protective legislation in conjunction with equal treatment under law. Over time, however, ERA activists came to understand sex-based protective laws as an injurious group classification of women that would undermine equal access to work opportunities.[18] As historian Nancy Cott has argued, both supporters of protective legislation and ERA proponents saw themselves as legatees of nineteenth-century suffragists and as advocates for economic justice for women.[19] Advocates for protective legislation were more pragmatic, taking the labor market as then structured; they understood women's roles as mothers to be inherent. In contrast, proponents of the ERA were more aspirational, envisioning the labor market as it could be; they saw women's reproductive roles as sociohistorical constructions.[20]

Following *Muller*, constitutional jurisprudence swung temporarily back in the direction of liberal individualism. In the 1923 case of *Adkins v. Children's Hospital*,[21] an employer challenged the District of Columbia's minimum-wage law for women as a violation of the Due Process Clause of the Fifth Amendment. The *Adkins* litigation generated an alliance between the National Woman's Party, which opposed sex-specific protective laws because of their perceived conflict with the ERA, and businessmen who opposed the laws because they imposed heightened

15. *Id.* at 421–23.

16. The opinion reasoned "[t]hat woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence." *Id.* at 421. The Court concluded that because "healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest." *Id.*

17. For a discussion of the constitutional constraints facing reformers in the progressive era, see VIVIEN HART, BOUND BY OUR CONSTITUTION: WOMEN, WORKERS, AND THE MINIMUM WAGE 63–129 (1994) (arguing that freedom of contract doctrine and a limited view of state authority under the police power forced advocates to tackle the minimum wage as a gender-specific problem).

18. Zimmerman, *supra* note 13.

19. NANCY F. COTT, THE GROUNDING OF MODERN FEMINISM 115–42 (1987).

20. *See, e.g.*, *id.*

21. 261 U.S. 525 (1923).

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costs on employers.[22] The Court in *Adkins* departed from the maternalism of *Muller* to strike down the minimum-wage law. The majority reasoned that having gained the right to vote with the ratification of the Nineteenth Amendment, women no longer needed the special protection of the state.[23] In addition, the Court reasoned that while a maximum-hours law had the clear purpose of preventing exploitation in the workplace, no similar protective justification existed for a minimum-wage law.[24]

The case that marked the famous switch-in-time on the New Deal Court[25] rested the New Deal's constitutional authority on maternalist arguments about the protection of women. *West Coast Hotel Co. v. Parrish*[26] reversed *Adkins* to uphold the state of Washington's minimum-wage law for women.[27] The decision justified the law on the ground of a societal interest in the health of mothers[28] as well as women's unequal bargaining position in the labor market.[29] *West Coast Hotel* represented the expansion of gendered ideologies about the need to protect women workers to universal ideologies about the need to regulate the market to correct power imbalances and protect all workers' from exploitation.[30] In the wake of the decision, Congress passed the Fair Labor Standards Act of 1938.[31] President Roosevelt used every political resource at his disposal to overcome opposition by southern conservatives who had long opposed a wages-and-hours bill. The Act contained forty-cent minimum wage and forty-hour maximum-hour provisions, but capitulated to white supremacy in the South by excluding domestic and agricultural workers.[32]

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22. *See* Zimmerman, *supra* note 13, at 197–200.

23. *Adkins*, 261 U.S. at 552–53.

24. *Id.* at 553–55.

25. For explanations of the Supreme Court's capitulation to the New Deal, *compare* BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998) (offering an externalist account that emphasizes the Court-packing plan, popular electoral mobilization, and Congressional legislation) and WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT (1995) (same) *with* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998) (offering an internalist account arguing that the New Deal represented the culmination of three decades' doctrinal evolution).

26. 300 U.S. 379 (1937).

27. *Id.* at 400 (overruling *Adkins*).

28. *Id.* at 398 ("What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers?").

29. *Id.* at 399.

30. *See* JULIE NOVKOV, CONSTITUTING WORKERS, PROTECTING WOMEN: GENDER, LAW, AND LABOR IN THE PROGRESSIVE ERA AND NEW DEAL YEARS 11–14 (2001).

31. 29 U.S.C. §§ 201-219 (2006 & Supp. V 2011).

32. *See* Phyllis Palmer, *Outside the Law: Agricultural and Domestic Workers under the Fair Labor Standards Act*, 7 J. POL. HIST. 416 (1995).

Maternalist ideologies provided a constitutional justification for the New Deal and also shaped the design of its social welfare programs. Intersecting constructions of race and gender motivated maternalist advocates. In the early twentieth century, concerns about immigration, the status of African-Americans and white women's "race suicide" motivated activists in the National Congress of Mothers and Parent-Teacher Association.[33] Their appeal to motherhood thus simultaneously contained the promise of universality and an implicit racial hierarchy.[34] During the Progressive and New Deal eras, the middle-class white female reformers who acted as architects of Aid to Dependent Children ("ADC") exhibited class, ethnic, and racial biases. These biases led white maternalist reformers who defied the family-wage ideal in their own lives to enshrine that ideal in policy regulating immigrant, poor, and African-American women.[35]

White maternalist activism starkly contrasted the maternalism of African-American women who during this time pursued health, childcare, and other welfare programs in their communities.[36] Black maternalist activists were more accepting of single motherhood and looked more favorably upon maternal employment.[37] Historian Linda Gordon argues that had black maternalists' vision prevailed ADC would have offered more support to working mothers.[38] Ultimately, however, racism plagued the administration of maternalist welfare programs. In 1931, black women comprised only three percent of mothers' pension recipients.[39] In the late 1930s and 1940s, ADC bureaucrats largely excluded black women from assistance.[40]

The history of feminist and labor reform in the early twentieth century sets the stage for this Article's close analysis of legal strategies and political dynamics a half century later. Some of the insights of this early history concern strategic argumentation and ideological tensions within feminist legal advocacy. The history of maternalist advocacy in the

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33. Activists in these two associations lobbied for school supplies, kindergartens, hot lunches, juvenile courts, and baby courts and, by the 1920s, played a pivotal role in advocating mothers' pensions and administering the Sheppard-Towner Act. *See* MOLLY LADD-TAYLOR, MOTHER WORK: WOMEN, CHILD WELFARE, AND THE STATE, 1890–1930, at 43–132 (1994).

34. *Id.* at 49–50.

35. LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE, 1890–1935, at 84–88 (1994).

36. *Id.* at 111–43.

37. *Id.* at 142.

38. *Id.*

39. *Id.* at 48.

40. *Id.* at 276.

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progressive era highlights the strategic use of arguments about the protection of women to realize labor reform. In the 1970s, feminists and anti-abortion activists would similarly use neomaternal argumentation about the social value of motherhood to gain antidiscrimination protections for pregnant workers. In addition, the early history shows how a combination of strategic constraints and ideological differences divided feminist activism during the progressive era. In the 1970s, feminist advocacy for the PDA would synthesize commitments to equal treatment and the protection of working-class women's economic security, thereby temporarily unifying elements of the women's rights movement that had earlier divided. But in the 1980s legal and political constraints would again catalyze a tension between feminist advocates' commitments to anti-stereotyping and economic security for working-class women.

Other insights gleaned from the early history of maternalist activism center on the political coalitions that feminists formed with other groups and the intersection of maternalist activism with the larger political culture. The history demonstrates how a strand of feminism that stressed equal treatment to the exclusion of concerns with protection aligned with the market libertarian interests of business. In the late twentieth century, feminists and the business lobby would draw on competing strains of liberal individualism, the former to challenge sex-role stereotypes under the law and the latter to legitimate the denial of pregnancy-related benefits. The history also reveals the intersection of racial and gender ideologies in the maternalist activism of the early twentieth century. In the 1970s, the political appeal of neomaternal arguments for the PDA rested in part on social anxieties about black and white motherhood.

B. The Exclusion of Pregnancy from Public and Private Insurance Plans

In the period between the New Deal and the 1970s, a loose patchwork of public welfare schemes and private employer benefits emerged. Employers responded in varying degrees to labor market, union, and political pressures to provide voluntary health, sick leave, and disability benefits. As a result, employees experienced disparate levels of protection against temporary dependence due to illness, injury, or disability. Many workers had no protections at all against losing their jobs and income when they experienced temporary periods of physical incapacity. These public and private insurance schemes provided the uneven baseline by

http://openscholarship.wustl.edu/law_lawreview/vol91/iss3/3

which Title VII and the PDA's equal-treatment mandates would be measured.[41]

Of critical importance, the fight against pregnancy discrimination took place within a system that privatized healthcare as well as disability insurance. Although some state assistance schemes existed for the poor, only private disability, unemployment, and health insurance existed for the working and middle classes. Including pregnancy within these insurance systems would spread the costs of pregnancy among private families, workers, and employers.[42] The United States, however, lacked taxpayer-funded social insurance systems providing coverage for healthcare and disability, such as those that existed in Western European social democracies. In the absence of such social-insurance schemes, equal treatment for pregnancy under employee- and employer-paid insurance plans would not socialize the costs of reproduction.

Before the rise of pregnancy discrimination law, neither employers nor states treated pregnant women as workers. Employers routinely fired employees from their jobs on the basis of their pregnant condition alone, despite their continued capacity to perform their job duties.[43] As of 1971, thirty-eight states disqualified pregnancy from unemployment insurance. Unemployment compensation in the United States was restricted to those who became unemployed through no fault of their own and who were actively looking for work. States excluded pregnant women on the ground that by voluntarily becoming pregnant, they chose to render themselves incapable of working.[44]

During the first half of the twentieth century, states also began to require employers to take responsibility for workplace injuries.[45] In 1910,

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41. *See* Deborah A. Widiss, Gilbert *Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961, 989–98 (2013) (underscoring the importance of the development of these public and private insurance schemes to later pregnancy discrimination claims).

42. Private health insurance and disability benefits spread the costs of illness and disability between employers and employees. Employer and employee contributions funded the public disability insurance systems such as existed in five states. *See infra* note 48. Accordingly, although state disability insurance spread the costs of disability more fully than private insurance by requiring a broader employer base, they did not entirely socialize these costs.

43. *See* Deborah Dinner, *Recovering the* LaFleur *Doctrine*, 22 YALE J.L. & FEMINISM 343, 352–53 (2010).

44. Elizabeth Duncan Koontz, *Childbirth and Child Rearing Leave: Job-Related Benefits*, 17 N.Y.L.F. 480 (1971); Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 453 (2011).

45. In exchange for employers taking partial responsibility for accidents at work, employees waive tort liability. MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW: CASES AND MATERIALS 541 (7th ed. 2011).

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New York enacted the first workmen's compensation statute to pass constitutional muster, and by 1949 all states had some form of protection.[46] As legal scholar Deborah Widiss observes, workers' compensation statutes have played a critical role in structuring the different accommodations extended to pregnant employees and to other employees with workplace injuries.[47]

In addition to excluding pregnant women from unemployment and workers' compensation, states refused to classify pregnant women as temporarily disabled. At mid-century, five states—Rhode Island, California, New York, New Jersey, and Hawaii—and Puerto Rico implemented temporary disability insurance programs providing income replacement to workers with non-occupational injuries or illnesses.[48] These six jurisdictions provided unequal treatment of pregnancy and childbirth under their temporary disability insurance plans.[49]

Private employers rarely provided coverage of pregnant workers under employer-sponsored fringe benefit programs.[50] Employer-sponsored health insurance and other fringe benefits took a firm hold during World War II and expanded in the post-war period. The conventional explanation stresses a combination of legal and economic causal factors. In 1943, the National War Labor Board held that fringe benefits worth up to five percent of wages did not violate the wartime wage freeze.[51] Employers confronting a scarce labor supply during the war turned to employee benefits as a means to attract workers. In the late 1940s, the National

46. PRICE V. FISHBACK & SHAWN EVERETT KANTOR, A PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKERS' COMPENSATION 103–04 (2000).

47. Workers' compensation statutes provide financial incentives for employers to provide "light-duty" assignments for injured employees. Widiss, *supra* note 41, at 985. Employers routinely deny comparable light-duty assignments for pregnant workers, and courts uphold these distinctions. *Id.* at 1032–33 (arguing that the language of the PDA requires that employers provide the same light-duty accommodations to pregnant workers as they do to workers injured on the job).

48. In 1942, Rhode Island became the first state to enact legislation establishing a state-run insurance program. SHEILA B. KAMERMAN ET AL., MATERNITY POLICIES AND WORKING WOMEN 78 (1983). California followed in 1946; New Jersey in 1948; New York in 1950; and Puerto Rico and Hawaii in 1969. *Id.* at 83–94.

49. California, New York, Hawaii, and Puerto Rico all excluded pregnancy and childbirth from coverage under their temporary disability insurance schemes. Koontz, *supra* note 44, at 495. Rhode Island changed its policy in 1969 to treat pregnancy and childbirth differently than temporary disabilities caused by other conditions, implementing a flat benefit payment, which restricted coverage for "normal" pregnancy and delivery to a single lump-sum payment of $250. KAMERMAN, *supra* note 48, at 78. New Jersey likewise covered pregnancy on a different basis than other conditions, restricting insurance payments to four weeks preceding the expected birth date and four weeks following the end of the pregnancy. KAMERMAN, *supra* note 48, at 86–87; Koontz, *supra* note 44, at 486.

50. Dinner, *supra* note 44, at 452–53.

51. JENNIFER KLEIN, FOR ALL THESE RIGHTS: BUSINESS, LABOR, AND THE SHAPING OF AMERICA'S PUBLIC-PRIVATE WELFARE STATE 179 (2003).

Labor Relations Board and U.S. Court of Appeals for the Seventh Circuit ruled that the "conditions of employment," about which managers had an obligation to negotiate with unions under the National Labor Relations Act, included insurance benefits and pensions.[52] After Congress failed to pass national health insurance, unions increasingly used collective bargaining to achieve insurance for workers and their families. Between 1948 and 1950, the number of workers covered by employer-provided health plans grew from 2.7 to more than 17 million; by 1954, health plans achieved via collective bargaining covered 12 million workers and 17 million dependents.[53]

Historian Jennifer Klein argues that the conventional explanation for the development of fringe benefit plans ignores a political struggle that took place among employers, workers, and the state. Klein argues that "[s]ince the late nineteenth century, American employers have relied on a program of welfare capitalism to deflect incursions into the workplace from the regulatory state or organized workers."[54] In the wake of the New Deal, employers expanded voluntary fringe benefits to foreclose workers' efforts to enlist the state in regulating labor and expanding health and other forms of social insurance. Thus, fringe benefit plans represented employers' efforts to define "the ideological meaning of security."[55] It is beyond the scope of this Article to reconcile these competing explanations. The historical literature suggests that a combination of political and economic motivations prompted employers to expand fringe benefit plans.

In the post-World War II period, unions, particularly industrial unions with large numbers of active female members, made limited progress negotiating health insurance coverage for pregnancy and other maternity benefits.[56] The majority of working women, however, suffered economic insecurity as a result of pregnancy.[57] Many employers in nonunionized workplaces often denied coverage for physical disability related to

52. Inland Steel Co. v. NLRB, 170 F.2d 247, 251 (7th Cir. 1948) (upholding the NLRB decision that pensions were a condition of employment under the meaning of the National Labor Relations Act), *cert denied*, 336 U.S. 960 (1949). *See also* PAUL STARR, THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE: THE RISE OF A SOVEREIGN PROFESSION AND THE MAKING OF A VAST INDUSTRY 313 (1982); *see also* LAWRENCE S. ROOT, FRINGE BENEFITS: SOCIAL INSURANCE IN THE STEEL INDUSTRY 29–55 (1982).

53. STARR, *supra* note 52, at 313.

54. KLEIN, *supra* note 51, at 2.

55. *Id.* at 3.

56. DOROTHY SUE COBBLE, THE OTHER WOMEN'S MOVEMENT: WORKPLACE JUSTICE AND SOCIAL RIGHTS IN MODERN AMERICA 128–29 (2004).

57. *Id.* at 129.

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pregnancy and childbirth under temporary disability benefits.[58] Economist Barbara Bergmann theorized that the differential treatment of pregnancy formed one of several barriers that employers used to block women workers' access to higher-paying jobs.[59]

Pregnant workers also faced discrimination under health insurance plans. Almost forty percent of private health-insurance policies excluded pregnancy and childbirth-related medical and surgical expenses from coverage for employees, employees' spouses, or both groups.[60] Often, health insurance plans restricted benefits to married couples enrolled in family plans. Group plans offered maternity benefits to wives of male employees but not female workers, or only to those female workers whose husbands were enrolled in the same plan.[61] The policies subsidized childbirths that took place within male-breadwinner/female-caregiver families, but not those births that took place in single-mother households or two-parent families in which women acted as primary wage-earners.

We face the question why employers did not use pregnancy-related benefits to attract employees in a competitive labor market. The answer must lie in the fact that employers as well as policy designers possessed what historian Alice Kessler-Harris has termed a "gendered imagination."[62] Employers incorporated biases about gender roles and family provisioning into voluntary fringe benefit plans in a manner that deepened racial and gender inequalities.[63] Employers understood the female employees who joined the workforce during World War II as only a temporary source of labor and forced them out of their jobs at the war's end.[64] The social construction of female employees as marginal workers limited the ideological impetus to extend pregnancy-related benefits.

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58. Koontz, *supra* note 44, at 491–92.

59. Memorandum from Barbara Bergmann 17–19 (June 22, 1973) (on file with the Rutgers Univ. Alexander Library, Special Collections and Univ. Archives, International Union of Electrical, Radio, and Machine Workers, President's Office Records: Paul Jennings [hereinafter IUE Records], Box 242, Folder: Bergmann, Barbara).

60. Koontz, *supra* note 44, at 491 (citing HEALTH INS. INST., NEW GROUP HEALTH INS. 10 (1971)).

61. Statement of Herbert S. Denenberg, Pa. Ins. Comm'r, *prepared for* the Hearings on Econ. Problems of Women of the Joint Econ. Comm. of the U.S. Cong. on Women's Access to Credit and Ins. 9 (July 12, 1973) (on file with Library of Cong., Patsy T. Mink Papers, Box 64, Folder 3).

62. KESSLER-HARRIS, *supra* note 12 at 5–6.

63. KLEIN, *supra* note 51, at 10.

64. *See* RUTH MILKMAN, GENDER AT WORK: THE DYNAMICS OF JOB SEGREGATION BY SEX DURING WORLD WAR II 99–126 (1987).

C. Sex Equality Claims for the Inclusion of Pregnancy Within Public and Private Insurance Plans

By the early 1970s, economic trends rendered the exclusion of pregnancy from public and private insurance plans increasingly harmful to greater numbers of women. These trends included: families' greater need for women's incomes, increases in women's workforce participation, and greater labor-force attachment during pregnancy and following childbirth. Economic change poised women workers, unions, and the feminist movement to challenge ongoing pregnancy discrimination.

Rising inflation[65] and increasing rates of single motherhood[66] heightened the importance of women's salaries as a source of familial income.[67] In the mid-1970s, married women aged twenty-five to thirty-four experienced "soaring rates" of labor-market participation.[68] Women of color experienced this trend particularly acutely.[69] By the late 1960s, women of color's labor-force participation rate reached 47.2%, while white women's labor-market participation rate reached 39.8%.[70] In 1970, fifty-nine percent of single mothers' engaged in paid employment.[71]

Women in their childbearing years rode the crest of the wave of change in labor-market patterns. Women between the ages of twenty and thirty-four accounted for the greatest increase in labor-force participation among women during the period from 1960 to 1974.[72] By 1973, the proportion of

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65. SCHULMAN, *supra* note 7, at 132–36. In 1964 and 1965 the annual rate of change in the U.S. consumer price index was 1.3% and 1.6%, respectively. In 1973, 1974, and 1975, the annual rates of change were 6.2%, 11.0%, and 9.1%, respectively. MICHAEL FRENCH, U.S. ECONOMIC HISTORY SINCE 1945 46 (1997).

66. By 1970, ten percent of all families with children had female heads of household. KAMERMAN, *supra* note 48, at 7.

67. In 1970, wives contributed twenty percent of family income nationwide; women working full-time contributed thirty-nine percent of their families' incomes in 1983. *Id.* at 10.

68. During this period, married women's labor supply was quite elastic and the income effect small enough that demand drove increases in both labor-force participation rates and hours worked. Claudia Goldin, *The Quiet Revolution that Transformed Women's Employment, Education, and Family*, 96 AM. ECON. REV., May 2006, at 1, 6.

69. Between 1967 and 1969, the median husband's income in nonwhite families was $41,800 lower than in white families. Deborah A. Dawson, *Trends and Differentials in Employment During Pregnancy, United States, 1963 and 1967–69*, at 67, 68 (on file with the IUE Records, Box 241, Folder: Gilbert v. General Electric Co., Trends and differentials in employment during pregnancy 1963).

70. This represented a thirty-nine percent increase in the labor-force participation rate of nonwhite women, between the years 1963 and the period from 1967–1969, and a twenty-eight percent increase for white women. *Id.*

71. KAMERMAN, *supra* note 48, at 7.

72. *Id.*

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women who worked during pregnancy reached forty-two percent.[73] In addition to continuing to work during pregnancy, women evinced heightened labor-force attachment following childbirth. Of those women in the United States who gave birth between 1971 and 1972, thirty-one percent returned to work within one year following childbirth.[74]

Workers, union leaders, and feminist activists identified pregnancy discrimination as one of the most harmful forms of sex inequality. Beginning in 1970, feminist legal advocates joined the longstanding effort of labor feminists to gain equal treatment for pregnancy within insurance schemes. That year, the Citizens' Advisory Council on the Status of Women issued a statement of principles arguing that pregnancy should be treated as a temporary disability under employment benefit schemes.[75] The temporary disability paradigm represented an effort to realize the related goals of achieving socio-economic protections for women workers and combatting gender stereotypes. The paradigm challenged gender stereotypes in three ways. First, the temporary disability framework rejected the notion that pregnancy categorically disqualified women from working. Instead, the paradigm required employers to conduct individualized assessments of whether pregnant employees could continue to perform their job duties. Second, the temporary disability paradigm distinguished between women's biological and social roles in reproduction. The paradigm suggested that women should get the same sick leave and disability benefits offered other temporarily disabled workers. It also, however, decoupled pregnancy leave from parental leave that might be taken by either women or men. Third, classifying pregnancy within a broader legal category rejected the notion that female employees' childbearing capacity imposed unique costs on employers.[76]

Labor activists as well as feminist attorneys were at the forefront of the fight against pregnancy discrimination.[77] Since 1955, the International Union of Electrical Workers ("IUE") had attempted to bargain with General Electric to gain maternity benefits for female workers, but had not

73. *Id.* at 135.

74. *Id.*

75. CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, JOB RELATED MATERNITY BENEFITS 1 (1970).

76. Dinner, *supra* note 44, at 450–52.

77. These groups also overlapped. Labor feminists were activists who, from the New Deal to the early 1970s, fought for women's rights within the labor movement while also using unions as a vehicle to achieve broader sex equality. COBBLE, *supra* note 56, at 4.

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met with any success.[78] Antidiscrimination law provided a potentially powerful new tool in labor negotiations. In the spring of 1971, a newsletter of the IUE legal department reported that the EEOC had issued its first ruling that the exclusion of pregnancy from disability coverage violated Title VII. The newsletter also provided exemplary language that workers could use to file grievances.[79] A chief steward at a General Electric plant in Salem, Virginia, was sympathetic to women's rights and urged members of Local 161 to challenge General Electric's exclusion of pregnancy from its sickness and accident benefit coverage. More than three hundred female workers asked for EEOC charge forms to file pregnancy discrimination claims.[80]

The demand for pregnancy disability benefits affirmed a social norm (new for white if not for black women) that women might occupy simultaneous roles as workers and mothers.[81] Women in the shops began to file charges of discrimination based on the denial of sick pay for pregnancy-related disabilities at a rate that would outstrip the filing of general sex-discrimination charges related to equal pay or promotions over the next couple of years.[82] The workers claimed that childbearing women had the right to keep their jobs and to gain the benefits attached to the employment relationship. Union activists and feminists' sex equality claims triggered a debate about whether law should attribute responsibility for the costs of reproduction to the private family or to employers. Female

78. Direct examination of Thomas F. Hilbert, Jr., Labor Counsel for Gen. Elec. Co., Gilbert v. Gen. Elec. Co., 375 F. Supp. 367 (E.D. Va. 1974) (on file with the IUE Records, Box 243).

79. Pre-Trial Stipulation of Facts at 3, Gilbert v. Gen. Elec. Co., No. 142-72-R (E.D. Va. July 14, 1973) (on file with the IUE Records, Box 241, Folder: pleadings 11-72 to 12-73).

80. *Discrimination on the Basis of Pregnancy, 1977*: *Hearings on S. 995 Before the Subcomm. on Labor of the Comm. on Human Resources*, 95th Cong. 301 (1977) [hereinafter *S. 995 Hearings*].

81. African-American women historically experienced labor exploitation at the same time as social and political devaluation of their caregiving as mothers. *See* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY (1999) (arguing that control of black women's reproduction has functioned as a critical tool of racial oppression from slavery through the late twentieth century). Accordingly, black women's activism focused not only on equal employment opportunity but also on the economic resources and legal rights necessary to care for their children. *See* TERA W. HUNTER, TO 'JOY MY FREEDOM: SOUTHERN BLACK WOMEN'S LIVES AND LABORS AFTER THE CIVIL WAR (1997) (describing how black domestic laborers in Reconstruction Atlanta resisted exploitation by their employers by taking time and resources to care for their family and to engage in communal childrearing practices); JACQUELINE JONES, LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT (1985) (describing how black women's decisions regarding work placed their family's survival as an overarching priority); ANNELISE ORLECK, STORMING CAESARS PALACE: HOW BLACK MOTHERS FOUGHT THEIR OWN WAR ON POVERTY 131–208 (2005) (chronicling the politicization of black mothers in Las Vegas from the late 1950s through the early 1990s).

82. Brief of Int'l Union of Elec., Radio and Mach. Workers, AFL-CIO-CLC, as Amicus Curiae at 14, Geduldig v. Aiello, 417 U.S. 484 (1974) (No. 73-640) [hereinafter IUE Brief, Geduldig].

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workers made the claim that they deserved equal recognition as workers, with equal rights to the forms of insurance and security provided to men.[83]

When workers' grievances did not prompt General Electric to revise its policies, the IUE turned to the courts. In the spring of 1972, the IUE filed a complaint in federal district court on behalf of seven female employees, the union, and Local 161. The plaintiffs in *Gilbert v. General Electric Co.* claimed that General Electric Company discriminated on the basis of sex in violation of Title VII when it excluded pregnancy from temporary disability benefits.[84] In defending against the *Gilbert* litigation, General Electric and other employers argued that the costs of including coverage for pregnancy within existing benefit schemes would prove overwhelming. An actuary testifying for General Electric in federal district court estimated that based upon an average thirteen-week leave, it would cost the nation's employers $804 million to provide short-term sickness and accident benefits for pregnancy. Including pregnancy in long term disability plans would cost another $1.35 billion.[85] The American Telephone and Telegraph Co. estimated that the addition of eight weeks of paid maternity leave cost the company $15.8 million from 1970 to 1971 and $19 million in 1972.[86]

A changed economic landscape contributed to employers' reluctance to grant coverage related to pregnancy and childbirth. Employers faced rising costs in providing benefits. Between 1950 and 1976 the Consumer Price Index rose 112% but medical costs skyrocketed by 191%.[87] Employer spending on private health insurance increased from $700 million in 1950 to $12.1 billion in 1970.[88] An economic recession in the early 1970s deepened employers' resistance to sex equality claims that would force them to assume greater responsibility for the costs of pregnancy and childbirth.

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83. *See* Dinner, *supra* note 44, at 426–27.

84. Gilbert v. Gen. Elec. Co., 347 F. Supp. 1058, 1058–59 (E.D. Va. 1972).

85. Brief for Petitioner at 17, Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1976) (No. 74-1245).

86. Linda H. Kistler & Carol C. McDonough, *Paid Maternity Leave—Benefits May Justify the Cost*, 26 LAB. L.J. 782, 784 (1975).

87. *S. 995 Hearings*, *supra* note 80, at 473.

88. EMP. BENEFIT RESEARCH INST., EBRI DATABOOK ON EMPLOYEE BENEFITS: TABLE 34.1 (2011), *available at* http://www.ebri.org/pdf/publications/books/databook/DB.Chapter%2034.pdf.

D. Traditional Gender Ideologies as a Defense to Pregnancy Discrimination Claims

Cost calculations had not always served as General Electric's rationale for offering different benefits to male and female employees. Instead, in the early twentieth century General Electric explicitly appealed to traditional gender roles to justify the exclusion of women from benefit schemes. In 1920, the president of General Electric, Gerard Swope, stated that female employees did not deserve *any* disability benefits because women "did not recognize the responsibilities of life."[89] Swope reasoned that women "were hoping to get married soon and leave the company."[90] Offering women workers insurance to help them make it through a period of disability made no sense if women did not genuinely need a salary and worked only to gain supplemental income for incidentals; if women did not support dependents; if women did not show loyalty to the company; if they were not truly workers at all.

A half century after Swope made his comments, his views remained current. Employers, insurance executives, and business trade associations mobilized family-wage and separate-sphere ideologies to justify the exclusion from coverage within disability, sick leave, and health insurance. They argued that women were only marginal labor-market participants who would leave the workforce when they entered their childbearing years. The discriminatory treatment of pregnancy and childbirth under public and private insurance schemes rested not only on cost rationales but also on ideologies about both the family and wage work. Pregnancy discrimination embodied a number of gendered assumptions. These included: the notion that childbearing women belonged in the home; the assumption that women would leave the workforce when they became mothers; the idea that women were marginal labor force participants who did not need or deserve the benefits merited workers; and the notion that male household heads should remain responsible for the costs of reproduction and would provide for dependent women and children.

The business lobby thus relied on sex-role stereotypes to rationalize discriminatory treatment of pregnancy. First, the business lobby argued that pregnancy disability benefits raised the specter of a moral hazard because women would malinger beyond the period of physical recovery

89. FRED STREBEIGH, EQUAL: WOMEN RESHAPE AMERICAN LAW 109 (2009).
90. *Id.*

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from childbirth to care for their infants.[91] An actuary who testified for General Electric Co. in federal district court projected women would take an average of fifteen weeks of pregnancy disability leave, rather than the six to eight weeks cited by physicians as the average period of recovery from childbirth.[92] Businesses offered varying and sometimes contradictory reasons for their belief that women would malinger. At times, employers and insurance underwriters operated on the assumption that women could rely on the income of their husbands.[93] Women did not really want or need to work, so they had no incentive to return as quickly as possible after childbirth.[94] Employers also assumed, however, that the fact that women would recover some portion of their salary during pregnancy disability leave would encourage them to abuse the benefit.[95]

Second, the business lobby contended that women would take their benefits and run. Because pregnant workers "more often than not, [did] not return to work after delivery,"[96] pregnancy disability benefits would function as "a unique form of severance pay."[97] Private employers and insurance companies justified the exclusion of pregnancy from employment benefits on the expectation that the vast majority of women would not continue to work after bearing children.

Employers argued that women's allegiance to their children rather than the workforce would frustrate a primary purpose of private benefit plans—improving employee loyalty. Townsend Munson, the Chairman of Western Savings Bank in Philadelphia, explained that an employee receiving temporary disability benefits ordinarily felt "grateful to our Bank for a generous disability policy and comes back to us after recovery

91. Kistler & McDonough, *supra* note 86, at 785.

92. IUE Brief, Geduldig, *supra* note 82, at 88. The actuary based his estimation in part on the assumption that physicians would collude with women in certifying them to stay at home for a longer period of time. *Id.* at 91.

93. Statement of Herbert S. Denenberg, *supra* note 61, at 11.

94. *Id.* at 6.

95. *Id.*

96. Brief Amicus Curiae on Behalf of Am. Life Ins. Assoc., Nat'l Assoc. of Ind. Insurers, Am. Mut. Ins. Alliance & Health Ins. Assoc. of Am. at 5, Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1976) (No. 74-1245); *see also* Motion of & Brief of Alaska Airlines, Inc. et al. for Leave to File Brief as Amici Curiae at 9, Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1976) (No. 74-1245) [hereinafter Motion and Brief of Alaska Airlines] (arguing that forty to fifty percent of women workers did not return to their jobs following childbirth).

97. Brief for Gen. Motors Corp. as Amicus Curiae at 13, Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1976) (No. 74-1245); Brief of the Am. Tel. & Tel. Co. as Amicus Curiae at 8, Liberty Mut. Ins. v. Wetzel, 424 U.S. 737 (1976) (No. 74-1245).

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thankful for what we have done."[98] By contrast, a female recipient of the company's maternity leave "comes back only to collect her benefits and then leaves for good."[99] Munson reflected upon the normative propriety of these patterns in women's workforce participation. He concluded that "disability provisions for pregnancy are obviously not to tide a woman over until her return to employment. In a sense, when she leaves she is already committed to a new employer—the child. Quite rightly."[100]

As a statistical matter, Munson, General Electric, and the business lobby were not wrong. At the time that the IUE filed the *Gilbert* case in federal district court, over two-thirds of female employees nationwide who worked during their pregnancies did not return to the workforce within one year after childbirth.[101] No data is available, however, on how many of these women left the workforce wholly voluntarily. Many may have found themselves pushed out of the labor market when their employers did not offer job-guaranteed leave either for temporary disability associated with childbirth or for early infant care. Thus, the discrimination that women faced created the social reality that employers used to justify the exclusion of pregnancy from employment benefits. Social scientific studies conducted after this period substantiated the argument that incidences of sex discrimination[102] and the existence or absence of childbearing leave[103] affect women's labor market participation.

Traditional gender ideologies, however, diminished in legal and political potency during the late 1960s and the early 1970s. First, the advent of sex discrimination law undermined the legitimacy of legal arguments explicitly based on sex-role stereotypes. In 1971, in the case of *Reed v. Reed*, the Supreme Court for the first time struck down a state law as a violation of sex equality under the Fourteenth Amendment.[104] In 1972, Congress passed the Equal Rights Amendment and sent it to the states for

98. Letter from Townsend Munson to Ruth Bader Ginsburg (Jan. 26, 1977) (on file with the Library of Cong., Ruth Bader Ginsburg Papers [hereinafter RBG Papers]); *see also Ms. Munson Has Wedding on L.I.*, N.Y. TIMES, Oct. 2, 1988.

99. Letter from Townsend Munson, *supra* note 98.

100. *Id.*

101. KAMERMAN, *supra* note 48, at 135.

102. *See* David Neumark & Michele McLennan, *Sex Discrimination and Women's Labor Market Outcomes*, 30 J. HUM. RESOURCES 713, 713–14 (1995) (arguing that a "feedback" loop exists between sex discrimination and labor market participation and thus offering an alternative to the human capital explanation of wage differential between women and men).

103. *See, e.g.*, Jutta M. Joesch, *Paid Leave and the Timing of Women's Employment Before and After Birth*, 59 J. MARRIAGE & FAM. 1008, 1017 (1997) (finding that women with paid childbearing leave are more likely to return to work during the second month following delivery and subsequent months than those without such leave).

104. 404 U.S. 71, 76–77 (1971).

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ratification.[105] In 1973, Justice Brennan's plurality opinion in *Frontiero v. Richardson* argued that courts should apply a strict-scrutiny standard of review to state regulation on the basis of sex.[106] Employers, insurance companies, and states faced a transformed legal and political landscape. Arguments that appealed to traditional gender ideologies to justify the exclusion of pregnancy from insurance coverage no longer held the persuasive power they once possessed.

Second, the feminist movement put pressure on businesses and states to conform to a legal regime that would transform gender norms rather than reinforce them. Feminist legal thinkers began to advance the theory that legal structures did not simply reflect society; instead, legal rules constituted social norms and behaviors.[107] Feminists argued that businesses and states should adopt legal practices that would disrupt the sex-based division of productive and reproductive labor.[108] In responding to Townsend Munson's claim that childbearing women left the workforce, Ruth Bader Ginsburg made the point that "an employer's attitude may bear substantially on the employee's decision" whether to return to the workplace.[109]

Evidence existed at the time attesting to the veracity of Ginsburg's statement. For example, one New England firm found that the percentage of female employees returning to the workforce increased after the firm started offering paid childbearing leave. Academic observers commented that the firm's experience "cast doubt on the appropriateness of citing termination statistics among female employees in firms which do not provide maternity leave to support the argument that such leave would be abused."[110]

Third, feminists began to argue that sex-role stereotypes inflected the business lobby's statistics about the costs of pregnancy disability benefits. Businesses estimated the cost of pregnancy disability leave based on figures drawn from mandatory maternity leave plans, which required

105. MARY FRANCES BERRY, WHY ERA FAILED: POLITICS, WOMEN'S RIGHTS, AND THE AMENDING PROCESS OF THE CONSTITUTION 64 (1986).

106. 411 U.S. 677, 682 (1973).

107. *See, e.g.*, Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, at 8–15 (1975).

108. *See, e.g.*, Koontz, *supra* note 44, at 481.

109. Letter from Ruth Bader Ginsburg to Townsend Munson (Jan. 31, 1977) (on file with the RBG Papers).

110. Kistler & McDonough, *supra* note 86, at 786.

female employees to stop working mid-way through their pregnancies.[111] Moreover, labor and feminist groups argued that employers used out-of-date birth rates and failed to take into account the fact that employed women had lower birth rates.[112] Finally, employers based statistics regarding cost-to-contribution ratios on average wage rates for the workforce, while in actuality women's wages averaged only sixty percent of those of men.[113]

Academic commentators argued that the total cost of pregnancy disability benefits appeared far less onerous when converted to unit costs per employee. They took General Electric's actuarial estimate of an $804 million nationwide cost as an example. If the average period of paid leave were reduced to eight weeks—what medical experts at the time considered medically appropriate—then the cost of pregnancy disability leave would amount to only $5.60 for each worker in the U.S. labor force in 1974, or $15 for each employed female worker.[114] A study of three New England industrial firms that offered paid childbearing leave suggested that total disability premiums did not rise as a consequence above five percent of annual payroll.[115] By the early 1970s, the business lobby thus confronted the limits of extant justifications for excluding pregnancy from insurance coverage.

Debates about reproductive choice, pregnancy, and the workplace in the 1970s were overlaid upon a longer history of feminist activism, welfare capitalism, and state development. In the progressive era and New Deal periods, maternalism helped to lay the foundation for the U.S. welfare state. Gender ideologies functioned as a justification for state and federal authority to regulate the labor market. Maternalist arguments wielded by feminists and progressive reformers made previously private virtues of caregiving and social protection into public values. Maternalism thus legitimated concerns about the exploitation of workers within constitutional jurisprudence. At the same time, the use of gender ideologies to justify social provisioning enabled the development of public and private insurance schemes premised on a masculine ideal. The exclusion of pregnancy and childbirth from employment-based insurance

111. Brief for the Am. Fed. of Labor & Cong. of Indus. Orgs. as Amicus Curiae at 5, Geduldig v. Aiello, 417 U.S. 484 (1974) (No. 73-640) [hereinafter Brief for the Am. Fed. of Labor & Cong. of Indus. Orgs.]; IUE Brief, Geduldig, *supra* note 82, at 87.

112. Brief for Appellees at 85–86, Geduldig v. Aiello, 417 U.S. 484 (1974) (No. 73-640) [hereinafter Appellees' Brief, Geduldig]; IUE Brief, Geduldig, *supra* note 82, at 87.

113. Brief for the Am. Fed. of Labor & Cong. of Indus. Orgs., *supra* note 111, at 28–29.

114. Kistler & McDonough, *supra* note 86, at 784.

115. *Id.* at 791.

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schemes undermined women's security and heightened their economic dependence.

In the late 1960s and early 1970s, the advent of sex discrimination law under Title VII and the Equal Protection Clause invested labor and feminist activists with a new tool to combat the exclusion of pregnancy from state and employer-sponsored insurance. Activists wielded liberal individualist ideals of equal treatment and sex neutrality to challenge gender stereotypes and to realize a longstanding commitment to improving the economic security of women workers. State officials, employers, and business groups continued to defend pregnancy discrimination on the basis of separate-spheres and family-wage ideologies. Several trends, however, undermined these justifications: the advent of sex discrimination law; the rise of a mass feminist movement focused on transforming gender roles; and the increasing recognition that gender bias inflected employers' statistics about childbearing women in the workplace. Employers would need a new argument to defend the allocation of the costs of reproduction to the private family. To preserve one pillar of liberalism—the privatization of dependency—they turned to a new strain of liberalism rising in legal and political legitimacy: reproductive choice.

II. LIBERAL INDIVIDUALIST CHOICE DISCOURSE ON THE RISE IN THE COURTS

Reproductive choice and privacy offered a powerful new discursive frame that the opponents of pregnancy disability benefits used to recast their stance. Yet reproductive choice was not a static concept. Part II.A discusses competing conceptions of reproductive choice in the 1970s. The business lobby fused notions of reproductive privacy with free-market ideologies. By contrast, feminists advanced an affirmative vision of choice that encompassed childbearing women's right to economic autonomy.

In pregnancy discrimination litigation, the business lobby and state governments attempted to refashion feminist principles as compatible with rather than oppositional to market conservatism. Part II.B discusses how employers, insurance companies, and state governments appropriated a liberal individualist strain of feminism steadily gaining legitimacy within the broader legal culture to serve market libertarian interests. Business trade associations and state officials argued that because the legalization of birth control and abortion had rendered pregnancy a private choice, the costs of reproduction should remain a private responsibility. Part II.C argues that this legal strategy heightened the salience of neomaternal argumentation for feminists. The Supreme Court, however, embraced a

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market libertarian construction of sex equality, as Part II.D and II.E demonstrate.

A. Competing Conceptions of Choice

The business lobby's strategic use of reproductive choice arguments drew upon market libertarian ideology ascendant in the 1970s. During this period, economists in the United States and Britain led by Milton Friedman and Frederick Hayek popularized the notion that free-market principles would realize the individual freedom promised by classical liberalism.[116] Legal scholarship, likewise, embraced microeconomic theories of individual choice as a means to explain legal doctrine.[117] During this period, too, unions declined in power and the political tides turned against federal regulation of the labor market and workplace.[118] Employers began to cut back on the fringe benefits that they had earlier extended. The business lobby's use of reproductive choice rhetoric resonated with these intertwined trends in economic theory, politics, legal theory, and employer practices.

State officials and business executives put a new twist on market libertarian principles in debates about pregnancy discrimination. They drew on the privacy logic of *Roe v. Wade* to justify private, familial responsibility for the costs of pregnancy.[119] The notion of reproductive choice justified classifying pregnancy as a "voluntary" condition rather than a temporary disability.[120] The business lobby further argued that because women now had the ability to choose whether to occupy roles as mothers or workers, discrimination on the basis of pregnancy did not amount to sex discrimination. This form of legal argument interpreted *Roe* in a manner consistent with growing political opposition to the growth of a regulatory state.[121] The rise of privacy as a conceptual paradigm in the

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116. *See* ERIC FONER, THE STORY OF AMERICAN FREEDOM 308–09 (1999).

117. *See* DANIEL T. RODGERS, AGE OF FRACTURE 42–76 (2011); NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 301–420 (1995).

118. NELSON LICHTENSTEIN, STATE OF THE UNION: A CENTURY OF AMERICAN LABOR 178–211 (2002).

119. For a contemporary argument that the constitutionalization of access to abortion as a negative right has the consequence of legitimizing the dearth of state support for family life, see Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394 (2009).

120. *See* CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, WOMEN IN 1971, at 53–54 (1972); Erica B. Grubb & Margarita C. McCoy, Comment, *Love's Labors Lost: New Conceptions of Maternity Leaves*, 7 HARV. C.R.-C.L. L. REV. 260, 288 (1972) (citing BUREAU OF NAT'L AFFAIRS, THE NEGRO & TITLE VII, SEX & TITLE VII 22 (Personnel Policies Forum, Survey No. 82 (1967))).

121. For a history of conservatives' legal opposition to the regulatory state, see Jefferson Decker,

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reproductive rights context was intertwined with the increasing popularity of market libertarianism in the 1960s and 1970s.

The market libertarian interpretation of reproductive choice differed dramatically from the construction of reproductive choice advanced by feminists. Although *Roe* itself privileged privacy, feminists argued for reproductive autonomy as well as reproductive privacy. That autonomy meant having the right to bear a child as well as to terminate a pregnancy. Feminists of color launched reproductive rights campaigns against forced sterilization.[122] Activists argued not only for the right to abortion but also for state funding that would enable women to exercise a full range of reproductive choice.

Feminist activists believed that neither childbearing nor childrearing should diminish women's capacity for engagement in the public sphere. The 1970 Strike for Women's Equality planned for the fiftieth anniversary of the passage of the Nineteenth Amendment made three demands: equal opportunity in education and employment; free, nonrestricted abortion; and free, twenty-four hour universal childcare. Feminist activists envisioned childcare as a social citizenship right that would enable women's full civic participation.[123]

After the Court's decision in *Roe v. Wade*, Ruth Bader Ginsburg, then-counsel to the ACLU Women's Rights Project, argued that just as women had gained recognition for a constitutional right to abortion so too did women have a right to bear children without sacrificing equal employment opportunity.[124] Ginsburg argued that the termination of pregnant employees by states or the federal government violated Title VII and women's constitutional right to reproductive privacy.[125] In sum, feminists understood reproductive autonomy to encompass private choice as well as public entitlements both to antidiscrimination protections and to affirmative social resources.

Lawyers for Reagan: The Conservative Litigation Movement and American Government, 1971–1987 (2009) (unpublished Ph.D. dissertation, Columbia Univ.).

122. *See* JENNIFER NELSON, WOMEN OF COLOR AND THE REPRODUCTIVE RIGHTS MOVEMENT 55–84 (2003).

123. On second-wave feminist thought and activism regarding childcare, see Deborah Dinner, *The Universal Childcare Debate: Rights Mobilization, Social Policy, and the Dynamics of Feminist Activism, 1966–1974*, 28 LAW & HIST. REV. 577 (2010).

124. Dinner, *supra* note 43, at 385–87.

125. *Id.* at 383–84.

B. States and the Business Lobby Embrace Privacy and Choice

In May of 1972, Sally Armendariz was driving near her home in Gilroy, California, when another vehicle rear-ended her car. As a result of the accident, Armendariz suffered a miscarriage at four months of pregnancy. Severe pain ensued, and Armendariz's doctor ordered her to stay home from work for three weeks. Her misfortune could not have come at a worse time. Armendariz's husband had just become unemployed, and her income served as the sole support for the couple and their eight-month-old son.[126]

Armendariz first thought to apply to the California State Disability Insurance program. She had paid one percent of her monthly salary for the past ten years into the insurance program, and she had never filed for benefits.[127] The California Department of Human Resources, however, denied Armendariz's claim because her disability "[arose] in connection with pregnancy."[128] Armendariz then applied for state unemployment insurance benefits but was again denied benefits, this time because the state considered her pregnancy-related disability "voluntary."[129] That administrative determination must have held a cruel irony for Amendariz. She would have considered her car accident and miscarriage far from voluntary.

Armendariz was a tenacious member of a Mexican-American family that had worked for generations in California's farm fields.[130] She was the second child and first daughter in her extended family to graduate from high school.[131] Armendariz decided to sue the state.[132] Along with three other named petitioners, Armendariz brought a lawsuit, *Aiello v. Hansen*, which challenged the constitutionality of California's disability insurance plan under the Equal Protection Clause. The lawsuit would ultimately reach the Supreme Court as *Geduldig v. Aiello*.[133]

In June 1973, the plaintiffs in *Aiello* won in the U.S. District Court for the Northern District of California.[134] The district court held that the

126. STREBEIGH, *supra* note 89, at 82.
127. *Id.*
128. *Id.* at 83.
129. *Id.* at 82–83 (emphasis omitted).
130. *Id.* at 81.
131. *Id.*
132. *Id.* at 83.
133. 417 U.S. 484 (1974). Because the case involved the constitutionality of a state statute, it was heard by a three-judge panel of a United States District Court with direct appeal to the U.S. Supreme Court. *Id.* at 486–87.
134. Aiello v. Hansen, 359 F. Supp. 792 (N.D. Cal. 1973).

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state's exclusion from coverage of "any injury or illness caused by or arising in connection with pregnancy" violated the Equal Protection Clause.[135] Dwight M. Geduldig, the director of the California Department of Human Resources warned the *New York Times* that a recent court decision would "bust" the state's disability insurance program.[136] He anticipated that the program would go insolvent within the year if the California legislature did not increase the employer payroll tax that funded it.[137]

The Supreme Court granted an appeal in *Geduldig v. Aiello*, in December 1973.[138] Business interests as well as labor, feminist, and civil rights groups understood that the case would hold broad import. The AFL-CIO submitted an amicus brief on the basis that the case would affect its 300,000 female workers employed in the state of California.[139] Even though the case concerned a challenge to a state insurance program, its outcome would directly affect private employers' fringe benefit plans. The California Law allowed employers to offer private disability insurance plans as an alternative to the state-administered Unemployment Compensation Disability Fund. To gain approval of a "voluntary plan," an employer had to show that it offered benefits that exceeded those offered under the state plan.[140] Therefore, if the Court held that equal protection required the state plan to include coverage for pregnancy, then employers would also have to provide such coverage.[141] California business trade associations and employers—the Merchants and Manufacturers

135. *Id.* at 797–801. The U.S. District Court for the Northern District of California did not apply heightened scrutiny. But the majority agreed with constitutional scholar, Gerald Gunther, that the Supreme Court decision in *Reed v. Reed* had rendered the rational-basis test under the Equal Protection Clause "slightly, but perceptibly, more rigorous." *Id.* at 796 (quoting Green v. Waterford Bd. of Educ., 473 F.2d 629, 633 (2d Cir. 1973)). The majority held that pregnancy-related disability did not substantially differ from the temporary disabilities covered by the insurance program, in any manner relevant to the program's purpose. *Id.* at 797–801.

136. Geduldig projected that including pregnancy within the state's insurance program would cost an additional $120 million per year above the program's annual $375 million in expenditures. *Disability Payment on Pregnancy Held Peril to Coast Plan*, N.Y. TIMES, June 3, 1973, at L27.

137. *Id.* The funding for California's disability insurance program came entirely from deductions from employee wages. *Geduldig*, 417 U.S. at 487.

138. 414 U.S. 1110 (1973) (noting probable jurisdiction).

139. Brief for the Am. Fed. of Labor & Cong. of Indus. Orgs., *supra* note 111, at 1–2.

140. Brief of Merchs. & Mfrs. Ass'n, et al. as Amici Curiae at 2–4, Geduldig v. Aiello, 417 U.S. 484 (1974) (No. 73-640).

141. Public disability insurance plans have an even more direct effect on private plans. Because employers make contributions to the funding of public temporary disability insurance plans, such plans influence whether employers adopt voluntary private plans. The business lobby may have preferred to keep the costs of California's temporary disability insurance plan relatively low, to give employers greater financial incentives to adopt private health insurance plans. This outcome would both preserve employer control and benefit the private insurance industry.

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Association and the Federated Employers of the Bay Area, Southern California Edison Company, Union Oil Company of California, and Pacific Mutual Life Insurance Company—submitted an amicus curiae brief defending the pregnancy exclusion.[142] The business associations expressed concern about the "substantial financial effect" of a potential Supreme Court ruling upholding the district court decision and "wish[ed] to assure that their unique financial interest [was] adequately protected."[143]

Observers also recognized the indirect influence that a ruling under the Equal Protection Clause would have on statutory antidiscrimination standards. The IUE and EEOC submitted amicus briefs on the basis that *Aiello* would have significance for sex discrimination standards under Title VII[144] and, in particular, for the resolution of the *Gilbert* case then pending in federal district court.[145] Business interests similarly highlighted the fluidity of equal protection and statutory antidiscrimination standards. Writing as amicus curiae, the Chamber of Commerce called the constitutional question in *Geduldig* "significant." The Chamber found "even more compelling," however, the question of whether the Court's constitutional decision would take account of recent EEOC guidelines requiring equal coverage of pregnancy under temporary disability benefit plans. The Chamber of Commerce advised the Court to look beyond *Geduldig* to the parallel question arising under Title VII.[146]

In arguing *Geduldig v. Aiello*, the State of California and business groups relied on familiar arguments resting on sex-role stereotypes[147] and also turned toward market libertarian choice discourse. To oppose the plaintiffs' claim in *Geduldig*, California needed to argue that state classification on the basis of pregnancy did not constitute sex discrimination. To this end, the state's brief appealed to liberal ideals of individual agency. The brief read: "[P]regnancy [is not] the *sine qua non* of being a woman. . . . [A] large part of woman's struggle for equality involves gaining social acceptance for roles alternative to childbearing and

142. Brief of Merchs. & Mfrs. Ass'n, et al. as Amici Curiae, *supra* note 140, at 2.

143. *Id.* at 9.

144. Brief of the U.S. EEOC as Amicus Curiae at 1–2, Geduldig v. Aiello, 417 U.S. 484 (1974) (No. 78-640) [hereinafter EEOC Brief, Geduldig].

145. IUE Brief, Geduldig, *supra* note 82, at 1–3.

146. Brief Amicus Curiae of the Chamber of Commerce of the U.S. in Support of the Appellant at 3, Geduldig v. Aiello, 417 U.S. 484 (1974) (No. 73-640).

147. California argued "that there is a major difference in the return-to-work rate following disability from pregnancy." Transcript of Oral Argument at 15, Geduldig v. Aiello, 417 U.S. 484 (1974) (No. 73-640) [hereinafter Transcript of Oral Argument].

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childrearing."[148] The brief portrayed women as autonomous individuals who might assert their agency by choosing either motherhood or other social roles. It drew a distinction between biological sex and the social construction of gender, which resonated with liberal theories of sex equality.

Even if classification on the basis of pregnancy did not amount to sex discrimination, California still needed to establish that the exclusion of pregnancy was rational. To this end, the state sought to prove pregnancy was not properly classified as a temporary disability. California argued: "Pregnancy is neither an illness nor an injury but is a normal biological function . . . voluntary and subject to planning."[149] The defendants and amici cited the Supreme Court's landmark decisions legalizing birth control and abortion as evidence. The Court's opinion in *Roe v. Wade*, they argued, had made pregnancy truly a choice.[150] California thus took a central victory for the liberal individualist strain of feminism and turned it against sex-egalitarian claims for pregnancy disability benefits.

California asserted that because women could foresee and plan for pregnancy, actuarial principles did not support classifying pregnancy as a temporary disability. Foreseeability alone, however, could not do all the logical work for those defending the state of California against the *Geduldig* litigation. Sickness and injury formed an ordinary part of the male and female life cycle. If one could plan for conceiving a child, then arguably one could also plan for the near inevitability of periodic, temporary disability. The fact that many women *chose* to become pregnant, and not the fact that pregnancy could be anticipated, formed the crucial distinction. In seeking to distinguish between pregnancy and temporary disability, California and trade associations writing as amici made a normative as well as a formal argument. They suggested that pregnancy's character as a choice legitimated the attribution of the costs of reproduction to the private family.

C. Feminists Turn toward Neomaternal Arguments

The plaintiffs in *Geduldig* made liberal individualist arguments to challenge the pregnancy exclusion. They argued that just as California pooled the risk of disability for all workers, regardless of actuarial

148. Reply Brief for Appellant at 2, Geduldig v. Aiello, 417 U.S. 484 (1974) (No. 73-640) [hereinafter Reply Brief, Geduldig].

149. *Id.* at 13.

150. Brief for Appellant at 19 n.23, Geduldig v. Aiello, 417 U.S. 484 (1974) (No. 73-640).

http://openscholarship.wustl.edu/law_lawreview/vol91/iss3/3

considerations, so too should the state pool the risk of disability resulting from pregnancy.[151] The pregnancy exclusion reinforced "stereotyped notions that women belong in the home with their children, that women are not serious members of the work force, and that women generally have a male breadwinner in their families to support them."[152] California and the business lobby's turn toward a market libertarian interpretation of sex equality, however, heightened the salience of neomaternal arguments for the plaintiffs in *Geduldig* and sympathetic amici. In response to California's arguments, the plaintiffs and supportive amici restitched a tight seam between female reproductive capacity, sex difference, and gender identity.

To counter California's disaggregation of pregnancy and sex, the plaintiffs needed to establish as a matter of formal legal interpretation that pregnancy-based and sex-based discrimination were synonymous. The brief for the plaintiffs argued that "[s]ex unique characteristics, particularly the capacity to become pregnant, are what define a person as a man or a woman."[153] This argument reduced gender to male and female reproductive capacity. The rhetoric was ironic. It proved strategically advantageous to the plaintiffs to link pregnancy with gender status, even as the broader feminist movement challenged the idea that female biology should determine gender roles.

Even if pregnancy did not constitute sex discrimination, plaintiffs sought to establish that the differential treatment of pregnancy and temporary disability should not pass rational basis scrutiny. To analogize between pregnancy and temporary disabilities, the plaintiffs' brief stressed the involuntary and unplanned character of pregnancy. The brief also emphasized the fallibility of contraceptives, many women's religious and philosophical objections to abortion, and medical contraindications to abortion.[154] Just as the women's movement had gained constitutional freedoms from state regulation of birth control and abortion, legal and labor feminists faced the strategic need to emphasize women's lack of control over their reproductive capacities.

Advocates for women's employment opportunity also began to couple sex-egalitarian arguments with arguments about the social value of

151. Transcript of Oral Argument, *supra* note 147, at 21–23.

152. *Id.* at 30.

153. Appellees' Brief, Geduldig, *supra* note 112, at 24.

154. *Id.* at 68–70. An amicus brief by the IUE admonished that "there are a variety of medical reasons to advise against abortion . . . . [C]omplications of infection of the uterine tract, perforation of the uterus with a subsequent necessary hysterectomy, or psychological problems may occur." IUE Brief, Geduldig, *supra* note 82, at 69.

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childbearing. An amicus brief submitted by the EEOC reasoned that although any individual woman's decision to become pregnant at a given point in time may be voluntary, "the procreation of the species—is not."[155] The EEOC implied that society needed women to get pregnant to reproduce the next generation of workers and citizens. As a matter of social reality, the conceptual distinction between pregnancy and sex notwithstanding, women needed to get pregnant. The EEOC concluded that if pregnancy did not truly represent a choice for women, then discrimination on the basis of pregnancy constituted discrimination on the basis of sex. The EEOC exemplified neomaternal argumentation in its use of the social value of childbearing to advance women's equal employment opportunity.

The opposing sides in *Aiello* therefore drew dramatically different pictures of the relationship between pregnancy, sex, and gender identity. One side disaggregated pregnancy and gender identity, emphasized the voluntary character of pregnancy, and depicted reproduction as a private choice. The other argued that reproductive capacity defined gender identity, emphasized the involuntary character of pregnancy, and depicted reproduction as a service to society. From today's vantage point, the first set of arguments sound feminist and the second resonate with social conservatism. The pregnancy discrimination debates in the 1970s, however, confound contemporary intuitions. The history reveals that state governments and business interests adopted the legal frame of reproductive choice to justify privatizing the costs of reproduction. Feminist, labor, and civil rights groups could not simply counter this argument with a claim to equal treatment and challenges to sex-role stereotypes. Instead, they needed to emphasize the connections between pregnancy and gender identity as well as the public nature of reproduction. The *Aiello* litigation did not pit traditional gender ideologies against anti-stereotyping so much as market libertarian against neomaternal interpretations of sex equality.

D. The Supreme Court Affirms a Market Libertarian Interpretation of Sex Equality

The Court in *Geduldig v. Aiello*[156] held that the exclusion of pregnancy from California's temporary disability insurance plan did not violate the

155. EEOC Brief, Geduldig, *supra* note 144, at 11.
156. 417 U.S. 484 (1974).

Equal Protection Clause.[157] Justice Potter Stewart wrote the majority opinion, joined by Chief Justice Burger and Justices White, Blackmun, Powell, and Rehnquist. The Court rejected the plaintiff's claim that the pregnancy-based exclusion discriminated on the basis of sex. In a footnote, Stewart's opinion explained that California did not "exclude anyone from benefit eligibility because of gender but merely remove[d] . . . pregnancy . . . from the list of compensable disabilities."[158] California's program divided the state's workers into "pregnant women and nonpregnant persons."[159] While only women comprised the first group, both men and women comprised the second group accruing the program's benefits.[160]

Geduldig represented a sea change in the constitutional construction of gender.[161] For a half century since the New Deal, women's reproductive capacity and social role as mothers had formed the basis for sex-differentiated labor regulations. Now the Court held that disparate treatment of actual pregnancy did not violate the Equal Protection Clause.[162] Although feminist legal scholars have long criticized *Geduldig*,[163] the critical distance provided by a historical viewpoint reveals greater historical complexity. The Court had traversed the distance from *West Coast Hotel* to *Geduldig* powered, in part, by feminists' legal victories.[164] The holding in *Geduldig* distinguished between pregnancy and

157. *Id.* at 494–95.

158. *Id.* at 496 n.20.

159. *Id.* at 496–97 n.20.

160. *Id.* at 496.

161. Technically, the doctrinal holdings of *Geduldig* did not conflict with those of Muller v. Oregon, 208 U.S. 412 (1908) and West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). *Muller* and *West Coast Hotel* only held that states had the power to enact labor laws protecting women workers; these decisions did not require protections for pregnant workers *Muller*, 208 U.S. at 422–23; *West Coast Hotel*, 300 U.S. at 398–400. Likewise, *Geduldig* did not forbid states from including coverage for pregnancy within temporary disability insurance plans; it only held that the Constitution did not require this coverage. Moreover, the Court decided *Muller* and *West Coast Hotel* under the Due Process Clause of the Fourteenth Amendment. *Muller*, 208 U.S. at 417; *West Coast Hotel*, 300 U.S. at 391. The question in these cases was whether protective labor laws for women violated substantive due process by restricting women workers' freedom of contract. By contrast, the Court decided *Geduldig* under the Equal Protection Clause. *Geduldig*, 417 U.S. at 494. My argument that *Geduldig* represented a sea change in constitutional jurisprudence, however, operates at the level of social meaning rather than formal doctrine.

162. The holding in *Geduldig* applied to the exclusion from the state disability insurance plan of routine pregnancies absent extraordinary complications. Prior to the district court decision in *Geduldig*, the California Court of Appeals held that the relevant statute did not foreclose disability benefit payments that related to medical complications arising during pregnancy. *Geduldig*, 417 U.S. at 490 (citing Rentzer v. Cal. Unemployment Ins. Appeals Bd., 108 Cal. Rptr. 336 (1973)).

163. One scholar noted a decade after the opinion that criticizing *Geduldig* had become a "cottage industry." Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 983 (1984).

164. Advances in reproductive rights lent coherence to the easy distinction drawn by the Court

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gender identity in a manner that resonated with both feminists' anti-stereotyping claims and the state and business lobby's arguments in favor of private responsibility for the costs of reproduction.

The Court's holding in *Geduldig* foreclosed the use of sex discrimination law to expand social insurance protections for pregnant workers.[165] First, *Geduldig* formed part of a several-year trend on the Burger Court to cut off the expansion of constitutional rights at the border of the social-welfare state. In conducting rational basis review of California's pregnancy exclusion,[166] the Court cited recent decisions rejecting equal protection challenges to social welfare regulations.[167] The majority opinion similarly portrayed California's temporary disability insurance program as a social program, which the state legislature had broad discretion to design, and the exclusion of pregnancy from coverage not as sex discrimination but as a legitimate cost-saving measure. *Geduldig* helped close the door on a moment of possibility for the constitutionalization of welfare rights.

Second, *Geduldig* foreshadowed the Court's evisceration of disparate-impact claims under the Equal Protection Clause in its 1976 *Washington v. Davis* decision.[168] *Geduldig* did not explicitly foreclose a constitutional disparate-impact claim. In distinguishing between pregnancy and sex-based discrimination, however, the Court ignored the undeniable negative effect that California's pregnancy exclusion had on women workers alone. In addition to reinforcing sex-role stereotypes, *Geduldig* thus also

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between the category "women" and the category "pregnant persons." Of course, women exerted control over their reproductive lives absent legal rights to birth control and abortion. LINDA GORDON, THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA, 55–294 (3d ed. 2002) (analyzing movements for reproductive control prior to second-wave feminist movement advocacy for legalized abortion). Still, these rights enhanced women's reproductive autonomy. *Id.* at 315 (discussing a study that attributed seventy-five percent of the late twentieth century decline in birth rates to increased use of contraception).

165. We can contrast the holding in *Geduldig* with that in the 1974 case of Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1973), which struck down pregnancy dismissal policies. While *LaFleur* forced employers to comport with market rational policies, the equal-treatment claim in *Geduldig* would force states and potentially employers to assume a greater cost burden.

166. *Geduldig*, 417 U.S. at 494–95. Once the majority dispatched with the argument in *Geduldig* that the pregnancy exclusion classified on the basis of sex, it needed only to accord rational basis review to California's plan. *Id.*

167. *Id.* at 495 (citing Dandridge v. Williams, 397 U.S. 471, 486–87 (1970) (rejecting an equal protection challenge to state caps on monthly public assistance payments under Aid to Families with Dependent Children) and Jefferson v. Hackney, 406 U.S. 535 (1972) (rejecting an equal protection challenge to a state's mechanism for public assistance grants that met a lesser percentage of need for AFDC recipients than for other assistance recipients)).

168. Washington v. Davis, 426 U.S. 229, 242 (1976).

precluded plaintiffs' use of equal protection doctrine to realize affirmative economic entitlements that would advance gender equality.

Geduldig painfully highlighted the predicament of feminist legal advocacy. The claim to pregnancy disability benefits represented a synthesis of feminist commitments to end sex-role stereotypes and to spread the costs of reproduction across society. In the course of litigation, feminists needed to articulate this objective by fitting their claim within existing legal frames. They used liberal individualist principles to challenge the gender bias that underpinned the exclusion of pregnancy from insurance coverage. When feminists confronted the limits of this strategy–its intellectual overlap with the market libertarian construction of reproduction as a private choice—they drew upon neomaternal arguments about the social value of reproduction. The Court, however, affirmed a market libertarian conception of sex equality that reinforced the anti-stereotyping strain of feminist legal argumentation while marginalizing the neomaternal strain. Existing constitutional discourses had proven inadequate tools for feminists to demonstrate the connection between sex equality and societal rather than individualized responsibility for the costs of reproduction.

E. Gilbert *and a Changed Labor Market*

In deciding *Geduldig* under the Equal Protection Clause, the Court was also looking sidewise and, possibly, ahead to a Title VII case: *General Electric Co. v. Gilbert*. The case that began with the activism of IUE members working at the General Electric plant in Salem was winding its way through the courts. Only two months before *Geduldig*, the U.S. District Court for the Eastern District of Virginia had ruled in favor of the *Gilbert* plaintiffs.[169] At a moment of fluidity between constitutional and statutory definitions of sex equality, the Court anticipated that its ruling under the Equal Protection Clause would likely affect lower courts' interpretation of employers' duties under Title VII. In its 1976 *Gilbert* ruling, the Court imported a market libertarian interpretation of sex equality from the constitutional to the statutory context.[170]

169. Gilbert v. Gen. Elec. Co., 375 F. Supp. 367 (E.D. Va. 1974).
170. Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976).

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The same six Justices who had formed the majority in *Geduldig* did so again in the *Gilbert* decision.[171] Writing for the majority,[172] Justice Rehnquist held that the logic of *Geduldig*—that classifications on the basis of pregnancy did not discriminate on the basis of sex—also applied under Title VII.[173] Furthermore, as in *Geduldig*, the plaintiffs in the instant case had failed to show that the exclusion of pregnancy served as a pretext for invidious discrimination.[174] Pregnancy's significant differences "from the typical covered disease or disability," namely its voluntary character, made its exclusion rational.[175]

Once the Court disposed of the claim that the pregnancy exclusion constituted per se sex discrimination, disparate impact liability became the major point of contention between the Justices. Rehnquist's majority opinion concluded that the pregnancy exclusion did not have a disparate effect on women because the plaintiffs had not proven that women received lesser net benefits under the General Electric plan. The opinion went further, however, to threaten the ongoing vitality of disparate-impact liability under Title VII altogether. That implication alarmed both feminist and civil rights groups.[176]

Gilbert portended to undermine the salutary effect that the guidelines already had on employer policies. In 1965, sixty percent of employers did not offer even unpaid maternity leaves but rather fired pregnant women.

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171. *See* Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1358–66 (2012) (arguing that *Gilbert* formed part of the courts' invention of an anticlassification tradition interpreting Title VII to prohibit only those employment practices that divide males and females into wholly sex-differentiated groups).

172. The Court heard oral argument in *Gilbert* twice. In the 1975 term, Blackmun had sat out on the arguments and the Court deadlocked on the case 4–4, with Burger, Stewart, Rehnquist, and White voting for the defendants and Powell, Brennan, Marshall, and Stevens voting for the plaintiffs. In 1976, Blackmun participated when the Court heard the case on re-argument and placed his vote on the side of the defendants. Powell also switched his vote to join the majority. Harry A. Blackmun Conference Notes (Jan. 21, 1976) (on file with the Library of Cong., Harry A. Blackmun Papers [hereinafter Blackmun Papers]), Box 238, Folder: Gen. Elec. Co. v. Gilbert).

173. *Gilbert*, 429 U.S. at 135–36.

174. The opinion ruled that the 1972 EEOC guidelines defining pregnancy as a temporary disability were not entitled to deference because they were enacted eight years after the passage of Title VII and represented an abrupt departure from earlier guidelines. *Id.* at 141–45. The majority's conclusions rested on a mistaken assumption that the 1972 guidelines were sudden and not thoroughly deliberated. In reality, the EEOC's position on pregnancy had gradually evolved over eight years in response to external feminist pressure and internal debate within the agency. Kevin Schwartz, *Equalizing Pregnancy: The Birth of a Super-Statute* 9–32 (2005), *available at* http://digitalcommons .law.yale.edu/ ylsspps_papers/41.

175. *Gilbert*, 429 U.S. at 136.

176. For a more comprehensive discussion of legal battles about disparate-impact liability in relation to *Gilbert*, see SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION 110–15 (2011).

Of the forty percent of employers who provided leave, only one-fifth allowed women themselves to decide how long to work. The rest forced women to take mandatory leaves at designated points in their pregnancy.[177] A mere six percent of employers allowed women to use sick leave benefits to replace lost income during pregnancy-related illnesses or disabilities.[178] By 1973, one year after the passage of the EEOC guidelines on pregnancy discrimination, three-quarters of companies surveyed by Prentice-Hall offered maternity leave and sixty percent allowed women to determine the timing and duration of these leaves.[179] The proportion of firms offering sick pay for pregnancy disabilities had risen to twenty-one percent.[180]

Feminist lawyers feared that *Gilbert*, by declining to defer to the EEOC guidelines, threatened the gains that women had made when employers thought these guidelines reflected the state of the law. In actuality, the available evidence suggests that the Court's ruling in *Gilbert* did not entirely stop the trend toward greater coverage of pregnancy under employer fringe benefit programs.[181] But it likely substantially slowed down the rate of change of employer behavior.

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177. Prentice Hall, *Personnel Management—Policies and Practices Report Bull. 24, Do Your Maternity Leave Policies Conform to EEOC Guidelines? Commission Decisions Offer Pointers*, at 457 (on file with the IUE Records, Box 242, Folder: Maternity Leave Policies Due for a Change).

178. LEGIS. HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, PUB. L. NO. 95-555, *prepared for* S. COMM. ON LABOR & HUMAN RESOURCES, 96TH CONG., at 62 (1979) [hereinafter PDA LEGIS. HISTORY].

179. Prentice Hall surveyed 929 companies across the country to identify trends in maternity leaves. Although the precise methodology is not clear, the survey was likely weighted toward larger employers rather than a random selection of companies. Prentice Hall, *supra* note 177, at 457.

180. *Id.* at 460.

181. The Institute for Social Research conducted a Quality of Employment Survey in 1977, one year after the *Gilbert* decision and before any legislative response overriding the decision. Had employers responded to *Gilbert* by ending policies that they previously believed to be mandatory under EEOC guidelines, one would expect a decline in the rates of employer provision of job-guaranteed maternity leave as well as maternity leaves with pay. Instead, one sees a continuing increase in the provision of maternity leaves and income replacement consistent with the trend established in the period from 1965 to 1973. In 1977, seventy-four percent of survey respondents indicated that they were entitled to maternity leave with re-employment rights and twenty-nine percent of respondents responded that they were entitled to maternity leave with pay. ROBERT P. QUINN & GRAHAM L. STAINES, THE 1977 QUALITY OF EMPLOYMENT SURVEY: DESCRIPTIVE STATISTICS, WITH COMPARISON DATA FROM THE 1969–70 AND THE 1972–73 SURVEYS 58 (1979).

The historical analysis here is based on imperfect data. Prentice Hall, *supra* note 177, surveyed firms, whereas the Quality of Employment study surveyed female workers. The data cannot be compared directly because of the variations in rates of maternity leave provision among firms of different sizes. Specifically, rates of maternity leave provision increased with size of the firm. For example, in 1977, only thirty-nine percent of firms with between one and nine employees offered maternity leave with reemployment rights, compared to eighty-nine percent of firms with five-hundred or more employees. Nonetheless, the data is sufficiently developed to support the point that firms did

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The *Gilbert* decision threw into sharp relief the difficulty of convincing courts, as opposed to legislatures, that economic justice was a critical component of sex equality. In reaction to the decision, labor feminist Olga Madar pointed out that collective bargaining could not mitigate the consequences of *Gilbert* for millions of nonunionized women.[182] In part as a result of this decline in bargaining power and reach, women's rights activists in unions had turned to antidiscrimination law as a way to fight for coverage for pregnancy under disability and health insurance plans. The courts, however, were inclined toward liberal individualist categories and were thus more receptive to anti-stereotyping arguments that stopped short of calling for the just allocation of economic burdens and benefits. The courts, therefore, were not the legal institutions most amenable to the campaign for pregnancy disability benefits. Congressional advocacy provided a new opportunity to make the argument that the transformation in gender roles depended on a just distribution of the costs of reproduction.

III. NEOMATERNAL POLITICS: THE CONTROVERSY IN CONGRESS

Part III traces the ascendance of neomaternal politics in Congressional debates over the Pregnancy Discrimination Act of 1978. Part III.A analyzes how anti-abortion activists made arguments for the PDA based on the need to protect childbearing women. Advocacy by anti-abortion activists for the PDA against the business lobby's opposition illustrates the tenuous character of the Republican alliance between market and social conservatism, as late as 1978. In the 1972 presidential election campaign, Republican strategists had used the abortion issue to chip away at the New Deal coalition of blue-collar workers, labor unions, African-Americans, and religious and ethnic minorities. These strategists had attempted to use social disagreement on issues of sex and gender, as well as race, to attract Catholics, southerners, and social conservatives to the Republican Party.[183] But the alignment between the pro-business and socially conservative elements of the Republican Party did not coalesce fully in the 1970s. This history helps to explain why some anti-abortion activists came to embrace

not immediately respond to *Gilbert* by taking away the benefits they had extended over the course of the prior decade.

182. Press Release, Coalition of Labor Union Women Criticizes Supreme Court Decision Depriving Women of Equitable Sick and Accident Benefit (on file with Wayne State Univ., Walter P. Reuther Library of Labor and Urban Affairs, Coal. of Labor Union Women Records, [hereinafter CLUW Records] Box 16, Folder 7).

183. Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade: *New Questions about Backlash*, 120 YALE. L.J. 2028, 2052–71 (2011).

equal employment opportunity for women, even as they took a socially conservative position on abortion. Not until the mid-1980s would the anti-abortion movement—influenced by Protestant fundamentalism—take strongly conservative stances on sexuality, marriage, and the family.[184]

Part III.B shows that in the legislative campaign for the PDA, legal and labor feminists, too, made neomaternal arguments. Feminists increasingly coupled anti-stereotyping arguments for pregnancy disability benefits with arguments depicting pregnancy as a form of socially valuable labor. These arguments resonated with the rhetoric of early-twentieth century reformers but feminist advocacy for the PDA differed ideologically from earlier maternalism. Instead of arguing for differential treatment of women as a group defined by gender status, feminist advocates argued for equal treatment of pregnant women. Instead of arguing that women's reproductive capacity justified the protection of women, advocates argued that pregnancy's economic and societal value justified making it a collective, societal responsibility. Neomaternal arguments wielded by both anti-abortion activists and feminists helped to overcome the business lobby's market libertarian opposition to the PDA.

Part III.C shows how the neomaternal construction of the PDA's meaning contributed to the passage of the PDA. The construction of the bill as legislation that would support women's decisions to bear children enhanced its political popularity. Liberal politicians who supported abortion rights nonetheless framed the PDA as legislation that would protect the decision whether to bear a child from the harsh calculus of the marketplace. Furthermore, the construction of the PDA as a "pro-life" bill split the loyalties of Republican Congressmembers between fiscal and social conservatism.

Social anxieties about race contributed to a political environment receptive to neomaternal policies. Although the PDA was formally race neutral, racial and gender ideologies were intertwined in the politics surrounding the bill. Historian Ruth Feldstein argues that from the New Deal to the mid-1960s liberal political actors deployed conservative ideas about gender and mothers, in particular, to advance racial liberalism.[185] The late 1970s debates about the PDA saw the inverse. Conservative racial ideologies shaped receptivity to liberal antidiscrimination laws that also affirmed neomaternal commitments.

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184. *See* Mary Ziegler, *The Possibility of Compromise: Antiabortion Moderates After* Roe v. Wade, *1973–1980*, 87 CHI.-KENT L. REV. 571, 587–90 (2012).

185. RUTH FELDSTEIN, MOTHERHOOD IN BLACK AND WHITE: RACE AND SEX IN AMERICAN LIBERALISM, 1930–1965, at 4–5 (2000).

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As Part III.D demonstrates, the neomaternal construction of the PDA facilitated the enactment of an anti-abortion rider. The anti-abortion rider created an asymmetry in the design of the PDA: the statute spreads the costs of pregnancy across employees and employers but reinforces the legal construction of abortion as the private economic burden of individual women. As enacted, the bill affirmed women's right to economic support for childbearing but not for women's exercise of their right to abortion.

*A. "*Roe v. Wade *Set the Precedent": Anti-Abortion Advocacy for the Pregnancy Discrimination Act*

The legislative debate about the PDA witnessed renewed conflict between feminist advocates and the business lobby. Ruth Weyand, the IUE attorney who had litigated *Gilbert*, and Susan Deller Ross, the attorney who as a staff member at the EEOC had helped to persuade the agency to adopt the temporary disability paradigm for pregnancy, co-chaired the Campaign to End Discrimination Against Pregnant Workers. Headquartered in Washington, D.C., the Campaign lobbied Congress to pass the PDA, which would amend Title VII to define pregnancy discrimination as unlawful sex discrimination. The Campaign ultimately amassed the support of over two hundred organizations and sustained legislative advocacy for twenty-one months, from December 1976 through August 1978.[186]

Trade associations continued to mobilize against the PDA by emphasizing the bill's costs to employers.[187] The business lobby argued that employers should not have to take responsibility for these costs.[188] Drawing on market libertarian logic, the business lobby suggested that the costs of reproduction naturally rested within the private family. "[T]he

186. Peggy Simpson, *Pregnant Workers Have a Tough Ally*, PARADE, May 20, 1979, at 31, (on file with the Schlesinger Library, Radcliffe Inst., Harvard Univ., Women's Equity Action League Records, Box 4, Folder 59).

187. An actuary testifying on behalf of insurance industry associations estimated that additional pregnancy disability benefits would cost $0.5 billion per year and that medical benefits related to pregnancy and childbirth would cost $0.8 billion. *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearing on H.R. 5055 and 6705 Before the Subcomm. on Employment Opportunities of the H. Comm. on Educ. & Labor*, 95th Cong. 107 (1977) [hereinafter H.R. 6075 Hearings] (Testimony of Peter M. Thexton).

188. On occasion, businesses repeated arguments in legislative hearings that appealed to traditional gender roles by representing women as secondary labor force participants. The National Retail Merchants Association, for example, testified in Congress that women did not merit pregnancy disability benefits because they were "not the primary breadwinners in their families, but [were] people who [took] jobs . . . to supplement the family's primary source of income or to earn extra spending money." H.R. 6075 Hearings, *supra* note 187, at 255.

essential question in consideration," according to the National Association of Manufacturers ("NAM"), did not involve sex discrimination but rather how far Congress wanted "to go in subsidizing parenthood."[189] The PDA went "too far in requiring employers to assume the economic responsibilities of parenthood."[190] In portraying the PDA as an attempt to subsidize the costs of reproduction rather than to remedy sex discrimination,[191] NAM implicitly interpreted the Act's legal requirements quite broadly. The PDA set a baseline requirement that if employer fringe benefit plans offered health and other benefits related to temporary disability, then the employer could not exclude pregnancy. Only if disparate-impact liability enabled plaintiffs to change this baseline, would the PDA more dramatically shift the costs of pregnancy and childbirth from individual women to employers.[192]

Some social conservatives joined the business lobby in applauding *Gilbert* and opposing the PDA. For these social conservatives, *Gilbert* correctly affirmed women's place in the home rather than the workplace. Phyllis Schlafly, the prominent conservative activist who led the STOP ERA campaign in the states, argued: "Pregnancy is a privilege and a right, but you can't make industry or government pay for it."[193] To buttress her argument about the just allocation of the costs of pregnancy, Schlafly

189. *S. 995 Hearings*, *supra* note 80, at 94.

190. *Id.* at 97.

191. NAM suggested that if Congress desired to augment economic protections for childbearing women, then it should do so within the framework of legislation regulating employment, such as the Employee Retirement Income Security Act, and not by amending Title VII. *Id.* at 89 (Testimony of Francis T. Coleman, attorney on behalf of the National Association of Manufacturers). Amendments to ERISA would have required equal coverage of pregnancy under temporary disability benefits, but ERISA itself "does not mandate that employers provide any particular benefits, and does not itself proscribe discrimination in the provision of employee benefits." *See* Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 91 (1983) (holding that for the period prior to the enactment of the PDA, ERISA preempted a state human rights law that required equal coverage of pregnancy under employer benefit plans). The biggest difference between the PDA and any potential ERISA amendments would concern not benefit coverage, but the PDA's prohibition on discrimination employment opportunities. The PDA and not ERISA amendments would render unlawful discrimination in hiring, promotion, and other employment opportunities on the basis of pregnancy and related medical conditions. This suggests that perhaps the business trade associations were in actuality less concerned about the cost of pregnancy disability benefits than about the threat of litigation challenging pregnancy discrimination in employment decisions.

192. The claim that the PDA would shift the costs of reproduction to employers overstated the case in another way. Decades later, legal scholar Christine Jolls observed that in some contexts employers would pass the cost of pregnancy disability benefits or other sex-based accommodations back onto women in the form of reduced wages or diminished employment levels. That dynamic occurs in sex-segregated workplaces or in sex-integrated workforces absent the enforcement of sex discrimination prohibitions. *See* Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223 (2000).

193. Joseph Sjostrom, *Women Hit Ruling on Maternity Aid*, CHI. TRIB., Dec. 9, 1976, at 18.

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appealed to the family-wage ideal: "Disability benefits are supposed to pay the lost wages of the family provider."[194] Schlafly thus suggested that women are not breadwinners. She argued further that government and employers should not replace the role of men as providers. Neither government nor employers paid for the pregnancies of women who stayed in the home, Schlafly reasoned; neither should they pay for the pregnancies of employed women.[195]

While the business lobby and some social conservatives opposed the PDA, feminists found a new ally in some anti-abortion organizations. At the time that Congress began to debate the PDA, anti-abortion activists evinced a relatively broad spectrum of political ideologies. Some, like Schlafly, opposed both abortion and pregnancy discrimination benefits on the basis that they disrupted traditional gender roles. Other organizations, however, both took an anti-abortion stance and supported legislation that challenged traditional gender and sexual ideologies.[196]

American Citizens Concerned for Life ("ACCL") exemplified anti-abortion advocacy in favor of neomaternal social policy. Marjory Mecklenburg and Judith Fink founded ACCL in 1974.[197] The two women wanted to create an organization that was more liberal than the National Right to Life Committee ("NRLC") on the issues of sex education, family planning, and public welfare for single mothers. The ACCL's support for these policies advanced sex equality by giving women control over their sexual lives, by challenging the feminization of poverty, and by enhancing women's economic autonomy.[198] ACCL retained significant influence over the NLRC during the early 1970s. In the latter half of the decade, however, the organization lost power within the broader anti-abortion movement as a result of several factors. These factors included: the increased involvement of anti-feminist organizations in the movement; its deepening ties to New Right and Religious Right political mobilization; and the rhetoric of feminist activists who described anti-abortion activists as inherently anti-feminist.[199]

Mecklenburg and Fink believed that the best strategy to combat abortion was to prevent unwanted pregnancies. As Mary Ziegler explains, ACCL held the "philosophy . . . that fetal rights could be protected only if

194. *Id.*
195. *Id.*
196. *See* Ziegler, *supra* note 184, at 574.
197. *Id.* at 578.
198. *Id.* at 579–82.
199. *Id.* at 584–89; *see generally* Mary Ziegler, *Women's Rights on the Right: The History and Stakes of Modern Pro-Life Feminism*, 28 BERKELEY J. GENDER L. & JUST. 232 (2013).

women were themselves guaranteed better legal and economic opportunities."[200] ACCL leaders sought to balance the rights of women and the rights of fetuses not only by campaigning against abortion but also by advocating public health services for pregnant women.[201] They believed that in the absence of such supportive services, society metaphorically "aborted" women via a form of structural violence that in turn generated the abortions of fetuses.[202] ACCL pursued a neomaternal agenda that involved protection for women and fetuses beyond prohibitions on abortion.

In March 1977, ACCL issued a press release criticizing the *Gilbert* decision. ACCL objected to businesses' use of reproductive choice discourse to justify private responsibility for the costs of reproduction. The organization's press release on *Gilbert* stated: "The attorneys for General Electric took the position that women employees should be willing to end the lives of their unborn children if they were financially unable to withstand a period of wage loss."[203] The press release drew a parallel between the libertarian stance of the business lobby regarding the allocation of the costs of pregnancy and the strain of liberalism that underpinned the abortion right: "ACCL maintains that the U.S. Supreme Court in its *Roe v. Wade* decision of 1973 legalizing abortion set the precedent for the General Electric argument that continuation of pregnancy is completely voluntary and that businesses need not reimburse women for time lost from work due to maternity."[204] Both *Gilbert* and *Roe* had drawn on notions of privacy and choice, in ACCL's view, to the detriment of motherhood.

To some feminist activists' surprise, anti-abortion activists attended several of the meetings of the Campaign to End Discrimination Against Pregnant Workers.[205] ACCL joined the coalition because pregnancy

200. Ziegler, *supra* note 184, at 578–79.

201. *Id.* at 579–81.

202. Thomas W. Hilgers et al., *Is Abortion the Best We Have to Offer? A Challenge to the Aborting Society*, *in* ABORTION AND SOCIAL JUSTICE 177, 179 (Thomas W. Hilgers, M.D. & Dennis J. Horan, Esq. eds., 1972) (on file with the, Georgetown Univ. Bioethics Research Library, Andre E. Hellegers File, [hereinafter AEH File]).

203. Press Release 2, Judith Fink, American Citizens Concerned for Life, Pro-Life Group Says Gen. Elec. Corp. "Encourages Abortion" in Gilbert Case; Calls for Support of Legislation to Provide Pregnancy Disability Payments (Mar. 15, 1977) (on file with the Gerald R. Ford Library, American Citizens Concerned for Life, Inc. Records, 1972-1986 [hereinafter ACCL Records], Box 26, Folder: ACCL Position on Pregnancy Disability Bill, March 8, 1978).

204. *Id.*

205. Transcript of Interview with Wendy W. Williams, Professor *emerita*, Georgetown Univ. Law Ctr., in Washington, D.C. at 24 (Dec. 16, 2008) [hereinafter Interview with Williams] (on file with author).

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disability benefits held "obvious potential for removing pressure on pregnant women to seek abortions (which usually *are* covered by employer medical insurance plans)."[206] At the state level, ACCL and other anti-abortion advocates mobilized in Minnesota, Maine, and Maryland to support legislation that would provide pregnancy disability or maternity leave to female employees.[207] The National Conference of Catholic Bishops also testified on behalf of the PDA, viewing the legislation as an incentive to women's decision to become mothers.[208]

Jacqueline Nolan-Haley, Special Counsel for ACCL, testified before Congress on behalf of the PDA. Nolan-Haley criticized *Gilbert* as a denial of "economic equality" to pregnant workers that made a woman's "decision to abort" not "the product of free choice but of economic coercion."[209] ACCL interpreted the subjection of "unborn human life . . . [to] a cost/benefit analysis . . . uniquely degrading to human life and human dignity."[210] Furthermore, the decision symbolically undermined the "value of children" by turning them into "'affordable' and 'non-affordable' commodities."[211] Nolan-Haley's testimony echoed feminists' affirmative vision of reproductive choice. She argued that women had a right to the economic resources necessary to have wanted children. In contrast to feminists, however, ACCL did not view reproductive choice to also include the legal right and economic resources to terminate a pregnancy. Thus, ACCL constructed childbearing as a normative social role for women, even as the group challenged law that privatized the costs of pregnancy within the family.

The most prominent Catholic voice on behalf of the PDA came from Andre E. Hellegers, the founder and director of the Joseph and Rose Kennedy Institute of Ethics at Georgetown University.[212] Hellegers had already achieved national recognition as a leading authority on fetal

206. Letter from Marjory Mecklenburg, President, Am. Citizens Concerned for Life, to Pro-Life Leaders and News Media Reps. (Mar. 1978) (on file with the ACCL Records, Box 26, Folder: ACCL Position on Pregnancy Disability Bill, March 8, 1978).

207. Legis. Bulletin, Am. Citizens Concerned for Life, Inc., Pregnancy Disability Benefits Bill, S.995 & H.R. 5055 (May 9, 1977) (on file with the ACCL Records, Box 27, Folder: Legislative Bulletin, May 9, 1977).

208. *See S. 995 Hearings*, *supra* note 80, at 495–96 (Letter from Msgr. James T. McHugh to the Honorable Harrison A. Williams, Jr. (Apr. 22, 1977)).

209. *Id.* at 436–37 (Statement of Jacqueline M. Nolan-Haley, Special Counsel, Am. Citizens Concerned for Life, Inc.).

210. *Id.* at 437.

211. *Id.* at 438.

212. When it opened in 1971, the Institute was originally called *The Joseph and Rose Kennedy Center for the Study of Human Reproduction and Bioethics*. Within a few years, it changed to its current name. ALBERT R. JONSEN, THE BIRTH OF BIOETHICS 23 (1998).

physiology and maternal-child medical care when he founded the Kennedy Institute in 1971.[213] Hellegers held non-orthodox ideas on birth control and advocated greater freedom for Catholics to perform family planning;[214] nonetheless, he shared the dominant Catholic position on abortion. Since the early 1970s, Hellegers had testified in court cases and in Congress in opposition to abortion.[215] He critiqued the Supreme Court's refusal in *Roe* to state when human life began, arguing that the Court had confused a biological with a social and moral determination. As a biological matter, Hellegers argued that human life began at conception. The question—one that needed to be answered philosophically rather than scientifically—was when to accord life moral value and dignity.[216]

Hellegers' opposition to abortion did not represent a unique aspect of his theological perspective, but rather exemplified his moral stance regarding broader trends in medicine. Hellegers drew attention to the fact that the Court in *Roe*, in discussing a woman's interest in her own health, had adopted the World Health Organization's definition of health as "a sense of well-being."[217] For Hellegers, such an "affective" definition of health threatened to eclipse the experience of suffering and the concept of sin, central to Catholicism.[218] Hellegers also critiqued a shift in medical care toward cost-benefit analyses that jeopardized those who would disproportionately tax resources.[219] That the "right" of a fetus to be born might depend on the degree of its parents' desire for a child exemplified

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213. Colman McCarthy, *Medical Ethics Pioneer Dr. Andre Hellegers Dies*, WASH. POST, May 9, 1979, at B6 (on file with the AEH File).

214. He conducted a theological inquiry that concluded that persons incapable of full cognitive consent to sex might use birth control. *An Interview With Dr. Andre Hellegers*, 24 GEO. MED. BULL. 3, 4–5 (1971) (on file with the AEH File). His research resulted in his appointment to a papal commission that ultimately recommended greater freedom for Catholics in family planning. When Pope Paul VI issued an encyclical in 1968 prohibiting birth control against the commission's recommendation, Hellegers denounced as "basically irrational" the Pope's request that scientists instead perfect the rhythm method. *Dr. Hellegers Disagrees*, BALT. CATH. REV., Aug. 9, 1968 (on file with the AEH File). President Johnson subsequently appointed Hellegers to a commission on Population and Birth Control in 1968. McCarthy, *supra* note 213; *LBJ Appoints Panel For Birth Curb Study*, PILOT, July 27, 1968 (on file with the AEH File).

215. *See Abortion Hearing Gets View of 8 Catholic Doctors*, N.Y. TIMES, Jan. 28, 1970, at A26; 120 Cong. Rec. 120 14280–81 (1974).

216. Andre Hellegers, M.D., Wade *and* Bolton*: A Medical Critique*, 19 CATH. LAW. 251, 254–55 (1973) (on file with the AEH File); Andre E. Hellegers, M.D., *The Beginnings of Personhood: Medical Considerations*, 27 PERKINS J. 11, 11–14 (1973) (on file with the AEH File).

217. Hellegers, Wade *and* Bolton, *supra* note 216, at 258.

218. Andre E. Hellegers, M.D., *'Affective' Medical Care*, OB. GYN. NEWS, Jan. 15, 1976, at 4 (on file with the AEH File).

219. Andre E. Hellegers, M.D., *Concept of 'Health Right' Possible Pandora's Box*, OB. GYN. NEWS, Apr. 15, 1973, at 52–53 (on file with the AEH File).

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this shift.[220] Thus, Hellegers' opposition to abortion both informed and derived from his larger critique of medical trends toward the subjective, utilitarian, and secular.

Hellegers' ethical commitment to fetal life had embroiled him in the early 1970s litigation challenging pregnancy discrimination in the workplace. Hellegers believed that pregnant women needed income security to bring their pregnancies to term and to maintain fetal health. Hellegers was a cultural traditionalist "still influenced by the old notion that pregnant women should be sat down in easy chairs with feet up and drink lots of milk."[221] Nevertheless, Hellegers also accepted the new economic reality that a significant proportion of pregnant women relied on their own salaries for essential income.[222]

Motivated by his religious commitment to advocate equal employment opportunity for childbearing women, Hellegers served as an expert witness on behalf of the IUE before the district court in the *Gilbert* litigation. Given that pregnant women needed to work, Hellegers saw a need for antidiscrimination law that would protect their economic security. He testified that pregnancy was appropriately classified as a temporary disability.[223] Hellegers had the "uneasy feeling" that his testimony in *Gilbert* might "affect the lives of more fetuses, for good or ill, than [he] could affect by working day and night on a delivery floor."[224] Hellegers exemplified the potential for anti-abortion advocates to ally with feminists on the issue of pregnancy disability benefits.

After the Supreme Court rejected the temporary disability analogy in *Geduldig* and *Gilbert*, Hellegers again made his case, this time in Congress. In testimony on behalf of the PDA, he admonished: "[T]he logic of the Supreme Court really escapes me as a physician."[225] Because the Court "does not know when human life begins . . . it has ruled that you

220. *Id.* at 53; Andre E. Hellegers, M.D., *Abortions Ruling Puzzle*, OB. GYN. NEWS, May 15, 1975, at 15 (on file with the AEH File).

221. Andre E. Hellegers, M.D., *Should Pregnant Women Work?*, OB. GYN. NEWS, Sept. 1, 1976, at 29 (on file with the AEH File).

222. *Id.*

223. Hellegers testified that although women exerted control over their reproductive capacity by planning their pregnancies, pregnancy remained a less than entirely voluntary condition because of the failure rates of and contradictions to oral contraceptives as well as abortion. Gilbert v. Gen. Elec. Co., 375 F. Supp. 367, 375 & n.3 (E.D. Va. 1974). Hellegers testified further that conditions accompanying pregnancy, including miscarriages and complications such as hypertension, comported with the medical definition of disease. *Id.* at 375–76, 377.

224. Hellegers, *supra* note 221, at 29.

225. *S. 995 Hearings*, *supra* note 80, at 65 (Statement of Andre E. Hellegers, M.D., Professor of Obstetrics and Gynecology and Director of the Joseph and Rose Kennedy Institute for the Study of Human Reproduction and Bioethics, Georgetown University).

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may treat the fetus in utero for abortion purposes as if it was a tumor."[226] Yet, Hellegers lamented, "for disability benefit purposes you may not treat a fetus as a tumor because if it was a tumor you would qualify for the disability benefits."[227] In the figure of Hellegers, the argument that pregnancy constituted a temporary disability fused with the anti-abortion argument for pregnancy disability benefits.

The debate over the PDA manifested a new awareness that the most fundamental reproductive activities, once unquestioned as the natural function of women, were now embedded in the harsh calculus of the marketplace. The legal rights to birth control and to abortion enabled women to exercise control over their own reproduction in response to economic pressures. Anti-abortion activists who supported the PDA believed the statute would help to transcend market libertarianism by affording pregnant women economic security. These activists' embrace of equal employment opportunity thus derived from their anti-abortion commitments. They promoted women's ability to reconcile motherhood with labor-market participation, while also reinforcing the normative primacy of motherhood.

B. "Can Pregnancy be Truly Voluntary?": Feminists Reframe Their Argument

Congressional debates offered feminists greater opportunity than did courts to make substantive arguments for sex equality. Feminist advocates emphasized the ways in which pregnancy discrimination reinforced women's economic inequality. Ruth Weyand made the case for the PDA by bringing to the fore the experience of the IUE's female membership. Weyand testified that "women feel more strongly about the effect of pregnancy than any other form of discrimination that they incur."[228] According to Weyand, the IUE catalogued one hundred complaints of pregnancy discrimination for every one complaint based on equal pay or other forms of sex discrimination.[229]

Feminist advocacy for the PDA resonated with multiple positive rights traditions including those connected to the labor movement, welfare rights, socialist feminism, and progressive-era feminism. In the late twentieth century, socialist feminists in Europe and North America developed the

226. *Id.*
227. *Id.*
228. *S. 995 Hearings*, *supra* note 80, at 300 (Testimony of Ruth Weyand).
229. *Id.*

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idea that motherhood constituted a form of economically valuable labor. In Italy, socialist feminists drew upon the theory of *operaismo*, or workerism, which had developed in the Italian trade union movement.[230] Building on the theory of *operaismo*, which had spread internationally, socialist feminists in both Italy and the United States campaigned for salaries for housework. They argued that mothers benefitted the capitalist economy by reproducing the next generation of workers at little cost to employers or the state.[231] The campaign for the PDA represented a less radical demand than remuneration for caregiving work in the home. Equal treatment for pregnancy within disability and health insurance mandates would modify rather than upend the privatization of dependency. Feminist advocacy for the PDA, however, drew upon a socialist feminist tradition that emphasized the economic value of reproductive labor.

The belief that childbearing had general societal value and not merely personal value underpinned feminist advocates' critique of *Gilbert*. A feminist newspaper quoted New York University Law Professor, Sylvia Law, who challenged the allocation of the costs of pregnancy to the private family. Law criticized the misguided assumption "that having children is a woman's trip."[232] Law emphasized the social dimensions of reproduction to argue for collective responsibility for the costs of pregnancy and childbirth. She explained: "First of all, having children necessarily involves men, and secondly, providing for the next generation should be the responsibility of everyone. My point is that pregnancy is not 'a woman's disease.' And the 'costs' should be spread on everyone."[233]

Letty Cottin Pogrebin, the editor of *Ms. Magazine*, questioned the business lobby's contention that pregnancy could be considered "voluntary." Despite women's access to birth control and abortion, Pogrebin queried: "Can pregnancy be truly voluntary for women if there is no other gender around to get pregnant in our place?"[234] Barbara Shack of

230. Operaismo was a New Left movement in Italy during the 1960s that advocated for worker control of factories. Valdo Spini, *The New Left in Italy*, 7 J. OF CONTEMP. HIST. 51, 56–58 (1972).

231. Patrick Cuninghame, *Italian Feminism, Workerism and Autonomy in the 1970s: The Struggle Against Unpaid Reproductive Labour and Violence*, *available at* http://libcom.org/history/italian-feminism-workerism-autonomy-1970s-struggle-against-unpaid-reproductive-labour-vi (last visited Aug. 12, 2013). Thanks to Jeremy Kessler for observing the connection between the demand for pregnancy disability benefits and operaismo.

232. LNS, *Court Ruling Favors the Employers*, BIG MAMA RAG, January 1977, at 3.

233. *Id.* Like NAM's argument that the PDA would subsidize childbearing, Law's argument also overstated the cost-spreading consequences of the PDA. The statute imposed an equality mandate on employers but did not socialize the costs of reproduction.

234. *S. 995 Hearings*, *supra* note 80, at 452 (Testimony of Letty Cotten Pogrebin, Editor and writer for Ms. Magazine).

the New York Civil Liberties Union challenged the idea she believed to underpin sex discrimination in the insurance industry: "that when a woman becomes pregnant, she makes a choice for which . . . she alone should suffer the disabilities."[235] Shack argued that "because women serve the biological function of continuing the species, society should share the disabilities and costs instead of penalizing her for her necessary physiological role."[236]

In advocating the PDA, feminists modernized and transformed a longstanding discourse in American political culture constructing motherhood as a service to society. They did so to affirm women's right to reconcile childbearing with labor-force attachment and that childbearing women should access the benefits attached to the employment relationship. Feminists thus deployed neomaternal arguments that resonated with a familiar form of discourse in the American political tradition to advance new ideals. Feminist neomaternal argumentation for the PDA sought to end women's dependence within the private family and to promote the economic autonomy of childbearing women.

C. "The Price Tag of a Baby": Congress Constructs a Pro-Family Bill

Neomaternal argumentation for the PDA contributed to its popularity in Congress on both sides of the aisle. Politicians, however, emphasized the protective and pronatalist dimensions of neomaternalism rather than its connection to sex equality. Congressmembers expressed support for the PDA because it would encourage childbearing. Congressional supporters depicted the PDA as a way to encourage families' economic security by buttressing women's job security. Rather than emphasizing the importance of women's economic independence from men to sex equality, proponents focused on the economic insecurity that families faced when the male-breadwinner ideal crumbled. In Congressional debates, neomaternalism drifted away from feminists' focus on the just distribution of the costs of reproduction toward pronatalist and anti-welfarist rationales for pregnancy discrimination legislation.

In Congress, the political argument for pregnancy disability benefits shifted from women's right to socio-economic independence outside the family unit to the need to protect familial economic security. Harrison

235. Women's Equity Action League, *What Constitutes Sex Discrimination in Insurance* (on file with the Women's Equity Action League Records, Schlesinger Library, Radcliffe Inst., Harvard Univ., Box 10, Folder 19).

236. *Id.*

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Williams, the Democrat from New Jersey who was the Chair of the Senate Committee on Labor and Public Welfare and the key sponsor of the PDA in the Senate, stated that "far more important" than the "serious setback to women's rights" was the "serious threat" *Gilbert* posed "to the security of the family unit."[237] The pro-family rhetoric of politicians who supported the PDA comported with the feminist demand for equal employment opportunity but also changed the social and political meaning of the bill.

Congressional proponents frequently called attention to the changed demographic circumstances that made sex-role stereotypes anachronistic. A Republican Representative from Connecticut reminded his colleagues that 61.4% of American women aged twenty-five to thirty-four years old were employed, working "to help provide for the necessities of life."[238] A Democratic Senator testified that forty-two percent of female employees were single, widowed, divorced, or separated and worked as the sole providers for themselves and their families.[239] Congressmembers suggested that pregnancy discrimination peculiarly harmed these single mothers and their children.[240] Politicians highlighted demographic and economic change to show that a new social policy had to replace the family-wage ideal.

Members of Congress, as well as feminist and labor advocates, used the experience of Sherrie O'Steen, who had served as one of the named plaintiffs in *Gilbert*, to exemplify the material harms rendered by the exclusion of pregnancy from benefit coverage. General Electric forced O'Steen, who had worked at a Virginia parts facility, to resign from her job at the end of her seventh month of pregnancy. O'Steen's paycheck had served as her only source of income. Her husband had abandoned her shortly after she found out that she was pregnant. Without work, O'Steen could no longer pay her electric bills. She spent part of a winter, until she received a state welfare check, caring for herself, her two-year-old daughter, and ultimately her newborn baby, in a house that lacked heating, lighting, an operable stove, and a working refrigerator.[241]

The PDA's Congressional proponents argued that antidiscrimination protections for pregnant women would diminish poverty and welfare dependence. Congressmembers wanted to prevent situations in which

237. PDA LEGIS. HISTORY, *supra* note 178, at 1 (Statement of Sen. Williams).
238. H.R. Rep. No. 95-948 at 170 (1978) (Testimony of Rep. Sarasin).
239. *S. 995 Hearings*, *supra* note 80, at 393 (Testimony of Sen. Dick Clark).
240. *Id.* at 14 (Testimony of Sen. Birch Bayh).
241. *See id.* at 14–15 (Statement of Sen. Birch Bayh), 135 (Statement of Wendy W. Williams, Asst. Professor, Georgetown Law Ctr.), 224 (Statement of David J. Fitzmaurice, President, Int'l Union of Elec., Radio, and Mach. Workers).

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pregnant women's loss of income would "dissipat[e] family savings" or "force[] [women] to go on welfare."[242] Congressional proponents did not emphasize the importance of equal employment opportunity to women's achievement of socio-economic independence. Instead, Congress wanted to avoid skyrocketing welfare rolls by shoring up familial security when reality fell short of the male-breadwinner ideal.

The construction of the PDA as legislation that would protect motherhood split the loyalties of Republicans between market and social conservatism. Some Republicans opposed the PDA on the basis of market conservatism. Senator Barry Goldwater, whose bid for the presidency in 1964 exploited anti-Communist, McCarthyist, and libertarian political philosophies, exemplified the pro-business argument.[243] Goldwater stated in Congressional debate: "I fully realize that my opposition could be interpreted as a vote against motherhood—it is not—it is a vote against further, unwarranted Federal interference in what should be a negotiable item between labor and management."[244]

Goldwater's portrayal of the PDA as the latest example of unwarranted federal regulation of the market might have represented the views of a larger number of Republican Senators but for the rise of neomaternalist politics. Senator Orrin Hatch's stance on the PDA is illustrative. Hatch expressed concern about the costs of pregnancy disability benefits that employers would "pass[] on to the consumers. . . . [But] [o]n the other hand," Hatch admitted, his "basic sympathy" lay with proponents of the PDA.[245] Hatch found it troubling that temporary disability insurance plans covered "hair transplants and vasectomies," yet not pregnancy.[246]

For Hatch, the specter of abortion made shifting the costs of pregnancy from individual women to employers more important. In response to Andre Hellegers' testimony, Hatch asked whether the PDA would likely reduce or increase abortions. Hellegers responded by reassuring Hatch that even if the legislation covered the medical costs associated with both childbirth and abortion, it would nonetheless offer far greater financial benefit for women carrying pregnancies to term than it would for abortion. "The numbers go somewhat like this," Hellegers calculated: deliveries cost ten times more than abortions; three deliveries occurred for every one

242. PDA LEGIS. HISTORY, *supra* note 178, at 3 (Statement of Sen. Harrison Williams).

243. For a discussion of Goldwater's place within the conservative movement of the 1950s and 1960s, see LISA MCGIRR, SUBURBAN WARRIORS: THE ORIGINS OF THE NEW AMERICAN RIGHT 111–95 (2001).

244. PDA LEGIS. HISTORY, *supra* note 178, at 183 (Statement of Sen. Barry Goldwater).

245. *S. 995 Hearings*, *supra* note 80, at 72 (Testimony of Sen. Orrin Hatch).

246. PDA LEGIS. HISTORY, *supra* note 178, at 109 (Testimony of Sen. Orrin Hatch).

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abortion; and a full-term pregnancy lasted about three times the average aborted pregnancy. In sum, the legislation would offer about one-hundred times the benefits to women who chose to bring their pregnancies to term than to those who chose to abort their fetuses.[247]

While feminists and labor activists viewed the PDA as critical to sex equality and anti-abortion activists saw the bill as a source of indirect protection for fetal life, civil rights groups viewed the PDA as significant to the fight for racial equality. Civil rights groups were particularly concerned about retaining the vitality of disparate-impact liability under Title VII.[248] The PDA would represent Congress's repudiation of the threat that *Gilbert* posed to disparate-impact claims on race or gender.[249] In addition, the PDA would benefit women of color, who participated in the labor market at higher rates than did white women.

Although the PDA would offer protections to working women of all races, the statute would nonetheless have disparate benefits along racial lines. The prohibition on discriminatory hiring, firing, or promotions on the basis of pregnancy would protect all women employees in workplaces regulated by Title VII. Whether the PDA would result in health, sick leave, and disability benefits for pregnant employees in a given workplace, however, would depend on whether that workplace offered these benefits generally. Because women of color were more likely to work in smaller firms and low-income jobs than were white women, they also were less likely to win enhanced fringe benefits under the PDA's antidiscrimination mandate.

A comparison of neomaternal advocacy for the PDA with maternalist activism for greater welfare rights offers insight into the racial construction of the PDA in Congress. In the late sixties, the racial politics of welfare frustrated efforts to expand welfare entitlements. Legal challenges eroded race-based restrictions on public assistance programs and increased the number of welfare recipients. As a consequence, political backlash against these programs increased.[250] Anxieties about

247. *S. 995 Hearings*, *supra* note 80, at 68–69 (Testimony of Dr. Hellegers).

248. *See* H.R. 6075 Hearings, *supra* note 187, at 198 (Statement of Clarence Mitchell, Dir. of the Wash. Bureau of the Nat'l Ass'n for the Advancement of Colored People & Chairman of the Leadership Conference on Civil Rights).

249. The threat that *Gilbert* posed to disparate-impact liability was mitigated somewhat just a year later by the case of Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), which struck down a policy that stripped employees who took pregnancy leave of their seniority. *See* MAYERI, *supra* note 176, at 117–19.

250. JILL QUADAGNO, THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY 120 (1994).

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rising welfare rolls, urban unrest, and the purportedly matriarchal black family contributed to demand for welfare reform. Racial politics, however, also limited the scope of reform efforts.[251] Southern politicians' fears that a guaranteed income would place upward pressures on the wages of a largely minority, low-income workforce contributed to the defeat of President Nixon's proposed Family Assistance Plan ("FAP").[252] Poor women used the moral authority of motherhood to campaign for augmented welfare entitlements, in lieu of FAP, that would secure a better quality of life for their children. Maternalist welfare rights activism by poor women of color, however, met with political hostility.[253]

Neomaternal advocacy for the PDA encountered more fertile, political soil than did activism to improve the welfare of poor mothers and their children. At least two salient distinctions between neomaternal advocacy for the PDA and maternalist advocacy for welfare rights explain the differing fate of these reform efforts. First, the racial construction of antidiscrimination protections for pregnant women differed from that of welfare rights. During the late 1960s and 1970s, AFDC took form in national political discourse as an entitlement largely benefiting women of color. By contrast, congressional proponents may have viewed the PDA as supportive of white motherhood. Economic, social, and legal changes in the decades prior to the passage of the PDA had challenged the political construction of middle-class motherhood. These factors included: the legalization of birth control and abortion; increasing proportions of women working during pregnancy and following childbirth; and rising rates of single motherhood. Declining fertility rates heightened popular anxieties about the economic trends that purportedly discouraged white women from reproducing.[254] The PDA's promise to encourage implicitly white working women to bear children augmented its political appeal. Second, the PDA promoted women's ability to reconcile childbearing with

251. *Id.* at 117–34.

252. The FAP would have provided monetary benefits to all poor and working poor families, allocated on the basis of family size and and earnings. *See id.* at 118, 123–28; *see also* JENNIFER MITTELSTADT, FROM WELFARE TO WORKFARE: THE UNINTENDED CONSEQUENCES OF LIBERAL REFORM, 1945–1965 (2005) (arguing that a demographic shift during the post-war period among ADC recipients from white widows to deserted, divorced, never-married women and women of color fostered a rehabilitative focus among social welfare reformers).

253. For a discussion, see FELICIA KORNBLUH, THE BATTLE FOR WELFARE RIGHTS: POLITICS AND POVERTY IN MODERN AMERICA 184–87 (2007).

254. On the decline in fertility rates among non-Hispanic white women during the late 1960s and early 1970s, see HERBERT S. KLEIN, A POPULATION HISTORY OF THE UNITED STATES 192–93 (2d ed. 2012). For a study of how declining fertility rates, race, and nativism have shaped pronatalist politics in another national context, see Jessica Autumn Brown and Myra Marx Ferree, *Close Your Eyes and Think of England: Pronatalism in the British Print Media*, 19 GENDER & SOCIETY 5, 5–24 (2005).

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continued labor-force participation. By contrast, welfare rights activism demanded state remuneration for the labor of caregiving within the home. Political discourse constructed AFDC recipients as women who shirked participation in the labor force. Advocacy for the PDA, however, affirmed market libertarian ideology that depicted remunerated work as superior to public assistance. Accordingly, the racial politics of neomaternal advocacy for the PDA operated in conjunction with market libertarian ideology to contribute to the bill's passage.

The construction of the PDA as a pro-family, "pro-life" bill resulted in its passage by overwhelming majorities. The Senate passed a version of the bill in September 1977 by a vote of seventy-five to eleven, with fourteen abstaining; the House passed a version of the bill in July of 1978 by a vote of three hundred and seventy-six to forty-three, with thirteen abstaining.[255]

Market libertarian arguments had diminished in significance in Congress. In arguing before the Court, the business lobby was able to successfully wield discourses of reproductive choice to oppose pregnancy disability benefits. In a political forum, the business lobby could not feasibly argue that pregnant workers did not merit equal benefit coverage under temporary disability insurance because they were able to abort their fetuses. That argument may have possessed formal logic, but it had no political legs. Indeed, anti-abortion activists leveraged the abortion controversy to gain support for the PDA as a revitalized form of state support for motherhood.

Neomaternal arguments were more successful in persuading Congress than the Supreme Court. PDA supporters believed the bill would give women the financial security necessary to protect their choice to bear children. Of particular importance to politicians, the PDA would give women the economic autonomy required to avoid dependence on the state as the family-wage ideal crumbled. Instead of focusing on formalist arguments linking pregnancy to temporary disability, the character of congressional debate gave feminist advocates the opportunity to better explain the social and economic consequences of pregnancy discrimination. They argued that pregnancy discrimination both reinforced sex-role stereotypes and perpetuated women's economic inequality.

In sum, feminists and anti-abortion activists both used neomaternal discourses to argue for antidiscrimination protections for pregnant workers. Neomaternalism leveraged the social value of motherhood to

255. PDA LEGIS. HISTORY, *supra* note 178, at 136–38, 186–89.

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overcome market libertarian opposition to pregnancy-related entitlements. Both feminist and anti-abortion activists for the PDA supported equal employment opportunity for women. Whereas feminists emphasized childbearing as a productive form of labor that deserved public support, anti-abortion activists emphasized the protection of pregnant workers as a means to encourage childbearing and protect fetuses.

D. "I'd Draw a Picture of . . . the Robber Barons Chuckling": The Beard Amendment Threatens the PDA Coalition

Abortion politics both broadened political support for the PDA and also threatened the coalition in favor of the bill. A controversy emerged regarding whether the proposed law should require employers to cover abortion on an equal basis with other medical and health insurance benefits. The controversy caused the ten-month delay between the Senate and House votes on the bill. After nearly a year of intense debate, the controversy resulted in the passage of an anti-abortion rider to the PDA.

The rider was not the inevitable consequence of the presence of anti-abortion activists in the PDA coalition. Many on both sides of the abortion debate considered the PDA "pro-life" in the absence of any anti-abortion rider. Rhetoric which generated support for the PDA by appealing to the social value of motherhood may, however, have lent political legitimacy to voices calling for the rider.

The abortion controversy began in June 1977, when Senator Thomas Eagleton (D-MO) proposed an anti-abortion amendment to the PDA in the Senate Committee on Labor and Human Resources. The Eagleton amendment excluded "nontherapeutic abortions" (those abortions not necessary to the health or to save the life of the mother) from the definition of "pregnancy" and "related medical conditions" under the PDA.[256]

Eagleton, who had served briefly as Senator George McGovern's running mate in the 1972 presidential race, had robust anti-abortion credentials.[257] In 1976, Eagleton had lent his support to the Hyde Amendment to the Labor-HEW appropriations. The Hyde Amendment prohibited the use of federal Medicaid funds "to perform abortions except

256. *Id.* at 54.

257. As one of the Senators instrumental in passing the Family Planning Services Act of 1970—the federal government's first piece of legislation allocating federal funds for family-planning services—Eagleton had secured a ban on the use of the funds for abortion. In 1973, Eagleton supported an amendment to the Public Health Services Act prohibiting any requirement that health-care institutions agree to perform abortion or sterilization procedures as a precondition to receiving federal funds. *Id.* at 113.

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where the life of the mother would be endangered if the fetus were carried to term."[258] The Amendment represented the first success of anti-abortion activists who in the late 1970s fought to restrict abortion's availability and not to overrule *Roe*.[259] Prior to the Hyde Amendment, abortion rates for women receiving Medicaid were three times those for higher-income women. Accordingly, critics opposed the Amendment on the ground that it limited poor women's capacity to exercise their rights to abortion.[260]

Unlike the Hyde Amendment, the PDA did not involve the use of federal funds. Nevertheless, Eagleton argued that "Federal laws should not be utilized to force an individual to violate his or her moral conscience."[261] Eagleton's anti-abortion rider responded to a concern expressed by the National Conference of Bishops that the PDA would require employers to pay for employees' abortions.[262] Opponents of the Eagleton Amendment, however, protested that neither the business lobby nor other anti-abortion organizations had testified on behalf of the need for an anti-abortion rider. The consensus had been that the legislation, unamended, was "prolife."[263]

Feminist advocates feared that the Eagleton rider would license a broad range of discriminatory practices as well as exempt employers from paying for abortion. If the definition of pregnancy and related medical conditions excluded abortion, then employers could refuse to hire, fail to promote, or fire women on the basis of past abortions or their plan to seek a future abortion. Feminist advocates rushed to perform triage. They needed to at least constrain the expansive anti-abortion rider to protect women from extensive employment discrimination.[264] Eagleton's colleagues on the Senate Committee on Human Resources defeated the amendment in a June 1977 vote.[265] When the PDA came before the full Senate in September of 1977, Eagleton again made an unsuccessful attempt to attach the same anti-abortion rider to the bill.[266]

In early 1978, Representative Edward Beard (D-RI) proposed an anti-abortion amendment to the House's pregnancy discrimination legislation.

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258. Pub. L. No. 96-123, § 109, 93 Stat. 923 (1979).

259. SARA DUBOW, OURSELVES UNBORN: A HISTORY OF THE FETUS IN MODERN AMERICA 110 (2010).

260. Polly F. Radosh, *Abortion: A Sociological Perspective*, *in* INTERDISCIPLINARY VIEWS ON ABORTION: ESSAYS FROM PHILOSOPHICAL, SOCIOLOGICAL, ANTHROPOLOGICAL, POLITICAL, HEALTH AND OTHER PERSPECTIVES 19, 26 (Susan A. Martinelli-Fernandez et al. eds., 2009).

261. PDA LEGIS. HISTORY, *supra* note 178, at 113.

262. *Id.* at 201–02 (Testimony of Sen. Harrison Williams).

263. *Id.* at 207 (Statement of Sen. Theodore Weiss).

264. Interview with Williams, *supra* note 205, at 23–24.

265. Sen. Rep. No. 95-331 (1977), at 3, 12.

266. PDA LEGIS. HISTORY, *supra* note 178, at 112.

The Beard Amendment to the PDA exempted employers from mandatory coverage of abortion except when necessary to save the life of the mother but required employers to cover medical complications resulting from abortions.[267] In March 1978, the House Committee on Education and Labor reported its version of the PDA containing the Beard Amendment to the entire House.[268] Anti-abortion advocates who had supported the PDA took differing positions on the Beard Amendment. The U.S. Catholic Conference had drafted the language of the Amendment and backed it heavily.[269] ACCL, however, called the PDA "on balance, a pro-life bill" and supported the legislation with or without the Amendment.[270] Representative William L. Clay (D-Mo) opposed abortion but resented the way in which the issue functioned as "an albatross on all legislation."[271]

Legal and labor feminist activists considered whether to fight the Beard Amendment at the risk of losing the entire campaign for the legislation. Feminists opposed the Beard Amendment, but they also recognized it as less pernicious than the alternative anti-abortion rider initially proposed by Eagleton.[272] The Eagleton rider excluded non-therapeutic abortions from the definition of medical conditions related to pregnancy. That exclusion threatened to make past or potential future abortions a valid basis for discrimination in hiring, promotion, or other employment decisions. By contrast, the Beard Amendment did not exclude abortion from the definition of conditions related to pregnancy. Instead, the Beard Amendment exempted employers from the responsibility of covering abortions within health, disability, or sickness insurance plans (except for abortions necessary to save the life of the mother). In significant respects, the Beard Amendment narrowed the scope of the anti-abortion rider proposed by Eagleton. The Beard Amendment would result in discrimination in benefits but not in employment decisions.

Feminist pragmatism won out over idealist politics. Ruth Weyand wrote to Olga Madar suggesting that the Chamber of Commerce, National Association of Manufacturers, and the insurance industry had stopped lobbying against pregnancy discrimination legislation because they "count[ed] on the women fighting among themselves over abortion to kill

267. *Id.* at 208 (Statement of Sen. James Jeffords).
268. *Id.* at 143, 145.
269. Mary Russell, *New Abortion Fight Seen Over Rider to House Bill*, WASH. POST, Mar. 2, 1978, at A3.
270. Letter from Marjory Mecklenburg, *supra* note 206.
271. Russell, *supra* note 269.
272. Interview with Williams, *supra* note 205, at 24.

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the bill."[273] Weyand elaborated: "If I were a cartoonist I'd draw a picture of what we used to call the Robber Barons chuckling over . . . what a close call they had just escaped."[274] She referenced the $225 billion that she alleged employers saved each year by paying women discriminatory, unequal wages, on the justification that women left the workforce to have children.

Weyand described the business lobby's strategy to defeat a bill that would prohibit such discrimination, as she imagined it, as follows: ". . . the wife of Robber Baron Jay will make a large gift of money to the pro abortion forces. The wife of Robber Baron Tom will make an even larger gift of money to the antiabortion forces. The House members will be convinced this is a no-win bill."[275] Weyand believed that the abortion rider might not have significant, practical consequences for women workers because General Motors, the airlines, and General Electric all paid for abortions in their contracts.[276] Abortions were cheaper than hospital childbirths and also maintained workforce productivity by enabling women to return to work sooner.

Despite feminist pragmatism regarding the Beard Amendment, the escalation of anti-abortion politics threatened to fracture the coalition that had mobilized in support of the PDA. By mid-summer 1978, the House had passed legislation containing the Beard Amendment, while the Senate had passed the same bill, without the rider. Some legislators who had supported the bill reluctantly stated that they would withdraw their support because the amendment represented "another governmental statement and intrusion into the private lives of women."[277] Although the abortion controversy delayed the bill by several months, the PDA coalition did not dissolve.

In mid-October the designated conferees from both bodies settled on a conference report.[278] The conference agreement provided that the provision would not require an employer to cover abortion in health insurance benefits, except in the case when a woman's life would be endangered were she to carry the fetus to term or in the case of medical

273. Letter from Ruth Weyand To Olga Madar 2 (May 18, 1978) (on file with the CLUW Records, Box 23, Folder 7).
274. *Id.*
275. *Id.*
276. *Id.* at 3.
277. PDA LEGIS. HISTORY, *supra* note 178, at 180–81 (Statement of Rep. George Miller).
278. *Id.* at 205, 209.

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complications arising from an abortion.[279] The conference report also included an agreement on the bill's effective date.[280]

E. A Statutory Compromise: The Imprint of Neomaternalism and Market Libertarianism on the Design of the PDA

The structure of the PDA bears the imprint of both market libertarian and neomaternal advocacy. The first clause of the PDA defined discrimination on the basis of sex under Title VII to include discrimination on the basis of "pregnancy, childbirth, and related medical conditions."[281] The second clause of the PDA responded directly to the fact pattern at issue in *Gilbert* by mandating the "same treatment" of pregnant workers and others "similar in their ability or inability to work."[282] By requiring equal treatment of pregnancy and childbirth under sick leave, health insurance, disability benefits, and other fringe benefits, the PDA shifts the costs of pregnancy and childbirth from individual women to the employer and, by implication, spreads these costs across the workforce.

Although the PDA further spread the costs of pregnancy and childbirth across society, however, it also preserved market libertarian commitments to keeping these costs private. The PDA did not socialize the costs of reproduction.

From the statute's inception, there existed ambiguity regarding the extent to which the PDA would reallocate the costs of pregnancy and childbirth. The PDA amended Title VII, which the Supreme Court interpreted in 1971 to recognize disparate impact as well as disparate treatment liability.[283] Isolated statements by members of Congress during the legislative debates about the PDA, however, suggested that the PDA would not impose more than a mandate of same treatment for pregnancy under existing fringe benefits. Congressmembers who supported the PDA spoke of the statute in narrow terms to reassure opponents that it would

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279. *Id.* at 206.

280. *Id.*

281. Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (2006)).

282. *Id.*

283. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971). Disparate-impact liability enables plaintiffs to challenge workplace policies and practices that disproportionately burden pregnant workers such as the absence of sick leave, dearth of disability benefits, and restrictive provision of light-duty. Disparate impact liability thus does more than disparate treatment to spread the costs of pregnancy and childbirth across society.

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not vastly increase costs for employers.[284] Thus, from the beginning, interpreters of the PDA disputed the degree to which its antidiscrimination mandate would reallocate the costs of reproduction.

While the PDA's concession to a patchwork of private employer-sponsored health and disability insurance compromised feminists' neomaternal commitments, the PDA also included a significant concession that compromised feminist's anti-stereotyping commitments. The Beard Amendment to the PDA created an asymmetry in the design of the PDA that reinforced childbearing as a normative role for women. In promoting the labor-force attachment of pregnant women and their access to insurance benefits, the PDA affirmed that childbearing women had a right to maintain economic autonomy. The PDA thus challenged a legal system that made childbearing women dependents within the private family. The Beard Amendment, however, reinforced the legal construction of abortion as a negative right that did not merit public support. The PDA embodied the valence of neomaternalism that reinforced the normative primacy of childbearing.

The PDA thus represented a statutory compromise for all sides. The business lobby lost its battle against the prohibition on pregnancy discrimination. Yet it succeeded in foreclosing alternative, more expansive social insurance schemes and in shaping the legislative history of the PDA in a manner that rendered ambiguous the scope of employers' duty of accommodation under disparate-impact liability. While anti-abortion activists did not succeed in reversing *Roe*, neomaternal advocacy for the PDA did achieve greater public support for childbearing. Feminists won in the PDA both a prohibition on sex-role stereotyping related to pregnancy and a legal mechanism that further spread the costs of pregnancy across the workforce. They lost, however, their most robust vision to achieve collective responsibility for the costs of reproduction and to realize economic supports for women to exercise reproductive choice. The meaning of the PDA, however, did not crystallize upon the bill's enactment, but rather took shape as judicial doctrine under the statute and broader gender politics evolved.

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284. *See* MAYERI, *supra* note 176 at 120–21 (citing PDA LEGIS. HISTORY, *supra* note 178, at 40–41 ("[T]he bill defines sex discrimination . . . to include these physiological occurences peculiar to women; it does not change the application of title VII to sex discrimination in any other way.")); PDA LEGIS. HISTORY, *supra* note 178, at 149 ("By making clear that distinctions based on pregnancy are *per se* violations of Title VII, the bill would eliminate the need in most instance to rely on the impact approach . . . ."); *id.* at 41 ("An employer who does not provide disability beneits or paid sick leave to other employees will not, because of [the PDA], have to provide these benefits.").

IV. THE LEGACIES OF LIBERAL INDIVIDUALISM AND NEOMATERNALISM IN INTERPRETIVE CONTROVERSIES ABOUT THE PDA

The PDA did not resolve contests between liberal individualist and neomaternal constructions of sex equality. Both these legal paradigms have shaped doctrinal debates from the 1980s to the present. In the 1980s, as Part IV.A chronicles, deepening economic and social conservatism frustrated feminists' ability to fuse a commitment to anti-stereotyping with a commitment to equal employment opportunity for working-class women. The tensions between equal treatment and economic rights, which had divided women's rights activists in the early twentieth century, again catalyzed splits among feminist legal activists that have persisted to the present. In recent decades, as Part IV.B discusses, courts have for the most part interpreted the PDA through the lens of liberal individualism's dual valences. Courts interpret the PDA as a prohibition on market irrational sex-role stereotypes, but resist interpretations of the PDA that would shift the costs of some workers' partial incapacity during pregnancy onto employers. In contrast to courts' market libertarian rulings, plaintiffs and antidiscrimination scholars offer alternative interpretations of the PDA rooted in neomaternal conceptions of the bill's purpose.

The history related in Parts I through III of this Article does not hand us a readily usable past. History cannot resolve contemporary debates in judicial doctrine or feminist legal theory, but it can offer insight into their intellectual and political genealogies. By uncovering the competing conceptions of sex equality that animate liberal individualist and neomaternal interpretations of the PDA, the history of the 1970s illuminates the normative stakes of ongoing doctrinal controversies.

A. The 1980s Split in Legal Feminism

Soon after the enactment of the PDA, labor organizations and feminist activists confronted the limitations of the statute. The PDA itself failed to provide a direct entitlement to job-protected pregnancy leave, income replacement, or health insurance coverage. As a result, the economic security of pregnant women varied according to the extent of the fringe benefit plans offered at their workplaces. The gaps in the statute's ability to promote the labor-force attachment and economic security of pregnant workers had disproportionate effects on working-class women. Lower-

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income workers were far more likely to be employed in workplaces that lacked adequate health- and disability-related benefits.[285]

In the 1980s, intensifying economic and social conservatism shaped the way in which feminist activists addressed the limitations of the PDA. The doctrinal controversies of the 1980s replicated the theoretical tensions between liberal individualism and neomaternalism which feminists had experienced in advocating the PDA. Market libertarianism foreclosed the possibility of expanding sex neutral, universal temporary disability insurance, while neomaternalism made it possible to expand sex-specific entitlements targeted to pregnant workers.

Market libertarianism in the political culture had undermined feminist efforts to achieve universal entitlements for all temporarily disabled workers via social insurance systems. Since the late 1960s, feminist reformers had taken account of the limits of an equal-treatment mandate. While advocating equal treatment for pregnancy under existing benefit schemes, reformers had also proposed the expansion of state temporary disability insurance programs or the establishment of a similar insurance program at the federal level.[286] Neither had proven politically feasible. Neomaternal sentiment, however, provided a political opportunity to gain benefits specific to pregnant workers. Feminists could leverage broader societal sentiment in favor of protecting motherhood to gain entitlements related to biological reproduction and caregiving. Feminists' use of neomaternal argumentation to demand a more just distribution of responsibility for reproduction also coincided uncomfortably with calls for revitalized state protection of motherhood as a normative role for women.

In doctrinal controversies regarding the interpretation of the PDA during the 1980s, feminists thus faced a painful decision. They could sacrifice some of their commitment to affirmative entitlements that would enhance the economic security of working-class women to avoid reinforcing sex-role stereotypes. Or they could obtain protections that promoted the labor-force attachment of working-class women, while sacrificing some of the movement's most robust anti-stereotyping goals. In the 1970s, the campaign for the PDA had contained the tension between anti-stereotyping and neomaternal commitments. Equal coverage for

285. *See* Ann O'Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 8 (2007).

286. *See* Koontz, *supra* note 44, at 502 ("A long range goal is the achievement of protection against loss of income for temporary disabilities for the forty per cent of working men and women who now have *no* protection."). In 1968, the Citizens' Advisory Council Task Force on Social Insurance and Taxes "recommended establishment of a federal temporary disability insurance system as a part of a [pre-existing] federal-state unemployment insurance program." *Id.* at 497–98.

pregnancy under public and private insurance plans implicated both a challenge to sex-role stereotypes and also a demand for affirmative entitlements that would enable women to reconcile workforce participation with childbearing. In the 1980s, however, a new political and legal context—the gaps in coverage left by the PDA as well as growing economic and social conservatism—meant that these dual ideals divided feminists between competing goals.

The heated controversy among feminist attorneys arose in response to pregnancy-leave statutes, which several states passed after the Supreme Court's 1976 *Gilbert* decision. Neomaternal political sentiment in favor of protecting women in their childbearing capacity had provided the impetus for the statutes. In Montana, for example, the joint subcommittee responsible for drafting the state's Maternity Leave Act endeavored to harmonize an equal rights amendment to the state constitution with the "essential protections" provided by state government.[287]

Political sentiment in favor of protecting motherhood helped overcome business opposition to the passage of a pregnancy-leave statute in California. The California Manufacturers Association and several other business trade associations[288] mobilized market libertarian arguments to challenge two provisions in the state bill that would have shifted the costs of pregnancy to employers.[289] These provisions would have required equal treatment for pregnancy under health insurance and disability benefits and would have required employers to give pregnant women light duty accommodations. The business lobby succeeded in defeating these provisions. By failing to require equal treatment of pregnancy under benefit plans, the final California pregnancy-leave bill fell below the antidiscrimination standards required by the PDA then under debate in Congress. Significantly, the part of the California law that survived business opposition—job-protected pregnancy leave—was the provision of the bill most clearly targeted at helping women reconcile labor-market

287. MONT. LEGIS. COUNCIL, EQUALITY OF THE SEXES: INTERIM STUDY BY THE SUBCOMM. ON JUDICIARY 1 (1974).

288. The most powerful opponents of the California pregnancy leave bill included the California Manufacturers' Association, California State Restaurant Association, Western Electronics Manufacturers, Pacific Telephone Company, and the Construction Industry Legislative Council. *Employment Discrimination Based on Pregnancy: Hearing on A.B. 1960 Before the Assembly Comm. on Labor, Emp't, & Consumer Affairs* (Cal. 1978) (on file with author).

289. *Id.*; Memorandum from Lee Adler, Exec. Vice President, California Seed Ass'n, for Members of the Senate Indus. Relations Comm. (Apr. 4, 1978) (on file with author) (arguing that "[i]t is the employee's choice to become pregnant and the employer should not be held financially responsible in any way").

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participation with childbearing.[290] A desire to protect women in their childbearing roles, rather than to secure equal employment opportunity for women, proved the most persuasive rationale to legislators. Neomaternal political sentiment convinced the California legislature to pass the bill over the business lobby's opposition.

In the early 1980s, employers in Montana and California challenged the states' pregnancy-leave laws as preempted by the PDA. The hotly contested lawsuits divided feminist legal activists into two sparring camps. Some feminists believed that the state laws violated the PDA's equal-treatment mandate and represented a potentially pernicious new form of protective legislation. Wendy Williams, the lawyer who had represented the plaintiffs in *Geduldig*, was the strongest voice against the pregnancy-leave laws. Williams feared that the laws might discourage the hiring of women by making female employees relatively more expensive to employ.[291] In addition, Williams argued that laws mandating pregnancy leave specifically, rather than leave for all workers suffering incapacity related to a temporary disability, risked reinforcing childbearing as a unique and primary social role for women.[292] Williams's position prioritized the PDA's prohibition on the use of sex-role stereotypes to regulate pregnant workers.

Other feminists, however, believed that the state pregnancy-leave laws would advance sex equality. Linda Krieger and Patricia Cooney, then civil rights lawyers in San Francisco, critiqued the notion that same treatment would realize sex equality. Because women faced unique obstacles not faced by men, same treatment could not guarantee equal employment opportunity. Conversely, legislation that took affirmative steps "to equalize this inherent sex difference" would not in turn justify unfavorable treatment of pregnant women.[293] Reva Siegel, then a law student, expanded on this argument. She argued that because the PDA amended Title VII, the PDA recognized disparate-impact as well as disparate-treatment liability. Accordingly, the state pregnancy-leave laws remedied

290. The initial bill in California, A.B. 1960, prohibited an employer from refusing to grant pregnant employees "reasonable" leave time, and from treating pregnancy differently than temporary disabilities. *Hearing on A.B. 1960*, *supra* note 288.

291. *See* Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 371 (1984–85).

292. Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 196 (1982).

293. Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U. L. REV. 513, 517 (1983).

http://openscholarship.wustl.edu/law_lawreview/vol91/iss3/3

the disparate impact that the dearth of disability leave in California's workplaces had on women.[294]

When the case of *California Federal Savings & Loan Ass'n v. Guerra*[295] ultimately reached the U.S. Supreme Court, feminist and civil rights organizations wrote opposing briefs that encapsulated the strategic and ideological divisions among feminists. National advocacy organizations embraced a robust anti-stereotyping interpretation of the PDA. The American Civil Liberties Union argued that the California law "reflect[ed] an ideology which values women most highly for their childbearing and nurturing roles . . . [and] reinforce[s] stereotypes about women's inclinations and abilities."[296] Likewise, the AFL-CIO and National Organization for Women ("NOW") argued employers would violate the PDA if they gave leave only to pregnant women and not to other temporarily disabled individuals. These latter two organizations, however, argued that the Court could reconcile the federal and state statutes. The Court might require employers to comply with both statutes by extending the leave available to pregnant workers to all temporarily disabled workers.[297]

By contrast, several other feminist organizations split from the ACLU, AFL-CIO, and NOW and formed the Coalition for Reproductive Equality in the Workplace ("CREW") to defend the California pregnancy-leave law. Activists with labor backgrounds proved willing to give up some of the PDA's anti-stereotyping potential to promote equal employment opportunity for women. CREW argued for a shift in the baseline frame of reference: the California pregnancy-leave law did not extend special treatment to women but rather corrected the "burden . . . wholly visited upon women" when inadequate leave policies resulted in pregnant women losing their jobs.[298] CREW's position was that the California law did not uniquely advantage women but rather leveled a playing field that heretofore disadvantaged women.

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294. Reva B. Siegel, Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929, 929–30 (1985).

295. 479 U.S. 272 (1987).

296. Brief of the ACLU et al., Amici Curiae at 7, Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) (No. 85-494).

297. *See* Brief of the Am. Fed. of Labor & Cong. of Indust. Orgs. as Amicus Curiae, Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) (No. 85-494); Brief Amici Curiae of the Nat'l Org. for Women et al. in Support of Neither Party, Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) (No. 85-494).

298. Brief Amici Curiae of Coal. for Reprod. Equal. in the Workplace et al. at 17–18, Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) (No. 85-494).

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The paradigm shift advanced by CREW, however, depended on a departure from the strictest construction of the temporary disability analogy. If one viewed pregnancy as distinct from temporary disability, one would then view women as disadvantaged relative to men by the lack of adequate leave policies. The California law then became a corrective measure rather than a unique benefit. But if one viewed pregnancy disability as indistinguishable from other temporary disabilities for the purposes of employment law and policy, as Wendy Williams did, then pregnancy leave appeared to function as differential treatment that reified childbearing as uniquely meritorious of public support.

The Supreme Court took the side of CREW. In a majority opinion written by Justice Thurgood Marshall, the Court held that the California pregnancy-leave law advanced the PDA's purpose of equal employment opportunity and, accordingly, that the PDA did not preempt the state law.[299] The Court's decision in *California Federal* interpreted the PDA to establish "a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise."[300] The majority opinion interpreted the "same treatment" language in the second clause of the PDA in its historical context, not as "a limitation on the remedial purpose of the PDA" but as an expression of intent to override *Gilbert*.[301] *California Federal* manifested the dual valences of neomaternalism. The statute reallocated the costs of childbearing by mandating pregnancy leave that promoted the labor-force attachment of working-class women. The decision also validated a state law that, in offering a benefit to pregnant workers unavailable to other temporarily disabled workers, reinforced ideas about the unique value of motherhood.

The tensions highlighted in the debates about *California Federal*—between commitments to anti-stereotyping and to a just allocation of the costs of reproduction—persist today. Some feminists call for greater state entitlements related to caretaking as a means to challenge the gender inequality that stems from the privatization of dependence.[302] Other feminists caution that state support for childrearing may serve the state's

299. The Court observed that the California statute applied only to "the period of *actual physical disability* on account of pregnancy, childbirth, or related medical conditions," and did not "reflect archaic or stereotypical notions about pregnancy and the abilities of pregnant workers." *Cal. Federal*, 479 U.S. at 290.

300. *Cal. Federal*, 479 U.S. at 285 (quoting Cal. Fed. Sav. & Loan Ass'n v. Guerra, 758 F.2d 390, 396 (9th Cir. 1985)).

301. *Id.*

302. *See* FINEMAN, *supra* note 5; Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J. L. & FEMINISM 1 (2008).

interest in repronormative policies[303] and may also reinforce an association between women and caretaking in the home.[304] Accommodations for pregnancy and childrearing women in the workplace, some warn, may impose disproportionate costs on women who are not mothers.[305] Still other feminists focus their attention not on public responsibility for dependence but rather on the socio-legal construction of masculinity and the sexual division of caretaking labor.[306]

B. Liberal Individualism and Neomaternalism in Contemporary Doctrinal Controversy

With few exceptions, courts today interpret the PDA according to a liberal individualist rather than a neomaternal framework. Federal courts understand the PDA to prohibit market-irrational sex-role stereotypes concerning pregnancy. The courts are reluctant, however, to interpret the PDA as a legal mandate that shifts the costs of pregnancy from individual employees to employers. Some of that reluctance stems from the design of the PDA itself as an anti-discrimination mandate rather than a social-welfare entitlement. Even when the structure and text of Title VII and the PDA support plaintiffs' claims for cost-sharing, however, courts are often resistant to such an interpretation. That reluctance is particularly evident in judicial doctrine respecting two areas: disparate impact liability under the PDA and employers' duty to extend workplace accommodations to pregnant employees on the same basis as they do to other workers.

Although the existence of disparate-impact liability is not disputed,[307] in practice, disparate-impact claims have rarely proven an effective means to enact widespread change in workplace policies. In the early 1980s, two federal district court decisions allowed plaintiffs' claims that challenged leave policies as rendering an unlawful disproportionate burden on

303. *See, e.g.*, Katherine M. Franke, Commentary, *Taking Care*, 76 CHI.-KENT L. REV. 1541 (2001) (cautioning that the effort to make privatized care a public responsibility poses risks for feminists because the state will have its own agenda).

304. *See* Maxine Eichner, *Dependency and the Liberal Polity: On Martha Fineman's* The Autonomy Myth, 93 CAL. L. REV. 1285 (2005) (Review Essay).

305. Mary Ann Case, Commentary, *How High the Apple Pie? A Few Troubling Questions about Where, Why, and How the Burden of Care for Children Should be Shifted*, 76 CHI.-KENT L. REV. 1753 (2001).

306. JOAN C. WILLIAMS, RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER (2010).

307. *See, e.g.*, Urbano v. Cont'l Airlines, Inc., 138 F.3d 204, 208 (5th Cir. 1998); Lang v. Star Herald, 107 F.3d 1308, 1314 (8th Cir. 1997); Troupe v. May Dep't Stores Co., 20 F.3d 734, 738 (7th Cir. 1994).

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pregnant women to survive summary judgment.[308] Plaintiffs have since brought disparate-impact claims challenging strict absenteeism rules,[309] inadequate sick-leave policies,[310] the absence of family leave,[311] and heavy-lifting requirements.[312] Courts, however, routinely reject these claims under the PDA by characterizing them as a demand for preferential treatment or a subsidy inconsistent with an antidiscrimination mandate.[313] These rulings evince a market libertarian interpretation that the PDA is neutral with respect to workplace structures that force pregnant women out of the workplace.

The contest between market libertarian and neomaternal interpretations of the PDA is highlighted by a second doctrinal controversy respecting accommodations for injured workers. The U.S. Supreme Court is currently considering a petition for certiorari in the case of Young v. United Parcel Services, Inc., which raises the issue whether an employer that provides work accommodations to nonpregnant employees must do the same for pregnant employees.[314] Like many other employers, UPS offers light-duty accommodations for employees with on-the-job injuries but does not extend these accommodations to pregnant employees. When pregnant plaintiffs bring disparate-treatment claims that challenge restrictive light-duty policies, the resulting doctrinal controversies center on the appropriate class of comparators. Employers argue that the appropriate class of comparators for pregnant employees is other employees who sustained non-occupational injuries. From this perspective, pregnant workers do not merit light-duty assignments because they are not similarly situated to the employees with workplace injuries. Most courts have sided with employers in cases in which plaintiffs challenge restrictive light-duty policies by bringing either disparate-treatment or disparate-impact claims.[315] These interpretations of the PDA privatize the economic burdens arising from partial capacity during pregnancy and childbirth.

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308. Abraham v. Graphic Arts Int'l Union, 660 F.2d 811, 818 (D.C. Cir. 1981); EEOC v. Warshawsky & Co., 768 F. Supp. 647, 651–55 (N.D. Ill. 1991).

309. *See, e.g.*, Stout v. Baxter Healthcare Corp., 282 F.3d 856, 859–60 (5th Cir. 2002); Dormeyer v. Comerica Bank-Illinois, 223 F.3d 579, 581–83 (7th Cir. 2000).

310. *See, e.g.*, *Lang*, 107 F.3d at 1310.

311. *See, e.g.*, Maganuco v. Leyden Cmty. High Sch. Dist. 212, 939 F.2d 440, 441–42 (7th Cir. 1991); Roberts v. U.S. Postmaster Gen., 947 F. Supp. 282, 287–88 (E.D. Tex. 1996).

312. *See, e.g.*, Spivey v. Beverly Enters., Inc., 196 F.3d 1309, 1311–12 (11th Cir. 1999); Garcia v. Woman's Hosp. of Tex., 97 F.3d 810, 811–12 (5th Cir. 1996).

313. *See* Dinner, *supra* note 44, at 485–88.

314. Young v. United Parcel Serv., Inc., 707 F.3d 437 (4th Cir. 2013), *petition for cert. filed*, 81 U.S.L.W. 3602 (Apr. 8, 2013) (No. 12-1226).

315. *See, e.g.*, Serednyj v. Beverly Healthcare, LLC, 656 F.3d 540, 548–49 (7th Cir. 2011); Reeves v. Swift Transp. Co., 446 F.3d 637, 642 (6th Cir. 2006); Spivey v. Beverly Enters., Inc., 196

By contrast, scholars of pregnancy discrimination law have advanced an interpretation of the PDA that argues in favor of light-duty accommodations. These scholars point to EEOC guidelines interpreting the second clause of the PDA to require that employers make the same accommodations for pregnant workers as for other temporarily disabled workers.[316] Leading scholars of the PDA argue that the statute's equal-treatment mandate requires the extension of light-duty accommodations to pregnant workers when employers make light-duty work available to other employees.[317] Whether employers extend light-duty assignments to all workers or only to those with on-the-job injuries should not matter to the requirement of same treatment for pregnancy.[318] These interpretations of the PDA continue a neomaternal tradition, arguing in cases of doctrinal ambiguity for a resolution that shifts the costs of reproduction from employees to employer. The trend in the courts may be turning toward this view. In recent years, two district courts held that plaintiffs could make disparate-impact claims under the PDA to challenge the restriction of light-duty assignments to employees with workplace injuries.[319]

As in the past, tensions between market libertarian and neomaternal ideologies persist in debates about pregnancy discrimination. We can trace the origins of contemporary market libertarian interpretations of the PDA to the business lobby's opposition to pregnancy disability benefits in the 1970s. We also see echoes of earlier neomaternal arguments about the just allocation of the costs of reproduction in contemporary interpretations of the PDA favoring expansive conceptions of employers' duty to accommodate pregnant workers. The history related in this Article helps us to better understand the differing conceptions of gender, sex equality,

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F.3d 1309, 1312–13 (11th Cir. 1999); Urbano v. Cont'l Airlines, Inc., 138 F.3d 204, 206 (5th Cir. 1998); *Young*, 707 F.3d at 446–49.

316. Widiss, *supra* note 41, at 1019 (quoting 29 C.F.R. pt. 1604 app. Question 5 (2013)).

317. Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO L.J. 567, 613–15 (2010) (critiquing jurisprudence limiting the PDA's comparative right of accommodation); *see also* Dinner, *supra* note 44, at 482–85 (critiquing court opinions that limit the comparison group in light-duty claims under the PDA to nonpregnant workers with non-occupational injuries).

318. Most recently, Deborah Widiss has extended this argument to take account of accommodations extended to employees under the Americans with Disabilites Act ("ADA"). The ADA does not classify "normal" pregnancy, absent extraordinary complications, as a disability. Nonetheless, Widiss argues, that when employers extend light-duty work to employees covered under the ADA, the same-treatment language of the PDA requires that they similarly extend light-duty work to pregnant employees. Widiss, *supra* note 41, at 1025–34.

319. *See* Germain v. Cnty. of Suffolk, No. 07-CV-2523, 2009 WL 1514513, at *4 (E.D.N.Y. May 29, 2009); Lochren v. Cnty.of Suffolk, No. 01CV03925, 2006 WL 6850118 (E.D.N.Y. June 14, 2006).

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reproductive choice, and the labor market that animate these competing interpretations.

CONCLUSION

In the 1970s, feminist legal advocacy synthesized commitments to eliminating sex-role stereotypes under the law and to the just distribution of the costs of reproduction. The constraints of the available legal and political frames led feminists to articulate this goal through two competing discourses: liberal individualist and neomaternalist. The conjunction of these two legal paradigms represented a potentially transformative vision for sex equality. When feminists coupled liberal individualist arguments with neomaternal arguments, they sought both to challenge sex-role stereotypes and to demand collective responsibility for the costs of reproduction. The coupling of these forms of argument challenged the market libertarian strain of liberal individualism and also combatted the valence of neomaternalism which reinforced childbearing as the normative social role for women. The synthesis of liberal individualism and neomaternalism aspired to an ambitious vision of sex equality. This vision entailed an end to the family-wage ideal, equal employment opportunity for women, and the conditions that would enable women to exercise reproductive choice without sacrificing economic autonomy.

Since the 1970s, however, the synthesis of liberal individualist and neomaternal paradigms has fractured, and both these ideologies have evolved in ways that have reinforced the privatization of dependency. Market libertarianism intensified in two notable ways. The discourse of reproductive choice continues to legitimate workplace structures modeled on the masculine ideal as well as social policies that provide inadequate public supports for families. Employers and the business lobby continue to wield libertarian arguments about choice to counteract legal mandates requiring coverage for women's reproductive health under fringe benefit plans. Likewise, maternalism evolved away from a commitment to empowering women as workers, which characterized neomaternal activism during the 1970s, and toward protecting women in their roles as mothers. Advocacy in favor of legal entitlements for mothers is considerably muted within the contemporary anti-abortion movement. Today's maternalists call for state support for motherhood while reinforcing the sexual division of labor within the home.

Market libertarian choice rhetoric continues to function as a discourse that legitimates gender inequality. Scholars have shown how courts use the concept of choice to attribute the negative effects of sex discriminatory

http://openscholarship.wustl.edu/law_lawreview/vol91/iss3/3

employment practices to women's individual behaviors.[320] Similarly, choice functions as a potent political argument that attributes the difference in the labor market outcomes experienced by men and women to private decisionmaking.[321] The concept of reproductive choice functions to ratify private rather than public responsibility for childrearing, to the particular detriment of poor families.[322] The construction of choice as a private activity obfuscates the ways in which a lack of financial resources constrains low-income women's ability to exercise their reproductive rights.[323]

Secular, for-profit employers today continue to use the idea of choice to resist labor regulation. Their arguments focus not on the reproductive choices of their employees but on companies' rights to exercise choice in issues of conscience.[324] Employers couple market-libertarian arguments with claims to religious liberty under the First Amendment of the U.S. Constitution and the Religious Freedom Restoration Act. Of particular relevance to this Article, employers use free-exercise claims to challenge the Affordable Care Act's contraception benefit rule.[325] As legal scholar Elizabeth Sepper observes, these lawsuits asserting religious liberty on behalf of companies conflate the identity of the corporation and its owners or shareholders.[326] Lawsuits resisting the contraception mandate echo the legal arguments of employers in the 1970s that were hostile to

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320. *See, e.g.*, Vicki Schultz, *Telling Stories about Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1800–06 (1990) (analyzing how courts use a narrative of "choice" to legitimate employers' lack of interest defense in sex discrimination cases).

321. *See, e.g.*, Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES, Oct. 26, 2003, at SM44 (arguing that many professional women are choosing to leave the workforce for motherhood). *See also* Judith Warner, *Ready to Rejoin the Rat Race*, N.Y. TIMES MAGAZINE, Aug. 11, 2013, at MM25 (revisiting Belkin's Article and describing the return to the workforce by the professional women who departed in the early 2000s, as well as the social, psychological, and economic costs of their earlier decisions).

322. West, *supra* note 119, at 1409–10 (arguing that *Roe v. Wade* legitimized a meager social-welfare net for poor parents).

323. Caps on public assistance on the basis of family size, for example, limit poor women's exercise of their reproductive rights to bear children.

324. *See* Courtney Miller, Note, *Reflections on Protecting Conscience for Health Care Providers: A Call for More Inclusive Statutory Protection in Light of Constitutional Considerations*, 15 S. CAL. REV. L. & WOMEN'S STUD. 327, 340 (2006) ("The abortion choice, the legal right which is rooted in an autonomy right, has provoked a call for a legal right to choose *not* to participate in abortion, echoing the same language of choice and autonomy.").

325. Although the Department of Health and Human Services exempted religious employers, such as churches, and religiously affiliated non-profits, the contraception mandate has nonetheless generated extensive litigation. *See, e.g.*, Hobby Lobby v. Sebelius, 870 F. Supp. 2d 1278 (W.D. Okla. 2012), *injunction pending appeal denied*, No. 12-6294, 2012 WL 6930302 (10th Cir. Dec. 20, 2012), *and injunction pending appeal denied*, 133 S. Ct. 641, *remanded and rev'd*, 723 F.3d 1114 (10th Cir. 2013), *and cert. granted*, 134 S. Ct. 678.

326. *See* Elizabeth Sepper, *Free Exercise Lochnerism* (forthcoming).

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antidiscrimination mandates related to pregnancy. In both eras, employers argue that women's healthcare needs are unique and beyond the scope of legitimate labor regulation. In both eras, employers have used market libertarian arguments about choice, in reproductive activity and in religious conscience, to advance their economic interests.

While market libertarian politics have intensified, the 1970s neomaternal advocacy by anti-abortion activists that called for collective social responsibility for the costs of pregnancy and childbirth has largely waned. By the early 1980s, New Right and religious right mobilization aligned the anti-abortion movement squarely within the Republican Party. As economic conservatism and social conservatism consolidated in electoral politics, neomaternal advocacy rooted in a principled opposition to abortion muted significantly. The mainstream anti-abortion movement assumed a more absolutist conservative stance on a host of social issues. It became both rarer and more difficult for anti-abortion activists to support pregnancy-related entitlements, welfare assistance for poor mothers, and sex education.

Only on the margins of the anti-abortion movement does advocacy in favor of public entitlements for pregnant women, mothers, and children continue to exist. In 1972, two members of Ohio's NOW chapter, Pat Goltz and Catherine Gallagher, founded Feminists for Life ("FFL").[327] FFL continues today to work toward its mission of combatting abortions through support for childbearing women as well as legal restrictions.[328] FFL calls attention to the background conditions of social and economic equality that constrain women's reproductive choices.[329] The group lobbied against welfare reform that capped public assistance regardless of

327. Kelsy Kretschmer, *Contested Loyalties: Dissident Identity Organizations, Institutions, and Social Movements*, 52 SOC. PERSP. 433, 444 (2009). Today, FFL continues to position itself as the legatee of feminist foremothers, nineteenth-century suffragists who allegedly opposed abortion. For an analysis of FFL as a dissident organization within the women's movement, see *id.* at 446–47. The historical evidence belies FFL's claim and shows that Susan B. Anthony and other suffragists campaigned not to criminalize abortion but to enable women's right to individual self-ownership and to "voluntary motherhood." *See* Reva Siegel, *Reasoning from the Body*: *A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992); Tracy A. Thomas, *Misappropriating Women's History in the Law and Politics of Abortion*, 36 SEATTLE U. L. REV. 1, 30–35 (2012). Nonetheless, the use of historical frames enables FFL to claim to represent the true feminism.

328. The group argues that "abortion is a reflection that our society has failed to meet the needs of women" and that women "deserve better than abortion." *About Us*, FEMINISTS FOR LIFE, http://www.feministsforlife.org/our-mission-organization/ (last visited Sept. 2, 2013).

329. FFL contends that women do not freely choose abortion; instead, social and economic pressures force women into abortions. *See* Patricia L. Hipsher, *Heretical Social Movement Organizations and Their Framing Strategies*, 77 SOC. INQUIRY 241, 254 (2007).

family size; campaigned for prenatal care in New York's state health insurance plan; and was the only pro-life group to join the coalition to pass the Violence Against Women Act.[330] In 2005, FFL first proposed the Elizabeth Cady Stanton Pregnant and Parenting Student Services Act, which eventually became part of the Affordable Care Act.[331]

FFL does not draw upon the labor and socialist traditions that feminist advocates used to construct childbearing as a form of socially valuable labor. Instead, FFL calls upon the state to protect mothers as well as fetuses.[332] FFL's support for welfare measures endorses public responsibility for the reproductive activity of poor women. The group's advocacy in favor of child support enforcement, by contrast, suggests that the private family is the appropriate location for managing dependence.[333] FFL points to constraints on women's reproductive autonomy, but the group fails to similarly take account of the repronormative policies that also limit women's independent decisionmaking.[334] For FFL, the decision to bear a child is the only morally legitimate choice[335] and the choice that women would naturally make absent external pressures.[336] FFL suggests the possibility of ongoing coalition building between feminists and anti-abortion activists. Ultimately, however, FFL represents not so much the potential for a happy alignment of cause between pro-life and feminist advocacy as it does the strategic benefits and costs of ever-shifting alliances.

In the twenty-first century, a new form of maternalism has emerged that reinforces gender inequality even as it calls for public entitlements related to mothering. Naomi Mezey and Nina Pillard identify a cultural trend "toward a maternalism that powerfully reinvigorates the links

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330. *Feminists for Life Celebrates Nineteen Years of Activism for Women*, FEMINISTS FOR LIFE, http://www.feministsforlife.org/accomplishments/ (last visited Sept. 2, 2013).

331. In 2010, the Obama administration announced federal funding for grants that universities and colleges can use to increase resources for pregnant and parenting students. Thomas, *supra* note 327, at 16–18.

332. For example, a controversial 1985 advertisement placed by FFL had a picture of a fetus next to the statement: "This Little Girl Deserves Protection . . . So Does Her Mother." Maggie Gallagher, *The New Pro-Life Rebels*, NAT'L REV., Feb. 27, 1987, at 37.

333. *Feminists for Life Celebrates*, *supra* note 330.

334. *See* Susan Frelich Appleton, *Unraveling the "Seamless Garment": Loose Threads in Pro-Life Progressivism*, 2 U. ST. THOMAS L.J. 294 (2005).

335. FFL argues that abortion is immoral even in cases of rape. Abortion in these cases would constitute a second act of violence and perpetuate patriarchy by punishing children for their fathers' behavior. Kathryn Jean Lopez, *About the Hard Cases*, NAT'L REV. ONLINE (Jan. 14, 2013, 4:38 PM), http://www.nationalreview.com/corner/337654/about-hard-cases-kathryn-jean-lopez.

336. *See* Katha Pollitt, *Feminists for (Fetal) Life*, THE NATION, Aug. 29, 2005, at 13.

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between women, parenting, and home care."[337] Internet sites, such as MomsRising.org, advocate health benefits, childcare, family leave, and work flexibility but also reinforce the cultural construction of motherhood as a private activity.[338] The new maternalism fails to challenge men to engage in domestic work,[339] avoids the term "feminism," and does not acknowledge a political link to second-wave feminist predecessors.[340] The new maternalism illustrates the double-edged sword of maternal politics: its potential to reify gender norms even as it uses gender as a category by which to make demands upon the state.

Liberal individualism and maternalism today reinforce both market libertarianism and the sexual division of caregiving labor within the family. This Article has analyzed how feminists, the business lobby, and anti-abortion activists wielded these two legal paradigms in the 1970s in ways both strategic and ideological. A richer historical understanding helps us to more clearly see the political work that liberal individualist and neomaternal discourses perform today. We still struggle as a nation with the question whether reproduction represents a private choice and, hence, a private economic responsibility or a public good deserving of societal support. We continue to wrestle with the question of how men and women's different roles in biological reproduction should inform our understanding of sex equality. This Article ultimately shows the limits of extant legal paradigms to realize a legal system that distributes the costs of reproduction in a manner that both supports families and also destabilizes sex-role stereotypes. The Article points toward the need for new legal paradigms that reach beyond the constraints of liberal individualism and neomaternalism.

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337. Naomi Mezey & Cornelia T.L. Pillard, *Against the New Maternalism*, 18 MICH. J. GENDER & L. 229, 232 (2012).

338. *Id.* at 248–49.

339. For a discussion of how a transformation in the socio-legal construction of masculinity is needed to realize sex equality, see WILLIAMS, *supra* note 306. On the ambivalent relationship between fathers' rights movements in the 1970s and feminist claims for sex equality, see Deborah Dinner, *Liberated Patriarchs: The Fathers' Rights Movement and the Revolution in Family Law, 1960–2000* (manuscript on file with author).

340. Mezey & Pillard, *supra* note 337, at 262–71.